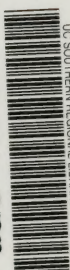


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BEING A

Complete Encyclopedia of All the Case Law of the Federal  
Supreme Court up to and including Volume 206 U. S.  
Supreme Court Reports (Book 51 Lawyers' Edition)

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UNDER THE EDITORIAL SUPERVISION OF

THOMAS JOHNSON MICHIE

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Volume IV

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#### CROSS REFERENCES.

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## I. Definition and Nature of a Constitution.

A constitution is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. It is the basis of legislative authority and lies at the foundation of all law; it is a rule and commission by which both legislators and judges are to proceed.<sup>1</sup>

**Enumerates Rather than Defines.**—A constitution must necessarily be an instrument which enumerates rather than defines the powers granted by it.<sup>2</sup>

**Deals in General Language and Prescribes Only the Outlines of Government.**—Minute details are not to be found in the federal constitution. It is necessarily brief and comprehensive, dealing unavoidably in general language, designating the important objects and prescribing the outlines of the system of government which it designed to establish, leaving the filling up to be deduced from those outlines.<sup>3</sup> But these outlines and objects are all enumerated; none can be added or taken away; what is so marked and designated in general terms comprehends the subject matter in its detail.<sup>4</sup>

**Permanent in Design.**—A constitution is framed for ages to come, and is designed to approach immortality, as nearly as human institutions can approach it. Its course cannot always be tranquil. It is exposed to storms and tempests, and its framers must have been unwise statesmen, indeed, if they failed to provide it, so far as its nature permitted, with the means of self-preservation

1. **Definition and nature.**—*Vanhorne v. Dorrance*, 2 Dall. 304, 308, 309, 1 L. Ed. 391.

The term constitution may be defined as the body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised. *Cooley Const. Lim.* 2; *Cooley Const. Law* (3d. Ed.) 22.

2. **Enumerates rather than defines.**—*Passenger Cases* (opinion of Grier, J.), 7 How. 283, 459, 12 L. Ed. 702; *Gibbons v. Ogden*, 9 Wheat. 1, 189, 194, 6 L. Ed. 23; *Lottery Case*, 188 U. S. 321, 346, 47 L. Ed. 492.

The federal constitution is one of enumeration, and not of definition. *Lottery Case*, 188 U. S. 321, 346, 47 L. Ed. 492; *Gibbons v. Ogden*, 9 Wheat. 1, 189, 194, 6 L. Ed. 23.

3. **Prescribes only the outlines of government.**—*Martin v. Hunter*, 1 Wheat. 304, 326, 4 L. Ed. 97; *McCulloch v. Maryland*, 4 Wheat. 316, 405, 4 L. Ed. 579; *New York v. Miln*, 11 Pet. 102, 153k, 9 L. Ed. 648; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 583c, 9 L. Ed. 773; *Rhode Island v. Massachusetts*, 12 Pet. 657, 721, 9 L. Ed. 1233; *Legal Tender Cases*, 12 Wall. 457, 532, 20 L. Ed. 287; *Legal Tender Case*, 110 U. S. 421, 439, 28 L. Ed. 204; *Pollock v. Farmers' Loan, etc., Co.*, 158 U. S. 601, 617, 39 L. Ed.

1108; *Fairbank v. United States*, 181 U. S. 283, 288, 45 L. Ed. 862; *South Carolina v. United States*, 199 U. S. 437, 448, 50 L. Ed. 261.

"A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably, never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language." (Opinion of Marshall, C. J.), *McCulloch v. Maryland*, 4 Wheat. 316, 407, 4 L. Ed. 579.

The constitution delineates only the great outlines of the judicial power, leaving the details to congress; but it provides itself for the organization of the legislative power, and the mode of its exercise. *Rhode Island v. Massachusetts*, 12 Pet. 657, 721, 9 L. Ed. 1233.

4. **Same.**—*New York v. Miln* (opinion of Baldwin, J.), 11 Pet. 102, 153k, 9 L. Ed. 648.



from the perils it may be destined to encounter. No government ought to be so defective in its organization as not to contain within itself the means of securing the execution of its own laws against other dangers than those which occur every day.<sup>5</sup>

**Embraces New Classes and Conditions.**—While a statute is presumed to speak from the time of its enactment, it embraces all such persons or things as subsequently fall within its scope, and ceases to apply to such as thereafter fall without its scope. So constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation.<sup>6</sup>

**The Constitution a Compact.**—Every state constitution is a compact made by and between the citizens of a state to govern themselves in a certain manner; and the constitution of the United States is likewise a compact made by the people of the United States to govern themselves, as to general objects, in a certain manner.<sup>7</sup>

**The Constitution a Compromise.**—The constitution was a compromise between all the states of conflicting rights among them.<sup>8</sup>

## II. Adoption and Amendment of Constitutions.

**A. Adoption**—1. **RIGHT OF MAJORITY TO ADOPT A CONSTITUTION.**—When one government is dissolved and the people assemble to form another, the voice

**5. Permanent in design.**—*Martin v. Hunter*, 1 Wheat. 304, 4 L. Ed. 97; *Cohens v. Virginia*, 6 Wheat. 264, 387, 5 L. Ed. 257; *Ex parte Milligan*, 4 Wall. 2, 121, 18 L. Ed. 281; *Legal Tender Case*, 110 U. S. 421, 439, 28 L. Ed. 204; *In re Debs*, 158 U. S. 564, 591, 39 L. Ed. 1092; *South Carolina v. United States*, 199 U. S. 437, 448, 50 L. Ed. 261.

"The constitution of a state is stable and permanent, not to be worked upon by the temper of the times, nor to rise and fall with the tide of events; notwithstanding the competition of opposing interests and the violence of contending parties, it remains firm and immovable, as a mountain amidst the strife of storms, or a rock in the ocean amidst the raging of the waves." *Vanhorne v. Dorrance*, 2 Dall. 304, 309, 1 L. Ed. 391.

**6. Embraces new classes and conditions.**—*In re Debs*, 158 U. S. 564, 591, 39 L. Ed. 1092; *South Carolina v. United States*, 199 U. S. 437, 449, 50 L. Ed. 261; *De Lima v. Bidwell*, 182 U. S. 1, 197, 45 L. Ed. 1041.

"Being a grant of powers to a government its language is general, and as changes come in social and political life it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred. In other words, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable. This in no manner abridges the fact of its changeless nature and meaning. Those things which are within its grants of power, as those grants were understood when made, are still within them, and those things not within them remain still excluded." *South Carolina v. United States*, 199 U.

S. 437, 448, 50 L. Ed. 261; *In re Debs*, 158 U. S. 564, 591, 39 L. Ed. 1092.

So when the constitution of the United States declares in art. 1, § 10, that the states shall not do certain things, this declaration operates not only upon the thirteen original states, but upon all the states which have subsequently become such. *De Lima v. Bidwell*, 182 U. S. 1, 197, 45 L. Ed. 1041; *Pollard v. Hagan*, 3 How. 212, 224, 225, 11 L. Ed. 565.

**7. The constitution a compact.**—*Chisholm v. Georgia* (opinion of Jay, C. J.), 2 Dall. 419, 471, 1 L. Ed. 440.

"To me, the constitution appears, in every line of it, to be a contract, which, in legal language, may be denominated tripartite. The parties are the people, the states, and the United States. It is reasoning in a circle to contend that it professes to be the exclusive act of the people, for what have the people done, but to form this compact? That the states are recognized as parties to it is evident from various passages, and particularly that in which the United States guaranty to each state a republican form of government." (Opinion of Johnson, J.) *Martin v. Hunter*, 1 Wheat. 304, 373, 4 L. Ed. 97.

**8. The constitution a compromise.**—*Passenger Cases* (opinion of Catron, J.), 7 How. 283, 449, 12 L. Ed. 702.

The object of one of these compromises was to secure as far as possible the equal power of the states in the councils of the nation. To this end the national legislature was created with two branches, in one of which the states are represented equally and in the other according to population. *Passenger Cases* (opinion of Catron, J.), 7 How. 283, 449, 12 L. Ed. 702.

of the majority must be conclusive as to the adoption of the new system.<sup>9</sup>

**Right of Minority to Withdraw from Country.**—But, in such case, the minority have, individually, an unrestrainable right to remove with their property into another country; and a reasonable time for that purpose should be allowed.<sup>10</sup> What is a reasonable time for the departure of those desiring to leave may properly be left to the determination of the court and jury.<sup>11</sup>

2. **REASON FOR ADOPTION OF FEDERAL CONSTITUTION.**—Experience made the fact known to the people of the United States that they required a national government for national purposes. The separate governments of the separate states, bound together by the articles of confederation alone, were not sufficient for the promotion of the general welfare of the people in respect to foreign nations, or for their complete protection as citizens of the confederate states. For this reason, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to themselves and their posterity, ordained and established the government of the United States, and defined its powers by a constitution, which they adopted as its fundamental law, and made its rule of action.<sup>12</sup>

3. **FEDERAL CONSTITUTION—BY WHOM ADOPTED.**—The judges of the United States supreme court early divided in opinion upon the question as to whether the federal constitution was adopted by the states or by the people of the United States. The various opinions upon this question are given in the notes.<sup>13</sup>

9. **Right of majority to adopt a constitution.**—*Respublica v. Chapman*, 1 Dall. 53, 58, 1 L. Ed. 33; *United States v. Cruikshank*, 92 U. S. 542, 549, 23 L. Ed. 588.

10. **Right of minority to withdraw from country.**—*Respublica v. Chapman*, 1 Dall. 53, 58, 1 L. Ed. 33.

As to the right of the persons so removing to join a party or nation at open war with the country they are leaving, the court said that this was untrodden ground, but that it was inclined to the opinion that such an act would amount to treason. *Respublica v. Chapman*, 1 Dall. 53, 58, 1 L. Ed. 33.

11. **Reasonable time for departure.**—*Respublica v. Chapman*, 1 Dall. 53, 58, 1 L. Ed. 33.

12. **Reason for adoption of federal constitution.**—*United States v. Cruikshank*, 92 U. S. 542, 549, 23 L. Ed. 588.

13. **According to the opinion of Judge Story**, the constitution was ordained and established, not by the states in their sovereign capacities nor was it carved out of existing state sovereignties, nor was it a surrender of powers already existing in state institutions, but, as the preamble declares, was ordained and established by "the people of the United States." *Martin v. Hunter*, 1 Wheat. 304, 324, 325, 4 L. Ed. 97. Accord: *Chisholm v. Georgia*, 2 Dall. 419, 471, 1 L. Ed. 440; *White v. Hart*, 13 Wall. 646, 650, 20 L. Ed. 685. See, also, *Downes v. Bidwell*, 182 U. S. 244, 378, 45 L. Ed. 1088.

"It is remarkable that in establishing it the people exercised their own rights, and their own proper sovereignty, and conscious of the plenitude of it, they declared with becoming dignity, 'We, the

people of the United States, do ordain and establish this constitution.' Here we see the people acting as sovereigns of the whole country; and in the language of sovereignty establishing a constitution by which it was their will that the state governments should be bound, and to which the state constitutions should be made to conform." *Chisholm v. Georgia*, 2 Dall. 419, 471, 1 L. Ed. 440.

See, however, *Ex parte Virginia*, 100 U. S. 339, 346, 25 L. Ed. 676, where it is said that every addition of power to the national government involves a corresponding diminution of the governmental powers of the states, and that the national government is carved out of them.

**Chief Justice Marshal said:** "The convention which framed the constitution was indeed elected by the state legislatures; but the instrument when it came from their hands was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing congress of the United States, with a request that it might be submitted to a convention of delegates chosen in each state by the people thereof, under the recommendation of its legislature for their assent and ratification. This mode of proceeding was adopted; and by the convention, by congress, and by the state legislatures, the instrument was submitted to the people." "The people acted upon it through conventions assembled in the respective states, and it was from these conventions that the constitution derived its whole authority. The government proceeds, in form and in substance, directly from the people. *McCulloch v. Maryland* (opinion of Marshall, C. J.), 4 Wheat. 316, 403, 405, 4 L. Ed. 579, approved in *re Debs*,

**B. Amendment**—1. **POWER OF PEOPLE TO AMEND THEIR CONSTITUTIONS**—*a. The Federal Constitution.*—The federal constitution makes express provision for its own amendment, prescribes the method whereby amendments shall be proposed and ratified, and defines the particulars wherein it shall not be amended.<sup>14</sup>

**As to the transcendent power of the people, as being the depository of the ultimate sovereignty** of the nation, to amend the constitution, aside from the express authority contained in article 5, it was said by Chief Justice Marshall, delivering the opinion of the court in *Cohens v. Virginia*, 6 Wheat. 264, 389, 5 L. Ed. 257: "The people made the constitution, and the people can unmake it. It is the creature of their will, and lives only by their will."<sup>15</sup> But

158 U. S. 564, 578, 39 L. Ed. 1092; *Kansas v. Colorado*, 206 U. S. 46, 81, 51 L. Ed. 956.

**Chief Justice Taney asserts that:** The preamble of the constitution "sets forth by whom it was formed, for what purposes, and for whose benefit and protection. It declares that it is formed by the people of the United States; that is to say, by those who were members of the different political communities in the several states; and its great object is declared to be to secure the blessings of liberty to themselves and their posterity." *Scott v. Sandford*, 19 How. 393, 410, 15 L. Ed. 691, opinion of Taney, C. J.

**On the other hand, Mr. Justice Baldwin**, delivering the opinion of the court in the case of *Rhode Island v. Massachusetts*, 12 Pet. 657, 720, 9 L. Ed. 1233, states that: The constitution was adopted by the states, "in their highest sovereign capacity, in the convention of the people thereof, upon whom by the revolution the prerogative of the crown and the transcendent power of parliament devolved, in a plenitude unimpaired by any act and controllable by no authority."

**Mr. Justice McLean asserts** that it was adopted by the combined power of the states and the people. Thus: "The constitution of the United States was formed not, in my opinion, as some have contended, by the people of the United States, nor, as others, by the states; but by a combined power, exercised by the people, through their delegates, limited in their sanctions, to the respective states. Had the constitution emanated from the people, and the states had been referred to, merely as convenient districts, by which the public expression could be ascertained, the popular vote throughout the Union would have been the only rule for the adoption of the constitution. This course was not pursued; and in this fact it clearly appears that our fundamental law was not formed, exclusively, by the popular suffrage of the people. The vote of the people was limited to the respective states in which they resided. So that it appears, there was an expression of popular suffrage and state sanction, most happily united, in the adoption of the constitution of the Union." *Worcester v. Georgia*, 6 Pet. 515, 569, 8 L. Ed. 483,

opinion of McLean, J. See, also, ante, "Definition and Nature of Constitutions," I.

**14. Amendment of the federal constitution.**—Const. U. S., Art. V.

**History of amendments.**—"Twelve articles of amendment were added to the federal constitution soon after the original organization of the government under it in 1789. Of these all but the last were adopted so soon afterwards as to justify the statement that they were practically contemporaneous with the adoption of the original; and the twelfth, adopted in 1803, was so nearly so as to have become, like all the others, historical, and of another age. But within the last eight years (prior to December, 1872), three other articles of amendment of vast importance have been added by the voice of the people to that now venerable instrument." Miller, J., delivering the opinion in *Slaughter-House Cases*, 16 Wall. 36, 67, 21 L. Ed. 394.

**15. Amendments; ultimate sovereignty of the people.**—This doctrine of the great chief justice is only in keeping with his previously expressed opinion in *McCulloch v. Maryland*, 4 Wheat. 316, 403, 405, 4 L. Ed. 579, that the constitution and the government, in form and in substance, proceed directly from the people, and not from the states. It leads directly to the question whether or not the whole people, or a majority thereof, could disregard the limitation contained in article 5 and adopt an amendment depriving any state of its equal suffrage in the senate, without its consent. The limitation imposed upon the power of amendment in this respect goes far to support the view taken by Mr. Justice Baldwin (*Rhode Island v. Massachusetts*, 12 Pet. 657, 720, 9 L. Ed. 1233), that the constitution was adopted by the states in their highest sovereign capacities. See, also, the opinion of Mr. Justice Johnson in *Martin v. Hunter*, 1 Wheat. 304, 373, 4 L. Ed. 97, and the language of Chief Justice Fuller, delivering the majority opinion in *Pollock v. Farmers' Loan, etc., Co.* (rehearing), 158 U. S. 601, 635, 39 L. Ed. 1108, in which he says: "Except that no state, without its consent, can be deprived of its equal suffrage in the senate, the constitution may be amended upon the concur-



this supreme and irresistible power to make or unmake, resides only in the whole body of the people; not in any subdivision of them. The attempt of any of the parts to exercise it, is usurpation, and ought to be repelled by those to whom the people have delegated their power of repelling it. The acknowledged inability of the government to sustain itself against the public will, and by force or otherwise, to control the whole nation, is no sound argument in support of its constitutional inability to preserve itself against a section of the nation, acting in opposition to the general will.<sup>16</sup>

b. *Amendment of State Constitutions.*—Perhaps without exception the state constitutions make provision for their own amendment; but aside from this, it is held that, according to the institutions of this country, the sovereignty in every state resides in the people, and that they may alter and change their form of government at their own pleasure.<sup>17</sup>

2. *EXECUTIVE APPROVAL OF AMENDMENTS.*—The negative or veto power of the president extends only to ordinary cases of legislation; he has nothing to do with the proposal or adoption of amendments to the constitution.<sup>18</sup>

**C. Time of Taking Effect.—The Constitution of the United States.**—The federal constitution took effect on the first Wednesday of March, 1789.<sup>19</sup>

**State Constitutions.**—As to the dates upon which various state constitutions and amendments thereto went into operation, see the footnotes.<sup>20</sup>

rence of two-thirds of both houses, and the ratification of the legislatures or conventions of the several states, or through a federal convention when applied for by the legislatures of two-thirds of the states, and upon like ratification. The ultimate sovereignty may be thus called into play by a slow and deliberate process, which gives time for mere hypothesis and opinion to exhaust themselves, and for the sober second thought of every part of the country to be asserted." In whatever light it is viewed, it would seem that such an amendment, or any amendment, adopted in any manner other than that prescribed in article 5, would be, not a constitutional, but a revolutionary proceeding. See, also, post, "Generally; Ultimate Sovereignty," IV, B, 1.

16. **Supreme power resides only in the whole body of the people.**—*Marshal, C. J.*, delivering the opinion in *Cohens v. Virginia*, 6 Wheat. 264, 389, 5 L. Ed. 257.

17. **Amendment of state constitutions.**—*Luther v. Borden*, 7 How. 1, 47, 12 L. Ed. 581. See, also, post, "Generally; Ultimate Sovereignty," IV, B, 1.

18. **Executive approval of amendments.**—*Hollingsworth v. Virginia*, 3 Dall 378, 381, 1 L. Ed. 644, note, holding that the eleventh amendment was lawfully adopted, although not submitted to the president for his approval.

19. **Time of taking effect; federal constitution.**—*Owings v. Speed*, 5 Wheat. 420, 422, 5 L. Ed. 124; *Ex parte McNeil*, 13 Wall. 236, 241, 20 L. Ed. 624.

The present constitution of the United States did not commence its operation until the first Wednesday in March, 1789. In September, 1787, the constitutional convention, having completed its work, resolved that the constitution should be laid before the congress of the United States, to be submitted by that body to

the conventions of the several states, to be convened by their respective state legislatures. The convention also expressed the opinion that as soon as the constitution should be ratified by the conventions of nine states, congress should fix a day on which electors should be appointed by the states, a day on which the electors should assemble to vote for president and vice president, "and the time and place for commencing proceedings under this constitution." The conventions of nine states having adopted the constitution, congress, in September or October, 1788, passed a resolution, in conformity with the opinions expressed by the convention, and appointed the first Wednesday in March, 1789, as the day, and the then seat of congress as the place, "for commencing proceedings under the constitution." Both governments could not exist at the same time, and the new government did not commence until the old government had expired. It is apparent, therefore, that under the constitution the government did not commence immediately upon its ratification by the ninth state: for these ratifications were to be reported to the then congress, whose continuing existence was recognized by the convention, and who were requested to continue to exercise their powers for the purpose of bringing the new government into operation. In fact, congress did continue to act as a government, until it dissolved on the first of November, by the successive disappearance of its members; but it existed potentially until the 2d of March, the day preceding that on which the members of the new congress were directed to assemble. *Owings v. Speed*, 5 Wheat. 420, 422, 5 L. Ed. 124.

20. **Illinois constitution of 1870; provision relating to municipal subscriptions.**—The section of the Illinois constitution



**Fractions of a Day—When Noticed.**—When necessary to determine conflicting rights, and to prevent injustice, the courts will take into consideration the fractions of a day, and determine, if possible, the very hour of a particular day at which a constitutional amendment went into operation.<sup>21</sup>

adopted in 1870, relating to "municipal subscriptions to railroads or private corporations," took effect on the 2d of July, 1870, the day the people voted for its adoption. *Wade v. Walnut*, 105 U. S. 1, 2, 26 L. Ed. 1027.

**The constitution of Texas.**—The constitution of Texas, adopted upon its admission into the Union, became operative immediately upon its ratification by the people; and the laws of the United States were extended over and became effective within the state of Texas from the day of its admission into the Union, December 29, 1845. *Benner v. Porter*, 9 How. 235, 13 L. Ed. 119; *Calkin v. Cocke*, 14 How. 227, 236, 14 L. Ed. 398; *Texas v. White*, 7 Wall. 700, 722, 19 L. Ed. 227.

The first section of the thirteenth article of the constitution of Texas provided "that all process which shall be issued in the name of the republic of Texas, prior to the organization of the state government under this constitution shall be as valid as if issued in the name of the state of Texas." The second section of the same article provided that "all criminal prosecutions or penal actions, which shall have arisen prior to the organization of the state government under this constitution, in any of the courts of the republic of Texas shall be prosecuted to judgment and execution in the name of the state." The sixth section of the same article provided that, upon its appearing that a majority of the votes of the people given were for the adoption of the constitution, "it shall be the duty of the president (of the republic of Texas), to make proclamation of the fact, and thenceforth this constitution shall be ordained and established as the constitution of the state, to go into operation, and be of force and effect, from and after the organization of the state government." The tenth section of the same article declared, "that the law of the republic relative to the duties of officers, both civil and military, of the same, shall remain in full force, and the duties of the several officers shall be performed in conformity with the existing laws, until the organization of the government of the state under this constitution, or until the first day of the meeting of the legislature." It was held that the foregoing provisions of the state constitution did not operate to postpone the period of the admission of Texas into the Union to the time of the first meeting of the legislature of the state and the organization of the government under the constitution, or to postpone the operation of the laws of the Union over the state of Texas, until that period; that these several provisions in

the constitution were designed and intended to effect the organization of a government at once, on the adoption of the constitution by the people, and thereby to avoid an interregnum between the abrogation of the old and the erection of the new system, and until the legislative body could meet, and put the government in operation in conformity with the requirements of the organic law. *Calkin v. Cocke*, 14 How. 227, 236, 237, 14 L. Ed. 398.

**Constitution of Pennsylvania.**—Upon an indictment for treason it was objected that the state government (in Pennsylvania) could not be said to have been established until there was a meeting of all its parts, and that as the executive council did not meet until the 4th of March, 1777, the state was, until that time, incapable of affording protection, and therefore, was not entitled to allegiance, prior to that date. It was held that before the meeting of the council, in March, 1777, all its members were chosen and the legislature was completely organized, and that allegiance being naturally due to such a power, the crime of high treason might have been committed by a subject of the commonwealth from the moment of the creation of such body. *Respublica v. Chapman*, 1 Dall. 53, 57, 1 L. Ed. 33.

**21. Fractions of a day—When noticed.**—*Louisville v. Savings Bank*, 104 U. S. 469, 473, 26 L. Ed. 775.

Thus the provision of the Illinois constitution of 1870, containing the prohibition against municipal subscriptions or donations in aid of railroad companies, was, by the schedule thereof, to take effect and become operative from the time it should be adopted by a popular vote. This vote was held upon the second day of July, 1870, the polls remaining open until sunset that day. Whether or not a municipal subscription in aid of a railroad company, voted upon the same day, was avoided by this provision or not, depended upon whether or not the constitutional provision became operative before the vote upon the subscription was had. It was not definitely shown the exact moment when the township voted in favor of the bonds, but it was shown that the town meeting was held at nine o'clock in the forenoon, and that only fifty-four votes were cast, of which fifty-two were in favor of the issue. It was held, that as the constitutional provision could not have become operative before the closing of the polls at sunset, it might fairly be presumed that the township had in fact voted for issuing the bonds before the close of the general election, and that the

### III. Construction of Constitutions.

**A. By Whom Construed**—1. **THE FEDERAL CONSTITUTION.**—It is the right and the duty of the national government to have its constitution and laws interpreted and applied by its own judicial tribunals. In cases arising under them, properly brought before it, the federal supreme court is the final arbiter.<sup>22</sup> The construction given by the supreme court of the United States to the constitution and laws of the United States, is binding on all the courts, both state and federal, and is received by all as the true construction.<sup>23</sup> But while the

bonds were therefore valid. *Louisville v. Savings Bank*, 104 U. S. 469, 473, 26 L. Ed. 775.

**22. Federal constitution; by whom construed.**—*United States v. Peters*, 5 Cranch 115, 135, 141, 3 L. Ed. 53; *Cohens v. Virginia*, 6 Wheat. 264, 415, 5 L. Ed. 257; *Davis v. Packard*, 8 Pet. 312, 323, 8 L. Ed. 957; *Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401; *Ableman v. Booth*, 21 How. 506, 517, 16 L. Ed. 169; *Mayor v. Cooper*, 6 Wall. 247, 253, 18 L. Ed. 851; *Tarble's Case*, 13 Wall. 397, 20 L. Ed. 597; *In re Ayers*, 123 U. S. 443, 507, 31 L. Ed. 216; *Haddock v. Haddock*, 201 U. S. 562, 585, 50 L. Ed. 867. See, also, the title **COURTS**.

**23. Same.**—*Elmendorf v. Taylor*, 10 Wheat. 152, 160, 6 L. Ed. 289; *Mayor v. Cooper*, 6 Wall. 247, 253, 18 L. Ed. 851. See, also, the title **COURTS**.

"The propriety of intrusting the construction of the constitution and laws made in pursuance thereof to the judiciary of the Union, has not, we believe, as yet, been drawn in question. It seems to be a corollary from this political axiom, that the federal courts should either possess exclusive jurisdiction in such cases, or a power to revise the judgment rendered in them by the state tribunals." *Marshall, C. J.*, delivering the opinion in *Cohens v. Virginia*, 6 Wheat. 264, 415, 5 L. Ed. 257.

"We think, that in a government, acknowledgedly supreme, with respect to objects of vital interest to the nation, there is nothing inconsistent with sound reason, nothing incompatible with the nature of government, in making all its departments supreme, so far as respects those objects, and so far as is necessary to their attainment. The exercise of the appellate power over those judgments of the state tribunals which may contravene the constitution or laws of the United States, is, we believe, essential to the attainment of those objects." *Marshall, C. J.*, delivering the opinion in *Cohens v. Virginia*, 6 Wheat. 264, 414, 415, 5 L. Ed. 257.

"The importance of preserving uniformity in the construction of the constitution, laws and treaties of the United States, must be felt by all; and the impracticability of maintaining this uniformity, unless the power of supervising all judgments in which the constitution, laws or treaties of the United States may be drawn in question, be vested in some single tribunal, is too apparent for con-

troversy. The people of the United States have vested that power in the federal supreme court and its highest duty is to exercise it with fidelity." *Davis v. Packard*, 8 Pet. 312, 323, 8 L. Ed. 957.

The supremacy conferred upon the federal government could not peacefully be maintained, unless it was clothed with judicial power, equally paramount in authority to carry it into execution; for if left to the courts of justice of the several states, conflicting decisions would unavoidably take place. For this reason the federal supreme court was made the supreme arbiter upon all questions which arise under the constitution and laws and treaties of the United States, whether such questions originate in a state court or a court of the United States. *Ableman v. Booth*, 21 How. 506, 517, 16 L. Ed. 169.

That the state courts are supreme over the courts of the United States, in cases arising under the constitution and laws of the United States, or that they can interfere with, or exercise any jurisdiction over the proceedings and judgments of a federal court, is a proposition which cannot be maintained. On the other hand, federal courts, within their sphere of action, are as far beyond the reach of the jurisdiction of the state courts and state process as though they were tribunals of another state. *Ableman v. Booth*, 21 How. 506, 513, 516, 16 L. Ed. 169; *Tarble's Case*, 13 Wall. 397, 20 L. Ed. 597.

The federal supreme court is the ultimate tribunal, erected by the constitution, to determine whether laws enacted by congress, or by state legislatures, or decisions of state courts are in conflict with the constitution and laws of the United States. *Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401. See, also, the title **COURTS**. And see post, "Supremacy in Case of Conflict between State and Federal Powers," VI, D, 3, c, (6), (b), (hh).

**Same; contrary viewed by supreme court of Pennsylvania.**—Speaking of the relation of the states to the United States, and of the division of powers between the state and federal governments, Chief Justice McKean, of the supreme court of Pennsylvania, says: "Should there be any defect in this form of government, or any collision occur, it cannot be remedied by the sole act of the congress or of a state; the people must be resorted to, for en-

United States supreme court may not avoid the duty of interpreting for itself the constitution of the United States, yet, in view of the persuasive force that would result if an overwhelming line of state decisions held an asserted doctrine, it would give them due consideration.<sup>24</sup>

2. STATE CONSTITUTIONS.—It is the province of the supreme court of a state to construe its own constitution and laws.<sup>25</sup> Questions arising under the provisions of a state constitution are finally settled by the decision of the court of last resort in the state, and cannot be reviewed by the supreme court of the

largement or modification. If a state should differ with the United States about the construction of them, there is no common umpire but the people, who should adjust the affair by making amendments in the constitutional way, or suffer from the defect. In such a case, the constitution of the United States is federal; it is a league or treaty, made by the individual states, as one party, and all the states, as another party. When two nations differ about the meaning of any clause, sentence or word in a treaty, neither has an exclusive right to decide it; they endeavor to adjust the matter by negotiation, but if it cannot be thus accomplished, each has a right to retain its own interpretation, until a reference be had to the mediation of other nations, an arbitration, or the fate of war. There is no provision in the constitution, that in such a case the judges of the supreme court of the United States shall control and be conclusive; neither can the congress by a law confer that power. There appears to be a defect in this matter, it is a *casus omissus*, which ought in some way to be remedied. Perhaps the vice president and senate of the United States; or commissioners appointed, say one by each state, would be a more proper tribunal than the supreme court. Be that as it may I rather think the remedy must be found in an amendment of the constitution." *Respublica v. Cobbett* (Supt. Ct. Pa.), 3 Dall. 467, 473, 1 L. Ed. 683.

24. Same; influence of state decisions.—*Haddock v. Haddock*, 201 U. S. 562, 585, 50 L. Ed. 867. See, also, the title COURTS.

25. State constitutions; by whom construed.—*Jefferson Branch Bank v. Skelly*, 1 Black 436, 17 L. Ed. 173; *Town of South Ottawa v. Perkins*, 94 U. S. 260, 267, 24 L. Ed. 154; *Boyd v. Alabama*, 94 U. S. 645, 649, 24 L. Ed. 302; *Columbus Southern R. Co. v. Wright*, 151 U. S. 470, 475, 38 L. Ed. 238; *Bryan v. Board of Education*, 151 U. S. 639, 650, 38 L. Ed. 297; *Montana Co. v. St. Louis Min., etc., Co.*, 152 U. S. 160, 165, 38 L. Ed. 398; *Marchant v. Pennsylvania R. Co.*, 153 U. S. 380, 385, 38 L. Ed. 751; *Pittsburg, etc., R. Co. v. Backus*, 154 U. S. 421, 425, 38 L. Ed. 1031; *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 41 L. Ed. 369; *Brown v. New Jersey*, 175 U. S. 172, 44 L. Ed. 119; *Wilson v. Standerfer*, 184 U. S. 399, 412, 46 L. Ed. 612; *Howard v.*

*Fleming*, 191 U. S. 126, 48 L. Ed. 121; *Citizens' Bank v. Parker*, 192 U. S. 73, 86, 48 L. Ed. 346; *West v. Louisiana*, 194 U. S. 258, 261, 48 L. Ed. 965; *Carfer v. Caldwell*, 200 U. S. 293, 297, 50 L. Ed. 488; *Montana v. Rice*, 204 U. S. 291, 301, 51 L. Ed. 490; *Barrington v. Missouri*, 205 U. S. 483, 486, 51 L. Ed. 890. See, also, the titles APPEAL AND ERROR, vol. 1, p. 469; COURTS.

**Kentucky constitution; long and short haul clause.**—Whether § 218 of the constitution of Kentucky, being a copy of the long and short haul provision of the Interstate Commerce Act, is to be given the same construction as that which the federal courts had previously given to the same provision of the Interstate Commerce Act, is a question for the state court; and that court having decided that, in adopting the provision, the constitutional convention did not adopt the previous construction thereof, its decision is binding upon the federal supreme court. *Louisville, etc., R. Co. v. Kentucky*, 183 U. S. 503, 508, 46 L. Ed. 298.

**Right of confrontation; whether evidence was admitted in violation of state constitutional provision.**—"Where the state supreme court held that the trial court in admitting the testimony did not commit error, this notwithstanding the constitution of the state provided that no person shall be compelled to testify against himself in a criminal case, its ruling upon that proposition is not subject to review in this court." *Barrington v. Missouri*, 205 U. S. 483, 486, 51 L. Ed. 890.

"And if, as decided, the admission of this testimony did not violate the rights of the plaintiff in error under the constitution and laws of the state of Missouri, the record affords no basis for holding that he was not awarded due process of law." *Barrington v. Missouri*, 205 U. S. 483, 486, 51 L. Ed. 890; *Howard v. Fleming*, 191 U. S. 126, 48 L. Ed. 121.

"Whether the state court erred in its construction of the state constitution and statutes and the common law on the subject of reading depositions of witnesses, is not a federal question. We are bound by the construction which the state court gives to its own constitution and statutes and to the law which may obtain in the state, under circumstances such as those existing herein. Among many of the cases to that effect, see *Brown v. New Jersey*,



United States,<sup>26</sup> unless they come in conflict with the constitution, laws or treaties of the United States, or involve some question of commercial or general law.<sup>27</sup> That court has no authority, on a writ of error to a state court, to de-

175 U. S. 172, 44 L. Ed. 119." West v. Louisiana, 194 U. S. 258, 261, 48 L. Ed. 965.

**26. State decisions followed by federal courts.**—Walker v. Sauvinet, 92 U. S. 90, 92, 23 L. Ed. 678. See, also, the title APPEAL AND ERROR, vol. 1, pp. 469, 736. And see the authorities cited in the preceding note.

"The construction uniformly given to the constitution of a state by its highest court is binding on the courts of the United States as a rule of decision." Ohio Life Ins., etc., Co. v. Debolt, 16 How. 416, 431, 14 L. Ed. 997; Gilman v. Sheboygan, 2 Black 510, 518, 17 L. Ed. 305; Leffingwell v. Warren, 2 Black 599, 17 L. Ed. 261; Randall v. Brigham, 7 Wall. 523, 19 L. Ed. 285; Township of Elmwood v. Marcy, 92 U. S. 289, 23 L. Ed. 710; Supervisors v. Post, 94 U. S. 260, 24 L. Ed. 154; Post v. Supervisors, 105 U. S. 667, 669, 26 L. Ed. 1204. See, also, the title COURTS.

A construction of a state constitution made by the highest state court very soon after the constitution was formed, acquiesced in by the people of the state for nearly thirty years, and repeatedly confirmed by subsequent judicial decisions of the highest state court, will be adopted by the court of the United States. Webster v. Cooper, 14 How. 488, 504, 14 L. Ed. 510. Accord; McKen v. Delancy, 5 Cranch 22, 3 L. Ed. 25; Polk v. Wendall, 9 Cranch 87, 3 L. Ed. 665; Shelby v. Guy, 11 Wheat. 361, 6 L. Ed. 495; Gardner v. Collins, 2 Pet. 58, 7 L. Ed. 347; Green v. Neal, 6 Pet. 291, 8 L. Ed. 402.

Where no federal question is involved, the United States supreme court will follow the construction which has been uniformly given to the constitution or the laws of a state by its highest court. Polk v. Wendall, 9 Cranch 87, 3 L. Ed. 665; Elmendorf v. Taylor, 10 Wheat. 152, 6 L. Ed. 289; Green v. Neal, 6 Pet. 291, 8 L. Ed. 402; Nesmith v. Sheldon, 7 How. 812, 12 L. Ed. 925; Sumner v. Hicks, 2 Black 532, 17 L. Ed. 355; Leffingwell v. Warren, 2 Black 599; 17 L. Ed. 261; Olcott v. The Supervisors, 16 Wall. 678, 21 L. Ed. 382; Walker v. State Harbor Comm'rs, 17 Wall. 648, 21 L. Ed. 744; State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663; Fairfield v. Gallatin County, 100 U. S. 47, 25 L. Ed. 544. See, also, the title APPEAL AND ERROR, vol. 1, p. 736.

And where a state decision construing a provision of the state constitution was decided before, but not reported until after, a decision of the federal supreme court giving the same provision a contrary construction, it was held, when the question again came before the federal supreme court, that it would reverse its

own decision and follow that of the state court, the latter having been consistently adhered to by the state court and having become a rule of property in the state. Fairfield v. Gallatin County, 100 U. S. 47, 25 L. Ed. 544, overruling Town of Concord v. Portsmouth Sav. Bank, 92 U. S. 625, 23 L. Ed. 628, and distinguishing Groves v. Slaughter, 15 Pet. 449, 10 L. Ed. 800, and Rowan v. Runnels, 5 How. 134, 12 L. Ed. 85.

The federal supreme court follows the decision of the supreme court of Georgia, that authority to grant the franchise of establishing and maintaining a toll bridge over a river where such river crosses a public highway in that state is vested solely in the legislature, and may be exercised by it, or be committed to such agencies as it may select. Wright v. Nagle, 101 U. S. 791, 25 L. Ed. 921.

**Exception where rights have accrued under the earlier decisions.**—But when the highest court of a state has given different constructions to its constitutions and laws, at different times, and rights have been acquired under the former constructions, the federal supreme court will follow the first and disregard the latter. Fairfield v. Gallatin County, 100 U. S. 47, 25 L. Ed. 544; Livingston County v. Darlington, 101 U. S. 407, 415, 25 L. Ed. 1015; Douglass v. Pike County, 101 U. S. 677, 25 L. Ed. 968. See, also, the titles COURTS; IMPAIRMENT OF OBLIGATION OF CONTRACTS.

**Exception where question involves the existence of a contract claimed to be impaired.**—See the titles APPEAL AND ERROR, vol. 1, p. 703, et seq.; COURTS; IMPAIRMENT OF OBLIGATION OF CONTRACTS.

**27. Same; construction of state court not conclusive, when.**—Polk v. Wendall, 9 Cranch 87, 3 L. Ed. 665; Elmendorf v. Taylor, 10 Wheat. 152, 160, 6 L. Ed. 289; Green v. Neal, 6 Pet. 291, 8 L. Ed. 402; Nesmith v. Sheldon, 7 How. 812, 12 L. Ed. 925; Sumner v. Hicks, 2 Black 532, 17 L. Ed. 355; Leffingwell v. Warren, 2 Black 599, 17 L. Ed. 261; Olcott v. The Supervisors, 16 Wall. 678, 21 L. Ed. 382; Walker v. State Harbor Comm'rs, 17 Wall. 648, 21 L. Ed. 744; State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663; Fairfield v. Gallatin County, 100 U. S. 47, 25 L. Ed. 544; Norton v. Shelby County, 118 U. S. 425, 439, 30 L. Ed. 178; Gormley v. Clark, 134 U. S. 338, 348, 33 L. Ed. 909. See, also, the titles APPEAL AND ERROR, vol. 1, p. 736; COURTS.

While it is true that the federal courts as a rule follow the state decisions construing the state constitution and laws, this is not true where the state decision, holding an act of the state legislature to



clare a state law void, on account of its collision with a state constitution.<sup>28</sup> Whether the legislature of a state has authority under the constitution of the state to pass a particular statute, what is the true interpretation of any statute passed by it for a purpose specified, and what acts will be justified under the statute, are matters which lie exclusively within the determination of the highest court of the state.<sup>29</sup>

be unconstitutional, is based, not upon any construction of the state constitution, but upon the general principle that a stated purpose for which taxation was authorized is not public in its nature, as that taxation, for the purpose of supplying municipal aid to a railroad company is for a private purpose and therefore unconstitutional. *Olcott v. The Supervisors*, 16 Wall. 678, 689, 21 L. Ed. 382.

**28. That state law is in conflict with constitution of state.**—See the title APPEAL AND ERROR, vol. 1, p. 736. See, also, the title COURTS.

**29. Same.**—*Aicardi v. State*, 19 Wall. 635, 22 L. Ed. 215.

**Statute alleged to contravene state constitution.**—The United States supreme court has no jurisdiction to determine that any law of a state legislature alleged to be contrary to the constitution of such state, is void; the state courts are the proper tribunals to decide whether an act of legislature is in accordance with the state constitution. *Calder v. Bull*, 3 Dall. 386, 392, 1 L. Ed. 648; *Young v. Bank*, 4 Cranch 384, 391, 2 L. Ed. 655; *Dartmouth College v. Woodward*, 4 Wheat. 518, 655, 4 L. Ed. 629; *Houston v. Moore*, 5 Wheat. 1, 33, 5 L. Ed. 19; *Town of South Ottawa v. Perkins*, 94 U. S. 260, 268, 24 L. Ed. 154; *Railroad Co. v. Georgia*, 98 U. S. 359, 366, 25 L. Ed. 185; *Post v. Supervisors*, 105 U. S. 667, 26 L. Ed. 1204; *Norton v. Shelby County*, 118 U. S. 425, 440, 30 L. Ed. 178; *Baldwin v. Kansas*, 129 U. S. 52, 57, 32 L. Ed. 640; *In re Duncan*, 139 U. S. 449, 462, 35 L. Ed. 219; *Leeper v. Texas*, 139 U. S. 462, 35 L. Ed. 225; *Davis v. Texas*, 139 U. S. 651, 35 L. Ed. 300.

Thus, where the constitution of a state declares that private property shall not be taken for public uses without just compensation, and it is alleged that the highest court of the state has sustained a law which violates this constitutional provision, the federal supreme court has no jurisdiction to review that decision. *Withers v. Buckley*, 20 How. 84, 15 L. Ed. 816.

The question whether a defendant was a manufacturer within the meaning of the Louisiana constitution was one dependent upon the construction of that constitution, and the interpretation given to it by the state supreme court, raising as it does no question of contract, is obligatory upon the federal court. *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89, 91, 45 L. Ed. 102.

"As it is the constitution of that state that we are called on to construe, these de-

cisions of her supreme court, that overflowing land by means of a dam across a stream is taking private property, within the meaning of that instrument, are of special weight if not conclusive on us." *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 180, 20 L. Ed. 557.

Where the state courts have decided that the statutes of the state authorizing municipal subscriptions and bond issues in aid of railway enterprises are not in conflict with the provisions of the state constitution, the federal supreme court will not, upon a certificate of division of opinion, undertake to re-examine the question, but will adopt the judgment of the state courts. *Amey v. Alleghany City*, 24 How. 364, 16 L. Ed. 614.

"It is further claimed by the plaintiff in error that the supreme court of the state erred in holding that the law under which bonds were issued and the proceeds of public lands devoted to their payment was repugnant to the constitution of the state. Upon this question the decision of that court is conclusive, and plainly we have no power to review it." *Montana v. Rice*, 204 U. S. 291, 301, 51 L. Ed. 490. See, also, the title APPEAL AND ERROR, vol. 1, p. 736.

**Constitution of Illinois; separation of departments; indeterminate sentence act.**—*Dryer v. Illinois*, 187 U. S. 71, 83, 47 L. Ed. 79.

**Same—equal and uniform taxation clause.**—The supreme court of the state of Illinois having decided that a statute of that state is not in violation of the state constitutional provision requiring taxation to be equal and uniform, the federal supreme court will adopt the decision of that court as a rule to be followed in the federal courts. *State Railroad Tax Cases*, 92 U. S. 575, 576, 23 L. Ed. 663.

**Whether statute enacted in manner prescribed by state constitution.**—The judgment of the highest court of a state that a statute has been enacted in accordance with the requirements of the state constitution, is conclusive upon this court, and it will not be reviewed. *Railroad Co. v. Georgia*, 98 U. S. 359, 25 L. Ed. 185.

"An act of the legislature of a state, which has been held by its highest court not to be a statute of the state because never passed as its constitution requires, cannot be held by the courts of the United States, upon the same evidence, between different parties, to be a law of the state." *Post v. Supervisors*, 105 U.

**Where Question Presented in Federal Court, Previous to Any State Decision.**—"Undoubtedly a federal court has the jurisdiction, and when the question is properly presented it may often become its duty, to pass upon an alleged conflict between a statute and a state constitution, even before the question has been considered by the state tribunals. All objections to the validity of the act, whether springing out of the state or the federal constitution, may be presented in a single suit and call for consideration and determination. At the same time the federal courts will be reluctant to adjudge a state statute to be in conflict with the state constitution before that question has been considered by the state tribunals. Especially is this true when the statute is one affecting the revenues of the state, and therefore of general public interest. \* \* \* And this reluctance becomes more imperative when the statute has been before the highest court of the state and a decision rendered upon the assumption that it is valid, and this, although the direct question of validity was not presented nor determined."<sup>30</sup>

**B. General Rules and Principles of Construction—1. APPLICABILITY OF ESTABLISHED CANONS OF CONSTRUCTION.**—Since a constitution is intended to mark only the great outlines and objects of government, leaving the minor rules and principles to be deduced from the nature of the objects themselves, it is always to be borne in mind, in construing it, that it is not a legal code, dealing with matters in the greatest detail, but a constitution that is being expounded.<sup>31</sup>

**2. CONSTRUCTION WITH REFERENCE TO THE COMMON LAW AND PREVIOUS JUDICIAL CONSTRUCTION AND ESTABLISHED USAGE.**—The federal constitution was formed in and for an advanced state of society, and rests at every point on received opinions and fixed ideas. It is not a new creation, but a combination of existing materials, whose properties and attributes were familiarly understood, and had been determined by reiterated experiments. It is not, therefore, reasoning upon things, as it were, to suppose that any deliberative assembly, constituted under it, would ever assert any other rights and powers than those which had been established by long practice, and conceded by public opinion.<sup>32</sup> The framers of the constitution did not speak in terms known only in local history, laws or usages, nor infuse into the instrument local definitions, the expres-

S. 667, 669, 26 L. Ed. 1204; *Supervisors v. Post*, 94 U. S. 260, 25 L. Ed. 154.

Nor is it of any importance that the act has been referred to in subsequent statutes as an existing law, nor that its validity had been assumed by the state supreme court in earlier cases, where, under the rules of practice, its constitutionality could not have been determined in those cases. *Post v. Supervisors*, 105 U. S. 667, 669, 26 L. Ed. 1204.

**Ordinance; whether forbidden by state constitution.**—Whether or not a municipal ordinance is forbidden by the provisions of the state constitution is a question for the state courts and will not be passed upon, upon a writ of error to the federal supreme court. *Barbier v. Connolly*, 113 U. S. 27, 28 L. Ed. 923.

**30. Whether statute in conflict with state constitution; where state court has not passed upon question.**—*Michigan Cent. R. Co. v. Powers*, 201 U. S. 245, 291, 50 L. Ed. 744; *Otis Co. v. Ludlow Mfg. Co.*, 201 U. S. 140, 50 L. Ed. 696; *Coulter v. Louisville, etc., R. Co.*, 196 U. S. 599, 609, 49 L. Ed. 615. See, also, the title COURTS.

**31. Applicability of established canons of construction.**—*Martin v. Hunter*, 1 Wheat. 304, 326, 4 L. Ed. 97; *McCulloch v. Maryland*, 4 Wheat. 316, 407, 4 L. Ed. 579; *New York v. Miln*, 11 Pet. 102, 153, 9 L. Ed. 648; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 483, 9 L. Ed. 773; *Rhode Island v. Massachusetts*, 12 Pet. 657, 721, 9 L. Ed. 1233; *Legal Tender Cases*, 12 Wall. 457, 467, 532, 20 L. Ed. 287; *Legal Tender Case*, 110 U. S. 421, 439, 28 L. Ed. 204; *Pollock v. Farmers' Loan, etc., Co.* (rehearing), 158 U. S. 601, 617, 39 L. Ed. 1108; *Fairbank v. United States*, 181 U. S. 283, 288, 45 L. Ed. 862.

"A constitution, establishing a frame of government, declaring fundamental principles, and creating a national sovereignty, and intended to endure for ages, and to be adapted to the various crises of human affairs, is not to be interpreted with the strictness of a private contract." *Legal Tender Case*, 110 U. S. 421, 439, 28 L. Ed. 204.

**32. Constitution a combination of existing materials.**—*Anderson v. Dunn*, 6 Wheat. 204, 232, 5 L. Ed. 242.

sions of historians, or the phraseology peculiar to the habits, institutions or legislation of the several states. Speaking in language intended to be "uniform throughout the United States," the terms used were such as had been long defined, well understood in policy, legislation and jurisprudence and capable of being referred to some authoritative standard meaning; otherwise, the constitution would be open to such a construction of its terms as might be found in any history of a colony, a state, or their laws, however contradictory the mass might be in the aggregate.<sup>33</sup> The principles and history of the common law were familiarly known to the framers of the constitution. It is the system from which our judicial ideas and legal definitions are derived, and the provisions of the constitution are framed in the language of the English common law. The constitution must, therefore, be read in the light of its history and construed with reference to its principles.<sup>34</sup> If the terms used are appropriate to the common or statute law, or the law of nations, it must be taken as intended to be applied according to its established definition as a known legal term.<sup>35</sup> "This is but another application of the familiar rule that where one state adopts the laws of another, it is also presumed to adopt the known and settled construction of those laws by the courts of the state from which they are taken."<sup>36</sup>

**Common-Law Exceptions to Provisions Intended to Secure Personal and Property Rights.**—As regards those provisions of the constitution intended to secure the protection of personal and property rights, the constitution is to be construed not as reaching out for new guaranties of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject—such as his ancestors had inherited and defended since the days of Magna Charter. Many of its provisions in the nature of a bill of rights are subject to exceptions recognized long before the adoption of the constitution,

**33. Terms previously well defined.**—*Briscoe v. Bank* (opinion of Baldwin, J.), 11 Pet. 257, 328, 9 L. Ed. 709.

**34. Construed with reference to common law.**—*Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 545, 9 L. Ed. 773; *Rice v. Railroad Co.*, 1 Black 358, 374, 17 L. Ed. 147; *Minor v. Happersett*, 21 Wall. 162, 22 L. Ed. 627; *Moore v. United States*, 91 U. S. 270, 274, 23 L. Ed. 346; *United States v. Carll*, 105 U. S. 611, 26 L. Ed. 1135; *United States v. Sanges*, 144 U. S. 310, 311, 36 L. Ed. 445; *Ex parte Wilson*, 114 U. S. 417, 422, 29 L. Ed. 89; *Boyd v. United States*, 116 U. S. 616, 624, 625, 29 L. Ed. 746; *Smith v. Alabama*, 124 U. S. 465, 478, 31 L. Ed. 508; *United States v. Wong Kim Ark*, 169 U. S. 649, 654, 42 L. Ed. 890; *Schick v. United States*, 195 U. S. 65, 69, 49 L. Ed. 99; *Kepner v. United States*, 195 U. S. 100, 126, 49 L. Ed. 114; *South Carolina v. United States*, 199 U. S. 437, 449, 50 L. Ed. 261; *Kansas v. Colorado*, 206 U. S. 46, 95, 51 L. Ed. 956.

"There is, however, one clear exception to the statement that there is no national common law. The interpretation of the constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history. The code of constitutional and statutory construction which, therefore, is gradually formed by the judgments of this court, in the ap-

plication of the constitution and the laws and treaties made in pursuance thereof, has for its basis so much of the common law as may be implied in the subject, and constitutes a common law resting on national authority. *Moore v. United States*, 91 U. S. 270, 23 L. Ed. 346." *Smith v. Alabama*, 124 U. S. 465, 478, 31 L. Ed. 508.

"As the object of the first eight amendments to the constitution was to incorporate into the fundamental law of the land certain principles of natural justice which had become permanently fixed in the jurisprudence of the mother country, the construction given to those principles by the English courts is cogent evidence of what they were designed to secure and of the limitations that should be put upon them." *Brown v. Walker*, 161 U. S. 591, 600, 40 L. Ed. 819.

**35. Legal terms to be given established definition.**—*Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 545, 9 L. Ed. 773; *Briscoe v. Bank*, 11 Pet. 257, 328c, 9 L. Ed. 709; *Rice v. Railroad Co.*, 1 Black 358, 374, 375, 17 L. Ed. 147; *United States v. Carll*, 105 U. S. 611, 26 L. Ed. 1135; *United States v. Sanges*, 144 U. S. 310, 311, 36 L. Ed. 445; *Ex parte Wilson*, 114 U. S. 417, 422, 29 L. Ed. 89.

**36. Same.**—*Cathcart v. Robinson*, 5 Pet. 264, 280, 8 L. Ed. 120; *McDonald v. Hovey*, 110 U. S. 619, 28 L. Ed. 269; *Brown v. Walker*, 161 U. S. 591, 600, 40 L. Ed. 819.



and not interfering at all with its spirit. Such exceptions were obviously intended to be respected.<sup>37</sup>

**Exception.**—Interpretations of any grant in the constitution, or limitation upon those grants, according to any English legislation or judicial rule, cannot be permitted.<sup>38</sup>

3. CONSTRUCTION IN THE LIGHT OF CONTEMPORANEOUS HISTORY AND EXISTING CONDITIONS.—“The constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now.”<sup>39</sup> “It is not only the same in words, but the same in meaning, and delegates the same powers to the government, and reserves and secures the same rights and privileges to the citizens; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.”<sup>40</sup> In all instances where con-

**37. Established exceptions to provisions guaranteeing personal and property rights.**—*Mattox v. United States*, 156 U. S. 237, 243, 39 L. Ed. 409; *Brown v. Walker*, 161 U. S. 591, 600, 40 L. Ed. 819; *Robertson v. Baldwin*, 165 U. S. 275, 281, 41 L. Ed. 715.

The third article of the constitution which provides for a jury in the trial of “all crimes, except in cases of impeachment,” is to be interpreted in the light of the principles which, at common law, determined whether the accused, in a given class of cases, was entitled to be tried by a jury. *Callan v. Wilson*, 127 U. S. 540, 549, 32 L. Ed. 223.

The term “due process of law” as used in the federal constitution is to be construed with reference to its established meaning as determined by the settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and in the states and colonies prior to the adoption of the constitution. *Murray v. Hoboken Land, etc., Co.*, 18 How. 272, 277, 15 L. Ed. 372.

The language of the federal constitution conferring upon the executive the power to grant reprieves and pardons must be construed with reference to its accepted meaning as established in the common law at the time of the adoption of the constitution, and as the term was used and construed in the laws of the states and colonies prior to the constitution. *Ex parte Wells*, 18 How. 307, 311, 15 L. Ed. 421.

**First ten amendments subject to well-recognized exceptions.**—“The law is perfectly well settled that the first ten amendments to the constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the

necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed.” *Robertson v. Baldwin*, 165 U. S. 275, 281, 41 L. Ed. 715.

**38. Exception as to grants contained in constitution.**—*Waring v. Clarke*, 5 How. 441, 459, 12 L. Ed. 226.

The right of the house of representatives to punish a citizen for a contempt of its authority or a breach of its privileges can derive no support from the precedents and practice of the two houses of the English parliament, nor from the adjudged cases in which the English courts have upheld these practices. *Kilbourn v. Thompson*, 103 U. S. 168, 182, 26 L. Ed. 377.

**39. Construction in light of contemporaneous history; meaning does not alter.**—*Scott v. Sandford*, 19 How. 393, 426, 15 L. Ed. 691; *McPherson v. Blacker*, 146 U. S. 1, 36, 36 L. Ed. 869; *Pollock v. Farmers' Loan, etc., Co.* (rehearing), 158 U. S. 601, 621, 39 L. Ed. 1108; *South Carolina v. United States*, 199 U. S. 437, 448, 50 L. Ed. 261.

**40. Same.**—*South Carolina v. United States*, 199 U. S. 437, 449, 50 L. Ed. 261.

We cannot recognize the doctrine that because the constitution has been found in the march of time sufficiently comprehensive to be applicable to conditions not within the minds of its framers, and not arising in their time, it may, therefore, be wrenched from the subjects expressly embraced within it, and amended by judicial decision without action by the designated organs in the mode by which alone amendments can be made.” *McPherson v. Blacker*, 146 U. S. 1, 36, 36 L. Ed. 869.

Previous to the adoption of the thirteenth, fourteenth and fifteenth amendments, it was held in the *Dred Scott* Case that the change in public opinion and feeling in relation to the African race, which had taken place since the adoption of the constitution, could not change, its con-



struction becomes necessary therefore, we must place ourselves in the position of the men who framed and adopted the constitution, and inquire what they must have understood to be the meaning and scope of the language used. To this end the courts must look to the history of the times and examine the state of things existing when it was framed and adopted in order to correctly interpret its meaning.<sup>41</sup>

**Language Embraces New Conditions as They Arise.**—But while the meaning of the language employed does not change, it applies from generation to generation to all things to which it is, in its nature, applicable, embracing within its operation all new conditions which are within the scope of the powers in terms conferred.<sup>42</sup>

4. CONTEMPORANEOUS EXPOSITION, USAGE AND ACQUIESCENCE—*a. By the Government and Its Departments.*—In cases of doubtful construction, the contemporaneous and practical construction of the constitution by the great departments of the government, followed by long usage and acquiescence, all

struction and meaning, and that it must be construed and administered according to its true meaning and intention when it was formed and adopted. *Scott v. Sandford*, 19 How. 393, 394, 15 L. Ed. 691.

41. Court must look to the history of the times and to conditions as they then existed.—*Rhode Island v. Massachusetts*, 12 Pet. 657, 723, 9 L. Ed. 1233; *Passenger Cases*, 7 How. 283, 428, 429, 12 L. Ed. 702; *Ex parte Bain*, 121 U. S. 1, 12, 30 L. Ed. 849; *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 558, 39 L. Ed. 759; *Pollock v. Farmers' Loan, etc., Co. (rehearing)*, 158 U. S. 601, 621, 39 L. Ed. 1108; *In re Debs*, 158 U. S. 564, 591, 39 L. Ed. 1092; *United States v. Wong Kim Ark*, 169 U. S. 649, 653, 42 L. Ed. 890; *Maxwell v. Dow*, 176 U. S. 581, 602, 44 L. Ed. 597; *Knowlton v. Moore*, 178 U. S. 41, 95, 44 L. Ed. 969; *Missouri v. Illinois*, 180 U. S. 208, 219, 45 L. Ed. 497; *South Carolina v. United States*, 199 U. S. 437, 450, 50 L. Ed. 261.

"When called upon to construe and apply a provision of the constitution of the United States, we must look not merely to its language but to its historical origin, and to those decisions of this court in which its meaning and the scope of its operation have received deliberate consideration." *Missouri v. Illinois*, 180 U. S. 208, 219, 45 L. Ed. 497.

"The necessities which gave birth to the constitution, the controversies which preceded its formation, and the conflicts of opinion which were settled by its adoption, may properly be taken into view for the purpose of tracing to its source any particular provision of the constitution, in order thereby to be enabled to correctly interpret its meaning. *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 558, 39 L. Ed. 759." *Knowlton v. Moore*, 178 U. S. 41, 95, 44 L. Ed. 969.

"In construing any act of legislation, whether a statute enacted by the legislature, or a constitution established by the people as the supreme law of the land,

regard is to be had, not only to all parts of the act itself, and of any former act of the same lawmaking power, of which the act in question is an amendment; but also to the condition, and to the history, of the law as previously existing, and in the light of which the new act must be read and interpreted." *United States v. Wong Kim Ark*, 169 U. S. 649, 653, 42 L. Ed. 890.

"The constitution is to be interpreted by what was the condition of the parties to it when it was formed, by their object and purpose in forming it, and by the actual recognition in it of the dissimilar institutions of the states. The exercise of constitutional power by the United States, or the consequences of its exercise, are not to be concluded by the summary logic of ifs and syllogisms." (Opinion of Wayne, J.) *Passenger Cases*, 7 How. 283, 428, 429, 12 L. Ed. 702.

42. Language embraces new conditions as they arise.—*In re Debs*, 158 U. S. 564, 591, 39 L. Ed. 1092; *South Carolina v. United States*, 199 U. S. 437, 448, 50 L. Ed. 261; *De Lima v. Bidwell*, 182 U. S. 1, 197, 45 L. Ed. 1041.

A direct tax cannot be taken out of the constitutional rule because the particular tax did not exist at the time the rule was prescribed. *Pollock v. Farmers' Loan, etc., Co. (rehearing)*, 158 U. S. 601, 632, 39 L. Ed. 1108.

"Just so is it with the grant to the national government of power over interstate commerce. The constitution has not changed. The power is the same. But it operates today upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop." *In re Debs*, 158 U. S. 564, 591, 39 L. Ed. 1092.

So when the constitution of the United States declares in article 1, § 10, that the states shall not do certain things, this declaration operates not only upon the thirteen original states, but upon all who subsequently become such. *De Lima v. Bidwell*, 182 U. S. 1, 197, 45 L. Ed. 1041.

tending to one settled and uniform construction, if not conclusive is certainly entitled to great weight. Congress, the executive and the judiciary upon various occasions have acted upon this as a sound and reasonable doctrine.<sup>43</sup>

**43. Contemporaneous and practical exposition; by the government and its departments.**—*Stuart v. Laird*, 1 Cranch 299, 309, 2 L. Ed. 115; *Martin v. Hunter*, 1 Wheat. 304, 351, 4 L. Ed. 97; *McCulloch v. Maryland*, 4 Wheat. 316, 401, 4 L. Ed. 579; *Cohens v. Virginia*, 6 Wheat. 264, 418, 5 L. Ed. 257; *Ogden v. Saunders*, 12 Wheat. 213, 311, 6 L. Ed. 606; *United States v. Nourse*, 9 Pet. 8, 9 L. Ed. 31; *Briscoe v. Bank*, 11 Pet. 257, 9 L. Ed. 709; *Prigg v. Pennsylvania*, 16 Pet. 539, 621, 10 L. Ed. 1060; *Waring v. Clarke*, 5 How. 441, 458, 12 L. Ed. 226; *Cooley v. Board of Wardens*, 12 How. 299, 315, 13 L. Ed. 996; *Ohio Life Ins., etc., Co. v. Debolt*, 16 How. 416, 431, 14 L. Ed. 997; *Murray v. Hoboken Land, etc., Co.*, 18 How. 272, 280, 15 L. Ed. 372; *Veazie Bank v. Fenno*, 8 Wall. 533, 544, 19 L. Ed. 482; *Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53, 57, 28 L. Ed. 349; *Ames v. Kansas*, 111 U. S. 449, 469, 28 L. Ed. 482; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 733, 28 L. Ed. 1137; *The Laura*, 114 U. S. 411, 416, 29 L. Ed. 147; *Boyd v. United States*, 116 U. S. 616, 622, 29 L. Ed. 746; *Clayton v. Utah Territory*, 132 U. S. 632, 642, 33 L. Ed. 455; *Jack v. Utah Territory*, 132 U. S. 643, 33 L. Ed. 459; *Auffmordt v. Hedden*, 137 U. S. 310, 329, 34 L. Ed. 674; *Field v. Clark*, 143 U. S. 649, 691, 36 L. Ed. 294; *McPherson v. Blacker*, 146 U. S. 1, 27, 36 L. Ed. 869; *Halter v. Nebraska*, 205 U. S. 34, 39, 51 L. Ed. 696.

"When called upon to construe and apply a provision of the constitution of the United States, we must look not merely to its language but to its historical origin, and to those decisions of this court in which its meaning and the scope of its operation have received deliberate consideration." *Missouri v. Illinois*, 180 U. S. 208, 219, 45 L. Ed. 497.

**Other statements of the doctrine.**—"Long usage, acquiesced in by the courts, goes a long way to prove that there is some plausible ground or reason for it in the law, or in the historical facts which have imposed a particular construction of the law favorable to such usage. It is a maxim that, *consuetudo est optimus interpret legum*; and another maxim that, *contemporanea expositio est optima et fortissima in lege*." *Boyd v. United States*, 116 U. S. 616, 622, 29 L. Ed. 746.

"In a case of doubtful construction the long acquiescence of congress and the general government may be resorted to as some evidence of the proper construction, or of the validity of a law. This principle is more applicable to questions relating to the construction of a statute than to matters which go to the power of the leg-

islature to enact it." *Clayton v. Utah Territory*, 132 U. S. 632, 642, 33 L. Ed. 455; *Jack v. Utah Territory*, 132 U. S. 643, 33 L. Ed. 459.

An act passed by the first legislature that assembled after the adoption of the constitution, and allowed to remain upon the statute book to the present time, must be considered as a contemporary interpretation entitled to much weight. *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 733, 28 L. Ed. 1137.

A uniform course of action, involving the right to the exercise of an important power by the state government, for half a century, and this almost without question, is no unsatisfactory evidence that the power is rightfully exercised. *Briscoe v. Bank*, 11 Pet. 257, 9 L. Ed. 709.

A contemporaneous construction of the constitution, practiced under and acquiesced in, for a period of years, fixes the construction, and the courts will not shake or control it. *Stuart v. Laird*, 1 Cranch 299, 2 L. Ed. 115.

When the constitution of a state, for nearly half a century, has received a uniform and unquestioned construction by all the departments of the government, legislative, executive and judicial, that construction must be regarded as the true one. (Opinion of Taney, C. J.) *Ohio Life Ins., etc., Co. v. Debolt*, 16 How. 416, 431, 14 L. Ed. 997.

"The practical construction of the constitution, as given by so many acts of congress, and embracing almost the entire period of our national existence, should not be overruled, unless upon a conviction that such legislation was clearly incompatible with the supreme law of the land." *The Laura*, 114 U. S. 411, 416, 29 L. Ed. 147; *Field v. Clark*, 143 U. S. 649, 691, 36 L. Ed. 294.

In the case of *McCulloch v. Maryland*, 4 Wheat. 316, 401, 4 L. Ed. 579, the question under consideration being the constitutional authority of congress to incorporate the Bank of the United States, Chief Justice Marshall, speaking of the legislative construction of the constitution upon this point and its weight, says: "It will not be denied that a bold and daring usurpation might be resisted, after an acquiescence still longer and more complete than this. But, it is conceived, that a doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted; if not put at rest by the practice of the government, ought to receive a considerable

**Practical Construction Resorted to Only in Doubtful Cases.**—After all, however, it is only in cases of doubtful construction that resort is to be had to

impression from that practice. An exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded."

**Illustrations—Due process in the collection of the revenue.**—The legislative construction of the constitution, that the collection of the revenues of the government by summary proceedings is "due process," within the meaning of that clause of the constitution, commencing early in the history of the government, and continued down to the present time, and repeatedly acted upon by the executive and the judiciary, is entitled to great weight upon the question, whether or not the collector of a balance, found to be due from a collector of the customs to the government, upon the auditing of his accounts, by a distress warrant, issued by the solicitor of the treasury, under the act of May 15, 1820 (3 Stat. at Large, 592), is due process of law. *Murray v. Hoboken Land, etc., Co.*, 18 How. 272, 286, 15 L. Ed. 372.

**As to the extent of the admiralty jurisdiction.**—Contemporaneous legislative and judicial construction as to the extent of the admiralty jurisdiction of the United States was accorded great weight in the case of *Waring v. Clarke*, 5 How. 441, 458, 12 L. Ed. 226.

**Selection of merchant appraisers and effect of appraisal.**—"The uniform course of legislation and practice in regard both to the mode of selection of the merchant appraiser and as to the conclusive effect of the appraisal, are entitled to great weight. *Stuart v. Laird*, 1 Cranch 299, 309, 2 L. Ed. 115; *Martin v. Hunter*, 1 Wheat. 304, 352, 4 L. Ed. 97; *Cohens v. Virginia*, 6 Wheat. 264, 418, 421, 5 L. Ed. 257; *Cooley v. Board of Wardens*, 12 How. 299, 315, 13 L. Ed. 996; *Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53, 57, 28 L. Ed. 349; *The Laura*, 114 U. S. 411, 416, 29 L. Ed. 147." *Auffmordt v. Hedden*, 137 U. S. 310, 329, 34 L. Ed. 674.

**Provision relating to direct taxes.**—The practical construction by congress of the constitutional provision relating to direct taxes is entitled to great consideration, especially in the absence of anything adverse to it in the discussions of the convention which framed it, and of the conventions which ratified the constitution. *Veazie Bank v. Fenno*, 8 Wall. 533, 544, 19 L. Ed. 482.

**Validity of state bankrupt laws.**—Speaking of the legislative assumption of the validity of state bankrupt laws, and of the great length of time during which such a law had existed in the state of New York, Mr. Justice Thompson, said:

"The long continuance of it there, clearly manifests the views of the state legislature with respect to the policy and expediency of the law. And I cannot but feel strongly impressed, that the length of time which this law has been in undisputed operation, and the repeated sanction it has received from every department of the government, ought to have great weight when judging of its constitutionality." *Ogden v. Saunders*, 12 Wheat. 213, 311, 6 L. Ed. 606.

**Organization and jurisdiction of federal courts.**—Upon objection that the judges of the supreme court had no right to sit as circuit judges, without special appointment and a separate commission as such, it was answered that the contemporaneous and practical exposition of the constitution to the contrary, and the acquiescence therein for a period of several years, commencing with the organization of the judicial system, afforded an irresistible answer to such objection. *Stuart v. Laird*, 1 Cranch 299, 2 L. Ed. 115.

"In view of the practical construction put upon \* \* \* the constitution by congress, at the very moment of the organization of the government, and of the significant fact that from 1789 until now no court of the United States has ever in its actual adjudications determined to the contrary, we are unable to say that it is not within the power of congress to grant to the inferior courts of the United States jurisdiction in cases where the supreme court has been vested by the constitution with original jurisdiction." *Ames v. Kansas*, 111 U. S. 449, 469, 28 L. Ed. 482.

"It is an historical fact, that this exposition of the constitution, extending its appellate power to state courts, was, previous to its adoption, uniformly and publicly avowed by its friends, and admitted by its enemies, as the basis of their respective reasonings, both in and out of the state conventions. It is an historical fact, that at the time when the judiciary act was submitted to the deliberations of the first congress, composed as it was, not only of men of great learning and ability, but of men who has acted a principal part in framing, supporting or opposing that constitution, the same exposition was explicitly declared and admitted by the friends and by the opponents of that system. It is an historical fact, that the supreme court of the United States have, from time to time, sustained this appellate jurisdiction, in a great variety of cases, brought from the tribunals of many of the most important states in the Union, and that no state tribunal has ever breathed a judicial doubt on the subject, or declined to obey the mandate of the supreme court, until the present occasion. This weight of contemporaneous exposi-



the practical construction placed upon the constitution by the legislative and executive departments. The plain language of the constitution cannot be overturned by the practice prevailing in any department of the government nor by the interpretation placed upon any particular provision by congress.<sup>44</sup>

tion by all parties, this acquiescence of enlightened state courts, and these judicial decisions of the supreme court, through so long a period, do, as we think, place the doctrine upon a foundation of authority which cannot be shaken, without delivering over the subject to perpetual and irremediable doubts." (Opinion of Story, J.) *Martin v. Hunter*, 1 Wheat. 304, 351, 352, 4 L. Ed. 97. *Accord*, *Cohens v. Virginia*, 6 Wheat. 264, 420, 421, 5 L. Ed. 257.

**Same.—The judiciary act of Sept. 24, 1789.**—"A contemporaneous exposition of the constitution, certainly of not less authority than that which has been just cited (the *Federalist*), is the judiciary act itself. We know, that in the congress which passed that act were many eminent members of the convention which founded the constitution. Not a single individual, so far as is known, supposed that part of the act which gives the supreme court appellate jurisdiction over the judgments of the state courts, in the cases therein specified, to be unauthorized by the constitution." Marshall, C. J., delivering the opinion in *Cohens v. Virginia*, 6 Wheat. 264, 420, 5 L. Ed. 257.

"The judiciary act of September 24, 1789, ch. 20, drawn by Senator (afterwards Chief Justice) Ellsworth, and passed—within six months after the organization of the government under the constitution, and on the day before the first ten amendments were proposed to the legislatures of the states—by the first congress, in which were many eminent men who had been members of the convention which formed the constitution, has always been considered as a contemporaneous exposition of the highest authority. *Cohens v. Virginia*, 6 Wheat. 264, 420, 5 L. Ed. 257; *Parsons v. Bedford*, 3 Pet. 433, 7 L. Ed. 732; *Bors v. Preston*, 111 U. S. 252, 256, 28 L. Ed. 419; *Ames v. Kansas*, 111 U. S. 449, 463, 464, 28 L. Ed. 482; *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 297, 32 L. Ed. 239." *Capital Tracção Co. v. Hof*, 174 U. S. 1, 9, 10, 43 L. Ed. 873.

**State pilotage laws.**—In 1789 (1 Stat. at Large 54), congress enacted a law declaring that all pilots in the bays, inlets, rivers, harbors and ports of the United States, should continue to be regulated in conformity with the existing laws of the states, etc. Held, that this was a contemporaneous construction of the constitution, since acted on with such uniformity in a matter of such public interest and importance as to be entitled to great weight in determining whether a state pilotage law was repugnant to the constitution, as levying a duty not uni-

form throughout the United States, or giving a preference to the ports of one state over those of another, or as obliging vessels to or from one state to enter, clear or pay duties in another. *Cooley v. Board of Wardens*, 12 How. 299, 315, 13 L. Ed. 996.

**Extension of the constitution to conquered or ceded territory.**—The practice of the executive department, continued for more than half a century, is entitled to great weight upon the question as to whether or not territory ceded to the United States becomes at once a domestic territory within the purview of the revenue laws and such practice should not be disregarded nor overturned except for cogent reasons, and unless it be clear that such construction be erroneous. *DeLima v. Bidwell*, 182 U. S. 1, 194, 45 L. Ed. 1041; *United States v. Johnston*, 124 U. S. 236, 31 L. Ed. 389.

"The executive and legislative departments of the government have for more than a century interpreted this silence as precluding the idea that the constitution attached to these territories as soon as acquired, and unless such interpretation be manifestly contrary to the letter or spirit of the constitution, it should be followed by the judicial department." *Downes v. Bidwell*, 182 U. S. 244, 286, 45 L. Ed. 1088, reaffirmed in *Czarnikow v. Bidwell*, 191 U. S. 559, 48 L. Ed. 302; *Warner v. Stranahan*, 191 U. S. 560, 48 L. Ed. 302.

**44. Practical construction resorted to only in doubtful cases.**—*Fairbank v. United States*, 181 U. S. 283, 307, 45 L. Ed. 862.

The acts of congress known as the Chinese Exclusion Acts, the earliest of which was passed some fourteen years after the adoption of the fourteenth amendment, cannot control its meaning, or impair its effect, but must be construed and executed in subordination to its provisions. *United States v. Wong Kim Ark*, 169 U. S. 649, 699, 42 L. Ed. 890.

**Resume of decisions.**—In *Fairbank v. United States*, 181 U. S. 283, 307, 45 L. Ed. 862, the court appends the following as a partial list of the cases in which this subject has been discussed: *Stuart v. Laird*, 1 Cranch 299, 2 L. Ed. 115; *Martin v. Hunter*, 1 Wheat. 304, 351, 4 L. Ed. 97; *Cohens v. Virginia*, 6 Wheat. 264, 418, 5 L. Ed. 257; *Edwards v. Darby*, 12 Wheat. 206, 210, 6 L. Ed. 603; *United States v. State Bank*, 6 Pet. 29, 39, 8 L. Ed. 308; *United States v. Macdaniel*, 7 Pet. 1, 8 L. Ed. 587; *Prigg v. Pennsylvania*, 16 Pet. 539, 10 L. Ed. 1060; *Union Ins. Co. v. Hoge*, 21 How. 35, 66, 16 L. Ed. 61; *United States v. Alexander*, 12 Wall. 177, 181, 20



b. *Debates of the Convention; Works of Political and Economic Writers.*—The courts, for the purposes of arriving at a just construction of any particular provisions of the constitution, may refer to the debates of the convention, the views of those who adopted the constitution, and to the works of political and

L. Ed. 381; *Peabody v. Stark*, 16 Wall. 240, 243, 21 L. Ed. 311; *Dollar Sav. Bank v. United States*, 19 Wall. 227, 237, 22 L. Ed. 80; *Smythe v. Fiske*, 23 Wall. 374, 382, 23 L. Ed. 47; *United States v. Moore*, 95 U. S. 760, 763, 24 L. Ed. 588; *Swift Co. v. United States*, 105 U. S. 691, 695, 26 L. Ed. 1108; *Hahn v. United States*, 107 U. S. 402, 406, 27 L. Ed. 527; *United States v. Graham*, 110 U. S. 219, 221, 28 L. Ed. 126; *Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53, 57, 28 L. Ed. 349; *Brown v. United States*, 113 U. S. 568, 571, 28 L. Ed. 1079; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 733, 28 L. Ed. 1137; *The Laura*, 114 U. S. 411, 416, 29 L. Ed. 147; *United States v. Philbrick*, 120 U. S. 52, 59, 30 L. Ed. 559; *United States v. Hill*, 120 U. S. 169, 182, 30 L. Ed. 627; *United States v. Johnston*, 124 U. S. 236, 253, 31 L. Ed. 389; *Robertson v. Downing*, 127 U. S. 607, 613, 32 L. Ed. 269; *Merritt v. Cameron*, 137 U. S. 542, 552, 34 L. Ed. 772; *Schell v. Fauche*, 138 U. S. 562, 570, 34 L. Ed. 1040; *United States v. Alabama*, etc., R. Co., 142 U. S. 615, 621, 35 L. Ed. 1134; *McPherson v. Blacker*, 146 U. S. 1, 36 L. Ed. 869; *United States v. Tanner*, 147 U. S. 661, 663, 37 L. Ed. 321; *United States v. Union Pac. R. Co.*, 148 U. S. 562, 572, 37 L. Ed. 560; *United States v. Alger*, 152 U. S. 384, 397, 38 L. Ed. 488; *Webster v. Luther*, 163 U. S. 331, 342, 41 L. Ed. 179; *Wisconsin Cent. R. Co. v. United States*, 164 U. S. 190, 205, 41 L. Ed. 399; *Hewitt v. Schultz*, 180 U. S. 139, 156, 45 L. Ed. 463. (Footnote to *Fairbank v. United States*, 181 U. S. 283, 308, 45 L. Ed. 862.) Then proceeding to a resume of these cases, Mr. Justice Brewer, delivering the opinion of the court, says: "An examination of the opinions in those cases will disclose that they may be grouped in three classes: First, those in which the court, after seeking to demonstrate the validity or the true construction of a statute, has added that if there were doubt in reference thereto, the practical construction placed by congress, or the department charged with the execution of the statute, was sufficient to remove the doubt; second, those in which the court has either stated or assumed that the question was doubtful, and has rested its determination upon the fact of a long continued construction by the officials charged with the execution of the statute; and, third, those in which the court, noticing the fact of a long continued construction, has distinctly affirmed that such construction cannot control when there is no doubt as to the true meaning of the statute.

*v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257. There the question presented was the jurisdiction of this court over proceedings by indictment in a state court for a violation of a state statute. In an elaborate argument Chief Justice Marshall sustained the jurisdiction, and then added (p. 418): 'Great weight has always been attached, and very rightly attached, to contemporaneous exposition. No question, it is believed, has arisen to which this principle applies more unequivocally than to that now under consideration.' And in support of that referred to the writings in the federalist, which were presented before the adoption of the constitution, and were generally recognized as powerful arguments in its favor; also to the judiciary act of 1789, 1 Stat. 73, the decisions of this court and the assent of the courts of several states thereto, saying (p. 421): 'This concurrence of statesmen, of legislators, and of judges in the same construction of the constitution may justly inspire some confidence in that construction.' Again, in *United States v. State Bank*, 6 Pet. 29, 39, 8 L. Ed. 308, Mr. Justice Story, in like manner, said: 'It is not unimportant to state, that the construction which we have given to the terms of the act, is that which is understood to have been practically acted upon by the government, as well as by individuals, ever since its enactment. Many estates, as well of deceased persons, as of persons insolvent who have made general assignments, have been settled upon the footing of its correctness. A practice so long and so general would, of itself, furnish strong grounds for a liberal construction, and could not now be disturbed without introducing a train of serious mischiefs. We think the practice was founded in the true exposition of the terms and intent of the act, but if it were susceptible of some doubt, so long an acquiescence in it would justify us in yielding to it as a safe and reasonable exposition.' In the second class may be placed *Stuart v. Laird*, 1 Cranch 299, 2 L. Ed. 115; *Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53, 28 L. Ed. 349; in which last case Mr. Justice Miller, speaking for the court, used this language (p. 57): 'The construction placed upon the constitution by the first act of 1790, and the act of 1802, by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is

"The first class is illustrated by *Cohens*

economic writers of established reputation.<sup>45</sup> "The opinion of the Federalist has always been considered as of great authority. It is a complete commentary on our constitution; and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank; and the part two of its authors performed in framing the constitution put it very much in their power to explain the views with which it was framed. These essays having been published while the constitution was before the nation for adoption or rejection, and having been written in answer to objections founded entirely on the extent of its powers, and on its diminution of state sovereignty, are entitled to the more consideration, where they frankly avow that the power objected to is given, and defend it."<sup>46</sup>

almost conclusive.' See, also, *The Laura*, 114 U. S. 411, 29 L. Ed. 147; *United States v. Philbrick*, 120 U. S. 52, 59, 30 L. Ed. 559; *United States v. Hill*, 120 U. S. 169, 182, 30 L. Ed. 627; *Robertson v. Downing*, 127 U. S. 607, 613, 32 L. Ed. 269; and *Schell v. Fauche*, 138 U. S. 562, 572, 34 L. Ed. 1040, in which it was said: 'In all cases of ambiguity, the contemporaneous construction, not only of the courts, but of the departments, and even of the officials whose duty it is to carry the law into effect, is universally held to be controlling.' The third class is the largest. While the language used by the several justices announcing the opinions in these cases is not the same, the thought is alike. Thus, in *Swift Co. v. United States*, 105 U. S. 691, 695, 26 L. Ed. 1108, Mr. Justice Matthews said: 'The rule which gives determining weight to contemporaneous construction, put upon a statute, by those charged with its execution, applies only in cases of ambiguity and doubt.' In *United States v. Graham*, 110 U. S. 219, 221, 28 L. Ed. 126, Chief Justice Waite thus stated the law: 'Such being the case it matters not what the practice of the departments may have been or how long continued, for it can only be resorted to in aid of interpretation, and "it is not allowable to interpret what has no need of interpretation." If there were ambiguity or doubt, then such a practice, begun so early and continued so long, would be in the highest degree persuasive, if not absolutely controlling in its effect. But with language clear and precise, and with its meaning evident, there is no room for construction, and consequently no need of anything to give it aid. The cases to this effect are numerous.' In *United States v. Tanner*, 147 U. S. 661, 663, 37 L. Ed. 321, it was said by Mr. Justice Brown: 'If it were a question of doubt, the construction given to this clause prior to October, 1885, might be decisive; but, as it is clear to us that this construction was erroneous, we think it is not too late to overrule it. *United States v. Graham*, 110 U. S. 219, 28 L. Ed. 126; *Swift Co. v. United States*, 105 U. S. 691, 26 L. Ed. 1108. It is only in cases of doubt that the construction given to an act by the department charged with the duty of enforcing it becomes material.' 'In *United States v. Alger*, 152 U.

S. 384, 397, 38 L. Ed. 488, Mr. Justice Gray used this language: 'If the meaning of that act were doubtful, its practical construction by the Navy Department would be entitled to great weight. But as the meaning of the statute, as applied to these cases, appears to this court to be perfectly clear, no practice inconsistent with that meaning can have any effect.' In *Webster v. Luther*, 163 U. S. 331, 342, 41 L. Ed. 179, Mr. Justice Harlan stated the rule in these words: 'The practical construction given to an act of congress, fairly susceptible of different constructions, by one of the executive departments of the government, is always entitled to the highest respect, and in doubtful cases should be followed by the courts, especially when important interests have grown up under the practice adopted. *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 34, 39 L. Ed. 601; *United States v. Healey*, 160 U. S. 136, 141, 40 L. Ed. 369. But this court has often said that it will not permit the practice of an executive department to defeat the obvious purpose of a statute.' From this resume of our decisions it clearly appears that practical construction is relied upon only in cases of doubt. We have referred to it when the construction seemed to be demonstrable, but then only in response to doubts suggested by counsel. Where there was obviously a matter of doubt, we have yielded assent to the construction placed by those having actual charge of the execution of the statute, but where there was no doubt we have steadfastly declined to recognize any force in practical construction. Thus, before any appeal can be made to practical construction, it must appear that the true meaning is doubtful.' *Fairbank v. United States*, 181 U. S. 283, 311, 45 L. Ed. 862.

**45. Debates of the convention; political and economic writings.**—*Pollock Farmers' Loan, etc., Co. (rehearing)*, 158 U. S. 601, 39 L. Ed. 1108.

**46. Same; the Federalist.**—*Marshall, C. J.*, delivering the opinion in *Cohens v. Virginia*, 6 Wheat. 264, 318, 5 L. Ed. 257.

"The general rules of construction applicable to the negative and affirmative powers of grant in the constitution are commented on in the 32d number of the *Federalist*, in these terms: 'That, notwithstanding the affirmative grants of

**Amendments Proposed by Congress.**—It is otherwise, however, with reference to those amendments proposed and debated by congress. As to them it is held that: "What individual senators or representatives may have urged in debate, in regard to the meaning to be given to a proposed constitutional amendment, or bill or resolution, does not furnish a firm ground for its proper construction, nor is it important as explanatory of the grounds upon which the members voted in adopting it."<sup>47</sup> "The safe way is to read its language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then to construe it, if there be therein any doubtful expressions, in a way, so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted. This rule could not, of course, be so used as to limit the force and effect of an amendment in a manner which the plain and unambiguous language used therein would not justify or permit."<sup>48</sup>

5. LEGISLATIVE CONSTRUCTION AND ITS WEIGHT.—See ante, "By the Government and Its Departments," III, B, 4, a.

6. RULE OF STARE DECISIS.—Principles of constitutional construction, long ago established and steadily adhered to, preclude a judicial tribunal from holding a legislative enactment, federal or state, unconstitutional and void, unless it be manifestly so.<sup>49</sup> Nevertheless, "it is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are con-

general authorities, there has been the most pointed care, in those cases where it was deemed improper that the like authorities should reside in the states, to insert negative clauses prohibiting the exercise of them by the states. The tenth section of the first article consists altogether of such provisions. This circumstance is a clear indication of the sense of the convention, and furnishes a rule of interpretation out of the body of the act, which justified the position I have advanced, and refutes every hypothesis to the contrary." That is, in favor of the state power. These remarks were made to quiet the fears of the people, and to clear up doubts on the meaning of the constitution, then before them for adoption by the state conventions. And it is an historical truth, never, so far as I know, denied, that these papers were received by the people of the states as the true exponents of the instrument submitted for their ratification." (Opinion of Catron, J.) License Cases, 5 How. 504, 607, 12 L. Ed. 256.

47. Otherwise as to amendments proposed and debated by congress.—United State v. Union Pac. R. Co., 91 U. S. 72, 79, 23 L. Ed. 224; United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 318, 41 L. Ed. 1007; United States v. Wong Kim Ark, 169 U. S. 649, 699, 42 L. Ed. 890; Dunlap v. United States, 173 U. S. 65, 75, 43 L. Ed. 616; Maxwell v. Dow, 176 U. S. 581, 601, 602, 44 L. Ed. 597; Downes v.

Bidwell, 182 U. S. 244, 254, 45 L. Ed. 1088; Czarnikow v. Bidwell, 191 U. S. 559, 48 L. Ed. 302; Warner v. Stranahan, 191 U. S. 560, 48 L. Ed. 302.

"The arguments of individual legislators are no proper subject for judicial comment. They are so often influenced by personal or political considerations, or by the assumed necessities of the situation, that they can hardly be considered even as the deliberate views of the persons who make them, much less as dictating the construction to be put upon the constitution by the courts. United States v. Union Pac. R. Co., 91 U. S. 72, 79, 23 L. Ed. 224." Downes v. Bidwell, 182 U. S. 244, 254, 45 L. Ed. 1088, reaffirmed in Czarnikow v. Bidwell, 191 U. S. 559, 48 L. Ed. 302; Warner v. Stranahan, 191 U. S. 560, 48 L. Ed. 302.

The intention of the congress which framed and of the states which adopted the fourteenth amendment of the constitution must be sought in the words of the amendment; and the debates in congress are not admissible as evidence to control the meaning of those words. But such statements are valuable as contemporaneous opinions of jurists and statesmen upon the legal meaning of the words themselves. United States v. Wong Kim Ark, 169 U. S. 649, 699, 42 L. Ed. 890.

48. Maxwell v. Dow, 176 U. S. 581, 602, 44 L. Ed. 597.

49. Rule of stare decisis.—Halter v. Nebraska, 205 U. S. 34, 40, 51 L. Ed. 696.



sidered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."<sup>50</sup>

7. WORDS, CONTEXT AND SUBJECT MATTER; INTENT AND MEANING, NATURE AND OBJECT, ETC.—a. *In General*.—The solution of constitutional questions must necessarily depend upon the words of the constitution; the meaning and intention of the convention which framed and proposed it for adoption and ratification to the conventions of the people of and in the several states; together with a reference to such sources of judicial information as are resorted to by all courts in construing statutes, and to which the federal supreme court has always resorted in construing the constitution. In the construction of the constitution, therefore, the words, the subject, the context, and the intention of the person using them, are all to be taken into view.<sup>51</sup>

b. *Spirit and Intent of Instrument; Nature, Purpose and Object*.—The object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people in adopting it.<sup>52</sup> Its provisions should be construed so as to effectuate, rather than defeat, its evident purpose.<sup>53</sup> All rules would be subverted, if mere extraneous matter should have the effect of interpreting a supreme law differently from its obvious or necessarily to be implied sense, so apparent as to overrule the words used.<sup>54</sup>

**Spirit and Intent to Be Ascertained from the Instrument.**—Although the spirit of an instrument is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words.<sup>55</sup> The intent is to be found in the instrument itself; and when the text of a constitutional provision is not ambiguous, the courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument.<sup>56</sup>

50. **As to general statements and expressions found in opinions.**—Marshall, C. J., delivering the opinion in *Cohens v. Virginia*, 6 Wheat. 264, 399, 5 L. Ed. 257. See, also, the title STARE DECISIS.

51. **Construction according to words, context, and subject matter; intent and meaning, etc.**—*Rhode Island v. Massachusetts*, 12 Pet. 657, 721, 723, 9 L. Ed. 1233. Accord: *McCulloch v. Maryland*, 4 Wheat. 316, 415, 4 L. Ed. 579; *United States v. Arrendondo*, 6 Pet. 691, 739, 741, 8 L. Ed. 547; *Pollock v. Farmers' Loan, etc., Co.* (rehearing), 158 U. S. 601, 619, 39 L. Ed. 1108.

"In performing the delicate and important duty of construing clauses in the constitution of our country, which involve conflicting powers of the government of the Union, and of the respective states, it is proper to take a view of the literal meaning of the words to be expounded, of their connection with other words, and of the general objects to be accomplished by the prohibitory clause, or by the grant of power." Marshall, C. J., delivering the majority opinion in *Brown v. Maryland*, 12 Wheat. 419, 437, 6 L. Ed. 678.

52. **Intent of framers; object of construction.**—*Lake County v. Rollins*, 130 U. S. 662, 670, 32 L. Ed. 1060.

53. **Construction should effectuate, not defeat, purpose.**—*Jarrold v. Moberly*, 103 U. S. 580, 586, 26 L. Ed. 492; *Prigg v. Pennsylvania*, 16 Pet. 539, 612, 10 L. Ed. 1060.

A constitutional provision is to be construed "in such a manner as, consistently with its words, shall fully and completely

effectuate the whole object of it. If, by one mode of interpretation, the right must become shadowy and unsubstantial, and without any remedial power adequate to the end, and by another mode, it will attain its just end and secure its manifest purpose, it would seem, upon principles of reasoning absolutely irresistible, that the latter ought to prevail. No court of justice can be authorized so to construe any clause of the constitution as to defeat its obvious ends, when another construction, equally accordant with the words and sense thereof, will enforce and protect them." Story, J., delivering the opinion of the court in *Prigg v. Pennsylvania*, 16 Pet. 539, 612, 10 L. Ed. 1060.

54. **Extraneous matter not to overrule obvious and necessary meaning.**—*Rhode Island v. Massachusetts*, 12 Pet. 657, 723, 9 L. Ed. 1233; *Cohens v. Virginia*, 6 Wheat. 264, 380, 5 L. Ed. 257; *Gibbins v. Ogden*, 9 Wheat. 1, 188, 6 L. Ed. 23.

55. **Spirit and intent ascertained from the words.**—*Sturges v. Crowninshield*, 4 Wheat. 122, 202, 4 L. Ed. 529; *Jacobson v. Massachusetts*, 197 U. S. 11, 22, 49 L. Ed. 643.

56. **Same.**—*Lake County v. Rollins*, 130 U. S. 662, 670, 32 L. Ed. 1060.

No matter what may have been the intention of the mover of the proviso, in one of the articles of the state constitution, the intention of the framers of the article, and of the people adopting it, must be gathered from the article itself. *Town of Concord v. Portsmouth Sav. Bank*, 92 U. S. 625, 629, 23 L. Ed. 628.



**Language Aided by Reference to Nature, Purpose and Object.**—The extent of the power granted by the people to the Federal government is to be ascertained, not by the date of the grant but by its nature and terms. The extent of the power is not in any degree dependent upon the circumstances that some of the state constitutions were formed before, and others after, the constitution of the United States.<sup>57</sup> It is to be ascertained by the language of the instrument taken in connection with the purpose for which they were conferred.<sup>58</sup> If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule, that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction.<sup>59</sup>

**When Intention to Prevail over Apparent Meaning.**—If the text be clear and distinct, no restriction upon its plain and obvious import ought to be admitted, unless the inference be irresistible.<sup>60</sup> If in any case, the plain meaning of the provision, not contradicted by any other provision in the same instrument, is to be disregarded, upon the grounds that the framers of the constitution could not have intended what they say, it must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would without hesitation unite in rejecting the application.<sup>61</sup>

**57. Extent of power to be ascertained from nature and terms of grant.**—*McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579.

**58. Same.**—*Passenger Cases*, 7 How. 283, 459, 12 L. Ed. 702, opinion of Grier, J.

**59. Construction of powers with reference to object.**—*Gibbons v. Ogden*, 9 Wheat. 1, 188, 6 L. Ed. 23, opinion of Marshall, C. J.

In investigating the nature and extent of the powers conferred by the constitution upon congress, it is indispensable to keep in view the objects for which those powers were granted. This is a universal rule of construction applied alike to statutes, wills, contracts, and constitutions. If the general purpose of the instrument is ascertained, the language of its provisions must be construed with reference to that purpose and so as to subserve it. *Legal Tender Cases*, 12 Wall. 457, 531, 20 L. Ed. 287.

This rule of construction is particularly applicable to the constitution for the reason that minute details are not found in the constitution. It is necessarily brief and comprehensive, dealing unavoidably in general language prescribing merely the outline of the system which it is designed to establish, leaving the filling up to be deduced from those outlines. *Legal Tender Cases*, 12 Wall. 457, 532, 20 L. Ed. 287.

The constitution of the United States and the powers confided by it to the general government, to be exercised for the benefit of all the states, ought not to be nullified or evaded by astute verbal criticism, without regard to the grand aim and object of the instrument and the principles on which it is based. (Opinion of Grier, J.) *Passenger Cases*, 7 How. 283, 459, 12 L. Ed. 702.

**War amendments; general purpose to be kept in view.**—In giving construction

to any of the amendments adopted after the war between the states, it is necessary to keep the main purpose of those amendments in view. *Strauder v. West Virginia*, 100 U. S. 303, 310, 25 L. Ed. 664; *Slaughter-House Cases*, 16 Wall. 36, 21 L. Ed. 394.

The one pervading purpose found in these amendments, lying at the foundation of each, and without which none of them would ever have been suggested, was the emancipation of the slave race, and the security and firm establishment of that freedom, and the protection of the newly made freemen and citizens from oppression of their former masters. In any fair and just construction of any section or phrase of these amendments, it is necessary to look to this purpose which is the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the constitution until that purpose was supposed to be accomplished. *Slaughter-House Cases*, 16 Wall. 36, 72, 21 L. Ed. 394.

**60. When intent to prevail over apparent meaning.**—*Martin v. Hunter*, 1 Wheat. 304, 339, 4 L. Ed. 97.

**61. Same.**—*Sturgis v. Crowninshield*, 4 Wheat. 122, 202, 4 L. Ed. 529.

Where a power under the federal constitution is expressly given in general terms, it is not to be restrained to particular cases, unless that construction grows out of the context, expressly, or by necessary implication. (Opinion of Story, J.) *Martin v. Hunter*, 1 Wheat. 304, 326, 4 L. Ed. 97.

The jurisdiction of the federal supreme court, being extended by the letter of the constitution to all cases arising under the constitution, or under the laws of the United States, it follows that those who would withdraw any case of this description from that jurisdiction, must sustain the exception they claim, by the spirit and

**Intent and Spirit Invoked to Sustain Language Sought to Be Restricted Thereby.**—In weighing arguments drawn from the nature of government, and from the general spirit of an instrument, and urged for the purpose of narrowing the construction which the words of that instrument seem to require, it is proper to place in the opposite scale those principles, drawn from the same sources, which go to sustain the words in their full operation and natural import.<sup>62</sup>

**c. Words and Language Taken in Their Natural and Ordinary Sense.**—To get at the thought or meaning expressed in a statute, a contract or a constitution, the first resort in all cases is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them.<sup>63</sup> Where there is no ambiguity in words used, taken separately or in connection, as a term or phrase, they require no other interpretation than is to be found in the known and universally received standard by which they are defined, nor can they be taken in any other sense or by any other reference, unless there appears from the context or other parts of the same instrument, an obvious intention to use and apply them differently from their ordinary or legal acceptance.<sup>64</sup> If the words convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it.<sup>65</sup>

true meaning of the constitution, which spirit and true meaning must be so apparent as to overrule the words which its framers have employed. *Marshall, C. J., delivering the opinion in Cohens v. Virginia*, 6 Wheat. 264, 379, 380, 5 L. Ed. 257.

**62. Spirit and intent invoked to sustain as well as to overturn language.**—*Cohens v. Virginia*, 6 Wheat. 264, 384, 5 L. Ed. 257.

**63. Words taken in their natural and ordinary sense.**—*Gibbons v. Ogden*, 9 Wheat. 1, 188, 6 L. Ed. 23; *Denn v. Reid*, 10 Pet. 524, 9 L. Ed. 519; *Rhode Island v. Massachusetts*, 12 Pet. 657, 721, 9 L. Ed. 1233; *Kidd v. Pearson*, 128 U. S. 1, 20, 32 L. Ed. 346; *Lake County v. Rollins*, 130 U. S. 662, 670, 32 L. Ed. 1060; *McPherson v. Blacker*, 146 U. S. 1, 27, 36 L. Ed. 869; *Hodges v. United States*, 203 U. S. 1, 11, 51 L. Ed. 65.

**64. Where no ambiguity in language employed.**—*Briscoe v. Bank*, 11 Pet. 257, 9 L. Ed. 709, opinion of Baldwin, J.

**65. Plain and definite meaning must be accepted.**—*Denn v. Reid*, 10 Pet. 524, 9 L. Ed. 519; *Green v. Biddle*, 8 Wheat. 1, 89, 5 L. Ed. 547; *Lake County v. Rollins*, 130 U. S. 662, 670, 32 L. Ed. 1060.

"As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said." *Marshall, C. J., delivering the opinion in Gibbons v. Ogden*, 9 Wheat. 1, 188, 6 L. Ed. 23; *Kidd v. Pearson*, 128 U. S. 1, 20, 32 L. Ed. 346; *McPherson v. Blacker*, 146 U. S. 1, 27, 36 L. Ed. 869; *Pollock v. Farmers' Loan &*

*Trust Co. (rehearing)*, 158 U. S. 601, 618, 619, 39 L. Ed. 1108; *South Carolina v. United States*, 199 U. S. 437, 449, 50 L. Ed. 261; *Hodges v. United States*, 203 U. S. 1, 16, 51 L. Ed. 65.

In *Hodges v. United States*, 203 U. S. 1, 16, 51 L. Ed. 65, Mr. Justice Brewer applies this principle to the construction of the thirteenth amendment, and states that the meaning of that amendment is as clear as language can make it.

Where the words are plain and clear, resort to collateral aids to interpretation is unnecessary and cannot be indulged in to narrow or enlarge the text. *McPherson v. Blacker*, 146 U. S. 1, 27, 36 L. Ed. 869.

"So, also, where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction. *United States v. Fisher*, 2 Cranch 358, 399, 2 L. Ed. 304; *Doggett v. Railroad Co.*, 99 U. S. 72, 25 L. Ed. 301. There is even stronger reason for adhering to this rule in the case of a constitution than in that of a statute, since the latter is passed by a deliberative body of small numbers, a large proportion of whose members are more or less conversant with the niceties of construction and discrimination and fuller opportunity exists for attention and revision of such a character, while constitutions, although framed by conventions, are yet created by the votes of the entire body of electors in a state, the most of whom are little disposed, even if they were able, to engage in such refinements. The simplest and most obvious interpretation of a constitution, if in itself sensible, is the most

**Standard of Definition.**—What the standard of definition shall be depends on the term used; if it is one of common use in the ordinary transactions of society and so applied, it shall be taken in its common ordinary acceptation by those who use the term. A want of certainty is cured by a reference to that which is certain; and when any word, term or phrase, has acquired a definite meaning, its use, without explanatory words, is always deemed to be so intended.<sup>66</sup>

**Some Words to Be Taken in a Mitigated Sense.**—It is essential to a just construction, that many words which import something excessive should be understood in a more mitigated sense—that is, in that sense which common usage justifies. The word “necessary,” as used in that section of the federal constitution which provides that congress shall have power to make all laws which shall be necessary and proper for carrying into execution its enumerated powers, is of this description.<sup>67</sup>

**When Mere Grammatical Construction Not to Control.**—Mere grammatical construction ought not to control the interpretation unless it is warranted by the general scope and object of the provision.<sup>68</sup>

d. *Technical Construction of Words.*—If the term used relates to any particular art, science or occupation, its meaning is its commonly understood sense according to the usage and acceptation among men so employed.<sup>69</sup>

e. *Construction with Reference to Context.*—The same words have not necessarily the same meaning attached to them when found in different parts of the same instrument; their meaning is controlled by the context. In common language the same words have various meaning, and the peculiar sense in which it

likely to be that meant by the people in its adoption.” *Lake County v. Rollins*, 130 U. S. 662, 670, 32 L. Ed. 1060.

**Court to construe and not revise constitution.**—It is no part of the duty of the court to make or unmake but simply to construe provisions of the constitution. All questions of policy; all questions of restriction and unjust discrimination; all questions of flexibility and adjustability to meet the varied wants and necessities of the people—must be regarded as having been fully considered and conclusively determined by the adoption of the constitution. The oath of all is to support it as it is, and not as it might have been. To do so may, in some cases, lead to individual hardships; but to do otherwise would be most portentous with evil. *Lake County v. Rollins*, 130 U. S. 662, 672, 32 L. Ed. 1060.

**66. Standard of definition.**—*Briscoe v. Bank*, 11 Pet. 257, 328c, 9 L. Ed. 709, opinion of Baldwin, J.

The same standard is to be applied to all its terms, and every word which can bear upon its intention, referring each to the appropriate subject to which it relates, the standard is furnished for the interpretation. (Opinion of Baldwin, J.) *Briscoe v. Bank*, 11 Pet. 257, 328c, 9 L. Ed. 709.

Words in a constitution as well as words in a statute are always to be given the meaning they have in common use, unless there are very strong reasons to the contrary. *Tennessee v. Whitworth*, 117 U. S. 139, 147, 29 L. Ed. 833; *Chisholm v. Georgia*, 2 Dall. 419, 477, 1 L. Ed. 440.

In construing the federal constitution the words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged. (Opinion of Story, J.) *Martin v. Hunter*, 1 Wheat. 304, 326, 4 L. Ed. 97.

**Illustrations.**—The word “party,” being, in common usage, applicable both to plaintiff and defendant is not to be limited as applying only to those cases in which a state is a party plaintiff, as used in the constitutional provision extending the judicial powers of the United States to controversies in which a state is a party. *Chisholm v. Georgia*, 2 Dall. 419, 477, 1 L. Ed. 440.

“We know of no reason for holding otherwise than that the words ‘direct taxes,’ on the one hand, and ‘duties, imposts and excises,’ on the other, were used in the constitution in their natural and obvious sense. Nor, in arriving at what those terms embrace, do we perceive any ground for enlarging them beyond, or narrowing them within, their natural and obvious import at the time the constitution was framed and ratified.” *Pollock v. Farmers’ Loan, etc., Co.* (rehearing), 158 U. S. 601, 619, 39 L. Ed. 1108.

**67. Words taken in mitigated sense.**—*McCulloch v. Maryland*, 4 Wheat. 316, 414, 4 L. Ed. 579.

**68. Grammatical construction not necessarily controlling.**—*Groves v. Slaughter*, 15 Pet. 449, 10 L. Ed. 800.

**69. Words used in technical sense.**—*Briscoe v. Bank*, 11 Pet. 257, 328c, 9 L. Ed. 709, opinion of Baldwin, J.



is used in a sentence is to be determined by the context.<sup>70</sup> Where any particular word is obscure or of doubtful meaning, taken by itself, its obscurity or doubt may be removed by reference to associated words. And the meaning of a term may be enlarged or restrained by reference to the object of the whole clause in which it is used.<sup>71</sup>

**Provisions Abrogated by Amendment.**—The constitutional provisions which have been abrogated by amendment may be looked to for the purpose of aiding the construction of those clauses with which they were originally associated.<sup>72</sup>

8. **CONSTITUTION CONSTRUED AS A WHOLE.**—The constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are of equal validity. It is a universal rule that the whole instrument is to be examined to ascertain the meaning of any particular part or sentence, so as to avoid any discrepancy or inconsistency.<sup>73</sup>

9. **EVERY WORD AND PART TO BE GIVEN EFFECT.**—In construing the constitution effect should be given, if possible, to every word. No expression should be regarded as a useless expletive; nor should it be supposed, without the most urgent necessity, that the illustrious framers of that instrument had, from ignorance or inattention, used different words, which are, in effect, merely tautologous.<sup>74</sup> That some degree of application must be given to words, is a

**70. Construction with reference to context.**—*Cherokee Nation v. Georgia*, 5 Pet. 1, 19, 8 L. Ed. 25; *Virginia v. Tennessee*, 148 U. S. 503, 519, 37 L. Ed. 537.

This may not be equally true with respect to proper names. Thus Chief Justice Marshall, in delivering the majority opinion in one case says: "Foreign nations" is a general term, the application of which to Indian tribes, when used in the American constitution, is, at best, extremely questionable. In one article, in which a power is given to be exercised in regard to foreign nations generally, and to the Indian tribes particularly, they are mentioned as separate, in terms clearly contradistinguishing them from each other. We perceive plainly, that the constitution, in this article, does not comprehend Indian tribes in the general term 'foreign nations;' not, we presume, because a tribe may not be a nation, but because it is not foreign to the United States. When, afterwards, the term 'foreign state' is introduced, we cannot impute to the convention the intention to desert its former meaning, and to comprehend Indian tribes within it, unless the context force that construction on us. We find nothing in the context, and nothing in the subject of the article, which leads to it." *Cherokee Nation v. Georgia*, 5 Pet. 1, 19, 8 L. Ed. 25.

**71. Where words of obscure and doubtful meaning.**—*Virginia v. Tennessee*, 148 U. S. 503, 519, 37 L. Ed. 537.

**72. Construction with reference to provisions abrogated by amendment.**—*Fletcher v. Peck*, 6 Cranch 87, 139, 3 L. Ed. 162.

Thus the provision which was formerly construed as authorizing suits against the states by individuals in the federal courts, which provision was in that respect abrogated by the eleventh amendment, aids

in the construction of the provisions with reference to the impairment of the obligation of contracts, since if it were permissible for a state to impair the obligation of its own contract, when it was liable to suit by individuals in the federal courts, it could have enacted statutes absolving its own obligation, and set up such statute in defense to the suit, a construction so absurd as to be untenable upon its face. *Fletcher v. Peck*, 6 Cranch 87, 139, 3 L. Ed. 162.

**73. Constitution construed as a whole.**—*Briscoe v. Bank*, 11 Pet. 257, 328c, 9 L. Ed. 709; *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 558, 39 L. Ed. 759; *Pollock v. Farmers' Loan, etc., Co.*, 158 U. S. 601, 619, 39 L. Ed. 1108; *Fairbank v. United States*, 181 U. S. 283, 288, 45 L. Ed. 862; *Prout v. Starr*, 188 U. S. 537, 543, 47 L. Ed. 584.

Thus the eleventh amendment providing that the states shall not be subject to suits instituted by citizens of other states is not to be construed as nullifying those provisions of the constitution which confer power on congress to regulate commerce among the several states, which forbid the states from entering into any treaty, alliance, or confederation, from passing any bill of attainder, ex post facto law or law impairing the obligation of contracts, from laying any duty on tonnage, from entering into any agreement or compact with other states. Neither can the eleventh amendment be pleaded as an invincible barrier to judicial inquiry, as to whether the provisions of the fourteenth amendment have been disregarded by state enactments. *Prout v. Starr*, 188 U. S. 537, 543, 47 L. Ed. 584.

**74. Every word given effect.**—*Ogden v. Saunders* (opinion of Trimble, J.), 12 Wheat. 213, 316, 6 L. Ed. 606; *Holmes v. Jennison* (opinion of Taney, C. J.), 14



proposition of universal adoption.<sup>75</sup> Neither can it be presumed that any clause in the constitution was intended to be without effect; and therefore such a construction is inadmissible unless the words require it.<sup>76</sup> Every part of the article under consideration must be taken into view, and that construction adopted which will consist with its words and promote its general intention.<sup>77</sup>

**10. CONFLICTING AND INEFFECTIVE PROVISIONS.**—The courts are bound to give to the constitution and laws such a meaning as will make them harmonize unless there is an apparent, or fairly to be implied conflict, between their respective provisions.<sup>78</sup> Where here is a seeming conflict or repugnancy between different provisions of the constitution, it is the duty of the court to so construe the constitution, as to give effect to both provisions, so far as it is possible to reconcile them, and not to permit their seeming repugnancy to destroy each other. Such provisions should be so construed as to preserve the true intent and meaning of the instrument.<sup>79</sup>

**Latest Provision to Control in Case of Irreconcilable Conflict.**—In case of conflict between a provision found in the body of the constitution and one found in the amendments, the latter must control, under the well understood rule that the last expression of the will of the lawmaker prevails over an earlier one.<sup>80</sup>

**11. THE OLD LAW, THE MISCHIEF, AND THE REMEDY.**—In the construction of all laws we look to the old law, the mischief and the remedy, and so expound the law as to suppress the mischief and advance the remedy; no just rule of interpretation requires the court to go further, by applying the remedy to a case not within the mischief, unless the words of the law are too imperative to admit of construction.<sup>81</sup>

Pet. 540, 570, 571, 572, 10 L. Ed. 579; *Hurtado v. California*, 110 U. S. 516, 534, 28 L. Ed. 232; *Prout v. Starr*, 188 U. S. 537, 544, 47 L. Ed. 584.

**75. Same.**—*Rhode Island v. Massachusetts*, 12 Pet. 657, 723, 9 L. Ed. 1233; *Holmes v. Jennison*, 14 Pet. 540, 570, 10 L. Ed. 579.

Applying this principle to § 10 of the first article of the constitution, it was said by Chief Justice Taney, in his separate opinion in the case of *Holmes v. Jennison*, 14 Pet. 540, 570, 572, 10 L. Ed. 579, that the word treaty, in the clause providing that no state shall enter into any treaty, alliance or confederation, and the words agreement and compact, in that part of the section providing that no state shall without the consent of congress enter into any agreement or compact with another state or with a foreign power, could not be construed as synonymous, but that each was to be taken as conveying a separate meaning; and, that, so construed, the word agreement was intended to include informal understandings whether express or implied.

**76. Same.**—*Marbury v. Madison*, 1 Cranch 137, 174, 2 L. Ed. 60; *Prout v. Starr*, 188 U. S. 537, 544, 47 L. Ed. 584.

**77. Same.**—*Cohens v. Virginia*, 6 Wheat. 264, 398, 5 L. Ed. 257; *Prigg v. Pennsylvania*, 16 Pet. 539, 612, 10 L. Ed. 1060.

**78. Conflicting provisions.**—*Rhode Island v. Massachusetts*, 12 Pet. 657, 723, 9 L. Ed. 1233.

**79. Conflicting provisions reconciled if possible.**—*Cohens v. Virginia*, 6 Wheat. 264, 393, 5 L. Ed. 257.

**Constitution and laws construed together.**—The appellate powers of the supreme court of the United States are defined in the constitution, subject to such exceptions as congress can make. In determining the appellate jurisdiction of the supreme court, therefore, the constitution and the laws are to be construed together. *Durousseau v. United States*, 6 Cranch 307, 318, 3 L. Ed. 232.

**80. Latest provision controls.**—*Schick v. United States*, 195 U. S. 65, 68, 49 L. Ed. 99.

"In the third clause of § 2, art. III, of the constitution it is provided that 'the trial of all crimes, except in cases of impeachment, shall be by jury;' and in art. VI of the amendments, that 'in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed.' If there be any conflict between these two provisions the one found in the amendments must control, under the well understood rule that the last expression of the will of the lawmaker prevails over an earlier one." *Schick v. United States*, 195 U. S. 65, 68, 49 L. Ed. 99.

**81. The old law, the mischief and the remedy.**—*Briscoe v. Bank*, 11 Pet. 257, 328n, 9 L. Ed. 709, opinion of Baldwin, J.

"A constitutional provision should not be construed so as to defeat its evident purpose, but rather so as to give it effective operation and suppress the mischief at which it was aimed." *Jarrold v. Moberly*, 103 U. S. 580, 586, 26 L. Ed. 492.

**Applicable to Restraints upon the Exercise of Reserved Power.**—This rule of construction is particularly appropriate to those constitutional provisions imposing prohibitions on the exercise of powers reserved by the states over subjects upon which congress has no delegated power.<sup>82</sup>

12. **EFFECTS AND CONSEQUENCES.**—In construing the constitution, it is proper for the court, in order to determine its true intent and meaning, to take into consideration the consequences naturally attendant upon the one construction or the other.<sup>83</sup>

13. **MANDATORY PROVISIONS.**—"Constitutional mandates are imperative. The question is never one of amount, but one of power. The applicable maxim is 'obsta principiis,' not 'de minimis noncurat lex.'"<sup>84</sup> And so whenever a particular object is to be effected, the language of the constitution is always imperative, and cannot be disregarded, without violating the first principles of public duty.<sup>85</sup>

14. **PROSPECTIVE AND RETROSPECTIVE OPERATION.**—Constitutions as well as statutes are construed to operate prospectively only, unless, on the face of the instrument or enactment the contrary intention is manifest beyond reasonable question.<sup>86</sup>

82. **Rule applicable to restraints upon reserved powers.**—*Briscoe v. Bank*, 11 Pet. 257, 9 L. Ed. 709, opinion of Baldwin, J.

83. **Effects and consequences.**—*Slaughter-House Cases*, 16 Wall. 36, 78, 21 L. Ed. 394; *Railroad Co. v. Peniston*, 18 Wall. 5, 31, 21 L. Ed. 787; *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 558, 39 L. Ed. 759; *Pollock v. Farmers' Loan, etc., Co.* (rehearing), 158 U. S. 601, 619, 39 L. Ed. 1108.

In *Slaughter-House Cases*, 16 Wall. 36, 78, 21 L. Ed. 394, Justice Miller, delivering the opinion of the court, says: "The argument we admit is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the state governments by subjecting them to the control of congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the state and federal governments to each other and of both of these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt. We are convinced that no such results were intended by the congress which proposed these amendments, nor by the legislatures of the states which ratified them."

Hence, the federal constitution must receive a practical construction. Its limitations and its implied prohibition must not be extended so far as to destroy the necessary powers of the states, or prevent their efficient exercise. *Railroad Co. v. Peniston*, 18 Wall. 5, 31, 21 L. Ed. 787.

84. **Mandatory provisions.**—*Fairbank v. United States*, 181 U. S. 283, 291, 45 L. Ed. 862.

85. **Same.**—*Martin v. Hunter*, 1 Wheat. 304, 333, 4 L. Ed. 97.

**Article creating and defining judicial power of the United States.**—The third article of the federal constitution creating and defining the judicial power of the United States, is manifestly designed to be mandatory upon the legislative department. Its obligatory force is so imperative that congress, without a violation of its duty, could not have refused to carry it into operation. It declares that the judicial power of the United States shall be vested (not may be vested) in one supreme court, and in such inferior courts as congress may, from time to time, ordain and establish. (Opinion of Story, J.) *Martin v. Hunter*, 1 Wheat. 304, 328; 4 L. Ed. 97.

On the other hand, the legislative powers are given in language which implies discretion, as from the nature of legislative power such a discretion must ever be exercised. *Martin v. Hunter*, 1 Wheat. 304, 333, 4 L. Ed. 97.

86. **Prospective and retrospective operation.**—*Shreveport v. Cole*, 129 U. S. 36, 43, 32 L. Ed. 589.

**The treaty making clause.**—It will be observed that the treaty making clause is retroactive as well as prospective. The constitution, when adopted, applied alike to all treaties "made and to be made." *Hauenstein v. Lynham*, 100 U. S. 483, 489, 25 L. Ed. 628.

**The contract clause.**—The federal constitutional provision that no state shall make any law impairing the obligation of contracts does not extend to a state law enacted before the first Wednesday of March, 1789, (the day upon which the government under the present constitution went into operation), and operating upon rights of property vested before that

15. APPLICATION OF THE RULE EXPRESSIO UNIUS.—Affirmative words are often, in their operation, negative of other subjects than those affirmed; and where a negative or exclusive sense must be given to them, in order to prevent them from having no operation at all, they must receive that negative or exclusive sense. But where they have full operation without it; where it would destroy some of the most important objects for which the power was created; then affirmative words ought not to be construed negatively.<sup>87</sup>

16. APPLICABILITY OF GENERAL RULES TO PARTICULAR CASES; IMPLIED EXCEPTIONS.—Although a particular and a rare case may not, in itself, be of sufficient magnitude to induce a rule, yet it must be governed by the rule when established, unless some plain and strong reason for excluding it can be given.<sup>88</sup> It is a general rule that where no exception is made in terms, none will be made by mere implication or construction.<sup>89</sup> It is not enough to say that a particular case was not in the mind of the convention when the article was framed, nor of the American people when it was adopted. In order to exclude it from the general rule, it is necessary to go further and to say that had the particular case been suggested, the language would have been so varied as to exclude it, or that it would have been made a special exception. The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd or mischievous or repugnant to the

time. *Owings v. Speed*, 5 Wheat. 420, 5 L. Ed. 124.

**State constitutional provisions; municipal aid.**—The fourteenth section of the constitution of Mississippi, ratified December 1, 1869, which declares that "the legislature shall not authorize any county, city or town to become a stockholder in, or to lend its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a special election, or a regular election, to be held therein, shall assent thereto," is wholly prospective. It does not abrogate previous acts of the legislature conferring authority to subscribe for stock. *Supervisors v. Galbraith*, 99 U. S. 214, 25 L. Ed. 410.

The prohibition contained in § 14, art. 11, of the constitution of Missouri which went into operation upon the 4th day of July, 1865, is a limitation merely upon the power of the legislature for the future, so that it should not thereafter grant to municipal corporations authority to become stockholders in companies except upon the terms expressly mentioned; all previous grants of such authority remain in their original force until duly revoked, unaffected by the constitutional provision. *County of Callaway v. Foster*, 93 U. S. 567, 570, 23 L. Ed. 911; *County of Scotland v. Thomas*, 94 U. S. 682, 688, 24 L. Ed. 219; *County of Henry v. Nicolay*, 95 U. S. 619, 24 L. Ed. 394; *County of Ray v. Vansycle*, 96 U. S. 675, 684, 24 L. Ed. 800; *County of Schuyler v. Thomas*, 98 U. S. 169, 25 L. Ed. 88; *County of Cass v. Gillett*, 100 U. S. 585, 25 L. Ed. 585; *Louisiana v. Taylor*, 105 U. S. 454, 458, 26 L. Ed. 1133. See, also, the titles MUNICIPAL, COUNTY, STATE AND FEDERAL AID.

87. Rule of *expressio unius*.—*Marbury v. Madison*, 1 Cranch 137, 174, 2 L. Ed. 60; *Cohens v. Virginia*, 6 Wheat. 264, 395, 5 L. Ed. 257.

The court may imply a negative from affirmative words where the implication promotes, but not where it defeats, the intention. *Cohens v. Virginia*, 6 Wheat. 264, 398, 5 L. Ed. 257. See, also, *Marbury v. Madison*, 1 Cranch 137, 174, 2 L. Ed. 60.

The general rule of construction of the constitution is that affirmative words in the constitution declaring in what cases the supreme court shall have original jurisdiction must be construed negatively as to all other cases. *Ex parte Vallandigham*, 1 Wall. 243, 252, 17 L. Ed. 589.

The constitution of Michigan provided that the credit of the state should not be granted in aid of any person, association, or corporation, and that the state should not be a party to or interested in any work of internal improvement. In construing this provision, the federal supreme court held that the rule of *expressio unius est exclusio alterius* applied, and that said provision did not operate to prohibit townships from extending aid to railroad enterprises; the decision of the state supreme court upon this provision of its own constitution to the contrary notwithstanding. *Township of Pine Grove v. Talcott*, 19 Wall. 666, 675, 22 L. Ed. 227.

88. General rules; implied exceptions.—*Dartmouth College v. Woodward*, 4 Wheat. 518, 644, 4 L. Ed. 629.

89. Implied exceptions not favored.—*Rhode Island v. Massachusetts*, 12 Pet. 657, 722, 9 L. Ed. 1233; *Cohens v. Virginia*, 6 Wheat. 264, 378, 5 L. Ed. 257; *Society for the Propagation of the Gospel v. New Haven*, 8 Wheat. 464, 489, 490, 5 L. Ed. 662; *Gibbons v. Ogden*, 9 Wheat. 1, 206, 207, 216, 6 L. Ed. 23.



general spirit of the instrument as to justify those who expound the constitution in making it an exception.<sup>90</sup>

17. **CONSTRUCTION STRICT OR LIBERAL, WHEN.**—Words in the constitution of the United States do not ordinarily receive a narrow and contracted meaning, but are presumed to have been used in a broad sense with a view of covering all contingencies.<sup>91</sup> The construction must be, according to the subject matter of the law, strict or liberal, as the nature of the case requires and the object to be affected will be defeated or accomplished, *ut res magis valeat quam pereat*; that which will effectuate all the objects of the prohibition cannot be too narrow, that which goes beyond the express word, or necessary implication, to effect an object not within the mischief, must be too broad.<sup>92</sup>

**Powers Granted to the Federal Government.**—In the grant of powers to the federal government there was no purpose to bind governmental action by the restrictive force of a code of criminal procedure. The words expressing the various grants in the constitution are words of general import, and they are to be construed as such, and as granting to the full extent the powers named.<sup>93</sup> It is clear, therefore, that the constitution is not to be construed technically and narrowly, as an indictment, or even as a grant presumably against the interest of the grantor, and passing only that which is clearly included within its language, but as creating a system of government whose provisions are designed to make effective and operative all the governmental powers granted.<sup>94</sup>

90. **Same.**—*Dartmouth College v. Woodward*, 4 Wheat. 518, 644, 645, 4 L. Ed. 629; *Pollock v. Farmers' Loan, etc., Co.* (rehearing), 158 U. S. 601, 632, 39 L. Ed. 1108.

"It will indeed, probably be found, when we look to the character of the constitution itself, the objects which it seeks to attain, the powers which it confers, the duties which it enjoins, and the rights which it secures, as well as the known historical fact that many of its provisions were matters of compromise of opposing interests and opinions, that no uniform rule of interpretation can be applied to it, which may not allow, even if it does not positively demand, many modifications, in its actual application to particular clauses." Story, J., delivering the opinion of the court in *Prigg v. Pennsylvania*, 16 Pet. 539, 610, 10 L. Ed. 1060.

Perhaps the safest rule of interpretation will be found to be to look to the nature and objects of the particular powers, duties and rights, with all the lights and aids of contemporary history; and to give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed. Story, J., delivering the opinion of the court in *Prigg v. Pennsylvania*, 16 Pet. 539, 10 L. Ed. 1060.

"A direct tax cannot be taken out of the constitutional rule because the particular tax did not exist at the time the rule was prescribed." *Pollock v. Farmers' Loan, etc., Co.* (rehearing), 158 U. S. 601, 632, 39 L. Ed. 1108.

91. **Construction strict or liberal.**—In *re Strauss*, 197 U. S. 324, 49 L. Ed. 774.

92. **Same.**—*Briscoe v. Bank*, 11 Pet. 257, 328p, 9 L. Ed. 709, opinion of Baldwin, J.

The word "charged" in art. IV, § 2, subd. 2, was used in its broad signification

to cover any proceeding which a state might see fit to adopt for a formal accusation against an alleged criminal. In *re Strauss*, 197 U. S. 324, 49 L. Ed. 774.

93. **Powers granted to the federal government.**—*Gibbons v. Ogden*, 9 Wheat. 1, 187, 188, 6 L. Ed. 23; *Fairbank v. United States*, 181 U. S. 283, 287, 45 L. Ed. 862; *Kansas v. Colorado*, 206 U. S. 46, 88, 51 L. Ed. 956. See, also, post, "Legislative Discretion as to Occasion or Necessity, Choice of Means, etc.," VI, D, 3, d, (4), (b), (bb), (bbb); "Discretion of Congress as to Necessity or Occasion for Exercise; Choice of Means," VI, D, 3, f, (1), (g), (ee), (ccc), (aaaa).

94. **Same.**—*Kansas v. Colorado*, 206 U. S. 46, 88, 51 L. Ed. 956.

"This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said, that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants, expressly, the means for carrying all others into execution, congress is authorized 'to make all laws which shall be necessary and proper' for the purpose. But this limitation on the means which may be used, is not extended to the powers which are conferred; nor is there one sentence in the constitution, which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribes this rule. We do not therefore, think ourselves justified in adopting it. What do gentlemen mean, by a strict construction? If they contend only against that enlarged construction, which would extend words beyond their natural and obvious import, we might

**No Independent Power to Be Derived Merely Through Construction.**—Yet while so construed, it is still true that no independent and unmentioned power passes to the national government or can rightfully be exercised by congress.<sup>95</sup>

**Limitations upon Powers of Congress.**—"If powers granted are to be taken as broadly granted and as carrying with them authority to pass those acts which may be reasonably necessary to carry them into full execution; in other words, if the constitution in its grant of powers is to be so construed that congress shall be able to carry into full effect the powers granted, it is equally imperative that where prohibition or limitation is placed upon the power of congress that prohibition or limitation should be enforced in its spirit and to its entirety. It would be a strange rule of construction that language granting powers is to be liberally construed and that language of restriction is to be narrowly and technically construed."<sup>96</sup> Especially is this true in view of the fact that, in respect to grants of powers, there is to be noticed the help found in the last clause of the eighth section, while no such helping clause is to be found in respect to prohibitions and limitations. The true spirit of constitutional interpretation in both directions is to give full, liberal construction to the language, aiming ever to show fidelity to the spirit and purpose.<sup>97</sup>

**Construction of the Tenth Amendment.**—Not only so, but the people who adopted the constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and after making provision for an amendment to the constitution by which any additional powers could be granted they adopted article X of the amendments by which they expressly reserved to themselves all powers not so delegated. This amendment is not to be shorn of its meaning by any narrow or technical construction, but is to be fairly and liberally construed so as to give effect to its scope and meaning.<sup>98</sup>

**Provisions for the Security of Persons and Property.**—Constitutional

question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the constitution, would deny to the government, those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument—for that narrow construction, which would cripple the government, and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent—then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the constitution is to be expounded." Marshall, C. J., delivering the opinion in *Gibbons v. Ogden*, 9 Wheat. 1, 187, 188, 6 L. Ed. 23.

**Remedial provisions; extent of judicial power.**—The extension of the judicial power of the United States to controversies to which a state is a party is held to be remedial, because it is to settle controversies. It is, therefore, to be construed liberally. *Chisholm v. Georgia*, 2 Dall. 419, 476, 1 L. Ed. 440.

**95. No independent power derived merely through construction.**—*Kansas v. Colorado*, 206 U. S. 46, 88, 51 L. Ed. 956.

"But the proposition that there are legislative powers affecting the nation as a whole, which belong to, although not expressed in, the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the constitution, independently of the amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the constitution is made absolutely certain by the tenth amendment. This amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the national government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted." *Kansas v. Colorado*, 206 U. S. 46, 89, 51 L. Ed. 956.

**96. Construction of limitations upon power of congress.**—*Fairbank v. United States*, 181 U. S. 283, 289, 45 L. Ed. 862.

**97. Same.**—*Fairbank v. United States*, 181 U. S. 283, 289, 45 L. Ed. 862.

**98. Tenth amendment to be liberally construed.**—*Fairbank v. United States*, 181 U. S. 283, 288, 45 L. Ed. 862; *Kansas v. Colorado*, 206 U. S. 46, 90, 51 L. Ed. 956.



provisions designed to protect personal and property rights are to receive a liberal construction in favor of those rights.<sup>99</sup> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*."<sup>1</sup>

18. **REASONABLE CONSTRUCTION.**—Every clause in every constitution must have a reasonable interpretation, and be held to express the intention of its framers.<sup>2</sup> The federal constitution, like every other grant, is to have a reasonable construction, according to the import of its terms.<sup>3</sup> The constitution and laws of the United States are construed as are other instruments granting power or property.<sup>4</sup>

19. **IMPLIED POWERS**—a. *Generally.*—Implication is but another term for meaning and intention, apparent in the writing upon judicial inspection; "the evident consequence;" "or some necessary consequence resulting from the law;"

99. **Provisions protecting personal and property rights.**—*Counselman v. Hitchcock*, 142 U. S. 547, 562, 35 L. Ed. 1110.

1. **Same; motto should be *obsta principiis*.**—*Boyd v. United States*, 116 U. S. 616, 635, 29 L. Ed. 746; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 325, 37 L. Ed. 463; *In re Debs*, 158 U. S. 564, 594, 39 L. Ed. 1092; *Gulf, etc., R. Co. v. Ellis*, 165 U. S. 150, 154, 41 L. Ed. 666; *Fairbank v. United States*, 181 U. S. 283, 302, 45 L. Ed. 862; *Jacobson v. Massachusetts*, 197 U. S. 11, 38, 49 L. Ed. 643.

2. **Reasonable construction.**—*Woodson v. Murdock*, 22 Wall. 351, 22 L. Ed. 716.

The provision of the Missouri state constitution which forbids the legislature, for any purpose whatever, to release a lien held by the state upon any railroad, if construed literally, would forbid the release of the state's lien even upon full payment of the debt. Since such could not have been the meaning of its framers, it is to be construed reasonably and in accord with the intentions of those who adopted it. So construed it does not prevent a compromise or an accord and satisfaction of the indebtedness owing by the railroad to the state. *Woodson v. Murdock*, 22 Wall. 351, 369, 22 L. Ed. 716.

3. **Same; federal constitution.**—*Martin v. Hunter*, 1 Wheat. 304, 326, 4 L. Ed. 97, opinion of Story, J. Accord: *Pollock v. Farmers' Loan, etc., Co.* (rehearing), 158 U. S. 601, 618, 619, 39 L. Ed. 1108.

4. **Same; constitution and laws construed as other instruments.**—*Rhode Island v. Massachusetts*, 12 Pet. 657, 723, 9 L. Ed. 1233; *Brown v. Maryland*, 12 Wheat. 419, 437, 6 L. Ed. 678; *United States v. Arredondo*, 6 Pet. 691, 738, 740, 8 L. Ed. 547.

"Powerful and ingenious minds, taking,

as postulates, that the powers expressly granted to the government of the Union are to be contracted, by construction, into the narrowest possible compass, and that the original powers of the states are retained, if any possible construction will retain them, may, by a course of well digested but refined and metaphysical reasoning founded on these premises, explain away the constitution of our country, and leave it, a magnificent structure, indeed, to look at, but totally unfit for use. They may so entangle and perplex the understanding as to obscure principles which were before thought quite plain, and induce doubts where, if the mind were to pursue its own course, none would be perceived. In such a case, it is peculiarly necessary to recur to safe and fundamental principles, to sustain those principles, and, when sustained, to make them the tests of the arguments to be examined." (Opinion of Marshall, C. J.) *Gibbons v. Ogden*, 9 Wheat. 1, 222, 6 L. Ed. 23.

"The words of the constitution are to be taken in their obvious sense, and to have a reasonable construction. In *Gibbons v. Ogden*, Mr. Chief Justice Marshall, with his usual felicity, said: 'As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution and the people who adopted it must be understood to have employed words in their natural sense, and to have intended what they have said.' 9 Wheat. 1, 188, 6 L. Ed. 23." *Pollock v. Farmers' Loan, etc., Co.* (rehearing), 158 U. S. 601, 618, 619, 39 L. Ed. 1108. See, also, ante, "Words and Language Taken in Their Natural and Ordinary Sense," III, B, 7, c.



or the words of an instrument. Such is the sense in which the common expression is used in the books; "express words or necessary implication," such as arise on the words taken in connection with other sources of construction, but not by conjecture, supposition or mere reasoning on the meaning or intention of the writing.<sup>5</sup> What is implied is as effectual as what is expressed.<sup>6</sup>

b. *Restrictive Provisions Not Construed as Enabling.*—It is a general rule that restrictive provisions are not to be construed as authorizing the exercise of the restricted powers within the limits of the restriction; such provisions are to be construed as restraining, and not as enabling.<sup>7</sup>

c. *Existence of Power Implied from Exceptions.*—The exception of a particular thing from general words proves that, in the opinion of the lawgiver, the thing excepted would be within the general clause, had the exception not

5. *Implied powers.*—*Rhode Island v. Massachusetts*, 12 Pet. 657, 723, 9 L. Ed. 1233.

6. *Implied powers as effectual as those expressed.*—*American Ins. Co. v. Canter*, 1 Pet. 511, 7 L. Ed. 243; *United States v. Babbitt*, 1 Black 55, 61, 17 L. Ed. 94; *Stewart v. Kahn*, 11 Wall. 493, 507, 20 L. Ed. 176; *Township of Pine Grove v. Talcott*, 19 Wall. 666, 676, 22 L. Ed. 227; *Ex parte Yarbrough*, 110 U. S. 651, 658, 28 L. Ed. 274; *South Carolina v. United States*, 199 U. S. 437, 451, 50 L. Ed. 261. See, also, post "Incidental and Implied Powers of the Federal Government," VI, D, 3, a, (5), et seq; "Auxiliary and Implied Powers of Congress," VI, D, 3, f, (1), (h), (ee), et seq.

7. *Restrictive provisions not construed as enabling.*—*Jarrolt v. Moberly*, 103 U. S. 580, 26 L. Ed. 492; *Dixon County v. Field*, 111 U. S. 83, 87, 89, 28 L. Ed. 360; *Cole v. La Grange*, 113 U. S. 1, 8, 28 L. Ed. 896; *Kelley v. Milan*, 127 U. S. 139, 154, 32 L. Ed. 77; *Norton v. Board of Comm'rs*, 129 U. S. 479, 489, 32 L. Ed. 774.

The constitution of Missouri, provides, art. 11, § 13: "The credit of the state shall not be given or loaned in aid of any person, association or corporation; nor shall the state hereafter become a stockholder in any corporation or association, except for the purpose of securing loans heretofore extended to certain railroad corporations by the state. Section 14. The general assembly shall not authorize any county, city or town, to become a stockholder in, or loan its credit to, any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto." Both these sections are restrictive and not enabling. *Jarrolt v. Moberly*, 103 U. S. 580, 26 L. Ed. 492; *Cole v. La Grange*, 113 U. S. 1, 8, 28 L. Ed. 896; *Kelley v. Milan*, 127 U. S. 139, 154, 32 L. Ed. 77; *Norton v. Board of Comm'rs*, 129 U. S. 479, 489, 32 L. Ed. 774.

The constitution of Nebraska took effect November 1st, 1875. Section 2, art.

XII, of that constitution is as follows: "No city, county, precinct, municipality, or other subdivision of the state, shall ever make donations to any railroad or other works of internal improvement, unless a proposition so to do shall have been first submitted to the qualified electors thereof, at an election by authority of law: Provided, that such donations of a county, with the donations of such subdivisions, in the aggregate, shall not exceed ten per cent. of the assessed valuation of such county: Provided further, that any city or county may, by a two-thirds vote, increase such indebtedness five per cent. in addition to such ten per cent., and no bonds or evidences of indebtedness so issued shall be valid unless the same shall have indorsed thereon a certificate signed by the secretary and auditor of the state, showing that the same is issued pursuant to law." Construing this provision the federal supreme court says: "We cannot think it was any part of the purpose of the constitution of Nebraska to enable a county, either to add to its existing or its authorized indebtedness any increase, without the express sanction of the legislature; and are persuaded, on the contrary, that the true object of the proviso, is to limit the power of the legislature itself, by definitely fixing the terms and conditions on which alone it was at liberty to permit the increase as well as the creation of municipal indebtedness. The language of the proviso that seems to countenance a contrary construction, by words apparently conferring immediate power upon counties to increase their indebtedness, must be taken in connection with the express and positive prohibition of the body of the section. This denies to municipal bodies all power to make any donations to railroads or other works of internal improvement, except by virtue of legislative authority, and an election held to vote on the particular proposition in pursuance thereof." *Dixon County v. Field*, 111 U. S. 83, 87, 89, 28 L. Ed. 360.

But see *Township of Pine Grove v. Talcott*, 19 Wall. 666, 676, 22 L. Ed. 227, where it is said that power to the legislature to incorporate towns and cities and

been made. This rule is as applicable to the constitution as to other instruments.<sup>8</sup> The supreme court has always held, as to grants of powers to the United States, and as to the restrictions upon the states, that an exception to a particular case presupposes that those which are not exceptions are embraced within the grant or prohibition.<sup>9</sup>

**Qualification of Rule.**—This is a sound principle, when applied to grants of power by paramount authority to a body subordinate to it, which can act only under the authority of the grant; and fairly applies to the powers of the federal government, which is a mere creature of the constitution. Such is the established rule of the United States supreme court where there is an express exception of a particular case, in which any given power shall not be exercised, that it may be exercised in cases not within the exception; otherwise the exception would be useless, and the words of the constitution become unmeaning. But the principle is radically different when it is applied to a provision of the constitution excepting a particular case from the exercise of state legislation, or containing a prohibition that a state law shall not be passed on any given subject, or shall not have the effect of doing what is prohibited; in such cases, there results no implication of power in other cases, for a most obvious reason: That states do not derive their powers from the constitution, but, by their own inherent reserved right, can act on all subjects which have not been delegated to the federal government, or prohibited to the states. This distinction necessarily arises from the whole language of the constitution and amendments, and is expressly recognized in the most solemn adjudications, of the United States supreme court.<sup>10</sup>

#### IV. Operation and Effect.

**A. Time of Taking Effect.**—See ante, "Time of Taking Effect," II, C.

**B. Supremacy as the Law**—1. **GENERALLY; ULTIMATE SOVEREIGNTY.**—While it is commonly said that the constitution is the supreme law of the land,

impose restrictions upon the exercise of certain powers by them, implies that the powers to be restricted might otherwise be exercised.

**8. Powers implied from exceptions.**—*Brown v. Maryland*, 12 Wheat. 419, 438, 6 L. Ed. 678; *Poole v. Fleegeer*, 11 Pet. 185, 212b, 9 L. Ed. 680; *New York v. Miln*, 11 Pet. 102, 153a, 9 L. Ed. 648.

An exception to a rule proves the existence of the rule. (Opinion of McLean, J.) *Groves v. Slaughter*, 15 Pet. 449, 505, 10 L. Ed. 800.

"It is a rule of construction, acknowledged by all, that the exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power, that which was not granted—that which the words of the grant could not comprehend. If, then, there are in the constitution plain exceptions from the power over navigation, plain inhibitions to the exercise of that power in a particular way, it is proof that those who made these exceptions, and prescribed these inhibitions, understood the power to which they applied as being granted." (Opinion of Marshall, C. J.) *Gibbons v. Ogden*, 9 Wheat. 1, 191, 6 L. Ed. 23.

**9. Same.**—*Rhode Island v. Massachusetts*, 12 Pet. 657, 722, 9 L. Ed. 1233.

**10. Same; qualifications of rule; distinction between state and federal pow-**

**ers.**—*Poole v. Fleegeer*, 11 Pet. 185, 212b, 9 L. Ed. 680, opinion of Baldwin, J.

"So, where there is an exception to the exercise of the powers of congress, as in the first clause of the ninth section of the first article of the constitution: 'The migration or importation of such persons as any of the states, now existing shall think proper to admit, shall not be prohibited by congress, prior to the year 1808.' The whole object of the exception is to preserve the power to those states which might be disposed to exercise it, and its language seems to convey this idea to the court unequivocally. It is an exception to the power to regulate commerce, and manifests clearly the intention to continue the pre-existing right of the states to admit or exclude for a limited period." *Gibbons v. Ogden*, 9 Wheat. 1, 206, 207, 216, 6 L. Ed. 23 (opinion of Baldwin, J.); *Poole v. Fleegeer*, 11 Pet. 185, 212b, 9 L. Ed. 680.

"So it is when a state is prohibited from imposing duties on imports, except what may be absolutely necessary for executing its inspection laws. 'This tax is an exception to the prohibition on the states to lay duties on imports and exports; the exception was made, because the tax would otherwise have been within the prohibition.' *Brown v. Maryland*, 12 Wheat. 419, 436, 6 L. Ed. 678." (Opinion of Baldwin, J.) *Poole v. Fleegeer*, 11 Pet. 185, 212b, 9 L. Ed. 680.

this must be understood subject to the qualification that, however in theory it may be elsewhere, in this country, both as to the state and national governments, the people are the depository of the ultimate sovereignty, and may change their form of government at pleasure; that with us, there is no government except by the consent of the governed; that the same mighty power from whence proceeds the life-giving principle of our constitutions may also give the death-dealing stroke.<sup>11</sup>

2. THE FEDERAL CONSTITUTION, LAWS AND TREATIES—a. *Generally*.—Subject to the doctrine stated in the preceding paragraph, the federal constitution, together with the laws of congress enacted pursuant thereto, and the treaties made under the authority of the United States is the supreme law of the land; the constitution itself being of controlling authority upon both the national and

11. At the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects, and have none to govern but themselves. The citizens of America are equal as fellow citizens, and as joint tenants in the sovereignty. (Opinion of Jay, C. J.) *Chisholm v. Georgia*, 2 Dall. 419, 471, 1 L. Ed. 440.

Every particle of authority which originally resided either in congress or in any branch of the state governments, was derived from the people, in whom was lodged the ultimate sovereignty. (Opinion of Iredell, J.) *Penhallow v. Doane*, 3 Dall. 54, 94, 1 L. Ed. 507.

**Supremacy of constitutions; ultimate sovereignty.**—*Vanhome v. Dorrance*, 2 Dall. 304, 308, 1 L. Ed. 391; *Chisholm v. Georgia*, 2 Dall. 419, 458, 471, 472, 1 L. Ed. 440; *Penhallow v. Doane*, 3 Dall. 54, 93, 94, 1 L. Ed. 507; *Cohens v. Virginia*, 6 Wheat. 264, 385, 5 L. Ed. 257; *Luther v. Borden*, 7 How. 1, 47, 12 L. Ed. 581; *United States v. Lee*, 106 U. S. 196, 208, 27 L. Ed. 171. See, also, ante, "The Federal Constitution," II, B, 1, a; "Amendment of State Constitutions," II, B, 1, b.

Laws derived from the pure source of equality and justice must be founded on the consent of those whose obedience they require. The sovereign, when traced to his source, must be found in the man. (Opinion of Mr. Justice Wilson.) *Chisholm v. Georgia*, 2 Dall. 419, 458, 1 L. Ed. 440.

According to the institutions of this country, the sovereignty in every state resides in the people, and they may alter and change their form of government at their own pleasure. *Luther v. Borden*, 7 How. 1, 47, 12 L. Ed. 581.

"Sovereignty is the right to govern; a nation or state sovereign is the person or persons in whom that resides. In Europe, the sovereignty is generally ascribed to the prince; here it rests with the people; there, the sovereign actually administers the government, here, never in a single instance; our governors are the agents of the people, and at most stand in the same relation to their sovereign in

which regents in Europe stand to their sovereigns. Their princes have personal powers, dignities, and pre-eminences, our rulers have none but official, nor do they partake in the sovereignty otherwise, or in any other capacity, than as private citizens." *Chisholm v. Georgia*, 2 Dall. 419, 472, 1 L. Ed. 440.

By the state forming a republic is meant all the citizens which compose that state, being integral parts thereof, and all together form a body politic. The great distinction between monarchies and republics is that in the former the monarch is considered as the sovereign, and each individual of his nation as subject to him; but in a republic all the citizens, as such, are equal and sovereignty resides in the great body of the people, not as so many distinct individuals, but in their politic capacity only. (Opinion of Iredell, J.) *Penhallow v. Doane*, 3 Dall. 54, 93, 1 L. Ed. 507.

"Under our system the people, who are there called subjects are the sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of a monarch. The citizen here knows no person, however near to those in power, or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right." *United States v. Lee*, 106 U. S. 196, 208, 27 L. Ed. 171.

So far as the federal constitution is concerned the proposition stated in the text raises the question, previously discussed, of the revolutionary right of the people to alter or amend the same in disregard of the limitation with reference to the equal representation in the senate, or in any manner other than the two methods prescribed by the constitution itself. See ante, "The Federal Constitution," II, B, 1, a.



the state governments in all of their departments with respect to those matters upon which it speaks.<sup>12</sup>

**Statute Valid in Part, and Void in Part.**—See the title STATUTES.

**Unconstitutional Act the Same as No Law.**—The constitution of the United States being the supreme law of the land, it follows that a state cannot enact an unconstitutional law. The state government, or the legislative department thereof as the agent and representative of the state, may attempt to do so, but such act is not a law of the state since it was not within the scope of the agent's authority. Such an act is a mere nullity and it cannot be said that the state has passed such a law; for what a state cannot do, in contemplation of law, it has not done.<sup>13</sup>

**12. Supremacy of the federal constitution, laws and treaties.**—*Vanhome v. Dorrance*, 2 Dall. 304, 308, 1 L. Ed. 391; *Marbury v. Madison*, 1 Cranch 137, 177, 2 L. Ed. 60; *Owings v. Norwood*, 5 Cranch 344, 3 L. Ed. 120; *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *Cohens v. Virginia*, 6 Wheat. 264, 385, 414, 5 L. Ed. 257; *Ogden v. Saunders*, 12 Wheat. 213, 325, 326, 6 L. Ed. 606; *American Ins. Co. v. Canter*, 1 Pet. 511, 7 L. Ed. 243; *Foster v. Neilson*, 2 Pet. 253, 314, 7 L. Ed. 415; *Craig v. Missouri*, 4 Pet. 410, 7 L. Ed. 903; *Worcester v. Georgia*, 6 Pet. 515, 595, 8 L. Ed. 483; *Dobbins v. Commissioners of Erie County*, 16 Pet. 435, 10 L. Ed. 1022; *License Cases*, 5 How. 504, 574, 12 L. Ed. 256; *Dodge v. Woolsey*, 18 How. 331, 347, 15 L. Ed. 401; *Ward v. Maryland*, 12 Wall. 418, 431, 20 L. Ed. 449; *Farmers', etc., Nat. Bank v. Dearing*, 91 U. S. 29, 35, 23 L. Ed. 196; *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 8, 24 L. Ed. 708; *United States v. Germaine*, 99 U. S. 508, 510, 25 L. Ed. 482; *United States v. Lee*, 106 U. S. 196, 220, 27 L. Ed. 171; *Legal Tender Case*, 110 U. S. 421, 438, 28 L. Ed. 204; *Robb v. Connolly*, 111 U. S. 624, 637, 28 L. Ed. 542; *Head Money Cases*, 112 U. S. 580, 28 L. Ed. 798; *United States v. Rauscher*, 119 U. S. 407, 30 L. Ed. 425; *Counselman v. Hitchcock*, 142 U. S. 547, 585, 35 L. Ed. 1110; *Gibson v. Mississippi*, 162 U. S. 565, 586, 40 L. Ed. 1075; *Northern Securities Co. v. United States*, 193 U. S. 197, 344, 48 L. Ed. 679; *Burton v. United States*, 202 U. S. 344, 368, 50 L. Ed. 1057.

It is a proposition too plain to be contested that the constitution controls any legislative act repugnant to it; or that the legislature may alter the constitution by any ordinary act. (*Opinion of Marshall, C. J.*) *Marbury v. Madison*, 1 Cranch 137, 177, 2 L. Ed. 60. *Accord, Counselman v. Hitchcock*, 142 U. S. 547, 585, 35 L. Ed. 1110.

The constitution of the United States being the supreme law, the judiciary act of the United States must be restrained thereby. *Owings v. Norwood*, 5 Cranch 344, 3 L. Ed. 120.

**Supreme over all the departments of the government.**—The federal constitution is supreme over all the three great departments of the federal government,

because the people who ratified it have made it so; consequently, anything which may be done by or under the authority of any department unauthorized by the constitution is unlawful. *Chisholm v. Georgia*, 2 Dall. 419, 468, 1 L. Ed. 440; *Dodge v. Woolsey*, 18 How. 331, 347, 15 L. Ed. 401; *Northern Securities Co. v. United States*, 193 U. S. 197, 333, 48 L. Ed. 679.

**Treaties are the law of the land.**—Treaties are the supreme law of the land, and a right of person or property secured or recognized by treaty may be set up as a defense to a prosecution in disregard of either with the same force and effect as if such right was secured by an act of congress. *Foster v. Neilson*, 2 Pet. 253, 314, 7 L. Ed. 415; *United States v. Rauscher*, 119 U. S. 407, 30 L. Ed. 425; *Head Money Cases*, 112 U. S. 580, 28 L. Ed. 798.

The treaty with Spain, by which Florida was ceded to the United States, is the law of the land. *American Ins. Co. v. Canter*, 1 Pet. 511, 7 L. Ed. 243; *Foster v. Neilson*, 2 Pet. 253, 314, 7 L. Ed. 415.

The treaties entered into between the United States and the Cherokee Nation of Indians, and the laws enacted pursuant thereto, come within the due exercise of the constitutional powers of the federal government, and consequently must be considered as the supreme law of the land. (*Opinion of McLean, J.*) *Worcester v. Georgia*, 6 Pet. 515, 595, 8 L. Ed. 483.

**13. Unconstitutional act is no law.**—*Worcester v. Georgia*, 6 Pet. 515, 569, 8 L. Ed. 483; *Ex parte Siebold*, 100 U. S. 371, 376, 25 L. Ed. 717; *Chaffin v. Taylor*, 114 U. S. 309, 29 L. Ed. 198; *Allen v. Baltimore, etc., R. Co.*, 114 U. S. 311, 29 L. Ed. 200; *Virginia Coupon Cases*, 114 U. S. 269, 270, 29 L. Ed. 185; *Ex parte Royall*, 117 U. S. 241, 248, 29 L. Ed. 868.

The constitution of the United States is the supreme law of the land; and consequently no state constitution nor any act of a state legislature, or of congress, which is repugnant to it, can be of any validity. *Worcester v. Georgia*, 6 Pet. 515, 571, 8 L. Ed. 483; *Vanhome v. Dorrance*, 2 Dall. 304, 308, 1 L. Ed. 391; *Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 60; *Cohens v. Virginia*, 6 Wheat. 264, 414, 5 L. Ed. 257; *Craig v. Missouri*, 4 Pet.

**As Affording a Basis for Equitable Claims.**—But while it is true that in general, an unconstitutional act of congress is the same as if there were no act, that is regarding it in its purely legal aspect. Being in violation of the constitution, that instrument must govern, and no one can base any legal claim as arising out of such an act.<sup>14</sup> But it is a different question whether or not there may not arise, in favor of persons who have acted upon the faith of the validity of an unconstitutional act, equitable claims of such a nature as to entitle the claimant to the favorable consideration of the courts and of congress.<sup>15</sup>

**Power of Congress to Suspend or Supersede Constitutional Provisions.**

—As a mere act of congress cannot amend the constitution, so neither can legislation abridge a constitutional privilege, nor replace or supply one, at least unless it is so broad as to have the same extent in scope and effect.<sup>16</sup> Where conditions are brought about to which any particular provision of the constitution applies, it is of controlling influence, and such control cannot be frustrated by the action of any or all the departments of the government.<sup>17</sup> The departments of the government may, however, in discharging their constitutional duties, deal with the subjects committed to them in such a way as to bring within the operation and control of the provisions of the constitution matters to which those provisions were not previously applicable. This does not, however, conflict with the doctrine just stated, nor presuppose that the constitution may or may not be applicable at the election of any agency of the government.<sup>18</sup>

b. *At All Times and as to All Classes.*—The supremacy of the law is the foundation rock upon which our institutions rest. The law, the supreme court of the United States has said, is the only supreme power in our system of government.<sup>19</sup> The constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection

410, 7 L. Ed. 903; *Ex parte Seibold*, 100 U. S. 371, 376, 25 L. Ed. 717; *Ex parte Yarbrough*, 110 U. S. 651, 654, 28 L. Ed. 274; *Ex parte Royall*, 117 U. S. 241, 29 L. Ed. 868; *Norton v. Shelby County*, 118 U. S. 425, 442, 30 L. Ed. 178; *Huntington v. Worthen*, 120 U. S. 97, 101, 30 L. Ed. 588; *The Chinese Exclusion Case*, 130 U. S. 581, 605, 32 L. Ed. 1068; *United States v. Realty Co.*, 163 U. S. 427, 439, 41 L. Ed. 215.

An unconstitutional law is void and is as no law. It binds no one and protects no one; it confers no rights and imposes no duties; an offense created by it is not a crime, and the conviction under it is not merely erroneous but is illegal and void. *Ex parte Seibold*, 100 U. S. 371, 376, 25 L. Ed. 717; *Ex parte Yarbrough*, 110 U. S. 651, 654, 28 L. Ed. 274; *Ex parte Royall*, 117 U. S. 241, 248, 29 L. Ed. 868; *Norton v. Shelby County*, 118 U. S. 425, 442, 30 L. Ed. 178; *Huntington v. Worthen*, 120 U. S. 97, 101, 30 L. Ed. 588.

**14. As affording a basis for equitable claims.**—*United States v. Realty Co.*, 163 U. S. 427, 439, 41 L. Ed. 215.

**15. Same.**—See the case of *United States v. Realty Co.*, 163 U. S. 427, 41 L. Ed. 215, in which the court held, without passing upon the constitutionality of the act of October 1, 1890, ch. 1244, 26 Stat. 567, that, regardless of whether such act was valid or not, the persons who had complied with its requirements and engaged in the production of sugar upon the faith that they would receive the

bounties provided for by that act were entitled to the favorable consideration of congress and that while their claims might not be of a legal character, they were nevertheless of so meritorious and equitable a nature as to authorize the nation through congress, to appropriate money, to pay them, and that the act of March 2, 1895, ch. 189, 28 Stat. 910, 933, appropriating money for that purpose was constitutional and valid.

**16. Power of congress to suspend or supersede constitutional privilege.**—*Counselman v. Hitchcock*, 142 U. S. 547, 585, 35 L. Ed. 1110.

The provision contained in article five of the amendments, that no person shall be compelled in any criminal case to be a witness against himself, may be replaced or superseded by an act of congress which affords absolute immunity against any prosecution for the offense to which the question relates. *Brown v. Walker*, 161 U. S. 591, 40 L. Ed. 819.

**17. The constitution of controlling influence.**—*Downes v. Bidwell*, 182 U. S. 244, 289, 45 L. Ed. 1088, per Justices White, Shiras and McKenna, concurring.

**18. Certain matters may or may not be brought under constitutional control.**—*Downes v. Bidwell*, 182 U. S. 244, 289, 45 L. Ed. 1088 (per Justices White, Shiras and McKenna).

**19. Supreme at all times; as to all classes.**—*United States v. Lee*, 106 U. S. 196, 220, 27 L. Ed. 171; *Northern Securities Co. v. United States*, 193 U. S. 197, 350, 48 L. Ed. 679.



all classes of them, at all times, and under all circumstances. None of its provisions can be suspended during any of the great exigencies of government.<sup>20</sup>

**Same, Treaties.**—Treaties of the United States with foreign nations, while they remain in force, are, by the constitution of the United States, the supreme law, and binding not only upon the government but upon every citizen. No contract can lawfully be made in violation of their provisions.<sup>21</sup>

**As Embracing New Classes and Conditions.**—See ante, "Definition and Nature of a Constitution," I; "Construction in the Light of Contemporaneous History and Existing Conditions," III, B, 3.

*c. Supreme over State Laws, Officers and Agents as Well as Federal*—(1) *Generally.*—By the explicit words of the constitution, that instrument and the laws of congress enacted in pursuance of its provisions, together with the treaties made under the authority of the United States, are the supreme law of the land, "anything in the constitution or laws of any state to the contrary notwithstanding."<sup>22</sup> The government of the United States, in the enforcement of its laws,

**20. Same.**—*Vanhorne v. Dorrance*, 2 Dall. 304, 309, 1 L. Ed. 391; *Cohens v. Virginia*, 6 Wheat. 264, 387, 5 L. Ed. 257; *Ex parte Milligan*, 4 Wheat. 2, 121, 18 L. Ed. 281; *Legal Tender Case*, 110 U. S. 421, 439, 28 L. Ed. 204; *Northern Securities Co. v. United States*, 193 U. S. 197, 333, 48 L. Ed. 679; *Burton v. United States*, 202 U. S. 344, 368, 50 L. Ed. 1057.

"By the explicit words of the constitution, that instrument and the laws enacted by congress in pursuance of its provisions, are the supreme law of the land, 'anything in the constitution or laws of any state to the contrary notwithstanding'—supreme over the states, over the courts, and even over the people of the United States, the source of all power under our governmental system in respect of the objects for which the national government was ordained. An act of congress constitutionally passed under its power to regulate commerce among the states and with foreign nations is binding upon all; as much so as if it were embodied, in terms, in the constitution itself. Every judicial officer, whether of a national or a state court, is under the obligation of an oath so to regard a lawful enactment of congress. Not even a state, still less one of its artificial creatures, can stand in the way of its enforcement. If it were otherwise, the government and its laws might be prostrated at the feet of local authority. *Cohens v. Virginia*, 6 Wheat. 264, 385, 414, 5 L. Ed. 257. These views have been often expressed by this court." *Northern Securities Co. v. United States*, 193 U. S. 197, 333, 48 L. Ed. 679.

"If that which is enacted in the form of a statute is within the general sphere of legitimate legislative, as distinguished from executive and judicial, action, and not forbidden by the constitution, it is the supreme law of the land—supreme over all in public stations as well as over all the people. 'No man in this country,' this court has said, 'is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from

the highest to the lowest, are creatures of the law, and are bound to obey it.' *United States v. Lee*, 106 U. S. 196, 220, 27 L. Ed. 171. Nothing in the relations existing between a senator, representative or delegate in congress and the public matters with which, under the constitution, they are respectively connected from time to time, can exempt them from the rule of conduct prescribed by § 1782." *Burton v. United States*, 202 U. S. 344, 368, 50 L. Ed. 1057.

**21. Same, treaties.**—*Kennett v. Chambers*, 14 How. 38, 46, 14 L. Ed. 316.

**22. Supreme over state laws, officers and agents.**—*Ware v. Hylton*, 3 Dall. 199, 284, 1 L. Ed. 568; *McCulloch v. Maryland*, 4 Wheat. 316, 403, 4 L. Ed. 579; *Ogden v. Saunders*, 12 Wheat. 213, 325, 326, 6 L. Ed. 606; *Cherokee Nation v. Georgia*, 5 Pet. 1, 31, 8 L. Ed. 25; *Worcester v. Georgia*, 6 Pet. 515, 8 L. Ed. 483; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 583d; 9 L. Ed. 773; *Dobbins v. Commissioners of Erie County*, 16 Pet. 435, 10 L. Ed. 1022; *License Cases*, 5 How. 504, 574, 12 L. Ed. 256; *Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. 518, 566, 14 L. Ed. 249; *Dodge v. Woolsey*, 18 How. 331, 348, 15 L. Ed. 401; *Ableman v. Booth*, 21 How. 506, 16 L. Ed. 169; *Sinnot v. Davenport*, 22 How. 227, 16 L. Ed. 243; *Foster v. Davenport*, 22 How. 244, 16 L. Ed. 248; *White v. Hart*, 13 Wall. 646, 650, 20 L. Ed. 685; *Farmers', etc., Nat. Bank v. Dearing*, 91 U. S. 29, 35, 23 L. Ed. 196; *Farrington v. Tennessee*, 95 U. S. 679, 685, 24 L. Ed. 558; *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 9, 24 L. Ed. 708; *Ex parte Siebold*, 100 U. S. 371, 392, 25 L. Ed. 717; *Hauenstein v. Lynham*, 100 U. S. 483, 488, 490, 25 L. Ed. 628; *Virginia Coupon Cases*, 114 U. S. 269, 270, 292, 29 L. Ed. 185; *Chaffin v. Taylor*, 114 U. S. 309, 29 L. Ed. 198; *Allen v. Baltimore, etc., R. Co.*, 114 U. S. 311, 29 L. Ed. 200; *Van Brocklin v. Tennessee*, 117 U. S. 151, 155, 29 L. Ed. 845; *Wilderhus' Case*, 120 U. S. 1, 17, 30 L. Ed. 565; *Baldwin v. Franks*, 120 U. S. 678, 683, 30 L. Ed. 766; *Brown v. Walker*,



deals with all persons within its territorial jurisdiction as individuals, owing obedience to its constitutional authority, and this without regard to the character in which they assume to act, whether as state officers or otherwise. The official character of a state officer confers no exemption, and cannot be interposed by the individual to absolve him from the obligation which he owes to the constitution of the United States, and the laws enacted pursuant thereto, as the supreme law of the land.<sup>23</sup> If the constitution is found inconvenient in practice, a regular mode is pointed out for amendment. But while it remains all officers, legislative, executive and judicial, both of the states and of the Union, are bound by oath to support it.<sup>24</sup>

161 U. S. 591, 606, 40 L. Ed. 819; *Gibson v. Mississippi*, 162 U. S. 565, 586, 40 L. Ed. 1075; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 558, 46 L. Ed. 679; *Northern Securities Co. v. United States*, 193 U. S. 197, 344, 48 L. Ed. 679.

**23. Deals with persons as individuals; official station no protection.**—In *re Ayers*, 123 U. S. 443, 507, 31 L. Ed. 216.

**24. All officers bound by oath to support to the constitution, any state law to the contrary notwithstanding.**—*Chisholm v. Georgia*, 2 Dall. 419, 468, 1 L. Ed. 440. *Accord*, *Northern Securities Co. v. United States*, 193 U. S. 197, 344, 48 L. Ed. 679.

An act of congress, passed in pursuance of a clear authority under the constitution, is the supreme law of the land, and any law of a state in conflict with it is inoperative and void. *Ableman v. Booth*, 21 How. 506, 16 L. Ed. 169; *Sinnot v. Davenport*, 22 How. 227, 16 L. Ed. 243; *Foster v. Davenport*, 22 How. 244, 16 L. Ed. 248.

The constitution and laws of the United States are the supreme law of the land, and to these every citizen of every state, whether in his individual or official capacity, owes obedience. *Ex parte Siebold*, 100 U. S. 371, 392, 25 L. Ed. 717.

The federal government, on those subjects in which it can act, must necessarily bind its component parts. *McCulloch v. Maryland*, 4 Wheat. 316, 405, 4 L. Ed. 579.

The constitution is supreme not only over the departments of the government, but it is so, to the extent of its delegated powers, over all who made themselves parties to it; states as well as persons, within those concessions of sovereign powers yielded by the people of the states when they accepted the constitution in their conventions. *Dodge v. Woolsey*, 18 How. 331, 348, 15 L. Ed. 401.

In addition to the constitution being supreme in the sense above stated, the people in the ratification of it have chosen to add that "this constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or

laws of any state to the contrary, notwithstanding." And in that connection, to make the supremacy more complete, impressive and practical, that there should be no escape from its operation, and that its binding force upon the states and the members of congress should be unmistakable, it is declared that "the senators and representatives before mentioned, and the members of the state legislatures, and all executive and judicial officers, both of the United States and the several states, shall be bound by an oath or affirmation to support this constitution." *Dodge v. Woolsey*, 18 How. 331, 348, 15 L. Ed. 401.

Each state in its sovereign capacity, by the people thereof, in a convention, have made the federal constitution the supreme law of the state, paramount to any state constitution then in existence, or which might be thereafter adopted. Each state has made an irrevocable restriction on its own once plenary sovereignty, which it cannot loosen without the concurrence of such a number of states as are competent to amend the constitution. (Opinion of Baldwin, J.) *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 583d, 9 L. Ed. 773.

In cases involving federal questions affecting a state, the state cannot be regarded as standing alone. It belongs to a union consisting of itself and all its sister states. The constitution of that union, and "the laws made in pursuance thereof, are the supreme law of the land, \* \* \* anything in the constitution or laws of any state to the contrary notwithstanding." *Farmers', etc., Nat. Bank v. Dearing*, 91 U. S. 29, 23 L. Ed. 196; *Farrington v. Tennessee*, 95 U. S. 679, 685, 24 L. Ed. 558.

"The constitution, laws, and treaties of the United States are as much a part of the law of every state as its own local laws and constitution. This is a fundamental principle in our system of complex national polity." *Cohens v. Virginia*, 6 Wheat. 264, 385, 414, 5 L. Ed. 257; *Worcester v. Georgia*, 6 Pet. 515, 571, 8 L. Ed. 483; *White v. Hart*, 13 Wall. 646, 650, 20 L. Ed. 685; *Farmers', etc., Nat. Bank v. Dearing*, 91 U. S. 29, 23 L. Ed. 196; *Farrington v. Tennessee*, 95 U. S. 679, 685, 24 L. Ed. 558; *Hauenstein v. Lynham*, 100 U. S. 483, 490, 25 L. Ed. 628; *North-*

**Congress Cannot Ratify Unconstitutional State Law.**—Congress cannot by authorization or ratification, give the slightest effect to a state law or constitution in conflict with the constitution of the United States. That instrument is above and beyond the power of congress and the states, and is alike obligatory upon both.<sup>25</sup>

*ern Securities Co. v. United States*, 193 U. S. 197, 333, 48 L. Ed. 679.

**Treaties as the supreme law within a state.**—"The treaties made by the United States and in force are part of the supreme law of the land, and they are as binding within the territorial limits of the states as they are elsewhere throughout the dominion of the United States." *Dodge v. Woolsey*, 18 How. 331, 348, 15 L. Ed. 401; *Wildenhus's Case*, 120 U. S. 1, 17, 30 L. Ed. 565; *Baldwin v. Franks*, 120 U. S. 678, 683, 30 L. Ed. 766.

"A treaty cannot be the supreme law of the land, that is, of all the United States, if any act of a state legislature can stand in its way. If the constitution of a state (which is the fundamental law of the state and paramount to its legislature) must give way to a treaty and fall before it, can it be questioned whether the less power, an act of the state legislature, must not be prostrate? It is the declared will of the people of the United States that every treaty made by the authority of the United States shall be superior to the constitution and laws of any individual state, and their will alone is to decide." *Hauenstein v. Lynham*, 100 U. S. 483, 488, 25 L. Ed. 628; *Ware v. Hylton*, 3 Dall. 199, 1 L. Ed. 568.

The act of 1802, which makes it penal to violate the Indian territory, having been enacted pursuant to a treaty of the United States, is the supreme law, and no law of the state of Georgia can repeal that act, or justify the violation of its provision. (Separate opinion of Johnson, J.) *Cherokee Nation v. Georgia*, 5 Pet. 1, 31, 8 L. Ed. 25.

The act of the legislature of Georgia passed December 22, 1830, entitled, "An act to prevent the exercise of assumed and arbitrary power by all persons, under pretext of authority from the Cherokee Indians, etc., provided, among other things, that 'all white persons residing within the limits of the Cherokee Nation, on the first day of March next, or at any time thereafter, without a license or permit from his excellency, the governor, or from such agents as his excellency, the governor, shall authorize to grant such permit or license, and who shall not have taken the oath hereinafter required, shall be guilty of a high misdemeanor, and upon conviction thereof, shall be punished by confinement in the penitentiary at hard labor for a term not less than four years.'" The plaintiff in error, having been arrested and indicted under this statute, pleaded that he was, on the 15th day of July, 1831, in the Cherokee Nation out

of the jurisdiction of the court of Gwinnett county; that he was a citizen of Vermont, and entered the Cherokee Nation as a missionary under the authority of the President of the United States and had not been required by him to leave it, and that with the permission and approval of the Cherokee Nation he was engaged in preaching the Gospel; that the state of Georgia ought not to maintain the prosecution because several treaties had been entered into by the United States with the Cherokee Nations, by which that nation was acknowledged to be a sovereign nation, and by which the territory occupied by them was guaranteed to them by the United States; and that the laws of Georgia, under which the plaintiff in error was indicated, were repugnant to the treaties, and unconstitutional and void, and also that they were repugnant to the act of congress of March, 1802, entitled "an act to regulate trade and intercourse with the Indian tribes." Held, that under the federal constitution and laws, the whole intercourse between the United States and the Indians was vested in the government of the United States; that the act of the legislature of Georgia interfered forcibly with the relations established between the United States and the Cherokee Nation; that said act was in direct hostility with the treaties, repeated in a succession of years, between the United States and the Cherokee Indians, which mark out the boundary which separated the Cherokee country from Georgia, guaranteed to them all the lands within their boundary, solemnly pledge the faith of the United States to restrain their citizens from trespassing on it, and recognized the pre-existing power to the nation to govern itself; that said statute was in equal hostility with the acts of congress for regulating this intercourse and giving effect to treaties; that said treaties and statute enacted pursuant thereto were valid, and the supreme law of the land, and that the Georgia statute was, therefore, unconstitutional and void, and that the plaintiff in error was entitled to be discharged and permitted to go thence without a day. *Worcester v. Georgia*, 6 Pet. 515, 8 L. Ed. 483.

**Power to alter state boundaries by treaty.**—See post, "To Settle Boundaries," VI. D. 2, c. (2). See, also, the titles BOUNDARIES, vol. 3, pp. 503, 505; TREATIES.

**25. Cannot ratify unconstitutional state law.**—*Gunn v. Barry*, 15 Wall. 610, 623, 21 L. Ed. 212; *Passenger Cases*, 7 How. 283, 399, 12 L. Ed. 702.

**Invalid State Constitution or Law Not Cured by Manner of Administration.**—If the provisions of a state constitution or law are invalid as contravening the provisions of the federal constitution, such invalidity cannot be cured by an administration which defeats their intent.<sup>26</sup>

**Supreme over the People Aggregately and in Their Separate Sovereignties.**—Nor does the supremacy of the constitution end here. It is supreme over the people of the United States aggregately and in their separate sovereignties, because they have excluded themselves from any direct or immediate agency in making amendments to it, and have directed that amendments shall be made representatively for them, by the congress of the United States, when two-thirds of both houses shall propose them; or where the legislatures of two-thirds of the several states shall call a convention for proposing amendments, which in either case become valid, to all intents and purposes, as a part of the constitution when ratified by the legislatures or by convention in three-fourths of the states, as one or the other mode of ratification may be proposed by congress.<sup>27</sup> The states, or rather the people forming the federal government, though sovereign as to the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are not independent of each other, in respect to the powers ceded in the constitution. Their union, by the constitution, was made by each of them conceding portions of their equal sovereignties for all of them, and it acts upon the states conjunctively and separately, and in the same manner upon their citizens, aggregately in some things, and individually in others, in many of their relations of business and also upon their civil conduct, so far as their obedience to the laws of congress is concerned.<sup>28</sup>

**Including New States and Territories.**—All constitutional laws are binding on the people in the new states, and in the old states, whether they consent to be bound by them or not. Every constitutional act of congress is passed by the will of the people of the United States, expressed through their representatives, on the subject matter of the enactment; and when so passed it becomes the supreme law of the land, and operates by its own force, on the subject matter, in whatever state or territory it may happen to be.<sup>29</sup> The constitution was adopted by common consent, and the people of the territories must necessarily be regarded as parties to it and bound by it, and entitled to its benefits, as well as the people of the then existing states. It became the supreme law of the United States, in the territories as well as elsewhere.<sup>30</sup>

**26. Invalidity not cured by manner of administration.**—*Giles v. Harris*, 189 U. S. 475, 487, 47 L. Ed. 909.

Thus where a colored citizen alleged that he was excluded from the lists of registered voters by reason of certain provisions of the state constitution which contravened the fourteenth amendment of the federal constitution, and filed a bill upon behalf of himself and all others in like situation, praying that said provisions might be declared void, and, at the same time, alleged that he was entitled to register under the alleged unconstitutional provisions as they were written, and prayed that the registrars might be compelled to add his name to the lists, it was held that the court would not, in one breath, declare such provisions to be void, and, at the same time, accept and ratify them by compelling the registrars to add the complainant's name to the lists in accordance therewith, since if said provisions were unconstitutional and void, as alleged, they could not be validated by

an administration which defeated their intent. *Giles v. Harris*, 189 U. S. 475, 487, 47 L. Ed. 909.

**27. Supreme over the people aggregately and in their separate sovereignties.**—*Dodge v. Woolsey*, 18 How. 331, 348, 15 L. Ed. 401.

**28. Same.**—*Dodge v. Woolsey*, 18 How. 331, 351, 15 L. Ed. 401.

"The constitution of the United States was made for the whole people of the Union, and is equally binding upon all the courts and all the citizens." *Farmers', etc., Bank v. Smith*, 6 Wheat. 131, 134, 5 L. Ed. 224.

**29. Including new states and territories.**—*Pollard v. Hagan*, 3 How. 212, 224, 225, 11 L. Ed. 565; *De Lima v. Bidwell*, 182 U. S. 1, 197, 45 L. Ed. 1041.

**30. Same.**—*Strader v. Graham*, 10 How. 82, 96, 13 L. Ed. 337. See, also, post, "Limitations upon the Power of Congress; Operation of the Constitution within the Territories." VI. D, 2, c, (3), (cc), (bbb), (cccc), (bbbbb).



(2) *Supremacy of Federal Constitution, Laws and Treaties in Case of Conflict with Reserved Powers of the State.*—See post, “Supremacy in Case of Conflict between State and Federal Powers,” VI, D, 3, c, (6) (b), (hh).

d. *Limitations upon the Supremacy of the Federal Constitution, Treaties and Laws*—(1) *Generally of the Constitution and Laws.*—The constitution is the supreme law of the land upon all subjects upon which it speaks. It is the sovereign will of the whole people. Whatever this sovereign will enjoins or forbids must necessarily be supreme, and must counteract the subordinate legislative will of the United States, and of the states. But on subjects, in relation to which the sovereign will is not declared, or fairly and necessarily implied, the constitution cannot, with any semblance of truth, be said to be the supreme law. It could not be said that the constitution of the United States is the supreme law of any state in relation to the solemnities requisite for conveying real estate, or the responsibilities or obligations consequent upon the use of certain words in such conveyance. The constitution contains no law, no declaration of the sovereign will, upon these subjects; and cannot, in the nature of things, in relation to them, be the supreme law.<sup>31</sup> And so it is with respect to the laws of the United States. In order to be binding, they must be within the legitimate powers vested by the constitution. Any legislation by congress beyond the limits of the powers delegated by the constitution would be trespassing upon the reserved rights of the states or of the people, and would not be the supreme law of the land, but null and void, and it would be the duty of the courts to declare it so.<sup>32</sup>

**Temporary Supremacy Pending Determination of Constitutional Question.**—Whenever any conflict arises between the enactments of the two sovereignties, or in the enforcement of their asserted authorities, those of the national government have supremacy until the validity of the different enactments and authorities are determined by the tribunals of the United States.<sup>33</sup>

(2) *Limitations upon Treaties as the Supreme Law*—(a) *Generally.*—Treaties made under the authority of the United States, in order to be binding upon the people and upon the states, must be made within the scope of the legitimate powers vested by the constitution, for there can be no “authority of the United States save what is derived mediately or immediately, and regularly and legitimately, from the constitution. In short, the federal government cannot add to its constitutional powers by treaty or compact; and a treaty, no more than an

**31. Limitations upon the constitution and laws as the supreme law.**—Ogden v. Saunders, 12 Wheat. 213, 325, 326, 6 L. Ed. 606. Accord, New York v. Miln, 11 Pet. 102, 9 L. Ed. 648; License Cases, 5 How. 504, 613, 12 L. Ed. 256; Passenger Cases, 7 How. 283, 397, 399, 12 L. Ed. 702; Ableman v. Booth, 21 How. 506, 16 L. Ed. 169; Hepburn v. Griswold, 8 Wall. 603, 611, 19 L. Ed. 513; Broderick v. Magraw, 8 Wall. 639, 19 L. Ed. 531; Tarble's Case, 13 Wall. 397, 406, 20 L. Ed. 597; Gordon v. United States, 117 U. S., appx., 697, 705.

**32. Same.**—New York v. Miln, 11 Pet. 102, 9 L. Ed. 648; License Cases, 5 How. 504, 588, 613, 12 L. Ed. 256; Passenger Cases, 7 How. 283, 397, 399, 12 L. Ed. 702; Ableman v. Booth, 21 How. 506, 16 L. Ed. 169; Hepburn v. Griswold, 8 Wall. 603, 611, 19 L. Ed. 513; Broderick v. Magraw, 8 Wall. 639, 19 L. Ed. 531; Tarble's Case, 13 Wall. 397, 406, 20 L. Ed. 597; Gordon v. United States, 117 U. S., appx., 697, 705.

The constitution declares that the constitution and treaties and the laws of the United States made in pursuance of the

constitution, shall be the supreme law of the land. It is not every act of congress, however, that is to be regarded as the supreme law of the land, or as binding upon the judges in the various states. This character and this force belong only to such acts of congress as are “made in pursuance of the constitution.” Hepburn v. Griswold, 8 Wall. 603, 611, 19 L. Ed. 513, followed in Broderick v. Magraw, 8 Wall. 639, 19 L. Ed. 531.

“It does not follow, as is often said, with little accuracy, that, when a state law shall conflict with an act of congress, the former must yield. On the contrary, except in certain cases named in the federal constitution, this is never correct when the act of the state is strictly within its powers.” (Opinion of McLean, J.) Passenger Cases, 7 How. 283, 397, 12 L. Ed. 702. Accord, New York v. Miln, 11 Pet. 102, 9 L. Ed. 648.

**33. Temporary supremacy pending settlement of conflicting state and federal powers.**—Ableman v. Booth, 21 How. 506, 16 L. Ed. 169; Tarble's Case, 13 Wall. 397, 406, 20 L. Ed. 597.

ordinary act of congress, cannot cede away or infringe upon the rights reserved to the states or to the people.<sup>34</sup>

**Alteration of State Boundaries by Treaty.**—See post, "To Settle Boundaries," VI, D, 2, c, (2).

(b) *Supremacy over Acts of Congress.*—By the constitution a treaty is placed on the same footing and made of like obligation with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent the one last in date will control the other. No paramount authority is given to one over the other.<sup>35</sup> There is nothing in a treaty which makes it

**34. Limitations upon treaties as the supreme law.**—Pollard v. Hagan, 3 How. 212, 11 L. Ed. 565; License Cases, 5 How. 504, 613, 12 L. Ed. 256; Scott v. Sandford (opinion of Campbell, J.), 19 How. 393, 509, 15 L. Ed. 691; Fort Leavenworth R. Co. v. Lowe, 114 U. S. 525, 541, 29 L. Ed. 264; Geofroy v. Riggs, 133 U. S. 258, 33 L. Ed. 642.

The treaty power, as expressed in the constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself, and of that of the states. It would not be contended that it extends so far as to authorize what the constitution forbids, or a change in the character of the government or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent. Fort Leavenworth R. Co. v. Lowe, 114 U. S. 525, 541, 29 L. Ed. 264. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country. Ware v. Hylton, 3 Dall. 199, 1 L. Ed. 568; Chirac v. Chirac, 2 Wheat. 259, 4 L. Ed. 234; Hauenstein v. Lynham, 100 U. S. 483, 25 L. Ed. 628; Geofroy v. Riggs, 133 U. S. 258, 33 L. Ed. 642.

"When the questions that came to the surface upon the acquisition of Louisiana were presented to the mind of Jefferson he wrote: 'I had rather ask an enlargement of power from the nation where it is found necessary, than to assume it by a construction which would make our power boundless. Our peculiar security is in the possession of a written constitution. Let us not make it blank paper by construction. I say the same as to the opinion of those who consider the grant of the treaty-making power as boundless. If it is, then we have no constitution. If it has bounds, they can be no others than the definitions of the powers which that instrument gives. It specifies and delineates the operations permitted to the federal government, and gives the powers necessary to carry them into execution.'" (Opinion of Campbell, J.) Scott v. Sand-

ford, 19 How. 393, 512, 15 L. Ed. 691.

**35. Treaty not supreme over act of congress.**—Foster v. Neilson, 2 Pet. 253, 314, 7 L. Ed. 415; The Cherokee Tobacco, 11 Wall. 616, 621, 20 L. Ed. 227; Chew Heong v. United States, 112 U. S. 536, 539, 559, 28 L. Ed. 770; Head Money Cases, 112 U. S. 580, 599, 28 L. Ed. 798; Whitney v. Robertson, 124 U. S. 190, 195, 31 L. Ed. 386; Botiller v. Dominguez, 130 U. S. 238, 247, 32 L. Ed. 926; The Chinese Exclusion Case, 130 U. S. 581, 600, 32 L. Ed. 1068; Horner v. United States, 143 U. S. 570, 578, 36 L. Ed. 266; United States v. Old Settlers, 148 U. S. 427, 468, 37 L. Ed. 509; Fong Yue Ting v. United States, 149 U. S. 698, 720, 37 L. Ed. 905; Lem Moon Sing v. United States, 158 U. S. 538, 549, 39 L. Ed. 1082; Thomas v. Gay, 169 U. S. 264, 271, 42 L. Ed. 740; Stephens v. Cherokee Nation, 174 U. S. 445, 483, 484, 43 L. Ed. 1041; La Abra Silver Min. Co. v. United States, 175 U. S. 423, 460, 44 L. Ed. 223; De Lima v. Bidwell, 182 U. S. 1, 195, 45 L. Ed. 1041; United States v. Lee Yen Tai, 185 U. S. 213, 221, 46 L. Ed. 878; Hijo v. United States, 194 U. S. 315, 324, 48 L. Ed. 994.

No distinction is made by the constitution as to the question of supremacy between laws and treaties, except that both are controlled by the constitution. Each of them is the supreme law of the land. DeLima v. Bidwell, 182 U. S. 1, 195, 45 L. Ed. 1041.

Congress by legislation, and so far as the people and authorities of the United States are concerned, can abrogate a treaty made between this country and another country which has been negotiated by the President and approved by the senate. Head Money Cases, 112 U. S. 580, 599, 28 L. Ed. 798; Whitney v. Robertson, 124 U. S. 190, 194, 31 L. Ed. 386; The Chinese Exclusion Case, 130 U. S. 581, 600, 32 L. Ed. 1068; Fong Yue Ting v. United States, 149 U. S. 698, 721, 37 L. Ed. 905; La Abra Silver Min. Co. v. United States, 175 U. S. 423, 460, 44 L. Ed. 223.

So far as an act of congress conflicts with a treaty between the United States and a foreign government, the courts of this country are bound to follow the statute. Botiller v. Dominguez, 130 U. S.



irrepealable or unchangeable. The constitution gives it no superiority over an act of congress in this respect, which may be repealed or modified by an act of a later date. Nor is there anything in its essential character, or in the branches of the government by which the treaty is made, which gives it this superior sanctity. A treaty is made by the president and the senate. Statutes are made by the president, the senate and the house of representatives. The addition of the latter body to the other two in making a law certainly does not render it less entitled to respect in the matter of its repeal or modification than a treaty made by the other two. If there be any difference in this regard, it would seem to be in favor of an act in which all three of the bodies participate. And such is, in fact, the case in a declaration of war, which must be made by congress, and which, when made, usually suspends or destroys existing treaties between the nations thus at war.<sup>36</sup>

**If the country with which the treaty is made is dissatisfied** with the action of the legislative department, it may present its complaint to the executive head of the government, and take such other measures as it may deem essential for the protection of its interests. The courts can afford no redress. Whether the complaining nation has just cause of complaint or whether our country was justified in its legislation are not matters for judicial cognizance.<sup>37</sup>

**Vested Rights under Treaties.**—See post, “Vested Rights under Treaties,” VIII, A, 5.

**Construction; Reconciliation Where Possible.**—“Nevertheless, the purpose by statute to abrogate a treaty or any designated part of a treaty, or the purpose by treaty to supersede the whole or a part of an act of congress, must not be lightly assumed, but must appear clearly and distinctly from the words used in the statute or in the treaty.”<sup>38</sup> “It is the duty of the courts not to construe an act of congress as modifying or annulling a treaty made with another nation, unless its words clearly and plainly point to such a construction.”<sup>39</sup>

238, 247, 32 L. Ed. 926; *The Cherokee Tobacco*, 11 Wall. 616, 20 L. Ed. 227; *Head Money Cases*, 112 U. S. 580, 597, 28 L. Ed. 798.

If the treaty operates by its own force, and relates to a subject within the power of congress, it can be deemed in that particular only the equivalent of a legislative act, to be repealed or modified at the pleasure of congress. In either case the last expression of the sovereign will must control. So far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as congress may pass for its enforcement, modification or repeal. *Foster v. Neilson*, 2 Pet. 253, 314, 7 L. Ed. 415; *Head Money Cases*, 112 U. S. 580, 599, 28 L. Ed. 798; *Whitney v. Robertson*, 124 U. S. 190, 195, 31 L. Ed. 386; *The Chinese Exclusion Case*, 130 U. S. 581, 600, 32 L. Ed. 1068; *United States v. Old Settlers*, 148 U. S. 427, 468, 37 L. Ed. 509; *Fong Yue Ting v. United States*, 149 U. S. 698, 720, 37 L. Ed. 905.

The act excluding Chinese laborers from the United States was a constitutional exercise of legislative power, and so far as it conflicted with existing treaties between the United States and China, it operated to that extent to abrogate them as part of the municipal law of the United States. *Wong Wing v. United States*, 163 U. S. 228, 230, 41 L. Ed. 140. See, also,

post, “Vested Rights under Treaties,” VIII, A, 5.

In *Foster v. Neilson*, 2 Pet. 253, 314, 7 L. Ed. 415, Chief Justice Marshall, delivering the opinion of the court, in speaking of the eighth article of the treaty between the United States and Spain of February 22, 1829, says: “The article under consideration does not declare that all the grants made by his Catholic majesty, before the 24th of January, 1818, shall be valid to the same extent as if the ceded territories had remained under his dominion. It does not say, that those grants are hereby confirmed. Had such been its language, it would have acted directly on the subject, and would have repealed those acts of congress which were repugnant to it; but its language is, that those grants shall be ratified and confirmed to the persons in possession, etc.”

**36. Treaty subject to change or repeal.**—*Head Money Cases*, 112 U. S. 580, 599, 28 L. Ed. 798.

**37. Remedy of dissatisfied party upon abrogation of treaty.**—*Whitney v. Robertson*, 124 U. S. 190, 194, 31 L. Ed. 386.

**38. Construction; statute and treaty to be reconciled if possible.**—*United States v. Lee Yen Tai*, 185 U. S. 213, 221, 46 L. Ed. 878.

**39. Same.**—*Lem Moon Sing v. United States* 158 U. S. 538, 549, 39 L. Ed. 1082. See the titles STATUTES; TREATIES.



e. *Duty of Courts to Uphold and Maintain the Supremacy of the Federal Constitution, Treaties and Laws.*—It is the duty of all the courts, state as well as federal, to preserve the supremacy of the federal constitution, the laws of congress enacted pursuant thereto, and treaties made under the authority of the United States. This follows from the language contained in the sixth article, which article, after declaring the supremacy of the constitution, laws and treaties, provides that "the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."<sup>40</sup>

**Presumption as to Action of State Courts.**—Since it is the duty of the state courts, equally with the courts of the Union, to recognize and uphold the federal constitution, laws and treaties as the supreme law of the land, the presumption obtains in every case, in the first instance that they will protect and enforce every right granted or secured thereby.<sup>41</sup>

**40. Duty of courts to uphold supremacy of constitution; laws, and treaties.**—*Martin v. Hunter*, 1 Wheat. 304, 340, 4 L. Ed. 97; *Worcester v. Georgia*, 6 Pet. 515, 572, 8 L. Ed. 483; *Amis v. Smith*, 16 Pet. 303, 314, 10 L. Ed. 973; *Chicago, etc., R. Co. v. Wiggins Ferry Co.*, 108 U. S. 18, 27 L. Ed. 636; *Robb v. Connolly*, 111 U. S. 624, 637, 28 L. Ed. 542; *Ex parte Royall*, 117 U. S. 241, 248, 29 L. Ed. 868; *Cook v. Hart*, 146 U. S. 183, 195, 36 L. Ed. 934; *New Orleans v. Benjamin*, 153 U. S. 411, 424, 38 L. Ed. 764; *New York v. Eno*, 155 U. S. 89, 98, 39 L. Ed. 80; *Pearce v. Texas*, 155 U. S. 311, 314, 39 L. Ed. 164; *Gibson v. Mississippi*, 162 U. S. 565, 586, 40 L. Ed. 1075; *Smyth v. Ames*, 169 U. S. 466, 527, 528, 42 L. Ed. 819.

While the supreme court of the United States conforms its decisions to those of the state courts, on all questions arising under the statutes and constitution of the respective states, they are bound to revise and correct those decisions, if they annul either the constitution of the United States or the laws made under it. (*Opinion of McLean, J.*) *Worcester v. Georgia*, 6 Pet. 515, 572, 8 L. Ed. 483.

It is the duty of the supreme court to preserve the supremacy of the laws of the United States, which they cannot do without disregarding all state laws and state decisions which conflict with the laws of the United States. *Amis v. Smith*, 16 Pet. 303, 314, 10 L. Ed. 973.

"Upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them; for the judges of the state courts are required to take an oath to support that constitution, and they are bound by it and the laws of the United States made in pursuance thereof, and all treaties made under their authority, as the supreme law of the land, 'anything in the constitution or laws of any state to the contrary notwithstanding.'" *Robb v. Connolly*, 111 U. S. 624, 637, 28 L. Ed. 542; *Ex parte Royall*, 117 U. S. 241, 248, 29 L. Ed. 868. *Accord: Ex parte Reggel*,

114 U. S. 642, 29 L. Ed. 250; *Roberts v. Reilly*, 116 U. S. 80, 29 L. Ed. 544; *Cook v. Hart*, 146 U. S. 183, 36 L. Ed. 934; *Pearce v. Texas*, 155 U. S. 311, 39 L. Ed. 164; *Whitten v. Tomlinson*, 160 U. S. 231, 245, 40 L. Ed. 406; *Baker v. Grice*, 169 U. S. 284, 291, 42 L. Ed. 748; *Smyth v. Ames*, 169 U. S. 466, 527, 528, 42 L. Ed. 819; *Fitts v. McGhee*, 172 U. S. 516, 532, 43 L. Ed. 535; *Davis v. Burke*, 179 U. S. 399, 402, 45 L. Ed. 249; *Minnesota v. Brundage*, 180 U. S. 499, 503, 45 L. Ed. 639; *Rogers v. Peck*, 199 U. S. 425, 50 L. Ed. 256; *Pettibone v. Nichols*, 203 U. S. 192, 51 L. Ed. 148; *Moyer v. Nichols*, 203 U. S. 221, 51 L. Ed. 160.

It is the duty of the state court, when the question of the validity of a state statute is necessarily involved, as being in alleged violation of any provision of the federal constitution, to decide that question and to hold the law void if it violate that instrument. *Baker v. Grice*, 169 U. S. 284, 291, 42 L. Ed. 748.

This obligation is imperative upon the state judges in their official, and not merely in their private capacities. (*Opinion of Story, J.*) *Martin v. Hunter*, 1 Wheat. 304, 340, 4 L. Ed. 97.

**41. Presumption that state courts will uphold constitution, laws and treaties.**—*Chicago, etc., R. Co. v. Wiggins Ferry Co.*, 108 U. S. 18, 27 L. Ed. 636; *Robb v. Connolly*, 111 U. S. 624, 637, 28 L. Ed. 542; *Ex parte Royall*, 117 U. S. 241, 251, 252, 29 L. Ed. 868; *Cook v. Hart*, 146 U. S. 183, 195, 36 L. Ed. 934; *New Orleans v. Benjamin*, 153 U. S. 411, 424, 38 L. Ed. 764; *New York v. Eno*, 155 U. S. 89, 98, 39 L. Ed. 80; *Pearce v. Texas*, 155 U. S. 311, 314, 39 L. Ed. 164; *Minnesota v. Brundage*, 180 U. S. 499, 503, 45 L. Ed. 639; *Pettibone v. Nichols*, 203 U. S. 192, 51 L. Ed. 148; *Moyer v. Nichols*, 203 U. S. 221, 51 L. Ed. 160.

If the freedom of a person properly convicted of murder and sentenced to death is improperly restricted in violation of any provision of the federal constitution it is to be presumed that the state authorities will afford the necessary relief. *Rogers v. Peck*, 199 U. S. 425, 50 L. Ed. 256.

"The recognition, therefore, of the au-

**Duty to Prevent Evasions by Change of Form, etc.**—Constitutional provisions cannot be evaded by a mere varying of the form of the obnoxious or prohibited thing. It is the substance and not the form which controls, and it matters not what form the attempt to deny constitutional right may take. It is vain and ineffectual and must be so declared by the courts.<sup>42</sup>

**Duty to Uphold the Constitution May Require Court to Limit the Doctrine of Stare Decisis.**—Manifestly, as the federal supreme court is clothed with the power, and entrusted with the duty, to maintain the fundamental law of the constitution, the discharge of that duty requires it not to extend any decision upon a constitutional question if it is convinced that error in principle might supervene.<sup>43</sup>

3. **STATE CONSTITUTIONS AS THE SUPREME LAW.**—The act of a state constitutional convention is the supreme law of the state; an act of the legislature is a law subordinate; both, however, are laws of the state, of binding authority, unless repugnant to that law which the state has, by its own voluntary act, in the plenitude of its sovereignty made paramount to both, and declared that its judges, "shall be bound thereby," anything to the contrary notwithstanding.<sup>44</sup>

thority of a state court, or one of its judges, upon writ of habeas corpus, to pass upon the legality of the imprisonment, within the territory of that state, of a person held in custody—otherwise than under the judgment or orders of the judicial tribunals of the United States, or by the order of a commissioner of a circuit court, or by officers of the United States acting under their laws—cannot be denied merely because the proceedings involve the determination of rights, privileges, or immunities derived from the nation, or require a construction of the constitution and laws of the United States." *Robb v. Connolly*, 111 U. S. 624, 637, 28 L. Ed. 542. See, also, the cases above cited. And see the title HABEAS CORPUS.

**42. Constitution not to be evaded by mere change of form.**—*Brown v. Maryland*, 12 Wheat. 419, 444, 6 L. Ed. 678; *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 581, 39 L. Ed. 759; *In re Debs*, 158 U. S. 564, 594, 39 L. Ed. 1092.

"We fully agree with counsel that 'it matters not what form the attempt to deny constitutional right may take. It is vain and ineffectual, and must be so declared by the courts,' and we reaffirm the declaration made for the court by Mr. Justice Bradley in *Boyd v. United States*, 116 U. S. 616, 635, 29 L. Ed. 746, that 'it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*.'" *In re Debs*, 158 U. S. 564, 594, 39 L. Ed. 1092.

"If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the constitution, or of the rule of taxation and representation, so carefully recognized and guarded in favor of the citizens of each state. But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls, as has indeed been

established by repeated decisions of this court. Thus in *Brown v. Maryland*, 12 Wheat. 419, 444, 6 L. Ed. 678, it was held that the tax on the occupation of an importer was the same as a tax on imports and therefore void. And Chief Justice Marshall said: 'It is impossible to conceal from ourselves that this is varying the form, without varying the substance. It is treating a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself.'" *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 581, 39 L. Ed. 759.

"In *Weston v. Charleston*, 2 Pet. 449, 7 L. Ed. 481, it was held that a tax on the income of United States securities was a tax on the securities themselves, and equally inadmissible." Cited in *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 581, 39 L. Ed. 759.

This doctrine has been often applied to statutes enacted for the purpose of evading constitutional provisions and limitations with respect to taxation. *Dobbins v. Commissioners of Erie County*, 16 Pet. 435, 10 L. Ed. 1022; *Almy v. California*, 24 How. 169, 16 L. Ed. 644; *Railroad Co. v. Jackson*, 7 Wall. 262, 19 L. Ed. 88; *Cook v. Pennsylvania*, 97 U. S. 566, 24 L. Ed. 1015; *Philadelphia, etc., Steamship Co. v. Pennsylvania*, 122 U. S. 326, 30 L. Ed. 1200; *Leloup v. Mobile*, 127 U. S. 640, 32 L. Ed. 311; *Postal Tel. Cable Co. v. Adams*, 155 U. S. 688, 698, 39 L. Ed. 311; *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 581, 582, 39 L. Ed. 759.

**43. May require court to limit doctrine of stare decisis.**—*Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 576, 39 L. Ed. 759.

**44. State constitutions as the supreme law.**—*Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 583d, 9 L. Ed. 773, opinion of Baldwin, J.

Whatever the people of a state, framing their organic act, have declared to be the limits of legislative power, and the mode in which that power shall be exercised, must always be recognized by the courts, state and national, as obligatory.<sup>45</sup>

**C. Territorial Operation of the Constitution**—1. IN THE UNITED STATES GENERALLY.—See ante, "The Federal Constitution, Laws and Treaties," VI, B, 2, et seq.

2. IN THE TERRITORIES.—See post, "Status of Acquired Territory as Foreign or Domestic," VI, D, 2, c, (3), (b), et seq.; "Usage as to Conquered or Ceded Territory," VI, D, 2, c, (3), (c), (bb), et seq.; "Generally," VI, D, 2, c, (3), (c), (cc), (bbb), (aaaa); "Generally," VI, D, 2, c, (3), (c), (cc), (bbb), (cccc), (aaaaa); "Limitations upon the Power of Congress; Operation of the Constitution within the Territories," VI, D, 2, c, (3), (cc), (bbb), (cccc), (bbbbb).

3. IN THE DISTRICT OF COLUMBIA AND PLACES UNDER EXCLUSIVE FEDERAL CONTROL.—Congress in the government of the District of Columbia has plenary power, save as controlled by the provisions of the constitution.<sup>46</sup> There is nothing in the history of the constitution or of the original amendments, however, to justify the assertion that the people of the District of Columbia may be lawfully deprived of the benefit of any of the constitutional guaranties of life, liberty and property.<sup>47</sup> The mere cession of the District of Columbia to the federal government relinquished the authority of the states, but it did not take it out of the United States or from under the ægis of the constitution. The district still remains a part of the United States, protected by the constitution.<sup>48</sup> The constitution having once attached thereto, its operation within the district is irrevocable.<sup>49</sup>

**45. Same.**—*Stearns v. Minnesota*, 179 U. S. 223, 241, 43 L. Ed. 162.

"What are legislatures? Creatures of the constitution; they owe their existence to the constitution; they derive their powers from the constitution; it is their commission; and therefore, all their acts must be conformable to it, or else they will be void." *Vanhorne v. Dorrance*, 2 Dall. 304, 308, 1 L. Ed. 391.

A state constitution being the supreme law of the state, a limitation therein upon the power of municipal corporations to incur debts, is binding upon the legislature, and it cannot dispense therewith either directly or indirectly. *Buchanan v. Litchfield*, 102 U. S. 278, 287, 288, 26 L. Ed. 138; *Dixon County v. Field*, 111 U. S. 83, 89, 28 L. Ed. 360; *Lake County v. Rollins*, 130 U. S. 662, 32 L. Ed. 1060; *Lake County v. Graham*, 130 U. S. 674, 684, 32 L. Ed. 1065; *Doon Township v. Cummins*, 142 U. S. 366, 371, 35 L. Ed. 1044; *Litchfield v. Ballou*, 114 U. S. 190, 192, 193, 29 L. Ed. 132.

Corporate privileges conferred by a state constitution are not revocable by the legislature, even though the business which the company is thereby authorized to conduct is within the police power of the state; as, for example, where charter privileges of conducting a lottery are revived and confirmed by constitutional amendment. *New Orleans v. Houston*, 119 U. S. 265, 30 L. Ed. 411, distinguishing *Stone v. Mississippi*, 101 U. S. 814, 25 L. Ed. 1079.

**46. Operation of the constitution in the District of Columbia.**—*Binns v. United*

*States*, 194 U. S. 486, 491, 48 L. Ed. 1087; *Wynn-Johnson v. Shoup*, 194 U. S. 496, 48 L. Ed. 1092.

**47. Inhabitants of the district entitled to the benefit of the guaranties of life, liberty and property.**—*Callan v. Wilson*, 127 U. S. 540, 550, 32 L. Ed. 223. See, also, post, "Jurisdiction in the District of Columbia and Places under Exclusive Federal Control," VI, D, 3, c, (3), (b).

**48. Effect of cession of the district to the United States.**—*Downes v. Bidwell*, 182 U. S. 244, 261, 45 L. Ed. 1088, reaffirmed in *Czarnikow v. Bidwell*, 191 U. S. 559, 48 L. Ed. 302; *Warner v. Stranahan*, 191 U. S. 560, 48 L. Ed. 302.

**49. Same; operation of the constitution irrevocable.**—*Loughborough v. Blake*, 5 Wheat. 317, 5 L. Ed. 98; *Downes v. Bidwell*, 182 U. S. 244, 261, 45 L. Ed. 1088.

**Same; trial by jury.**—"It is beyond doubt, at the present day, that the provisions of the constitution of the United States securing the right of trial by jury, whether in civil or in criminal cases, are applicable to the District of Columbia. *Webster v. Reid* (1850), 11 How. 437, 460, 13 L. Ed. 761; *Callan v. Wilson* (1888), 127 U. S. 540, 550, 32 L. Ed. 223; *Thompson v. Utah* (1898), 170 U. S. 343, 42 L. Ed. 1061." *Capital Traction Co. v. Hof*, 174 U. S. 1, 5, 43 L. Ed. 873.

**Same; requirement as to the apportionment of direct taxes.**—The constitutional requirement as to the apportionment of a direct tax is applicable to the District of Columbia when congress enacts a statute to impose a direct tax for general pur-



4. **EX-TERRITORIAL OPERATION.**—By the constitution a government is ordained and established “for the United States of America,” and not for countries outside of their limits. It can have no operation in another country.<sup>50</sup> The provisions relating to the writ of habeas corpus, bills of attainder, ex post facto laws, trial by jury for crimes, and generally to the fundamental guaranties of life, liberty and property embodied in that instrument, have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country.<sup>51</sup> Citizenship of the United States does not give an immunity to commit crime in other countries, nor entitle one to demand, of right, a trial in any other mode than that allowed to its own people by the country whose laws he has violated and from whose justice he has fled. When an American citizen commits a crime in a foreign country he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States.<sup>52</sup> And when the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as may be agreed upon between the two countries, the laws of neither one being obligatory upon the other.<sup>53</sup>

poses in that district. *Loughborough v. Blake*, 5 Wheat. 317, 5 L. Ed. 98.

In *Loughborough v. Blake*, 5 Wheat. 317, 5 L. Ed. 98, it was held that the constitutional requirement as to the apportionment of a direct tax did not in terms require that the system of direct taxation, when resorted to, should be extended to the territories, as the words of the second section require that it shall be extended to all the states; that this provision might, therefore, be understood to furnish the rule when the territories are taxed, without imposing the necessity of extending the tax to them. In a later case it was said that there could be no doubt as to the correctness of this conclusion as applied to the District of Columbia, since it had been a part of the states of Maryland and Virginia, and therefore subject to the constitution; that the constitution having once attached thereto, its operation within the district was irrevocable. See *Downes v. Bidwell*, 182 U. S. 244, 261, 45 L. Ed. 1088.

**The fourteenth amendment.**—The fourteenth amendment not being a limitation upon the powers of congress, the due process clause thereof imposes no restriction upon congress when legislating for the District of Columbia. Congress is subject, however, to the restrictions contained in the fifth amendment. *Wight v. Davidson*, 181 U. S. 371, 384, 45 L. Ed. 900.

50. **Ex-territorial operation of the constitution.**—In re *Ross*, 140 U. S. 453, 464, 35 L. Ed. 581.

51. **Same; crimes committed in foreign countries.**—*Cook v. United States*, 138 U. S. 157, 181, 34 L. Ed. 906; In re *Ross*, 140 U. S. 453, 464, 35 L. Ed. 581; *Neely v. Henkel*, 180 U. S. 109, 122, 45 L. Ed. 448.

The guaranties which the constitution affords against accusations of capital or infamous crime, except by indictment or presentments by a grand jury, and for an

impartial trial by a jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad. In re *Ross*, 140 U. S. 453, 464, 35 L. Ed. 581; *Cook v. United States*, 138 U. S. 157, 181, 34 L. Ed. 906.

52. **Offender against laws of foreign country not protected.**—*Neely v. Henkel*, 180 U. S. 109, 123, 45 L. Ed. 448.

The act of June 6, 1900, is not unconstitutional and void, in that it does not secure to the accused, when surrendered to a foreign country for trial in its tribunals, all of the rights, privileges and immunities that are guarantied by the constitution to persons charged with the commission in this country of crime against the United States. *Neely v. Henkel*, 180 U. S. 109, 122, 45 L. Ed. 448.

“Within the meaning of the act of June 6, 1900, Cuba is foreign territory. It cannot be regarded, in any constitutional, legal, or international sense, a part of the territory of the United States.” *Neely v. Henkel*, 180 U. S. 109, 45 L. Ed. 448. See, also, *Pearcy v. Stranahan*, 205 U. S. 257, 265, 51 L. Ed. 793.

“Cuba is none the less foreign territory, within the meaning of the act of congress, because it is under a military government appointed by and representing the president in the work of assisting the inhabitants of that island to establish a government of their own, under which, as a free and independent people, they may control their own affairs without interference by other nations.” *Neely v. Henkel*, 180 U. S. 109, 120, 45 L. Ed. 448.

53. **Foreign representatives exercise authority only in accordance with permission of foreign country.**—In re *Ross*, 140 U. S. 453, 464, 35 L. Ed. 581.

**Same; trials before consular tribunals.**—“The constitution does not apply to for-

**D. Effect on Existing Laws.**—In the absence of a saving clause, the adoption of a new constitution, or the amendment of an old, operates to supersede and revoke all previous inconsistent and irreconcilable constitutional and statutory provisions and rights exercisable thereunder, at least so far as their future operation is concerned.<sup>54</sup>

**Effect of Fourteenth and Fifteenth Amendments.**—The effect of the fourteenth and fifteenth amendments of the constitution of the United States was to strike from the state constitutions and laws all laws and all provisions inconsistent therewith.<sup>55</sup>

foreign countries or to trials therein conducted, and congress may lawfully provide for such trials before consular tribunals, without the intervention of a grand or petit jury." *Downes v. Bidwell*, 182 U. S. 244, 271, 45 L. Ed. 1088, reaffirmed in *Czarnikow v. Bidwell*, 191 U. S. 559, 48 L. Ed. 302; *Warner v. Stranahan*, 191 U. S. 560, 48 L. Ed. 302.

The acts of congress, Rev., §§ 4083-4096, enacted for the purpose of carrying into effect various treaty stipulations giving the United States ex-territorial rights in China, Japan, and other foreign countries, and providing for the trial by a consular court, without presentment or indictment by a grand jury, and without a petit jury, of American citizens charged with the commission of crime in those countries, are valid constitutional enactments, since, as stated, the constitutional guaranties in regard to presentments and indictments for crime and in regard to jury trial have no ex-territorial operation. In re *Ross*, 140 U. S. 453, 464, 35 L. Ed. 581.

**The deck of a private American vessel**, it is true, is considered for many purposes constructively as territory of the United States, yet persons on board of such vessels, whether officers, sailors, or passengers, cannot invoke the protection of the constitutional provision referred to until brought within the actual territorial boundaries of the United States. In re *Ross*, 140 U. S. 453, 464, 35 L. Ed. 581.

**54. Effect on existing laws.**—*Respublica v. Chapman*, 1 Dall. 53, 56, 1 L. Ed. 33; *United States v. Villato*, 2 Dall. 370, 373, 1 L. Ed. 419; *South Carolina v. Georgia*, 93 U. S. 4, 9, 23 L. Ed. 782; *Neal v. Delaware*, 103 U. S. 370, 389, 26 L. Ed. 567; *Bush v. Kentucky*, 107 U. S. 110, 118, 27 L. Ed. 354; *Chicago, etc., R. Co. v. Wiggins Ferry Co.*, 108 U. S. 18, 27 L. Ed. 636; *Ex parte Yarbrough*, 110 U. S. 651, 665, 28 L. Ed. 274; *Commissioners v. League*, 129 U. S. 493, 32 L. Ed. 780; *Shreveport v. Cole*, 129 U. S. 36, 42, 32 L. Ed. 589; *Kaukauna Water Power Co. v. Green Bay, etc., Canal Co.*, 142 U. S. 254, 269, 35 L. Ed. 1004. See, also, ante, "Prospective and Retropective Operation," III, B, 14.

Upon the abolition of an old constitution those laws which become inconsistent with the provisions of the new constitution cease to exist, unless preserved by some saving clause contained therein. *United States v. Villato*, 2 Dall. 370, 373, 1 L. Ed. 419.

The constitution promulgated by the general convention which met in Pennsylvania on the 15th of July, 1776, for the purpose of framing a new government, operated as a dissolution of the government so far as related to the powers of Great Britain, but not in relation to the powers which prior to that time had been exercised by councils and committees. *Respublica v. Chapman*, 1 Dall. 53, 56, 1 L. Ed. 33.

The Pennsylvania act of March 29, 1788, suspending the act of March 28, 1787, the last mentioned act being entitled "an act for ascertaining and confirming to certain persons, called Connecticut claimants the lands by them claimed within the county of Luzerne," etc., was passed before the adoption of the constitution of the United States and was not affected by it. *Vanhorne v. Dorrance*, 2 Dall. 304, 319, 1 L. Ed. 391.

The compact between Georgia and South Carolina, made in 1787, determining the boundary between those states and providing that the navigation of the Savannah River along a certain channel should be forever free and open to the citizens of the two states without hindrance or molestation, must be construed in subordination to the commerce clause of the federal constitution, since both states have adopted and ratified that instrument. *South Carolina v. Georgia*, 93 U. S. 4, 9, 23 L. Ed. 782.

**55. Effect of fourteenth and fifteenth amendments.**—*Neal v. Delaware*, 103 U. S. 370, 389, 26 L. Ed. 567; *Ex parte Yarbrough*, 110 U. S. 651, 665, 28 L. Ed. 274.

Thus the Delaware constitutional provision restricting the right of suffrage to the persons of the white race, in force at the time of the adoption of the fourteenth and fifteenth amendments, was ipso facto superseded and avoided thereby; and the statutory provision of that state which provided that no person should be eligible to serve as a juror unless he was a qualified voter, was, by the operation of these amendments, enlarged so as to embrace all who by the state constitution, as modified by the fourteenth and fifteenth amendments, were qualified to vote. *Neal v. Delaware*, 103 U. S. 370, 389, 26 L. Ed. 567.

In all cases where the former slaveholding states had not removed from their constitutions the words "white man" as a qualification for voting, the fifteenth amendment did, in effect, confer on the negro the right to vote, because, being



**Constitutional Amendment of Statutes.**—The adoption of a new constitution, or of an amendment, does not operate to amend inconsistent acts of the legislature so as to perpetuate them in a modified form. The reason is that the power of ordinary legislation is vested, under all our constitutions, in the legislature, and constitutional conventions do not ordinarily assume to exercise such power. The amendment of statutes is usually left to be accomplished by the legislature according to a prescribed course. And it is immaterial that the constitution or the schedule thereof provides that existing statutes shall be continued in force in so far as not inconsistent therewith.<sup>56</sup>

**Presumption as to Recognition of Amendment.**—The presumption should be indulged, in the first instance, that the state recognizes, as is its plain duty, an amendment of the federal constitution from the time of its adoption as binding on all of its citizens and every department of its government, and to be enforced, within its limits, without reference to any inconsistent provisions in its own constitution or statutes.<sup>57</sup> But where the state legislature has re-enacted the inconsistent act subsequent to the adoption of the amendment, or where the judicial tribunals of the state have by their decisions repudiated the amendment as a part of the supreme law of the land, such presumption does not obtain.<sup>58</sup>

**Effect of Federal Constitution upon the Ordinance of 1787.**—See post, "Effect of Constitution upon Ordinances of the Old Confederation," VI, D, 2, c, (3), (d).

**E. Effect on Pending Suits.**—The eleventh amendment to the federal constitution operated to supersede all suits depending, as well as to prevent the institution of new suits, against any one of the United States by citizens of another state.<sup>59</sup>

**F. Self-Executing Provisions.**—A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law. Thus, a constitution may very clearly require county and town government; but if it fails to indicate its range, and to provide proper machinery, it is not in this particular self-executing, and legislation is essential. Where a constitutional provision is complete in itself it needs no further legislation to put it in force. When

paramount to the state law, and a part of the state law, it annulled the discriminating word white, and thus left him in the enjoyment of the same right as white persons. And such would be the effect upon any future constitutional provision of a state which should give the right of voting exclusively to white people, whether they be men or women. *Neal v. Delaware*, 103 U. S. 370, 26 L. Ed. 567; *Ex parte Yarbrough*, 110 U. S. 651, 665, 28 L. Ed. 274.

The unexercised right, given by a state statute, enacted before the adoption of the fourteenth amendment to the federal constitution, to do that which, in effect, amounts to a taking of private property without due process of law, was revoked by the adoption of that amendment. *Kaukauna Water Power Co. v. Green Bay, etc., Canal Co.*, 142 U. S. 254, 269, 35 L. Ed. 1004.

**56. Constitutional amendment of statutes.**—*Commissioners v. Loague*, 129 U. S. 493, 32 L. Ed. 780.

Thus a grant of power to a county or municipality to lend its aid or to subscribe to the stock of a railroad company, upon

such conditions and terms as are valid under an existing constitution, is not merely amended, but absolutely revoked and superseded by a new constitution which prohibits counties and municipalities from lending their aid or subscribing to the stock of public enterprises except upon different terms and conditions; as, for example, the requirement of a three-fourth majority, where under the previous constitution a bare majority was sufficient. *Norton v. Board of Comm'rs*, 129 U. S. 479, 493, 32 L. Ed. 774.

**57. Presumption as to recognition and enforcement of amendment.**—*Neal v. Delaware*, 103 U. S. 370, 390, 26 L. Ed. 567; *Bush v. Kentucky*, 107 U. S. 110, 118, 27 L. Ed. 354; *Chicago, etc., R. Co. v. Wiggins Ferry Co.*, 108 U. S. 18, 27 L. Ed. 636; *Shreveport v. Cole*, 129 U. S. 36, 42, 32 L. Ed. 589.

**58. Same.**—*Bush v. Kentucky*, 107 U. S. 110, 118, 27 L. Ed. 354.

**59. Effect of constitution on pending suits.**—*Hollinsworth v. Virginia*, 3 Dall. 378, 1 L. Ed. 644; *Hans v. Louisiana*, 134 U. S. 1, 11, 33 L. Ed. 842.



it lays down certain general principles, as to enact laws upon a certain subject, or for the incorporation of cities of certain population, or for uniform laws upon the subject of taxation, it may need more specific legislation to make it operative. In other words, it is self-executing only so far as it is susceptible of execution. But where a constitution asserts a certain right, or lays down a certain principle of law or procedure, it speaks for the entire people as their supreme law, and is full authority for all that is done in pursuance of its provisions. In short, if complete, itself, it executes itself.<sup>60</sup>

**G. Who May Raise Constitutional Questions—1. GENERALLY.**—The general rule that no person has any standing in any court as a suitor, unless he

**60. Self-executing provisions.**—*Davis v. Burke*, 179 U. S. 399, 403, 45 L. Ed. 249; *Cooley Const. Lim.*, p. 99.

**Illustrations.**—The prohibitions to the states contained in the fifth section of the first article of the federal constitution are self-executing and require no legislation to make them effective. *Dodge v. Woolsey*, 18 How. 331, 349, 15 L. Ed. 401.

The thirteenth amendment as well as the fourteenth is self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force and effect it abolished slavery and established universal freedom. *Civil Rights Cases*, 109 U. S. 3, 20, 27 L. Ed. 835; *Clyatt v. United States*, 197 U. S. 207, 216, 49 L. Ed. 726.

"Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the amendment is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." *Clyatt v. United States*, 197 U. S. 207, 217, 49 L. Ed. 726.

The third paragraph of § 2 art. 4, of the constitution, provides: "No person held to service or labor in one state, under the laws thereof, escaping into another shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due." By virtue of this provision the owners of slaves were clothed with authority in every state in the Union to arrest and recapture their slaves whenever such recapture could be effected without a breach of the peace, or any illegal violence. In this sense, and to this extent, this clause of the constitution was self-executing, and required no aid from legislation, state or national. *Story, J.*, delivering the opinion of the court in *Prigg v. Pennsylvania*, 16 Pet. 539, 613, 10 L. Ed. 1060.

A provision in a state constitution that the credit of no county, city or town shall be given or loaned to or in aid of any person, company association or corporation,

except upon an election to be first held by the qualified voters of such county, city or town, and the assent of three-fourths of the votes passed at said election, operates directly upon the municipalities themselves, and is self-executing. *Norton v. Board of Comm'rs*, 129 U. S. 479, 489, 32 L. Ed. 774.

**Article 1, § 8, of the constitution of Idaho**, that no person shall be held to answer for any felony or criminal offense of any grade, unless upon presentment or indictment of a grand jury, or on information by the public prosecutor, after a commitment by a magistrate, is self-executing. *Davis v. Burke*, 179 U. S. 399, 401, 403, 45 L. Ed. 249.

**Section 264 of the Mississippi constitution of 1890**, prescribing the qualifications of grand and petit jurors, became the law of the state immediately upon the adoption of the constitution, and legislation was not necessary to give it effect. *Gibson v. Mississippi*, 162 U. S. 565, 590, 40 L. Ed. 1075.

**The constitution of Texas, declaring generally that aliens shall not hold land in Texas**, except by title emanating directly from the government, did not divest their title; for it adds, that "they shall have a reasonable time to take possession of and dispose of the same in a manner hereafter to be pointed out by law." Before the title can be divested, proceedings for enforcing its forfeiture must be provided by law, and carried into effect. *Airhart v. Massieu*, 98 U. S. 491, 25 L. Ed. 213.

**The constitution of Mississippi adopted on the 26th day of October, 1832**, provided that, "the introduction of slaves into this state, as merchandise, or for sale, shall be prohibited from and after the first day of May, 1833." There were no penalties or sanctions provided in the constitution for the due and effectual operation of this provision. Held, that this provision was not self-executing, but contemplated the enactment of legislation for the purpose of carrying it into effect; that consequently, a contract for the purchase of slaves, brought into the state to be sold as merchandise subsequent to the first day of May, 1833, and prior to the enactment of the statute of 1837 for the purpose of making this provision effectual, was valid, and that the purchasers were bound upon their note given for the purchase money

alleges and shows that he has an actionable interest in the rights which he seeks to recover, or that he has suffered or will suffer an actionable injury by reason of the wrongs which he seeks to redress or prevent, applies with full force to persons seeking to raise constitutional questions in the courts of justice. In order to maintain an action or suit, they must establish that they have an actionable interest in the constitutional rights which they seek to protect.<sup>61</sup> A court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has therefore no interest in defeating it; that is, a legal interest in defeating it. The objection to the constitutionality of a statute must be made by one having the right to make it, not by a stranger to its grievance.<sup>62</sup> Likewise the unconstitutionality of an act cannot be set up in de-

of said slaves. *Groves v. Slaughter*, 15 Pet. 449, 10 L. Ed. 800.

Admitting that such a provision of the constitution was mandatory upon the legislature, and that they neglected their duty in not carrying it into execution, such neglect had no effect upon the construction of the article; it required the sanction of penalties to accomplish its object, and legislative provision was essential to carry it into effect. *Groves v. Slaughter*, 15 Pet. 449, 10 L. Ed. 800.

Moreover, the enactment of the law of 1837 to carry this provision of the constitution into effect, by imposing penalties from and after the passing of the law, showed the sense of the legislature on the subject, and that in the opinion of the legislature such a law was necessary. Also the laying of a tax upon slaves brought into the state for sale after May 1, 1833, showed that the provision in the constitution was not considered in operation without some legislative provision to carry it into effect. *Groves v. Slaughter*, 15 Pet. 449, 10 L. Ed. 800.

The federal supreme court adhered to the construction given to this provision of the Mississippi constitution in *Groves v. Slaughter*, and enforced contracts made before the enactment of the act of May 13, 1837, notwithstanding the state court of last resort subsequent to the decision of *Groves v. Slaughter*, 15 Pet. 449, 10 L. Ed. 800, declared such contracts to be void. *Rowan v. Runnels*, 5 How. 134, 12 L. Ed. 85; *Truly v. Wanzer*, 5 How. 141, 12 L. Ed. 88; *Sims v. Hundley*, 6 How. 1, 12 L. Ed. 319.

**Article 13, § 3, of the constitution of Ohio of 1851**, providing that dues from corporations should be secured by such individual liability of the stockholders and other means as might be prescribed by law, was not so far self-executing that it could be enforced outside of the jurisdiction of said state without compliance with the requirements of § 3260 of the Revised Statutes of Ohio as amended in 1894. *Middletown Nat. Bank v. Toledo, etc.*, R. Co., 197 U. S. 394, 403, 49 L. Ed. 803.

**Provision that legislature should have power to prevent abuses and discrimination by water companies.**—Where a state constitution provided that the legislature should have full power to prevent unjust

discrimination and avoid abuses and excessive charges by water companies, such provision was held to be self-executing and controlling on any contract made after its going into effect. *Tampa Waterworks Co. v. Tampa*, 199 U. S. 241, 243, 50 L. Ed. 170.

**61. Who may raise constitutional questions; generally.**—*Worcester v. Georgia*, 6 Pet. 515, 595, 8 L. Ed. 483; *Board of Liquidation v. McComb*, 92 U. S. 531, 536, 23 L. Ed. 623; *Ex parte Karstendick*, 93 U. S. 396, 404, 23 L. Ed. 889; *Hagar v. Reclamation District No. 108*, 111 U. S. 701, 712, 28 L. Ed. 569; *Marye v. Parsons*, 114 U. S. 325, 29 L. Ed. 205; *Clough v. Curtis*, 134 U. S. 361, 371, 33 L. Ed. 945; *Wiley v. Sinkler*, 179 U. S. 58, 45 L. Ed. 84; *Mason v. Missouri*, 179 U. S. 328, 333, 45 L. Ed. 214; *Red River Valley Nat. Bank v. Craig*, 181 U. S. 548, 45 L. Ed. 994.

**62. Supervisors v. Stanley**, 105 U. S. 305, 26 L. Ed. 1044; *Clark v. Kansas City*, 176 U. S. 114, 118, 44 L. Ed. 392; *Tyler v. The Court of Registration*, 179 U. S. 405, 45 L. Ed. 252; *Lampasas v. Bell*, 180 U. S. 276, 283, 45 L. Ed. 527; *Red River Valley Nat. Bank v. Craig*, 181 U. S. 548, 45 L. Ed. 994; *Turpin v. Lemon*, 187 U. S. 51, 60, 47 L. Ed. 70; *Chadwick v. Kelley*, 187 U. S. 540, 547, 47 L. Ed. 293; *Hooker v. Burr*, 194 U. S. 415, 419, 48 L. Ed. 1046.

"In a case from a state court, this court does not listen to objections of those who do not come within the class whose constitutional rights are alleged to be invaded; or hold a law unconstitutional because, as against the class making no complaint, the law might be so held." *New York v. Reardon*, 204 U. S. 152, 51 L. Ed. 415. See, also, *Supervisors v. Stanley*, 105 U. S. 305, 311, 26 L. Ed. 1044; *Clark v. Kansas City*, 176 U. S. 114, 118, 44 L. Ed. 392; *Lampasas v. Bell*, 180 U. S. 276, 283, 284, 45 L. Ed. 527; *Cronin v. Adams*, 192 U. S. 108, 114, 48 L. Ed. 365; *The Winnebago*, 205 U. S. 354, 360, 51 L. Ed. 836.

**Whether particular body a de jure legislative assembly.**—"It is not one of the functions of a court to make up the records of the proceedings of legislative bodies. Nor can it be required, in a case not involving the private interests of parties,



to determine whether particular bodies, assuming to exercise legislative functions, constitute a lawful legislative assembly." *Clough v. Curtis*, 134 U. S. 361, 371, 33 L. Ed. 945.

**Want of due process; taking or damaging property.**—A person who had the requisite notice, and who has appeared at the hearing, cannot attack the constitutionality of the Massachusetts Torrens act for land registration upon the ground that persons may be deprived of property without due process of law under those provisions of the act providing for the giving of notice by registered letter, posting of notice, publication, etc., *Tyler v. The Court of Registration*, 179 U. S. 405, 45 L. Ed. 252.

An objection to the validity of an ordinance on the ground that it was unconstitutional as authorizing the taking of private property without compensation can be made only by one whose property is taken and not by those who have no property that has been or can be affected thereby. *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, 50 L. Ed. 204.

A municipal corporation, the boundaries of which have been extended to include certain adjacent territory with its inhabitants, cannot object on behalf of the people so brought within its limits that they were denied their constitutional rights in that they were given no opportunity to be heard upon the question of incorporation into the city. *Lampasas v. Bell*, 180 U. S. 276, 45 L. Ed. 527.

**Objection to statute as denying the equal protection of the laws.**—A person, natural or artificial, who is not affected by the discrimination made by a law, cannot raise the question of its constitutionality on the ground that it denies the equal protection of the laws. *Clark v. Kansas City*, 176 U. S. 114, 118, 44 L. Ed. 392.

**Same; extension of boundaries; railroad lands.**—Thus the provision in § 1 of chapter 74 of the Laws of Kansas of 1891, authorizing certain cities to extend their boundaries by ordinance and take in lands used for agricultural purposes and owned by railroad and other corporations, but not agricultural lands owned by individuals, cannot be objected to by a railroad company as making an unjust discrimination between railroad and other corporations on the one hand and individuals on the other, where the land owned by the company and taken into the city under the ordinance extending the boundaries is used, not for agricultural, but for railroad purposes. *Clark v. Kansas City*, 176 U. S. 114, 118, 44 L. Ed. 392.

But the railroad company may raise the question for what it is worth of the constitutionality of the discrimination made in favor of lands used for agricultural purposes and against lands used for

other purposes. *Clark v. Kansas City*, 176 U. S. 114, 118, 44 L. Ed. 392.

**Impairment of obligation—Public land grants to the states.**—A private individual, who is no party to a contract between a state and the United States respecting a grant of public lands for the construction of canals, to be used, when completed, as public highways by the general government, has no standing to raise the question of the constitutionality of state legislation alleged to impair the obligation of the contract. *Walsh v. Columbus, etc.*, R. Co., 176 U. S. 469, 479, 44 L. Ed. 548, followed in *Vaught v. Columbus, etc.*, R. Co., 176 U. S. 481, 44 L. Ed. 554; *Wright v. Columbus, etc.*, R. Co., 176 U. S. 481, 44 L. Ed. 554.

Upon objection that the law of California authorizing an assessment for the reclamation of swamp lands impaired the obligation of the contract created between the state and the United States by the act of congress of September 28, 1850 (9 Stat. 519, 84), commonly known as the Arkansas Swamp Act, it was answered that the plaintiff was not a party to such contract, and was in no position to invoke its protection. *Hagar v. Reclamation District No. 108*, 111 U. S. 701, 712, 28 L. Ed. 569; *Mills County v. Railroad Companies*, 107 U. S. 557, 27 L. Ed. 578.

**Same—Mortgagees, creditors, purchasers at judicial sales, etc.**—An independent purchaser, having no connection whatever with the mortgage, excepting as he becomes purchasers at the foreclosure sale, cannot raise the question in his own behalf in relation to the validity of legislation as to redemption and rate of interest which existed at the time he made his purchase. This question has been clearly determined against the purchaser in the case of *Connecticut Mut. Life Ins. Co. v. Cushman*, 108 U. S. 51, 27 L. Ed. 648. The later case of *Barnitz v. Beverly*, 163 U. S. 118, 41 L. Ed. 93, when the facts therein are regarded, does not militate against the soundness of the views expressed in the *Cushman* case, and in addition to that it was distinctly so stated in the opinion of the court. *Hooker v. Burr*, 194 U. S. 415, 426, 48 L. Ed. 1046. See the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**.

"Therefore, if the mortgagee, or his assignee, were himself the plaintiff, and complaining that the obligation of his contract had been impaired by subsequent legislation, it is plain his complaint would be dismissed when it appeared that, notwithstanding the alleged subsequent illegal legislation, he suffered no injury, because he had proceeded with the foreclosure of his mortgage and had been paid the full amount of his contract debt, interest and costs. Under such circumstances the question becomes a moot one, and courts do not sit to decide questions



of that character. *American Book Co. v. Kansas*, 193 U. S. 49, 49 L. Ed. 613; *Jones v. Montague*, 194 U. S. 147, 48 L. Ed. 913." *Hooker v. Burr*, 194 U. S. 415, 419, 48 L. Ed. 1046.

**Refusal to receive Virginia coupons.**—

The constitutional right of a holder of Virginia coupons, issued under the Funding Act of that state of March 30, 1871, to have the same received in payment of taxes due to the state can be enforced only by a taxpayer. To enable the complainant to avail himself of the benefit of his contract, he must first assign his coupons to some one who has taxes to pay; and when he has done that, he no longer has any interest in the coupons, and cannot maintain an action for a refusal to so receive them. A bill which alleges that the plaintiff has made arrangements with the certain taxpayers to use his coupons in payment of their taxes, but that the state officers have refused to receive them, will be dismissed. *Marye v. Parsons*, 114 U. S. 325, 29 L. Ed. 205.

**Unconstitutional increase of state debt.**

—So it is held, that the action of the legislature, in increasing the state debt beyond the constitutional limit, or in failing to provide adequate ways and means, as required by the state constitution, for the payment of a debt created, while it affects the public generally, is held to affect no individual in particular in such manner as to give him a legal remedy. The interest of a creditor of the state is too remote to enable him to interfere by suit to prevent a supposed violation of the state constitution by an increase of the state debt. *Board of Liquidation v. McComb*, 92 U. S. 531, 23 L. Ed. 623. (See *quære*, as to taxpayers.)

**Paving ordinance; requiring employment of resident laborers only.**—In *Chadwick v. Kelley*, 187 U. S. 540, 546, 47 L. Ed. 293, it is said: "Because the ordinance and specifications, under which the paving in this case was done, require the contractor to employ only bona fide resident citizens of the city of New Orleans as laborers on the work, it cannot be contended, on behalf of the plaintiff in error, that thereby citizens of the state of Louisiana, and of each and every state and the inhabitants thereof, are deprived of their privileges and immunities under article 4, § 2, and under the fourteenth amendment to the constitution of the United States. In so far as the provisions of the city ordinance may be claimed to affect the rights and privileges of citizens of Louisiana and of the other states, the plaintiff in error is in no position to raise the question. It is not alleged, nor does it appear, that he is one of the laborers excluded by the ordinance from employment, or that he occupies any representative relation to them. Apparently he is one of the preferred class of resi-

dent citizens of the city of New Orleans."

**Georgia statute excluding white residents from Cherokee country.**—Persons residing within the limits of the Cherokee nation in the state of Georgia were not entitled to question the constitutionality of the Georgia statute extending the jurisdiction of the state of Georgia over the Cherokee Indians and the territory occupied by them and forbidding a white person to reside within the limits of the Cherokee territory without permission from the state of Georgia, except so far as such laws affected their liberty or interests. (Opinion of McLean, J.) *Worcester v. Georgia*, 6 Pet. 515, 595, 8 L. Ed. 483.

**Constitutional rights of condemned person; interference by third persons.**—However friendly one may be to a condemned man and sympathetic for his situation; however concerned he may be lest unconstitutional laws be enforced, and however laudable such sentiments are, the grievance they suffer and feel is not special enough to furnish a cause of action having for its purpose the prevention of the enforcement of such laws and the liberation of the condemned person. *Gusman v. Marrero*, 180 U. S. 81, 87, 45 L. Ed. 436.

Thus it was held that an action could not be maintained by a third person to prevent the carrying out of a sentence of death, and to liberate the accused person, upon the ground that the constitution and laws, under and in accordance with which he was tried and condemned, were not the true constitution and laws of the state, because of said constitution not having been adopted in the manner prescribed by the former and true constitution of the state. *Gusman v. Marrero*, 180 U. S. 81, 45 L. Ed. 436.

**Confinement of federal prisoners in state prisons.**—Where the laws of the United States have authorized the confinement of federal offenders in designated state prisons, and the prison officers receive and retain in custody persons sentenced thereto, the persons so imprisoned cannot object that congress had no power to use the state's prison without the state's consent, and that the state has not consented; such objection must come from the state. *Ex parte Karstendick*, 93 U. S. 396, 404, 23 L. Ed. 889.

**Where statute void as being ex post facto.**—See post, "Who May Question Constitutionality of Law," XIX, H.

**Right of public officer to question validity of statute.**—"The power of a public officer to question the constitutionality of a statute as an excuse for refusing to enforce it has often been assumed, and sometimes directly decided, to exist. In any event, it is a purely local question, and seems to have been so treated by this

fense to an action or prosecution by one who is in no wise prejudiced thereby.<sup>63</sup>

2. **ESTOPPEL TO RAISE CONSTITUTIONAL QUESTIONS.**—When a party has availed himself of the benefit of an unconstitutional law, he cannot, in a subsequent litigation with others not in that position, aver its constitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit. In such cases the principle of estoppel applies with full force and conclusive effect.<sup>64</sup> And where a litigant in a state court avails himself of a right or power conferred by a state law, and joins in a trial or other proceeding in which he relies upon the statute as a valid act, he thereby waives all objections to its validity and estops himself from objecting to it as unconstitutional.<sup>65</sup>

**But Validity of Law Cannot Be Established Through an Estoppel.**—

There can be no estoppel in the way of ascertaining the existence of a law. That which purports to be a law of a state is a law, or it is not a law, according as the truth of the fact may be, and not according to the shifting circumstances of parties. It would be an intolerable state of things if a document purporting to be an act of the legislature could thus be a law in one case and for one party, and not a law in another case and for another party; a law to-day, and not a law to-morrow; a law in one place, and not a law in another in the same state. And

court in *Huntington v. Worthen*, 120 U. S. 97, 101, 30 L. Ed. 588." *Smith v. Indiana*, 191 U. S. 138, 148, 48 L. Ed. 125.

63. **Unconstitutionality no defense to one not affected thereby.**—*Jaehne v. New York*, 128 U. S. 189, 194, 32 L. Ed. 398.

64. **Estoppel to raise constitutional objections.**—*McKinney v. Carroll*, 12 Pet. 66, 9 L. Ed. 1002; *Daniels v. Tearney*, 102 U. S. 415, 421, 26 L. Ed. 187; *Pierce v. Somerset Railway*, 171 U. S. 641, 648, 43 L. Ed. 316. See the title **ESTOPPEL**.

Thus, where defendants, whose property was about to be sold upon execution, availed themselves of the unconstitutional act of the Virginia legislature, passed upon the 13th day of April, 1861, providing, among other things, for the suspension of the enforcement of executions and the return of the property to the execution defendant upon his tendering bond with security for the payment of the debt, interest, and costs, it was held, in an action upon the bond, that they were estopped to plead the unconstitutionality of the statute. *Daniels v. Tearney*, 102 U. S. 415, 421, 26 L. Ed. 187. Accord: *McKinney v. Carroll*, 12 Pet. 66, 9 L. Ed. 1002.

65. **Same; where litigant has availed himself of benefit of act.**—*Clay v. Smith*, 3 Pet. 411, 7 L. Ed. 723; *Beaupre v. Noyes*, 138 U. S. 397, 34 L. Ed. 991; *Eustis v. Bolles*, 150 U. S. 361, 37 L. Ed. 1111; *Electric Co. v. Dow*, 166 U. S. 489, 41 L. Ed. 1088; *Pierce v. Somerset Railway*, 171 U. S. 641, 648, 43 L. Ed. 316.

This doctrine has found frequent illustration in the case of persons accepting the benefit of dividends and compositions under bankrupt and insolvency laws which they afterwards sought to have declared unconstitutional. Such were the cases of *Clay v. Smith*, 3 Pet. 411, 7 L. Ed. 723; *Beaupre v. Noyes*, 138 U. S.

397, 34 L. Ed. 991; *Eustis v. Bolles*, 150 U. S. 361, 37 L. Ed. 1111.

A creditor who accepts a dividend awarded in a composition under a state insolvency law thereby waives or abandons his right to attack the constitutionality of the law. *Clay v. Smith*, 3 Pet. 411, 7 L. Ed. 723. See, also, *Eustis v. Bolles*, 150 U. S. 361, 37 L. Ed. 1111.

So where an act of the state of New Hampshire provided that, in proceedings to ascertain the damages occasioned from the flowage of lands in the erection of mill dams, either party might elect to have the damages assessed by a jury, and that judgment for the amount awarded, with fifty per cent added, should be final, it was held that a litigant who had elected to proceed thereunder was estopped to question the constitutionality of the provision adding fifty per cent to the amount of the damages assessed by the jury. *Electric Co. v. Dow*, 166 U. S. 489, 41 L. Ed. 1088.

S, the purchaser of a railroad property at a sale under foreclosure, and his associates could not demand to be incorporated under the statutes of Michigan as a matter of contract right. Possessing no such contract right, they or their privies cannot be heard to assail the constitutionality of the conditions which were agreed to be performed when the grant by the state was made of the privilege to operate as a corporation the property in question. Having voluntarily accepted the privileges and benefits of the incorporation law of Michigan, the company was bound by the provisions of existing laws regulating rates of fares upon railroads, and it was estopped from repudiating the burdens attached by the statute to the privilege of becoming an incorporated body. *Grand Rapids, etc., R. Co. v. Osborn*, 193 U. S. 17, 29, 48 L. Ed. 598.



whether it be a law, or not a law, is a judicial question, to be settled and determined by the courts and judges. The doctrine of estoppel is totally inadmissible in the case.<sup>66</sup> When certain parties have acted and have been placed in obligatory positions toward others under a statute subsequently declared unconstitutional, such persons cannot claim the benefit of an estoppel in such manner as to have such void law executed as against the parties claimed to have been estopped. Speaking upon this point, the court said: "We are unwilling to assent to the doctrine of legislation by estoppel. The courts cannot, by the execution of an unconstitutional law as a law, supply the want of power in the legislative department."<sup>67</sup> This result is not inconsistent, however, with the cases which hold that, "although a law is found to be unconstitutional, a party who has received the full benefit under it, may be compelled to pay for that benefit according to the terms of the law. This is upon the theory of an implied contract, the terms of which may be sought in the invalid law, and which arises when the full consideration has been received by the party against whom the contract is sought to be enforced."<sup>68</sup>

**Application of Doctrine Raises No Federal Question.**—The application of the doctrine of estoppel in such cases raises no federal question.<sup>69</sup>

3. **WAIVER OF ABANDONMENT OF CONSTITUTIONAL RIGHTS.**—Speaking generally upon this subject, Mr. Justice Hunt, in a case arising out of the statute of the state of Wisconsin requiring foreign insurance companies to waive their right to remove causes into the federal courts, as a condition precedent to the right to do business within the state, said: "Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life, or his free-

**66. Validity of law cannot be established through an estoppel.**—*South Ottawa v. Perkins*, 94 U. S. 260, 267, 24 L. Ed. 154; *O'Brien v. Wheelock*, 184 U. S. 450, 489, 46 L. Ed. 636.

**Estoppel to deny validity of law under which municipal bonds were issued.**—A municipal corporation is not estopped to deny the constitutionality of an act authorizing it to tax its citizens to pay the interest on bonds issued in aid of a private manufacturing enterprise by the fact that the town authorities paid one installment of interest on the bonds by means of a levy of taxes for that purpose. *Loan Association v. Topeka*, 20 Wall. 655, 667, 22 L. Ed. 455. See, generally, as to estoppel in this class of cases, the title **MUNICIPAL COUNTY, STATE AND FEDERAL SECURITIES**.

**67. Same; want of power not supplied through an estoppel.**—*O'Brien v. Wheelock*, 184 U. S. 450, 46 L. Ed. 636.

In *O'Brien v. Wheelock*, 184 U. S. 450, 46 L. Ed. 636, it was held that property owners, who had secured the enactment of a public improvement act and participated in the organization of an improvement district in accordance with the terms of the act were not estopped, as against the holders of improvement bonds issued under the act, to deny its constitutionality.

In *Shepard v. Barron*, 194 U. S. 553, 48 L. Ed. 1115, the court criticised the decision in *O'Brien v. Wheelock*, 184 U. S. 450, 46 L. Ed. 636, and said in part: "The plaintiffs have referred to *O'Brien v. Wheelock*, 184 U. S. 450, 46 L. Ed. 636,

as the chief authority to support their contentions as to estoppel. In that case, while the estoppel contended for was denied, yet, it is stated, in the opinion of the court, which was delivered by the chief justice, that: "The result is not inconsistent with the cases that hold that, although a law is found to be unconstitutional, a party who has received the full benefit under it may be compelled to pay for that benefit according to the terms of the law. This is upon the theory of an implied contract, the terms of which may be sought in the invalid law and which arises when the full consideration has been received by the party against whom the contract is sought to be enforced."

\* \* \* The history of the proceeding thereafter is given, commencing at page 457 of the report in 184 U. S., but it is entirely too long to be referred to here in detail. It is enough to say that, after perusing it, there will be found great difficulty in perceiving even a slight analogy to the case before us. The facts cannot be summarized. They must be appreciated in all their fullness and detail, and when thus examined the result arrived at will, as we think, seem inevitable. The case was *sui generis*."

**68. Not inconsistent with previous cases.**—*O'Brien v. Wheelock*, 184 U. S. 450, 491, 46 L. Ed. 636.

**69. Raises no federal question.**—*Gillis v. Stinchfield*, 159 U. S. 658, 40 L. Ed. 295; *Speed v. McCarthy*, 181 U. S. 269, 45 L. Ed. 855; *Leonard v. Vicksburg, etc., R. Co.*, 198 U. S. 416, 423, 49 L. Ed. 1108.



dom, or his substantial rights. In a criminal case, he cannot, as was held in *Cancemi's case*, 18 N. Y. 128, be tried in any other manner than by a jury of twelve men, although he consent in open court to be tried by a jury of eleven men. In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. So he may omit to exercise his right to remove his suit to a federal tribunal, as often as he thinks fit, in each recurring case. In these aspects any citizen may no doubt waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented."<sup>70</sup> "But provisions of a constitutional nature, intended for the protection of the property owner, may be waived by him, not only by an instrument in writing, upon a good consideration, signed by him, but also by a course of conduct which shows an intention to waive such provision, and where it would be unjust to others to permit it to be set up. Certainly when action of this nature has been induced at the request and upon the instigation of an individual he ought not to be thereafter permitted, upon general principles of justice and equity, to claim that the action which he has himself instigated and asked for, and which has been taken upon the faith of his request, should be held invalid and the expense thereof, which he ought to pay, transferred to a third person."<sup>71</sup>

**70. Waiver or abandonment of constitutional rights.**—*Insurance Co. v. Morse*, 20 Wall. 445, 451, 22 L. Ed. 365. Accord: *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 538, 24 L. Ed. 148; *Barron v. Burnside*, 121 U. S. 186, 30 L. Ed. 915. See, also, *Lafayette Ins. Co. v. French*, 18 How. 404, 407, 15 L. Ed. 451; *Ducat v. Chicago*, 10 Wall. 410, 415, 19 L. Ed. 972; *St. Clair v. Cox*, 106 U. S. 350, 356, 27 L. Ed. 222; *Philadelphia Fire Ass'n v. New York*, 119 U. S. 110, 120, 30 L. Ed. 342.

**Waiver of right to remove causes into federal court.**—Thus a statute which exacts from an insurance company, as a condition to the right to do business within the state, an agreement to abstain in all cases from resorting to the courts of the United States is void as against public policy, and as conflicting with the constitution of the United States. *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 24 L. Ed. 148; *Insurance Co. v. Morse*, 20 Wall. 445, 450, 22 L. Ed. 365; *Barron v. Burnside*, 121 U. S. 186, 30 L. Ed. 915. See, also, the title REMOVAL OF CAUSES.

**71. Waiver implied from conduct.**—*Shepard v. Barron*, 194 U. S. 553, 568, 48 L. Ed. 1115. See, also, *Pierce v. Somerset Railway*, 171 U. S. 641, 648, 43 L. Ed. 316.

"The constitutional right against unjust taxation is given for the protection of private property, and may be waived by those affected who consent to such action to their property as would otherwise be invalid." *Wight v. Davidson*, 181 U. S. 371, 377, 45 L. Ed. 900; *Shutte v. Thompson*, 15 Wall. 151, 159, 21 L. Ed. 123.

"Under some circumstances a party who is illegally assessed may be held to have waived all right to a remedy by a course of conduct which renders it unjust and

inequitable to others that he should be allowed to complain of the illegality. Such a case would exist if one should ask for and encourage the levy of the tax of which he subsequently complains; and some of the cases go so far in this direction as to hold that a mere failure to give notice of objections to one who, with the knowledge of the person taxed, as contractor or otherwise, is expending money in reliance upon payment from the taxes, may have the same effect. *Cooley*, on Taxation, p. 573, and cases cited in note 5; *Tagh v. Adams*, 10 Cush. 252; *Bidwell v. City of Pittsburg*, 85 Pa. St. 412; *Shutte v. Thompson*, 15 Wall. 151, 21 L. Ed. 123." *Shepard v. Barron*, 194 U. S. 553, 567, 48 L. Ed. 1115.

But see *O'Brien v. Wheelock*, 184 U. S. 450, 46 L. Ed. 636, where it was held that property owners who had secured the passage of an act and afterwards organized an improvement district thereunder were not estopped to deny its validity as against the holders of the improvement bonds.

"On principles of general law, we are satisfied that the plaintiffs are not in a position to assert the unconstitutionality of the act under which they petitioned that proceedings should be taken and that the assessment should be made in accordance with those provisions. This principle has been recognized in Ohio many times. See *State v. Mitchell*, 31 O. St. 592, 609; *Tone v. Columbus*, 39 O. St. 281, 296; *City of Columbus v. Shol*, 44 O. St. 479, 481; *City of Columbus v. Slyh*, 44 O. St. 484; *Mott v. Hubbard*, 59 O. St. 199, 211." *Shepard v. Barron*, 194 U. S. 553, 567, 48 L. Ed. 1115.

In *Wight v. Davidson*, 181 U. S. 371, 45 L. Ed. 900, the supreme court, while not positively deciding the proposition, strongly intimated that, by reason of the

**In Criminal Prosecutions.**—That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure when on trial and in custody, to object to unauthorized methods.<sup>72</sup> But when there is no constitutional or statutory mandate, and no public policy prohibiting, an accused person may waive any privilege which he is given the right to enjoy.<sup>73</sup>

**By Laches and Acquiescence.**—The right to enforce or protect a constitutional right in a court of equity may be lost by laches the same as other rights.<sup>74</sup>

acts of the appellees, they were not in a position to question the validity of the statute there under consideration; but as there were others than the appellees concerned, and a decision of the court of appeals had declared the act void as to the appellees, it was thought better to pass by the question whether they were estopped by having made the dedication provided for in the act, and to decide the question of the constitutionality of the act of congress under which the proceedings were had. The act was held to be valid. *Shepard v. Barron*, 194 U. S. 553, 567, 48 L. Ed. 1115.

**72. Waiver of constitutional requirements in criminal cases.**—*Hopt v. Utah*, 110 U. S. 574, 578, 28 L. Ed. 262; *Schwab v. Berggren*, 143 U. S. 442, 448, 36 L. Ed. 218; *Lewis v. United States*, 146 U. S. 370, 374, 36 L. Ed. 1011.

"The natural life, says Blackstone, 'cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures, merely upon their own authority.' 1 Bl. Com. 133. The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law." *Lewis v. United States*, 146 U. S. 370, 374, 36 L. Ed. 1011. See, also, the titles CRIMINAL LAW; DUE PROCESS OF LAW. And see post, "Protection to Persons Accused of Crime," XVIII, et seq.

**73. Otherwise as to mere privileges.**—*Schick v. United States*, 195 U. S. 65, 71, 49 L. Ed. 99.

"Can it be that a defendant can plead guilty of the most serious, even a capital offense, and thus dispense with all inquiry by a jury, and cannot, when informed against for a petty offense, waive a trial by jury? Article six of the amendments, as we have seen, gives the accused a right to a trial by jury. But the same article gives him the further right 'to be confronted with the witnesses against him \* \* \* and to have the assistance of counsel.' Is it possible that an accused cannot admit and be bound by the admission that a witness not present would testify to certain facts? Can it be that if he does not wish the assistance of counsel and waives it, the trial is invalid. It seems only necessary to ask these questions to answer them." *Schick v. United States*, 195 U. S. 65, 71, 49 L. Ed. 99.

"Authorities in the state courts are in harmony with this thought. In Common-

wealth *v. Dailey*, 12 Cush. 80, the defendant in a misdemeanor case waived his right to a full panel and consented to be tried by eleven jurors, and this action was sustained by the supreme court of Massachusetts. Chief Justice Shaw, delivering the opinion of the court, said (p. 83): 'He may waive any matter of form or substance, excepting only what may relate to the jurisdiction of the court.' The same doctrine was laid down in *Murphy v. Commonwealth*, 1 Met. (Ky.) 365; *Tyra v. Commonwealth*, 2 Met. (Ky.) 1, and in *State v. Kaufman*, 51 Iowa 578. In *Connelly v. State*, 60 Alabama 89, a statute authorizing the waiver of a jury was sustained. The same rule was made in *State v. Warden*, 46 Connecticut 349, which was a case of a felony. See, also, *People v. Rathburn*, 21 Wend. 509, 542." *Schick v. United States*, 195 U. S. 65, 72, 49 L. Ed. 99.

**74. Waiver by laches or acquiescence.**—*Pennsylvania Mut. Life Ins. Co. v. Austin*, 168 U. S. 685, 42 L. Ed. 626.

Relief has been denied to a corporation which has succeeded to the rights of a water company, and which claims that the obligation of its contract has been impaired by certain state laws and city ordinances, upon its appearing that the corporation lay idly by while the city proceeded at great expense under said laws and ordinances to the erection of its own waterworks, and which were nearing completion at the time suit was brought. *Pennsylvania Mut. Life Ins. Co. v. Austin*, 168 U. S. 685, 42 L. Ed. 626.

But where, by a contract between a municipal corporation and a water company, the power of the city to regulate water rates was restricted to the extent that it was forbidden to reduce the rates below the rates then existing, acquiescence by the water company under protest for a period of fifteen years, in an ordinance alleged to impair the obligation of a contract, was held not to estop the company to contest its validity, it appearing that there was no concealment, no misleading, no injury, no change of condition, and no circumstances upon which to invoke the doctrine of estoppel or laches. *Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558, 578, 44 L. Ed. 886.

Where a statute has been enacted providing for compensation to persons whose property has been taken in the construction of a public improvement, and a rea-

"A person may by his acts, or omission to act, waive a right which he might otherwise have under the constitution of the United States as well as under a statute, and the question whether he has or has not lost such right by his failure to act or by his action, is not a federal one."<sup>75</sup>

## V. System or Theory of Constitutional Government in General.

**A. State or Government Defined.**—The word state describes sometimes a people or community of individuals united more or less closely in political relations, inhabiting temporarily or permanently the same country; often it denotes only the country, or territorial region, inhabited by such a community; not unfrequently it is applied to the government under which the people live; at other times, it represents the combined idea of people, territory, and government.<sup>76</sup>

In the constitution the term state most frequently expresses the combined idea just noticed, of people, territory and government. A state, in the ordinary sense of the constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed.<sup>77</sup>

**Distinction between State and Government of the State.**—There is an important distinction between a state and the government of a state. The state itself is an ideal person, intangible, invisible, immutable. The government is an

sonable opportunity has been afforded to such persons to obtain such compensation, and a reasonable time has elapsed without their having taken any steps to do so, the government is not bound to keep such statute in force indefinitely, but may repeal it, since under such circumstances they must be deemed to have waived their right to damages or compensation. *Kaukauna Water Power Co. v. Green Bay, etc., Canal Co.*, 142 U. S. 254, 280, 35 L. Ed. 1004.

So where a landowner acquiesces for a number of years in the appropriation of his property to public use without compensation and without the observance of other legal requirements concerning the appropriation of private property, he will be held to have waived his rights and cannot, *manu forti*, obstruct the public use and repossess himself of his own. *Kaukauna Water Power Co. v. Green Bay, etc., Canal Co.*, 142 U. S. 254, 280, 35 L. Ed. 1004.

Thus where a lot owner had acquiesced for over twenty-five years in the construction and maintenance of a dam and water power and in the exclusive appropriation of the water by the state and its grantees, it was held that he could not then treat the proceedings as a nullity and take such action as could only be justified upon the theory that the state and its grantee had acquired no rights by his long silence. *Kaukauna Water Power Co. v. Green Bay, etc., Canal Co.*, 142 U. S. 254, 281, 35 L. Ed. 1004.

**75. Same; not a federal question.**—*Eustis v. Bolles*, 150 U. S. 361, 37 L. Ed. 1111; *Rutland R. Co. v. Central Vermont R. Co.*, 159 U. S. 630, 40 L. Ed. 284;

*Seneca Nation v. Christy*, 162 U. S. 283, 40 L. Ed. 970; *Leonard v. Vicksburg, etc., R. Co.*, 198 U. S. 416, 422, 49 L. Ed. 1108.

In *Seneca Nation v. Christy*, 162 U. S. 283, 40 L. Ed. 970, it was held by the state court that even if there were a right of recovery on the part of plaintiffs in error because a certain grant was in contravention of the constitution of the United States, yet that such recovery was barred by the New York statute of limitations.

**76. State or government defined.**—*Texas v. White*, 7 Wall. 700, 19 L. Ed. 227.

**77. In the constitutional sense.**—*Texas v. White*, 7 Wall. 700, 19 L. Ed. 227; *McPherson v. Blacker*, 146 U. S. 1, 25, 36 L. Ed. 869.

In his separate opinion in *Chisholm v. Georgia*, 2 Dall. 419, 455, 1 L. Ed. 440, Mr. Justice Wilson defines and describes a state as follows: "By a state, I mean a complete body of free persons united together for their common benefit, to enjoy peaceably what is their own, and to do justice to others. It is an artificial person. It has its affairs and its interests; it has its rules; it has its rights; and it has its obligations. It may acquire property, distinct from that of its members; it may incur debts to be discharged out of the public stock, not out of the private fortunes of individuals. It may be bound by contracts; and for damages arising from the breach of those contracts. In all our contemplations, however, concerning this feigned and artificial person, we should never forget, that, in truth and nature, those who think and speak and act, are men."



agent and representative of the state through which it acts. Within the scope of its constitutional authority the acts of the government are the acts of the state and binding upon the state. Outside of this constitutional authority, the acts of the government are not the acts of the state, but mere lawless usurpations and of no force or validity whatever. The maxim that the king can do no wrong is applicable to the state itself, but not applicable to the government which is the agent of the state; the state being absolutely bound by constitutional limitation can do nothing in contravention thereof; but the government, or the individuals of which it is composed, may transcend their constitutional authority and entail liability upon individuals who attempt to enforce their unconstitutional acts.<sup>78</sup> A state does not act by its people in their collective capacity, but through such political agencies as are duly constituted and established.<sup>79</sup> The legislative power is the supreme authority except as limited by the constitution of the state, and the sovereignty of the people is exercised through their representatives in the legislature unless by the fundamental law power is elsewhere reposed.<sup>80</sup> Therefore, what is forbidden or required to be done by a state is forbidden or required of the legislative power under state constitutions as they exist.<sup>81</sup>

**As Used in Provision which Guarantees Republican Form of Government.**—The term state is also used to express the idea of a people or political community, as distinguished from the government. In this sense it is used in the clause which provides that the United States shall guarantee to every state in the Union a republican form of government, and shall protect each of them against invasion.<sup>82</sup>

**B. Powers Possessed by Government.**—In the formation of a government, the people may confer upon it such powers as they choose. The government, when so formed, should exercise all the powers it has for the protection of its citizens and the people within its jurisdiction; but it can exercise no other.<sup>83</sup>

**Right of Majority to Frame a Government.**—When one government is dissolved and the people come to form a new one, it is the right of the majority to determine what system shall be adopted and what powers shall be conferred upon it.<sup>84</sup>

**C. Written and Unwritten Constitutions**—1. **FORMAL COMPACT UNNECESSARY.**—A formal compact is not a necessary foundation of government; for if an individual should assume the sovereignty, and the people assent to it, this would be a legal establishment, whatever limitation might afterwards be imposed.<sup>85</sup>

2. **BRITISH AND AMERICAN SYSTEMS CONTRASTED.**—In England, there is no written constitution, no fundamental law, nothing visible, nothing real, nothing certain, by which a statute can be tested. Parliament has sovereign and uncon-

78. **Distinction between state and government of the state.**—Virginia Coupon Cases, 114 U. S. 269, 270, 307, 29 L. Ed. 185. See, also, Langford v. United States, 101 U. S. 341, 25 L. Ed. 1010.

79. **Same; does not act in collective capacity.**—McPherson v. Blacker, 146 U. S. 1, 25, 36 L. Ed. 869.

80. **Same; sovereignty exercised through the legislature.**—McPherson v. Blacker, 146 U. S. 1, 25, 36 L. Ed. 869.

81. **Same; restrictions upon state are binding upon legislature of state.**—McPherson v. Blacker, 146 U. S. 1, 25, 36 L. Ed. 869.

82. **As used in provision which guarantees republican form of government.**—Texas v. White, 7 Wall. 700, 19 L. Ed. 227. See, also, McPherson v. Blacker, 146 U. S. 1, 25, 36 L. Ed. 869.

83. **Powers possessed by government.**—United States v. Cruikshank, 92 U. S. 542, 549, 23 L. Ed. 588.

84. **Right of majority to frame a government.**—Respublica v. Chapman, 1 Dall. 53, 58, 1 L. Ed. 33. See, also, ante, "Right of Majority to Adopt a Constitution," II. A, 1.

85. **Formal compact unnecessary.**—Respublica v. Chapman, 1 Dall. 53, 58, 1 L. Ed. 33.

**Federal sovereignty antedates formal compact.**—Upon exception to an indictment for forgery, "that, at the time of the offense charged, the United States were not a body corporate known in law," it was held that the United States became a body corporate from the moment of their association, since from that moment there was no superior from whom that

trollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime or criminal; this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of those kingdoms.<sup>86</sup> It is difficult to say, what the constitution of England is; because, not being reduced to written certainty and precision, it lies entirely at the mercy of the parliament; it bends to every governmental exigency; it varies and is blown about by every breeze of legislative humor or political caprice.<sup>87</sup> In America the case is widely different. Not only have we a written federal constitution, which is the supreme law and sovereign will, binding upon all the departments of government, both state and federal, as to these matters upon which it speaks,<sup>88</sup> but each state in the Union has its constitution reduced to written exactitude and precision.<sup>89</sup>

## VI. Organization of Government in the United States.

**A. Status of the States as Colonies.**—When resistance was made to the execution of the laws of Great Britain the colonies were not thirteen independent states, but colonies and provinces belonging to, and a part of, a great empire comprehending both countries.<sup>90</sup> Before opposition to the measures of the parliament of Great Britain became necessary, each province, or colony, composed a body politic, and the several provinces or colonies were in no wise connected with each other, than as being subject to a common sovereign. Each province or colony had a distinct legislature, a distinct executive, a distinct judiciary; and in respect to the powers of taxation no power then existed, or was claimed, for any joint authority on behalf of all the provinces or colonies to tax the whole.<sup>91</sup>

character could otherwise be derived. *Respublica v. Sweers*, 1 Dall. 41, 44, 1 L. Ed. 29.

**86. American and English systems contrasted.**—*Vanhorne v. Dorrance*, 2 Dall. 304, 307m, 308, 1 L. Ed. 391; *Dartmouth College v. Woodward*, 4 Wheat. 518, 643, 4 L. Ed. 629; *Farrington v. Tennessee*, 95 U. S. 679, 684, 24 L. Ed. 558.

"It is the theory of the British constitution that parliament is omnipotent. It can pass bills of attainder and acts of confiscation. Gibbon's *Autobiography*, 14. It can also create and destroy corporations." *Dartmouth College v. Woodward*, 4 Wheat. 518, 643, 4 L. Ed. 629; *Farrington v. Tennessee*, 95 U. S. 679, 684, 24 L. Ed. 558.

It has unquestioned power to annul or revoke corporate rights. *Dartmouth College v. Woodward*, 4 Wheat. 518, 643, 4 L. Ed. 629.

But these things involve the exercise, not of its ordinary, but of an extraordinary power, not unlike that of the Roman emperors, sometimes applied in moulding and administering the civil law in special cases. *Farrington v. Tennessee*, 95 U. S. 679, 674, 24 L. Ed. 558.

**87. Same.**—*Vanhorne v. Dorrance*, 2 Dall. 304, 308, 1 L. Ed. 391.

**88. Same.**—See ante. "The Federal Constitution, Laws and Treaties," IV, B, 2, et seq.

**89. Each state has a written constitution.**—*Vanhorne v. Dorrance*, 2 Dall. 304, 308, 1 L. Ed. 391; *Wilkinson v. Leland*, 2 Pet. 627, 656, 7 L. Ed. 542.

Upon the separation from Great Britain in 1776, the governments of the several states were at first revolutionary. They soon proceeded, however, to adopt formal constitutions, apportioning, defining, and limiting the powers of the several departments of government, and, with two exceptions, they had completed this work before independence was acknowledged by Great Britain. Of the original states, Delaware, Maryland, New Hampshire, New Jersey, North Carolina, Pennsylvania, South Carolina and Virginia adopted constitutions in 1776, Georgia and New York in 1777 and Massachusetts in 1780; while the colonial charter of Connecticut was not superseded by a constitution until 1818, and that of Rhode Island not until 1842. See Cooley, *Const. Law*, 3d Ed., p. 10.

**90. Status of the colonies at the time of the separation.**—*Camp v. Lockwood*, 1 Dall. 393, 401, 1 L. Ed. 192; *Penhallow v. Doane*, 3 Dall. 54, 90, 1 L. Ed. 507; *Chisholm v. Georgia*, 2 Dall. 419, 471, 1 L. Ed. 440.

**91. Same.**—*Penhallow v. Doane*, 3 Dall. 54, 90, 1 L. Ed. 507, opinion of Iredell, J.

"All the people of this country were then subjects of the king of Great Britain, and owed allegiance to him; and all the civil authority then existing, or exercised here, flowed from the head of the British Empire. They were, in strict sense, fellow subjects, and in a variety of respects, one people." *Chisholm v. Georgia*, 2 Dall. 419, 471, 1 L. Ed. 440.



**B. Effect of the Revolution and Declaration of Independence—1.** REVOLUTION WAS POLITICAL AND NOT SOCIAL.—The American Revolution was not a social revolution. It did not alter or affect the domestic condition or capacity of persons within the colonies, nor was it designed to disturb the domestic relations existing among them. It was a political revolution by which thirteen dependent colonies became thirteen independent states.<sup>92</sup>

**Effect on Individual Rights.**—The revolution and the following separation from the mother country did not operate to deprive individuals of their civil rights, nor of their property rights.<sup>93</sup>

2. CHANGED THE FORM BUT NOT THE SUBSTANCE OF THE GOVERNMENT.—When the people of the United Colonies separated from Great Britain, they changed the form, but not the substance, of their government. They retained for the purposes of government all the powers of the British parliament, and through their state constitutions, or other forms of social compact, undertook to give practical effect to such as they deemed necessary for the common good and the security of life and property. All the powers which they retained they committed to their respective states, unless in express terms or by implication reserved to themselves. Subsequently, when it was found necessary to establish a national government for national purposes, a part of the powers of the states and of the people of the states were granted to the United States and to the people of the United States. This grant operated as a further limitation upon the powers of the states, so that now the governments of the states possess all the powers of the parliament of England, except such as have been delegated to the United States or reserved by the people. The reservation by the people is shown in the prohibitions of the constitution.<sup>94</sup>

3. THE COLONIES BECAME INDEPENDENT STATES.—By the revolution the prerogatives of the crown and the transcendent power of parliament devolved upon the individual states in a plenitude unimpaired by any act and controllable by no authority.<sup>95</sup> Thirteen dependent colonies became thirteen independent states.

**92. Nature of Revolution political, not social.**—*Scott v. Sandford*, 19 How. 393, 503, 15 L. Ed. 691 (opinion of Campbell, J.), citing *Ware v. Hylton*, 3 Dall. 199, 1 L. Ed. 568; *McIlvaine v. Cox*, 4 Cranch 209, 212, 2 L. Ed. 598.

**93. Effect of Revolution on individual rights.**—*Dawson v. Godfrey*, 4 Cranch 321, 323, 2 L. Ed. 634; *Terrett v. Taylor*, 9 Cranch 43, 50, 3 L. Ed. 650; *Dartmouth College v. Woodward*, 4 Wheat. 518, 651, 707, 4 L. Ed. 629; *Society for the Propagation of the Gospel v. New Haven*, 8 Wheat. 464, 5 L. Ed. 662.

This was necessarily true under the principle of the common law and the law of nations, repeatedly recognized by the supreme court of the United States, that the division of an empire or the transfer of sovereignty as to a part or the whole of its territory, whether peaceably by treaty, or forcibly by revolution or conquest, works no forfeiture of private rights of person or property. *Dawson v. Godfrey*, 4 Cranch 321, 323, 2 L. Ed. 634; *Terrett v. Taylor*, 9 Cranch 43, 50, 3 L. Ed. 650; *Mutual Assur. Society v. Watts*, 1 Wheat. 279, 4 L. Ed. 91; *Dartmouth College v. Woodward*, 4 Wheat. 518, 651, 707, 4 L. Ed. 629; *Green v. Biddle*, 8 Wheat. 1, 98, 5 L. Ed. 547; *Society for Propagation of the Gospel v. New Haven*, 8 Wheat. 464, 5 L. Ed. 662; *Johnson v. McIntosh*, 8 Wheat. 543, 589, 5 L. Ed. 681;

*Henderson v. Poindexter*, 12 Wheat. 530, 536, 6 L. Ed. 718; *American Ins. Co. v. Canter*, 1 Pet. 511, 7 L. Ed. 243; *Soulard v. United States*, 4 Pet. 511, 7 L. Ed. 938; *Hawkins v. Barney*, 5 Pet. 457, 467, 8 L. Ed. 190; *United States v. Arredondo*, 6 Pet. 691, 712, 8 L. Ed. 547; *United States v. Percheman*, 7 Pet. 51, 86, 87, 8 L. Ed. 604; *United States v. Clark*, 8 Pet. 445, 8 L. Ed. 1001; *Delassus v. United States*, 9 Pet. 117, 133, 9 L. Ed. 71; *Mitchel v. United States*, 9 Pet. 711, 734, 9 L. Ed. 283; *Smith v. United States*, 10 Pet. 326, 330, 9 L. Ed. 442; *New Orleans v. United States*, 10 Pet. 662, 718, 9 L. Ed. 573; *Strother v. Lucas*, 12 Pet. 410, 9 L. Ed. 1137; *Rhode Island v. Massachusetts*, 12 Pet. 657, 749, 9 L. Ed. 1233; *Pollard v. Kibbe*, 14 Pet. 353, 393, 10 L. Ed. 490; *United States v. Wiggins*, 14 Pet. 344, 10 L. Ed. 481; *Leitensdorfer v. Webb*, 20 How. 176, 15 L. Ed. 891. See, also, post, "As to Private, Personal and Property Rights; Continuation of Existing Laws," VI, D, 2, c, (3), (c), (bb), (aaa).

**94. Revolution changed the form but not the substance of the government.**—*Munn v. Illinois*, 94 U. S. 113, 124, 24 L. Ed. 77.

**95. The colonies become independent states.**—*Johnson v. McIntosh*, 8 Wheat. 543, 595, 5 L. Ed. 681; *Cherokee Nation v. Georgia*, 5 Pet. 1, 46, 8 L. Ed. 25; *Briscoe v. Bank*, 11 Pet. 257, 328n, 9 L. Ed. 709;



The declaration of independence was not a declaration that the united colonies jointly, in a collective capacity, were independent states, but that each of them was a sovereign and independent state; that is, that each of them had a right to govern itself by its own authority and its own laws, without any control from any other power on earth.<sup>96</sup>

**Formal Declaration of Independence Unnecessary to State Independence.**—Delegates and representatives were elected by the people of the several counties and corporations of Virginia to meet in a general convention, for the purpose of framing a new government, by the authority of the people only, which convention met on the 6th day of May, continued in session until the 5th of July,

Rhode Island *v.* Massachusetts, 12 Pet. 657, 720, 9 L. Ed. 1233; Martin *v.* Waddell, 16 Pet. 367, 408, 410, 414, 10 L. Ed. 997; Shively *v.* Bowlby, 152 U. S. 1, 14, 38 L. Ed. 331.

**96. Same.**—Scott *v.* Sandford, 19 How. 393, 502, 15 L. Ed. 691 (opinion of Campbell, J.). See, also, Ware *v.* Hylton, 3 Dall. 199, 1 L. Ed. 568; McIlvaine *v.* Cox, 4 Cranch 209, 212, 2 L. Ed. 598; Manchester *v.* Massachusetts, 139 U. S. 240, 257, 35 L. Ed. 159.

In June, 1776, the convention of Virginia formally declared that Virginia was a free, sovereign and independent state; and on the 4th of July, 1776, following, the United States, in congress assembled, declared the thirteen united colonies free and independent states; and that, as such, they had full power to levy war, conclude peace, etc. Speaking of the effect of this declaration, Mr. Justice Chase, says: "I consider this as a declaration, not that the united colonies jointly in a collective capacity, were independent states, etc., but that each of them was a sovereign and independent state, that is, that each of them had a right to govern itself by its own authority and its own laws, without any control from any other power upon earth." Ware *v.* Hylton, 3 Dall. 199, 224, 1 L. Ed. 568, opinion of Chase, J.

Speaking upon this point Mr. Justice Cushing, in his separate opinion in the case of Penhallow *v.* Doane, 3 Dall. 54, 117, 1 L. Ed. 507, says: "I have no doubt of the sovereignty of the states, saving the powers delegated to congress, being such as were 'proper and necessary' to carry on, unitedly, the common defense in the open war that was waged against this country, and in support of their liberties, to the end of the contest. But as has been said, I conceive, we are concluded upon that point, by a final decision heretofore made."

"The several states which composed this union, so far at least as regarded their municipal regulations, became entitled, from the time when they declared themselves independent, to all the rights and powers of sovereign states; and that they did not derive them from concessions made by the British King. The treaty of peace contains a recognition of their independence, not a grant of it.

From hence, it results that the laws of the several state governments were the laws of sovereign states, and as such were obligatory upon the people of such state from the time they were enacted." McIlvaine *v.* Cox, 4 Cranch 209, 212, 2 L. Ed. 598. Accord: Manchester *v.* Massachusetts, 139 U. S. 240, 257, 35 L. Ed. 159.

When the revolution took place the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them for their own common use, subject only to the rights since surrendered by the constitution; and by no compact between a state and the United States, can the rights of the states be either diminished or enlarged with respect to these matters. Martin *v.* Waddell, 16 Pet. 367, 410, 10 L. Ed. 997; Pollard *v.* Hagan, 3 How. 212, 229, 11 L. Ed. 565; Gilman *v.* Philadelphia, 3 Wall. 713, 726, 18 L. Ed. 96; Shively *v.* Bowlby, 152 U. S. 1, 16, 38 L. Ed. 331.

By the revolution the duties as well as the power of the government devolved on the state of Georgia. It is admitted that among the latter were comprehended the transcendent powers of parliament as well as those of the executive department. (Separate opinion of Baldwin, J.) Cherokee Nation *v.* Georgia, 5 Pet. 1, 46, 8 L. Ed. 25, citing Dartmouth College *v.* Woodward, 4 Wheat. 518, 651, 4 L. Ed. 629; Sturges *v.* Crowninshield, 4 Wheat. 120, 192, 4 L. Ed. 529; Green *v.* Biddle, 8 Wheat. 1, 98, 5 L. Ed. 547; Orden *v.* Saunders, 12 Wheat. 213, 254, 6 L. Ed. 606.

On the 4th of October, 1776, the state of New Jersey was completely a sovereign and independent state, and had a right to compel the inhabitants of the state to become citizens thereof. McIlvaine *v.* Cox, 4 Cranch 209, 2 L. Ed. 598.

Previous to the establishment of the first state constitution of Pennsylvania, following the severance from Great Britain, a kind of government, independent of Great Britain, was administered in that state; and upon the establishment of the state constitution, or state government, powers of sovereignty were lodged with congress. Republica *v.* Chapman, 1 Dall. 53, 56, 1 L. Ed. 33.

1776, and in virtue of their delegated powers established a constitution or form of government, to regulate and determine by whom and in what manner the authority of the people of Virginia should thereafter be executed. This was done under the authority of the people of the state of Virginia who were the genuine source and fountain of all power that could be rightfully exercised within its limits, and who had therefore an unquestionable right to grant it to whom they pleased and under what restrictions or limitations they thought proper. From the moment the people of Virginia exercised this power, all dependence on, and connection with Great Britain absolutely and forever ceased, and no formal declaration of independence was necessary.<sup>97</sup>

4. **POWERS OF THE REVOLUTIONARY CONGRESS**—a. *Represented the States as to Their National Powers and Attributes*.—In the prosecution of the revolutionary war, all the states, or colonies, were equally principals, and carried on the war as a common cause, and by common consent, without being tied together by any regularly organized system of government. The first body that exercised anything like a sovereign authority was the congress of the then united colonies which body superintended the whole and by common consent was invested with such general powers as were necessary for the prosecution of the war. Afterwards the colonies were divided into several distinct governments by the name of states, still leaving the general power in congress, which power, being in a great measure undefined, was exercised, with respect to internal matters, by recommendations to the several governments, instead of laws; which, however, had generally the force of laws.<sup>98</sup> The states individually were not known or recognized as sovereign by foreign nations, nor are they now; but the states collectively, under congress, as a connecting point or head, were acknowledged by foreign powers as sovereign, particularly as to national powers and attributes, such as rights of war and peace, making treaties, and sending and receiving ambassadors.<sup>99</sup>

b. *Nature of Powers Exercised by Congress*.—Before the adoption of the articles of confederation the powers of congress originated from necessity, and

**97. Formal declaration of independence unnecessary.**—*Ware v. Hylton*, 3 Dall. 199, 223, 1 L. Ed. 568. (Opinion of Chase, J.)

**98. Powers of the revolutionary congress.**—*Camp v. Lockwood*, 1 Dall. 393, 401, 1 L. Ed. 192.

**99. Individual states were not recognized.**—*Penhallow v. Doane*, 3 Dall. 54, 81, 1 L. Ed. 507, opinion of Patterson, J.

**Same—Nature of union during revolutionary period.**—When the revolution commenced, the patriots did not assert that only the same affinity and social connection subsisted between the people of the colonies, which subsisted between the people of Gaul, Britain and Spain, while Roman provinces, viz, only that affinity and social connection which result from the mere circumstance of being governed by the same prince, different ideas prevailed, and gave occasion to the Congress of 1774 and 1775. The revolution or rather the Declaration of Independence, found the people already united for general purposes, and at the same time providing for their more domestic concerns by state conventions and other temporary arrangements. From the crown of Great Britain, the sovereignty of their country passed to the people of it; and it was then not an uncommon opinion, that the

unappropriated lands, which belonged to that crown, passed, not to the people of the colony or states within whose limits they were situated, but to the whole people; on whatever principles this opinion rested it did not give way to the other, and thirteen sovereignties were considered as emerged from the principles of the revolution, combined with local convenience and considerations; the people, nevertheless, continued to consider themselves, in a national point of view, as one people; and they continued, without interruption, to manage their national concerns accordingly. *Chisholm v. Georgia*, 2 Dall. 419, 470, 1 L. Ed. 440.

**Same; as to prize questions.**—"In every government, whether it consists of many states, or of a few, or whether it be of a federal or consolidated nature, there must be a supreme power or will; the rights of war and peace are component parts of this supremacy, and incidental thereto is the question of prize. The question of prize grows out of the nature of the thing. If it be asked, In whom, during our revolutionary war, was lodged, and by whom was exercised, this supreme authority? No one will hesitate for an answer. It was lodged in, and exercised by, congress; it was there or nowhere; the states individually did not, and, with safety, could not exercise it." *Penhallow v. Doane*, 3 Dall. 54, 80, 1 L. Ed. 507.



arose out of and were only limited by events; or, in other words, they were revolutionary in their nature. Their extent depended upon the exigencies and necessities of public affairs. There is only one rule of construction, in regard to the acts done, which will fully support them, namely, that the powers actually exercised were rightfully exercised, wherever they were supported by the implied sanction of the state legislature, and by the ratification of the people.<sup>1</sup>

c. *Whence Derived*.—From the first meeting of congress in 1774 until the ratification of the articles of confederation on the first of March, 1781, the powers of congress were derived from the people they represented expressly given, through the medium of their state conventions or state legislatures; or the powers exercised were impliedly ratified by the acquiescence and obedience of the people. These powers were revolutionary in their nature, and their extent depended on the exigencies and necessity of public affairs. The several states retained all internal sovereignty while congress possessed the great rights of external sovereignty.<sup>2</sup>

d. *Extent of Powers Possessed by Congress*—(1) *Power to Bind States*.—If previous to the articles of confederation any state had the right to revoke or rescind powers conferred upon congress, there was but one way of exercising it, and that was by withdrawal from the confederacy. So long as a state continued a member and had representatives in congress, it was bound by the acts of congress, and any statute purporting to revoke legitimate powers of congress were nugatory, so long as the state remained in the confederation.<sup>3</sup> The states, when in congress, stood on the floor of equality, and the majority were entitled to control. No state could remain in the confederacy and deny the supreme powers of congress as to war and peace and their incidents.<sup>4</sup>

(2) *Particular Powers*.—**Court of Appeals in Prize Causes**.—Previous to the ratification of the articles of confederation, the continental congress, as an implied or revolutionary power, had authority to institute a court of appeals in prize cases, and to vest it with jurisdiction both as to appeals then pending before congress and also as to those subsequently arising.<sup>5</sup>

**War—Powers—Removal or Destruction of Private Property**.—During

1. **Nature of powers exercised by the revolutionary congress**.—*Scott v. Sandford*, 19 How. 393, 504, 15 L. Ed. 691. (Opinion of Campbell, J.)

The powers of congress were revolutionary in their nature, arising out of events, adequate to every national emergency and co-extensive with the object to be obtained. Congress was a general, supreme and controlling council of the nation, the center of union, the center of force, and the sun of the political system. (Opinion of Patterson, J.) *Penhallow v. Doane*, 3 Dall. 54, 80, 1 L. Ed. 507.

The powers of congress were at first little more than advisory; but in proportion as the danger increased their powers were gradually enlarged, either by express grant or by implication arising from a kind of indefinite authority suited to the unknown exigencies that might arise. Previous to the ratification of articles of confederation, congress did exercise, with the acquiescence of the states, high powers of external sovereignty. (Opinion of Iredell, J.) *Penhallow v. Doane*, 3 Dall. 54, 91, 1 L. Ed. 507.

2. **Whence derived**.—*Ware v. Hylton*, 3 Dall. 199, 232, 1 L. Ed. 568. (Opinion of Chase, J.)

Every particle of authority which orig-

inally resided in congress was derived from the people. This authority was delegated to congress not by all the people in the several provinces or states, but by each body politic separately, and of course no authority could be conveyed to the whole, but that which previously was possessed by the several parts. (Opinion of Iredell, J.) *Penhallow v. Doane*, 3 Dall. 54, 94, 1 L. Ed. 507.

That congress did not possess all the powers of war is evident from the fact that it never attempted to lay any kind of tax on the people of the United States, but relied all together on the state legislatures to impose taxes, to raise money to carry on the war, and to sink the emissions of all paper money issued by congress. (Opinion of Chase, J.) *Ware v. Hylton*, 3 Dall. 199, 232, 1 L. Ed. 568.

3. **Power of revolutionary congress to bind the states**.—*Penhallow v. Doane*, 3 Dall. 54, 82, 95, 113, 1 L. Ed. 507.

4. **Equality of the states in the revolutionary congress**.—*Penhallow v. Doane*, 3 Dall. 54, 82, 1 L. Ed. 507, opinion of Patterson, J.

5. **Power to establish court of appeals for prize causes**.—*Penhallow v. Doane*, 3 Dall. 54, 1 L. Ed. 507.



the war of the revolution the congress had power to lawfully direct the removal of any articles that were necessary to the maintenance of a continental army, or useful to the enemy and in danger of falling into their hands; for they were vested with the powers of peace and war, to which this was a natural and necessary incident; and in this case it was held that the removal having been lawfully made, the appellant was not entitled to compensation.<sup>6</sup>

5. **CITIZENS; RIGHTS AND PRIVILEGES IN OTHER STATES.**—Before the actual signature of the articles of confederation, a citizen of one state was not for any purpose a citizen of another. He was to all substantial purposes a foreigner to their forensic jurisprudence, and if rigorous law had been enforced, he might have been deemed an alien, without any express provision of the state to save him.<sup>7</sup>

### C. Character of the Government under the Articles of Confederation

—1. **THE STATES INDEPENDENT; THE CONFEDERATION A LEAGUE.**—The United States, as they existed under the articles of confederation, were thirteen separate, sovereign, independent states, which had entered into a league or confederation for their mutual protection and advantage; and the congress of the United States was composed of the representatives of these separate sovereignties, meeting together as equals, to discuss and decide on certain measures which the states, by the articles of confederation, had agreed to submit to their decision. This confederation had none of the attributes of sovereignty in legislative, executive or judicial power. It was little more than a congress of ambassadors, authorized to represent separate nations in matters in which they had a common concern.<sup>8</sup>

6. **War powers; destruction of property to prevent same falling into enemies' hands.**—*Respublica v. Sparhawk*, 1 Dall. 357, 363, 1 L. Ed. 174.

7. **Right of citizens in other states.**—*Penhallow v. Doane*, 3 Dall. 54, 92, 1 L. Ed. 507. (Opinion of Iredell, J.)

8. **Nature of the government under the articles of confederation.**—*Scott v. Sandford*, 19 How. 393, 434, 15 L. Ed. 691, opinion of Taney, C. J. Accord: *Camp v. Lockwood*, 1 Dall. 393, 401, 1 L. Ed. 192; *Chisholm v. Georgia*, 2 Dall. 419, 463, 1 L. Ed. 440; *Respublica v. Cobbett*, 3 Dall. 467, 1 L. Ed. 683; *McIlvaine v. Cox*, 4 Cr. 209, 214, 2 L. Ed. 598; *Martin v. Hunter*, 1 Wheat. 304, 332, 4 L. Ed. 97; *Sturges v. Crowninshield*, 4 Wheat. 120, 122, 192, 4 L. Ed. 529; *Gibbons v. Ogden*, 9 Wheat. 1, 187, 227, 6 L. Ed. 23; *License Cases*, 5 How. 504, 587, 12 L. Ed. 256; *Passenger Cases*, 7 How. 283, 393, 12 L. Ed. 702; *Tennessee v. Davis*, 100 U. S. 257, 267, 25 L. Ed. 648; *Manchester v. Massachusetts*, 139 U. S. 240, 257, 35 L. Ed. 159.

The confederation was a compact between states, and its structure and powers were wholly unlike those of the national government. (Opinion of Story, J.) *Martin v. Hunter*, 1 Wheat. 304, 332, 4 L. Ed. 97.

"Previous to the formation of the federal constitution we were divided into independent states, united for some purposes, but in most respects, sovereign. These states could exercise almost every legislative power, and among others that of passing bankrupt laws." *Marshall, C. J.*, delivering the opinion in *Sturges v.*

*Crowninshield*, 4 Wheat. 120, 122, 192, 4 L. Ed. 529.

Under the articles of confederation, the states were unquestionably supreme; and each possessed that power over commerce which is acknowledged to reside in every sovereign state. (Opinion of Johnson, J.) *Gibbons v. Ogden*, 9 Wheat. 1, 227, 6 L. Ed. 23.

Before the adoption of the constitution, the states possessed, respectively, all the attributes of sovereignty. In their organic laws they had distributed their powers of government according to their own views, subject to such modification as the people of each state might sanction. The agencies established by the articles of confederation were not entitled to the dignified appellation of government. (Opinion of McLean, J.) *License Cases*, 5 How. 504, 587, 12 L. Ed. 256.

Before the adoption of the constitution, the states, respectively, exercised sovereign power, under no other limitations than those contained in the articles of confederation. (Opinion of McLean, J.) *Passenger Cases*, 7 How. 283, 393, 12 L. Ed. 702; *Respublica v. Cobbett*, 3 Dall. 467, 1 L. Ed. 683.

"Before the adoption of the constitution, each state had complete and exclusive authority to administer by its courts all the law, civil and criminal, which existed within its borders. Its judicial power extended over every legal question that could arise." *Tennessee v. Davis*, 100 U. S. 257, 267, 25 L. Ed. 648.

Before the new constitution was adopted Virginia had as much right to treat and agree as any European government had.

2. OPERATED ONLY THROUGH THE STATES; NOT ON THE CITIZEN.—The articles of confederation did not operate upon individual citizens, but operated only through the states as such. In the matter of taxation, for example, congress had no coercive power upon individuals. The most that it could do was in the line of requisitions upon the states, and if a state disregarded a requisition, congress was powerless to enforce it. For the purpose of public strength and the general welfare, the confederacy was totally inadequate. A requisition upon the several states terminated its legislative authority; executive or judicial authority, it had none.<sup>9</sup>

3. POWERS OF WAR AND PEACE VESTED IN CONGRESS.—The ninth article of the confederation ratified by all the states on the first of March, 1781, declared "that the United States in congress assembled, shall have the sole and exclusive right and power of determining on peace or war, except in the two cases mentioned in the sixth article; and of entering into treaties and alliances, with a proviso when made, respecting commerce." By this provision the states parted with all their powers to declare war, to make peace, and conclude treaties, and vested the same exclusively in the congress.<sup>10</sup>

4. ACQUISITION, GOVERNMENT AND CONTROL OF TERRITORY—a. *Ownership of Unoccupied Western Lands*.—From the commencement of the revolutionary war serious difficulties existed between the states in relation to the disposition of large and unsettled territories which were included in the chartered limits of some of the states. Some of the other states, especially Maryland, which had no unsettled lands, insisted that as the unoccupied lands, if wrested from Great Britain, would owe their preservation to the common purse and the common sword, the money arising from them ought to be applied in just proportion among the several states to pay the expenses of the war, and ought not to be appropriated to the use of the state in whose chartered limits they might happen to lie, to the exclusion of the other states, by whose combined efforts and common expense the territory was defended and preserved against the claim of the British government. The majority of the congress of the confederation concurred in opinion with the state of Maryland, and on the 6th of September, 1780, adopted a resolution urging the states to cede these lands to the United States, both for the sake of peace and union among themselves, and to maintain the public credit. This was followed by the resolution of October 10, 1780, by which congress pledged itself, that if the lands were ceded, as recommended, they should be disposed of for the common benefit of the United States, and be settled and formed into distinct republican states, which should become members of the federal Union and have the same rights of sovereignty and freedom and independence as other states. These difficulties became much more serious after peace was declared. Every state at that time felt the pressure of its war debt; but in Virginia and some other states there were large territories of unsettled lands, the sale of which would enable them to discharge their obligations without much inconvenience; while other states, which had no such resource, saw before them

Thus in ceding the Northwest Territory to the United States she had the right to impose a condition that slavery should be abolished there; and the cession having been accepted upon the terms imposed, the new government under the constitution was bound by that engagement by virtue of article 6 of the new constitution. (Opinion of Catron, J.) *Scott v. Sandford*, 19 How. 393, 523, 15 L. Ed. 691.

The treaty of 1783 contains an acknowledgment of the independence and sovereignty of the United States in their political capacities, and a relinquishment on the part of his Britannic majesty of all claim to the government, propriety and territorial rights of the same. *McIlvaine*

*v. Cox*, 4 Cranch 209, 214, 2 L. Ed. 598; *Manchester v. Massachusetts*, 139 U. S. 240, 257, 35 L. Ed. 159.

9. Articles of confederation operated through the states; not upon individuals. —*Chisholm v. Georgia*, 2 Dall. 419, 463, 464, 1 L. Ed. 440; *Hylton v. United States*, 3 Dall. 171, 178, 1 L. Ed. 556; *Cohens v. Virginia*, 6 Wheat. 264, 388, 5 L. Ed. 257; *Lane County v. Oregon*, 7 Wall. 71, 77, 19 L. Ed. 101; *Collector v. Day*, 11 Wall. 113, 125, 20 L. Ed. 122; *Virginia Coupon Cases*, 114 U. S. 269, 270, 307, 29 L. Ed. 185.

10. Powers of war and peace vested in congress. —*Ware v. Hylton*, 3 Dall. 199, 236, 1 L. Ed. 568 (opinion of Chase, J.).



many years of heavy and burdensome taxation; and the latter insisted, that these unsettled lands should be treated as the common property of the states; and the proceeds applied to their common benefit. These fears and dangers were removed, however, when the state of Virginia, in 1784, voluntarily ceded to the United States the immense tract of country lying northwest of the Ohio River, and which was within the acknowledged limits of the state. The object of the state of Virginia, in making this cession, was to put an end to the threatening and exciting controversy, and to enable the congress of that time to dispose of the lands, and appropriate the proceeds as a common fund for the common benefit of the states. It was not ceded because it was inconvenient to the state to hold and govern it, nor from any expectation that it could be better or more conveniently governed by the United States. The example of Virginia was soon afterwards followed by other states, and, at the time of the adoption of the constitution, all of the states similarly situated had ceded their unappropriated lands, except North Carolina and Georgia. This was the state of things when the constitution of the United States was formed.<sup>11</sup> It was in view of this state of affairs, existing at the time of the adoption of the constitution, that it was provided, in that part of the third section of article four, relating to the power of congress to dispose of and make needful laws and regulations respecting the territory belonging to the United States, that "nothing in the constitution shall be so construed as to prejudice any claims of the United States or of any particular state."<sup>12</sup>

b. *Power to Acquire and Govern Northwest Territory.*—Under the articles of confederation congress had no power to accept from Virginia the cession of the Northwest Territory. But the states had an undoubted right as independent sovereignties to accept any cession of territory for their common benefit, to which all of them assented; and the territory ceded, being their common property after its acceptance, the states, having no superior to control them, had the right to exercise absolute dominion over it, subject only to the restrictions which Virginia had imposed in her act of cession.<sup>13</sup>

**Government of Northwest Territory.**—Subject to the limitations mentioned in the preceding paragraph, the states, as sovereign states, had a right to establish for such territory any form of government they pleased, by compact or treaty among themselves, and to regulate rights of persons and rights of property in the territory as they might deem proper.<sup>14</sup>

**Ordinance of 1787.**—By agreement among themselves, the states had the power to adopt the Ordinance of 1787, which was obligatory in the ceded territory while the confederation or league of the states in their separate sovereign character continued to exist.<sup>15</sup>

**11. Ownership of unoccupied western lands.**—*Scott v. Sandford*, 19 How. 393, 432, 15 L. Ed. 691 (opinion of Taney, C. J.). See, also, *Fletcher v. Peck*, 6 Cranch 87, 142, 3 L. Ed. 162; *Handly v. Anthony*, 5 Wheat. 374, 375, 376, 5 L. Ed. 113.

**12. Same.**—*Scott v. Sandford*, 19 How. 393, 437, 15 L. Ed. 691, opinion of Taney, C. J.

"The question whether the vacant lands within the United States became a joint property, or belonged to the separate states, was a momentous question which at one time threatened to shake the American confederacy to its foundation. This important and dangerous contest has been compromised, and the compromise is not now to be disturbed." Marshall, C. J., delivering the opinion in *Fletcher v. Peck*, 6 Cranch 87, 142, 3 L. Ed. 162.

**13. Authority for acquisition of Northwest Territory.**—*Scott v. Sandford*, 19 How. 393, 434, 15 L. Ed. 691, opinion of Taney, C. J.

**14. Government of Northwest Territory.**—*Scott v. Sandford*, 19 How. 393, 435, 15 L. Ed. 691, opinion of Taney, C. J.

**15. Ordinance of 1787.**—*Scott v. Sandford*, 19 How. 393, 435, 15 L. Ed. 691, opinion of Taney, C. J.

The authority of congress was not adequate to the enactment of the ordinance of 1787, and it cannot be supported upon the authority given to congress under the articles of confederation. Mr. Madison said (*Federalist* No. 38): "Congress have proceeded to form new states, to erect temporary governments, to appoint officers for them, and to prescribe the conditions upon which such states shall be admitted into the confederacy; all this has



c. *Encroachment by One State upon the Territory of Another*.—By the third article of the confederation, the states entered into a mutual league for the defense of their sovereignty, their mutual and general welfare; being thus allies in the war of the revolution, a settled principle of the law of nations prevented one from making any acquisition at the expense of the other.<sup>16</sup>

5. **RIGHTS AND PRIVILEGES OF CITIZENSHIP**.—By the articles of confederation each state was to retain its sovereignty, freedom and independence, and every right not expressly delegated to congress; but the free inhabitants of each state were to be entitled to all the privileges and immunities of free citizenship of the several states.<sup>17</sup>

**D. Government under the Constitution**—1. **DUAL NATURE OF GOVERNMENT**.—We have in our political system a government of the United States and a government of each of the several states, thereby making the people of the United States resident within any state subject to two governments; the one state and the other national. Each of these governments is distinct from the other, and each has citizens of its own who owe it allegiance, and whose rights within its jurisdiction it must protect. They are established for different purposes, and their jurisdiction, while concurrent as to places and persons, is, in general, distinct as to subject matter. Together they make one whole, and furnish the people of the United States with a complete government, ample for the protection of all their rights at home and abroad.<sup>18</sup>

been done, and done without the least color of constitutional authority." Scott v. Sandford, 19 How. 393, 503, 15 L. Ed. 691, opinion of Campbell, J.

16. **Encroachment by one state upon another**.—Rhode Island v. Massachusetts, 12 Pet. 657, 748, 9 L. Ed. 1233; Harcourt v. Gaillard, 12 Wheat. 523, 525, 526, 6 L. Ed. 716.

17. **Rights and privileges of citizenship**.—Camp v. Lockwood, 1 Dall. 393, 401, 1 L. Ed. 192.

18. **Dual nature of government**.—United States v. Worrall, 2 Dall. 384, 393, 1 L. Ed. 426; McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579; Houston v. Moore, 5 Wheat. 1, 31, 5 L. Ed. 19; Ableman v. Booth, 21 How. 506, 16 L. Ed. 169; Lane County v. Oregon, 7 Wall. 71, 19 L. Ed. 101; Texas v. White, 7 Wall. 700, 725, 19 L. Ed. 227; Collector v. Day, 11 Wall. 113, 124, 20 L. Ed. 122; Tarble's Case, 13 Wall. 397, 20 L. Ed. 597; White v. Hart, 13 Wall. 646, 650, 20 L. Ed. 685; United States v. Railroad Co., 17 Wall. 322, 21 L. Ed. 597; United States v. Cruikshank, 92 U. S. 542, 549, 23 L. Ed. 588; Clafin v. Houseman, 93 U. S. 130, 136, 23 L. Ed. 833; Transportation Co. v. Parkersburg, 107 U. S. 691, 700, 27 L. Ed. 584; Van Brocklin v. Tennessee, 117 U. S. 151, 172, 29 L. Ed. 845; Robbins v. Shelby County Taxing District, 120 U. S. 489, 496, 30 L. Ed. 694; Smith v. Alabama, 124 U. S. 465, 476, 31 L. Ed. 508; Plumley v. Massachusetts, 155 U. S. 461, 472, 39 L. Ed. 223; Pollock v. Farmers' Loan, etc., Co., 157 U. S. 429, 560, 39 L. Ed. 759; Stockard v. Morgan, 185 U. S. 27, 33, 46 L. Ed. 785; Northern Securities Co. v. United States, 193 U. S. 197, 348, 48 L. Ed. 679; In re Heff, 197 U. S. 488, 505, 49 L. Ed. 848; South Carolina v.

United States, 199 U. S. 437, 448, 50 L. Ed. 261.

"We have in this republic a dual system of government, national and state, each operating within the same territory and upon the same persons; and yet working without collision, because their functions are different." South Carolina v. United States, 199 U. S. 437, 448, 50 L. Ed. 261.

In this country, every man sustains a two-fold political capacity; one in relation to the state, and another in relation to the United States. In relation to the state, he is subject to various municipal regulations, founded upon the state constitution and policy, which do not affect him in his relation to the United States. United States v. Worrall, 2 Dall. 384, 393, 1 L. Ed. 426; Houston v. Moore, 5 Wheat. 1, 31, 5 L. Ed. 19.

The people of this country are citizens of the United States, as well as of the individual states, and they have some rights under the constitution and laws of the former independent of the latter, and free from any interference or restraint from them. Stockard v. Morgan, 185 U. S. 27, 33, 46 L. Ed. 785; Robbins v. Shelby County Taxing District, 120 U. S. 489, 496, 30 L. Ed. 694.

"The people of each state compose a state, having its own government, and endowed with all the functions essential to separate and independent existence." Lane County v. Oregon, 7 Wall. 71, 19 L. Ed. 101; Texas v. White, 7 Wall. 700, 725, 19 L. Ed. 227; Pollock v. Farmers' Loan, etc., Co., 157 U. S. 429, 560, 39 L. Ed. 759; Northern Securities Co. v. United States, 193 U. S. 197, 348, 48 L. Ed. 679.

"The general government and the states, although both exist within the same territorial limits, are separate and distinct

**The United States Not a Foreign Sovereignty—Operates upon States and People.**—The federal government is not a foreign sovereignty either as to states or people, nor is it hostile to either. It proceeds from the same people, and is as much under their control as the state governments. Where by the constitution the power of legislation is exclusively vested in congress, that body represents the power of the Union, and the laws enacted by it are as binding upon the states and people as are the constitutional enactments of a state legislature upon the people of the state.<sup>19</sup>

**Both the States and the United States Existed before the Constitution.**—Both the states and the United States existed before the constitution; the people through that instrument establishing a more perfect union, by substituting a national government, acting with ample power directly upon the citizen,

sovereignties, acting separately and independently of each other, within their respective spheres." *United States v. Railroad Co.*, 17 Wall. 322, 21 L. Ed. 597; *Van Brocklin v. Tennessee*, 117 U. S. 151, 178, 29 L. Ed. 845; *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 584, 39 L. Ed. 759.

"For local interests the several states of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power." *Legal Tender Cases*, 12 Wall. 457, 555, 20 L. Ed. 287; *The Chinese Exclusion Case*, 130 U. S. 581, 606, 32 L. Ed. 1068; *Fong Yue Ting v. United States*, 149 U. S. 698, 706, 37 L. Ed. 905.

**Federal government a part of the government of each state.**—The constitution, laws and treaties are as much a part of the law of each state and are as binding on the citizens and courts thereof as its own local laws and constitution. This is a fundamental principle in our system of complex national polity. *Cohens v. Virginia*, 6 Wheat. 264, 385, 414, 5 L. Ed. 257; *Worcester v. Georgia*, 6 Pet. 515, 571, 8 L. Ed. 483; *White v. Hart*, 13 Wall. 646, 650, 20 L. Ed. 685; *Farmers', etc., Nat. Bank v. Dearing*, 91 U. S. 29, 35, 23 L. Ed. 196; *Claffin v. Houseman*, 93 U. S. 130, 136, 23 L. Ed. 833; *Farrington v. Tennessee*, 95 U. S. 679, 685, 24 L. Ed. 558; *Hauenstein v. Lynham*, 100 U. S. 483, 490, 25 L. Ed. 628; *Northern Securities Co. v. United States*, 193 U. S. 197, 333, 48 L. Ed. 679.

The government of the United States forms a part of the government of each state, its jurisdiction extends to the providing for the common defense against exterior injuries and violence, the regulation of commerce, and other matters specially enumerated in the constitution; all other powers remain in the individual states, comprehending the interior and other concerns; these, combined, form one complete government. *Respublica v. Cobbett*, 3 Dall. 467, 473, 1 L. Ed. 683.

**Concurrent jurisdiction.**—The power of the federal government to enforce its laws and to execute its functions in all places does not derogate from the power of the state to execute its laws at the same time

and in the same places. The one does not exclude the other, except where both cannot be executed at the same time. In that case, the words of the constitution itself show which is to yield: "This constitution and the laws which shall be made in pursuance thereof, \* \* \* shall be the supreme law of the land." In re *Neagle*, 135 U. S. 1, 60, 34 L. Ed. 55.

**19. The United States not a foreign sovereignty; operates upon states and people.**—*Respublica v. Cobbett*, 3 Dall. 467, 473, 1 L. Ed. 683; *Martin v. Hunter*, 1 Wheat. 304, 363, 4 L. Ed. 97; *Worcester v. Georgia*, 6 Pet. 515, 571, 8 L. Ed. 483; *Dobbins v. Commissioners of Erie County*, 16 Pet. 435, 10 L. Ed. 1022; *United States v. Cruikshank*, 92 U. S. 542, 550, 23 L. Ed. 588; *Claffin v. Houseman*, 93 U. S. 130, 136, 23 L. Ed. 833; *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 10, 24 L. Ed. 708; *Tennessee v. Davis*, 100 U. S. 257, 262, 25 L. Ed. 648; *Ex parte Siebold*, 100 U. S. 371, 394, 25 L. Ed. 717; In re *Ayers*, 123 U. S. 443, 507, 31 L. Ed. 216; In re *Neagle*, 135 U. S. 1, 60, 34 L. Ed. 55.

It is a mistake that the constitution was not designed to operate upon states in their corporate capacities. It is crowded with provisions which restrain or annul the sovereignty of the states, in some of the highest branches of their prerogatives. The language of the constitution is also imperative upon the states, and state legislature, as to the performance of many duties. (Opinion of Story, J.) *Martin v. Hunter*, 1 Wheat. 304, 343, 4 L. Ed. 97.

The federal government, as established and defined by the constitution, is to some extent a government of the states in their political capacity; and it is also, for certain purposes, a government of the people. *United States v. Cruikshank*, 92 U. S. 542, 550, 23 L. Ed. 588; *Tennessee v. Davis*, 100 U. S. 257, 25 L. Ed. 648.

The people of the states had the power, and it was their intention, in adopting the federal constitution, to bind the states by the legislative, executive and judicial powers vested in the federal government by the constitution. (Opinion of Mr. Justice Wilson.) *Chisholm v. Georgia*, 2 Dall. 419, 463, 1 L. Ed. 440.

instead of the confederate government, which acted, with powers greatly restricted, only upon the states.<sup>20</sup>

2. THE UNITED STATES AS A NATION.—a. *Generally.*—The United States form, for many, and for most important purposes, a single nation. In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people. In many other respects, the American people are one; and the government which is alone capable of controlling and managing their interests in all these respects is the government of the Union. It is their government, and in that character they have no other. America has chosen to be in many respects, and to many purposes, a nation; and for all these purposes her government is complete; to all these objects, it is competent. The people have declared, that in the exercise of all powers given for these objects, it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory.<sup>21</sup>

b. *Contrasted with the Government under the Articles of Confederation.*—The constitution was intended to frame a national government, supreme within its sphere and complete in all its parts, as distinguished from a league or compact

20. Both the states and the United States existed before the constitution.—

Lane County v. Oregon, 7 Wall. 71, 76, 19 L. Ed. 101; Collector v. Day, 11 Wall. 113, 125, 20 L. Ed. 122; Pollock v. Farmers' Loan, etc., Co., 157 U. S. 429, 560, 39 L. Ed. 759; In re Debs, 158 U. S. 564, 578, 39 L. Ed. 1092.

21. The United States as a nation.—Chisholm v. Georgia, 2 Dall. 419, 465, 1 L. Ed. 440; Cohens v. Virginia, 6 Wheat. 264, 413, 5 L. Ed. 257; Bucker v. Finley, 2 Pet. 586, 590, 7 L. Ed. 528; Holmes v. Jennison, 14 Pet. 540, 575, 10 L. Ed. 579; Lane County v. Oregon, 7 Wall. 71, 76, 19 L. Ed. 101; Legal Tender Cases (concurring opinion of Bradley, J.), 12 Wall. 457, 545, 20 L. Ed. 287; White v. Hart, 13 Wall. 646, 650, 20 L. Ed. 685; Legal Tender Case, 110 U. S. 421, 438, 28 L. Ed. 204; Head Money Cases, 112 U. S. 580, 28 L. Ed. 798.

The people of the United States intended to form themselves into a nation for national purposes. They instituted, for such purposes, a national government, complete in all its parts, with powers legislative, executive, and judicial; and in all those powers, extending over the whole nation. (Opinion of Mr. Justice Wilson.) Chisholm v. Georgia, 2 Dall. 419, 465, 1 L. Ed. 440; Legal Tender Case, 110 U. S. 421, 438, 28 L. Ed. 204; The Chinese Exclusion Case, 130 U. S. 581, 604, 32 L. Ed. 1068; Ekiu v. United States, 142 U. S. 651, 659, 35 L. Ed. 1146; Fong Yue Ting v. United States, 149 U. S. 698, 705, 37 L. Ed. 995; Pollock v. Farmers' Loan, etc., Co., 157 U. S. 429, 560, 39 L. Ed. 759; In re Quarles, 158 U. S. 535, 39 L. Ed. 1080; In re Debs, 158 U. S. 564, 599, 39 L. Ed. 1092; Kansas v. Colorado, 206 U. S. 46, 80, 51 L. Ed. 956.

"The United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace, and

negotiations and intercourse with other nations; all which are forbidden to the state governments." (Concurring opinion of Bradley, J.) Legal Tender Cases, 12 Wall. 457, 555, 20 L. Ed. 287. Accord: Holmes v. Jennison, 14 Pet. 540, 575, 10 L. Ed. 579.

"While under our constitution and form of government the great mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries, and their subjects or citizens are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory." The Chinese Exclusion Case, 130 U. S. 581, 604, 32 L. Ed. 1068.

"For all the purposes of the national government, the people of the United States are an integral, and not a composite mass, and their unity and identity, in this view of the subject, are not affected by their segregation by state lines for the purposes of State government and local administration. Considered in this connection, the states are organisms for the performance of their appropriate functions in the vital system of the larger polity, of which, in this aspect of the subject, they form a part, and which would perish if they were all stricken from existence or ceased to perform their allotted work." White v. Hart, 13 Wall. 646, 650, 20 L. Ed. 685.

"Whatever powers of government were granted to the nation or reserved to the states (and for the description and limitation of those powers we must always accept the constitution as alone and absolutely controlling), there was created a nation to be known as the United States of America, and as such then assumed its place among the nations of the world." Kansas v. Colorado, 206 U. S. 46, 80, 51 L. Ed. 956.



of states such as existed under the articles of confederation.<sup>22</sup> The great difference between the powers of the government under the articles of confederation and under the constitution, and the great change which was intended to give efficacy to the present system, is the ability of the government under the constitution to act on individuals directly instead of acting through the instrumentality of the state governments.<sup>23</sup>

**Government under the Constitution a New Government.**—The government under the constitution was not a mere change in a dynasty, or in the form of government, leaving the nation or sovereignty the same, and clothed with all the rights, and bound by all the obligations of the preceding one, but, when the present United States came into existence under the constitution, it was a new

**22. As compared with the government under the articles of confederation.**—

*Chisholm v. Georgia*, 2 Dall. 419, 1 L. Ed. 440; *Hylton v. United States*, 3 Dall. 171, 178, 1 L. Ed. 556; *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *Cohens v. Virginia*, 6 Wheat. 264, 388, 5 L. Ed. 257; *Gibbons v. Ogden*, 9 Wheat. 1, 187, 6 L. Ed. 23; *Bucker v. Finley*, 2 Pet. 586, 590, 7 L. Ed. 528; *Rhode Island v. Massachusetts*, 12 Pet. 657, 729, 730, 9 L. Ed. 1233; *Lane County v. Oregon*, 7 Wall. 71, 76, 19 L. Ed. 101; *Collector v. Day*, 11 Wall. 113, 125, 20 L. Ed. 122; *Legal Tender Cases*, 12 Wall. 457, 545, 20 L. Ed. 287; *White v. Hart*, 13 Wall. 646, 650, 20 L. Ed. 685; *Legal Tender Case*, 110 U. S. 421, 438, 28 L. Ed. 204; *Virginia Coupon Cases*, 114 U. S. 270, 307, 29 L. Ed. 185; *The Chinese Exclusion Case*, 130 U. S. 581, 604, 32 L. Ed. 1068; *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 561, 39 L. Ed. 759; *In re Debs*, 158 U. S. 564, 39 L. Ed. 1092; *Kansas v. Colorado*, 206 U. S. 46, 80, 51 L. Ed. 956.

As preliminary to the very able discussions of the constitution, which we have heard from the bar, and as having some influence on its construction, reference has been made to the political situation of these states, anterior to its formation. It has been said, that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But when these allied sovereigns converted their league into a government, when they converted their congress of ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a legislature, empowered to enact laws on the most interesting subjects, the whole character in which the states appear underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected." *Marshall, C. J.*, delivering the opinion in *Gibbons v. Ogden*, 9 Wheat. 1, 187, 6 L. Ed. 23.

**23. Acts directly on the individual; not through the states.**—*Chisholm v. Georgia*, 2 Dall. 419, 464, 1 L. Ed. 440; *Hylton v. United States*, 3 Dall. 171, 178, 1 L. Ed. 556; *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *Cohens v. Virginia*, 6

Wheat. 264, 388, 5 L. Ed. 257; *Rhode Island v. Massachusetts*, 12 Pet. 657, 729, 730, 9 L. Ed. 1233; *Lane County v. Oregon*, 7 Wall. 71, 76, 19 L. Ed. 101; *Collector v. Day*, 11 Wall. 113, 125, 20 L. Ed. 122; *White v. Hart*, 13 Wall. 646, 650, 20 L. Ed. 685; *Virginia Coupon Cases*, 114 U. S. 270, 307, 29 L. Ed. 185; *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 560, 39 L. Ed. 759; *In re Debs*, 158 U. S. 564, 578, 39 L. Ed. 1092.

"It is no longer open to question that by the constitution a nation was brought into being, and that that instrument was not merely operative to establish a closer union or league of states." *Kansas v. Colorado*, 206 U. S. 46, 80, 51 L. Ed. 956.

The government of the Union is a government of the people, it emanates from them; its powers are granted by them, and are to be exercised directly on them, and for their benefit. *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579.

The people, through the constitution of the United States, "established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the confederate government, which acted with powers, greatly restricted, only upon the states." *Lane County v. Oregon*, 7 Wall. 71, 76, 19 L. Ed. 101; *Collector v. Day*, 11 Wall. 113, 125, 20 L. Ed. 122; *Virginia Coupon Cases*, 114 U. S. 270, 307, 29 L. Ed. 185; *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 560, 39 L. Ed. 759. *In re Debs*, 158 U. S. 564, 578, 39 L. Ed. 1092.

Under the articles of confederation congress had no coercive power in the matter of taxation upon individuals. The most that it could do was in the line of requisition upon the states, and if a state disregarded the requisition congress was powerless to enforce it. Under the constitution, however, congress has the power over the individual citizen to levy and enforce taxes in accordance with the methods and limitation prescribed by that instrument. *Hylton v. United States*, 3 Dall. 171, 178, 1 L. Ed. 556 (opinion of *Patterson, J.*); *Lane County v. Oregon*, 7 Wall. 71, 76, 19 L. Ed. 101; *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 561, 39 L. Ed. 759.

political body, a new nation, then for the first time taking its place in the family of nations. It took nothing by succession from the confederation; it had no right, as its successor, to any property or rights of property which it had acquired, and was not liable for any of its obligations.<sup>24</sup>

c. *Incidents of Sovereignty*—(1) *Generally as to Foreign Relations*.—The United States, as a sovereign and independent nation, is vested by the constitution with the exclusive and entire control of international relations in peace as well as in war, and with all the powers of government necessary to maintain that control and make it effective. War, peace, intercourse and negotiations with other nations, and whatever pertains to our foreign relations, are forbidden to the state governments. In short, the only government of this country which other nations recognize or treat with is the government of the Union; and the only American flag known throughout the world is the flag of the United States.<sup>25</sup>

**Belongs to the Political Department of the Government.**—This power belongs to the political department of the government and may be exercised either through treaties made by the president and senate or through statutes enacted by congress.<sup>26</sup>

(2) *To Settle Boundaries*.—It is a part of the general right of sovereignty, belonging to independent nations, to establish and fix the disputed boundaries between their respective limits; and the boundaries so established and fixed by

**24. Government under the constitution a new government.**—*Martin v. Hunter*, 1 Wheat. 304, 305, 322, 4 L. Ed. 97; *Rhode Island v. Massachusetts*, 12 Pet. 657, 729, 730, 9 L. Ed. 1233; *Scott v. Sandford* (opinion of Taney, C. J.), 19 How. 393, 441, 15 L. Ed. 691; *Kansas v. Colorado*, 206 U. S. 46, 81, 51 L. Ed. 956.

The constitution was an act of the people of the United States to supersede the confederation, and not to be engrafted upon it as a stock through which it was to receive life and nourishment. (Opinion of Story, J.) *Martin v. Hunter*, 1 Wheat. 304, 332, 4 L. Ed. 97.

The constitution, which superseded the articles of confederation, erected a new government, organized it into distinct departments, assigning to each its appropriate powers, and to congress the power to pass laws for carrying into execution the powers granted to each; so that the laws of the Union could be enforced by its own authority upon all persons and subject matters over which the jurisdiction was granted to any department or officer of the government of the United States. *Rhode Island v. Massachusetts*, 12 Pet. 657, 729, 730, 9 L. Ed. 1233.

**25. Generally as to foreign relations.**—*Legal Tender Cases*, 12 Wall. 457, 555, 20 L. Ed. 287; *Head Money Cases*, 112 U. S. 580, 28 L. Ed. 798; *The Chinese Exclusion Case*, 130 U. S. 581, 604, 32 L. Ed. 1068; *Ekiu v. United States*, 142 U. S. 651, 659, 35 L. Ed. 1146; *In re Cooper*, 143 U. S. 472, 36 L. Ed. 232; *Fong Yue Ting v. United States*, 149 U. S. 698, 705, 37 L. Ed. 905; *Lem Moon Sing v. United States*, 158 U. S. 538, 543, 39 L. Ed. 1082. See, also, post, "Generally; Foreign Relations and Matters Exclusively Delegated to the Federal Government," VI, D, 3, c, (3). (a).

"The powers to declare war, make

treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republican governments to the states and admit subjects of other nations to citizenship, are all sovereign powers, restricted in their exercise only by the constitution itself and considerations of public policy and justice, which control, more or less, the conduct of all civilized nations." *The Chinese Exclusion Case*, 130 U. S. 581, 604, 32 L. Ed. 1068.

A right secured by the law of nations to a nation, or its people, is one which the United States government, as representing the power of the nation, is bound to protect. Consequently, a law which is necessary and proper to afford this protection is one that congress may enact, because it is one that is needed to carry into execution a power conferred by the constitution on the government of the United States exclusively. *United States v. Arjona*, 120 U. S. 479, 487, 30 L. Ed. 728.

**26. Belongs to the political department of the government.**—*Head Money Cases*, 112 U. S. 580, 28 L. Ed. 798; *The Chinese Exclusion Case*, 130 U. S. 581, 604, 609, 32 L. Ed. 1068; *Ekiu v. United States*, 142 U. S. 651, 659, 35 L. Ed. 1146; *In re Cooper*, 143 U. S. 472, 36 L. Ed. 232; *Fong Yue Ting v. United States*, 149 U. S. 698, 705, 37 L. Ed. 905; *Lem Moon Sing v. United States*, 158 U. S. 538, 543, 39 L. Ed. 1082.

The president and senate, except under the treaty-making power, cannot enter into compacts with the Indians, or with foreign nations. (Opinion of McLean, J.) *Worcester v. Georgia*, 6 Pet. 515, 584, 8 L. Ed. 483.

**Power of federal government to enter into treaties with Indian tribes and nations.**—See the titles INDIANS; TREATIES; UNITED STATES.



compact between nations become conclusive upon all the subjects and citizens thereof, and bind their rights, and are to be treated to all intents and purposes as the real boundaries.<sup>27</sup>

**Alteration of State Boundaries by Treaty Stipulations.**—Upon objection that it was not within the power of the United States, by treaty with the Cherokee Indians, to vary the line established by the treaty of Holston so as to affect private rights or the rights of North Carolina, McLean, J., delivering the majority opinion, said in part: "And it is a sound principle of national law, and applied to the treaty-making power of this government, whether exercised with a foreign nation or an Indian tribe, that all questions of disputed boundaries may be settled by the parties to the treaty. And to the exercise of these high functions by the government, within its constitutional powers, neither the rights of a state, nor those of an individual, can be interposed. We think it was in the due exercise of the powers of the executive and the Cherokee nation, in concluding the treaty of Tellico, to recognize in terms, or by acts, the boundary of the Holston treaty."<sup>28</sup>

(3) *Power to Acquire, Govern and Dispose of Territory*—(a) *Power of Acquisition*—(aa) *By Conquest or Treaty*.—The constitution confers upon the government of the Union the power to declare war and conclude treaties. These powers include, as incident thereto, the power to acquire territory. The United States may acquire territory and extend its boundaries, therefore, either by conquest or by treaty.<sup>29</sup>

**Acquired Only Through the Treaty-Making Power.**—But this can be done only by the treaty-making power or the legislative authority, and is not a part of the power conferred upon the president by the declaration of war.<sup>30</sup>

**Acquired as Absolutely as if by Act of Congress.**—The territory thus acquired is acquired as absolutely as if the annexation were made, as in the case of Texas and Hawaii, by an act of congress.<sup>31</sup>

(bb) *By Annexation*.—Congress also has power to annex territory to the United States, as was actually done in the cases of Texas and the Hawaiian Islands.<sup>32</sup>

(cc) *Acquisition by Discovery and Occupation*.—The United States may acquire an independent title to territory through discovery followed by actual settlement and occupation.<sup>33</sup>

**27. To settle boundaries.**—Poole v. Fleeger, 11 Pet. 184, 9 L. Ed. 680; Virginia v. Tennessee, 148 U. S. 503, 525, 37 L. Ed. 538.

**28. As affecting state boundaries.**—Latimer v. Poteet, 14 Pet. 4, 14, 10 L. Ed. 328.

**29. Power to acquire territory by conquest or treaty.**—American Ins. Co. v. Canter, 1 Pet. 511, 542, 7 L. Ed. 243; Stewart v. Kahn, 11 Wall. 493, 507, 20 L. Ed. 176; Mormon Church v. United States, 136 U. S. 1, 42, 34 L. Ed. 481; De Lima v. Bidwell, 182 U. S. 1, 196, 45 L. Ed. 1041; Dorr v. United States, 195 U. S. 138, 141, 49 L. Ed. 128; Wilson v. Shaw, 204 U. S. 24, 32, 51 L. Ed. 351.

"The power to acquire territory, other than the territory northwest of the Ohio River (which belonged to the United States at the adoption of the constitution), is derived from the treaty-making power and the power to declare and carry on war. The incidents of these powers are those of national sovereignty, and belong to all independent governments. The power to make acquisitions of territory by conquest, by treaty, and by cession is an

incident of national sovereignty." Mormon Church v. United States, 136 U. S. 1, 42, 34 L. Ed. 481.

The United States may demand the cession of territory as the condition of peace, in order to indemnify its citizens for the injuries they have suffered, or to reimburse the government for the expenses of the war. Fleming v. Page, 9 How. 603, 13 L. Ed. 276; De Lima v. Bidwell, 182 U. S. 1, 182, 45 L. Ed. 1041; Dorr v. United States, 195 U. S. 138, 140, 49 L. Ed. 128.

**30. Acquired only through the treaty-making power.**—Fleming v. Page, 9 How. 603, 13 L. Ed. 276; De Lima v. Bidwell, 182 U. S. 1, 182, 45 L. Ed. 1041.

**31. Territory acquired absolutely.**—De Lima v. Bidwell, 182 U. S. 1, 196, 45 L. Ed. 1041.

**32. Acquisition by annexation.**—See De Lima v. Bidwell, 182 U. S. 1, 196, 45 L. Ed. 1041; Hawaii v. Mankichi, 190 U. S. 197, 215, 47 L. Ed. 1016.

**33. Acquisition by discovery and occupation.**—Shively v. Bowlby, 152 U. S. 1, 50, 38 L. Ed. 331. See, also, Johnson v. McIntosh, 8 Wheat. 543, 545, 595, 5 L. Ed. 681; Martin v. Waddell, 16 Pet. 367, 409,



**Abandoned and Unoccupied Islands.**—In accordance with the law of nations, the political departments of the government have the power to extend its jurisdiction over abandoned and unoccupied islands in the public high seas which have been taken possession of by its citizens in its name although only for the purpose of conducting a particular business, as the exploitation of guano deposits, therein.<sup>34</sup>

(b) *Status of Acquired Territory as Foreign or Domestic*—(aa) *Generally.*—Upon the ratification of a treaty ceding territory to the United States, and the taking possession thereof by the United States, the ceded territory ceases to be foreign and becomes territory of the United States.<sup>35</sup> Both these conditions must exist to produce a change of nationality for revenue purposes. Possession is not alone sufficient, as was held in *Fleming v. Page*, 9 How. 603, 13 L. Ed. 276; nor is a treaty ceding such territory sufficient without a surrender of possession.<sup>36</sup>

10 L. Ed. 997; *Jones v. United States*, 137 U. S. 202, 212, 34 L. Ed. 691.

**Same—Territory of Oregon.**—The title of the United States to Oregon was founded upon original discovery and actual settlement by citizens of the United States, authorized or approved by the government of the United States, as well as upon the cession of the Louisiana Territory by France in the treaty of 1803, and the renunciation of the claims of Spain in the treaty of 1819. So far as the title of the United States was derived from France or Spain, it stood as in other territories acquired by treaty. The independent title based on discovery and settlement was equally absolute. *Shively v. Bowlby*, 152 U. S. 1, 50, 38 L. Ed. 331.

**34. Acquisition of abandoned or unoccupied islands.**—*Jones v. United States*, 137 U. S. 202, 34 L. Ed. 691.

Statutes extending the criminal jurisdiction of the United States to such islands and providing for the punishment of crimes committed therein, held constitutional in *Jones v. United States*, 137 U. S. 202, 34 L. Ed. 691.

**35. Status of acquired territory as foreign or domestic.**—*Cross v. Harriman*, 16 How. 164, 14 L. Ed. 889; *De Lima v. Bidwell*, 182 U. S. 1, 196, 45 L. Ed. 1041; *Goetze v. United States*, 182 U. S. 221, 222, 234, 45 L. Ed. 1065; *Dooley v. United States*, 183 U. S. 151, 46 L. Ed. 128; *Fourteen Diamond Rings v. United States*, 183 U. S. 176, 46 L. Ed. 138; *United States v. Heinszen*, 206 U. S. 370, 380, 51 L. Ed. 1098.

In *De Lima v. Bidwell*, 182 U. S. 1, 194, 45 L. Ed. 1041, it was said that, except for the dictum in *Fleming v. Page*, 9 How. 603, 13 L. Ed. 276 (practically overruled in *Cross v. Harriman*, 16 How. 164, 184, 14 L. Ed. 889), there is not a shred of authority for holding that a district ceded to and in possession of the United States remains for any purpose a foreign country.

**36. Ratification and possession both necessary to effect change.**—*Keene v. McDonough*, 8 Pet. 308, 8 L. Ed. 955; *Pollard v. Kibbe*, 14 Pet. 353, 406, 10 L. Ed.

490; *De Lima v. Bidwell*, 182 U. S. 1, 194, 45 L. Ed. 1041.

**Porto Rico not a foreign country.**—By the ratification of the treaty of Paris, the island of Porto Rico became territory of United States, although not an organized territory in the technical sense of the word. *DeLima v. Bidwell*, 182 U. S. 1, 196, 45 L. Ed. 1041.

**Same: within the meaning of the tariff laws.**—The island of Porto Rico ceased to be a foreign country within the meaning of those words as used in the tariff laws of the United States upon the ratification of the treaty of peace between the United States and Spain, April 11, 1899; the United States being already in possession of the island. *De Lima v. Bidwell*, 182 U. S. 1, 200, 45 L. Ed. 1041; *Goetze v. United States*, 182 U. S. 221, 45 L. Ed. 1065; *Dooley v. United States*, 182 U. S. 222, 234, 45 L. Ed. 1074; *Downes v. Bidwell*, 182 U. S. 244, 248, 45 L. Ed. 1088; *United States v. Heinszen*, 206 U. S. 370, 379, 51 L. Ed. 1098.

**Same; within the meaning of the constitutional provision declaring that no tax or duty shall be laid on exports.**—The island of Porto Rico is not a foreign country within that provision of the constitution declaring that no tax or duty shall be laid on articles exported from any state. *Dooley v. United States*, 183 U. S. 151, 46 L. Ed. 128, reaffirming *De Lima v. Bidwell*, 182 U. S. 1, 45 L. Ed. 1041.

**Same: Foraker act constitutional.**—Accordingly it is held that the act of May 1, 1900, known as the Foraker act, and which imposed a duty upon all goods going to Porto Rico from the United States, was constitutional, since goods shipped from the United States to the island of Porto Rico will not be considered exports within the meaning of this clause. *Dooley v. United States*, 183 U. S. 151, 46 L. Ed. 128.

**Philippines not foreign within the meaning of the tariff laws.**—Merchandise imported from the Philippine Islands after the ratification of the treaty of peace and cession of those islands by Spain to the United States was not subject to duties

The fact that conquered territory is under a military or provisional government established and maintained by the United States is not conclusive upon its status as foreign or domestic territory, even though a treaty of peace has been concluded whereby the defeated belligerent relinquishes all sovereignty and dominion over the same.<sup>37</sup>

**Effect of Armed Rebellion after Cession.**—The complete title and possession of the Philippine Islands by the United States after the treaty of peace and cession of those islands by Spain to the United States was not affected by the fact that the insurrection against the authority of Spain which existed at the time of the cession continued to be waged against the authority of the United

under the act of July 24, 1897, 30 Stat. 451, imposing duties "upon all articles imported from foreign countries." In this respect there is no distinction between the Philippines and the islands of Porto Rico. Neither of them is a foreign country within the terms of that act. *Fourteen Diamond Rings v. United States*, 183 U. S. 176, 46 L. Ed. 138; *United States v. Heinszen*, 206 U. S. 370, 380, 51 L. Ed. 1098.

**Cuba and the Isle of Pines as foreign countries.**—On the other hand, while the status of Cuba and the Isle of Pines at the close of the Spanish-American war was that of conquered territory, nevertheless, they are, as to the United States, foreign territory, since this government has never taken that possession in fact and in law which is essential to render conquered territory a part of the United States. *Neely v. Henkel*, 180 U. S. 109, 45 L. Ed. 448; *Pearcy v. Stranahan*, 205 U. S. 257, 265, 51 L. Ed. 793.

"It is true that as between Spain and the United States—indeed, as between the United States and all foreign nations—Cuba, upon the cessation of hostilities with Spain and after the treaty of Paris, was to be treated as if it were conquered territory. But as between the United States and Cuba that island is territory held in trust for the inhabitants of Cuba to whom it rightfully belongs and to whose exclusive control it will be surrendered when a stable government shall have been established by their voluntary action." *Neely v. Henkel*, 180 U. S. 109, 120, 45 L. Ed. 448; *Pearcy v. Stranahan*, 205 U. S. 257, 265, 51 L. Ed. 793.

**Cuba a foreign country within extradition statutes.**—In *Neely v. Henkel*, 180 U. S. 109, 45 L. Ed. 448, the question was whether Cuba was a foreign country or foreign territory within the act of congress of June 6, 1900 (31 Stat. 656, c. 793), providing for the extradition from the United States of persons committing crimes within any foreign country or foreign territory or any part thereof, occupied or under the control of the United States. It was held that Cuba was within this description. Mr. Justice Harlan, delivering the opinion of the court, said: "The facts above detailed make it clear that within the meaning of the act of June 6, 1900, Cuba is foreign territory.

It cannot be regarded, in any constitutional, legal or international sense, a part of the territory of the United States." Accord: *Pearcy v. Stranahan*, 205 U. S. 257, 263, 51 L. Ed. 793.

**Cuba and the Isle of Pines foreign within the meaning of the revenue acts.**—"The Isle of Pines continues at least de facto under the jurisdiction of the government of the Republic of Cuba, and that settles the question before us, because as the United States have never taken possession of the Isle of Pines as having been ceded by the treaty of peace, and as it has been and is being governed by the Republic of Cuba, it has remained 'foreign country' within the meaning of the Dingley Act according to the ruling in *De Lima v. Bidwell*, 182 U. S. 1, 45 L. Ed. 1041, and cases cited; *United States v. Rice*, 4 Wheat. 246, 4 L. Ed. 562. There has been no change of nationality for revenue purposes, but, on the contrary, the Cuban government has been recognized as rightfully exercising sovereignty over the Isle of Pines as a de facto government until otherwise provided. It must be treated as foreign, for this government has never taken, nor aimed to take, that possession in fact and in law which is essential to render it domestic." *Pearcy v. Stranahan*, 205 U. S. 257, 272, 51 L. Ed. 793.

**37. Military occupation not conclusive as to status.**—*Neely v. Henkel*, 180 U. S. 109, 45 L. Ed. 448; *Pearcy v. Stranahan*, 205 U. S. 257, 264, 51 L. Ed. 793.

"Cuba is none the less foreign territory, within the meaning of the act of congress, because it is under a military governor appointed by and representing the president in the work of assisting the inhabitants of that island to establish a government of their own, under which, as a free and independent people, they may control their own affairs without interference by other nations. The occupancy of the island by troops of the United States was the necessary result of the war. That result could not have been avoided by the United States consistently with the principles of international law or with its obligations to the people of Cuba." *Neely v. Henkel*, 180 U. S. 109, 45 L. Ed. 448; *Pearcy v. Stranahan*, 205 U. S. 257, 264, 51 L. Ed. 793.

States. After title passed April 11, 1899, there was nothing in the Philippine insurrection of sufficient gravity to give to the islands the character of foreign countries within the meaning of the tariff acts.<sup>38</sup>

(lb) *May Be Subject to Jurisdiction of the United States without Being Incorporated into the Union.*—In *Scott v. Sandford*, 19 How. 393, 395, 15 L. Ed. 691, it was held that the United States, under the present constitution, cannot acquire territory to be held as a colony, to be governed at its will and pleasure; but that it may acquire territory which, at the time, has not a population that fits it to become a state, and may govern it as a territory until it has a population which, in the judgment of congress, entitles it to be admitted as a state of the Union. In recent years, however, it has been held that the United States government may hold territory, once it is acquired, without incorporating it immediately into the nation itself; that though the United States may by treaty or otherwise acquire jurisdiction over certain territory, complete incorporation thereof into the Union will not take place until such territory approaches the condition which congress in its discretion sees fit for it to reach before it can be admitted as a part of the United States.<sup>39</sup> It is said that the thirteenth amendment to the constitution, prohibiting slavery and involuntary servitude within the United States, "or in any place subject to their jurisdiction," proves that there may be places within the jurisdiction of the United States that are no part of the Union.<sup>40</sup>

**38. Effect of armed rebellion after cession.**—*Fourteen Diamond Rings v. United States*, 183 U. S. 176, 46 L. Ed. 138; *Lynch v. United States*, 202 U. S. 484, 496, 50 L. Ed. 1117.

**39. May hold territory without incorporating same into the Union.**—*Downes v. Bidwell*, 182 U. S. 244, 336, 342, 45 L. Ed. 1088 (per Justices White, Sheres and McKenna), reaffirmed in *Czarnikow v. Bidwell*, 191 U. S. 559, 48 L. Ed. 302; *Hawaii v. Mankichi*, 190 U. S. 197, 219, 47 L. Ed. 1016; *Warner v. Stranahan*, 191 U. S. 560, 48 L. Ed. 302; *Dorr v. United States*, 195 U. S. 138, 143, 49 L. Ed. 128; *Rasmussen v. United States*, 197 U. S. 516, 521, 49 L. Ed. 862.

**40. Same; thirteenth amendment.**—*Downes v. Bidwell*, 182 U. S. 244, 251, 344, 45 L. Ed. 1088 (per Justice White, Sheres and McKenna), reaffirmed in *Czarnikow v. Bidwell*, 191 U. S. 559, 48 L. Ed. 302; *Warner v. Stranahan*, 191 U. S. 560, 48 L. Ed. 302.

**Porto Rico held as a mere dependency.**—While in an international sense Porto Rico is not a foreign country, since it is subject to the sovereignty of and is owned by the United States, it is foreign to the United States in a domestic sense, because the island had not been incorporated into the United States, but it is merely appurtenant thereto as a possession. *Downes v. Bidwell*, 182 U. S. 244, 340, 45 L. Ed. 1088, per Justices White, Shiras and McKenna.

**Philippine Islands not incorporated into Union by treaty of cession.**—"If the treaty-making power could incorporate territory into the United States without congressional action, it is apparent that the treaty with Spain, ceding the Philippines to the United States, carefully refrained from so doing; for it is expressly provided that (Article IX) 'the civil rights

and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the congress.' In this language it is clear that it was the intention of the framers of the treaty to reserve to congress, so far as it could be constitutionally done, a free hand in dealing with these newly-acquired possessions." *Dorr v. United States*, 195 U. S. 138, 143, 49 L. Ed. 128; *Rasmussen v. United States*, 197 U. S. 516, 521, 49 L. Ed. 862.

**Hawaiian Islands not incorporated into Union by resolution of annexation.**—Neither the terms of the resolution of annexation nor the situation which arose from it served to incorporate the Hawaiian Islands into the United States and make them an integral part thereof. On the contrary, it was the manifest purpose, whilst acquiring them, to leave the permanent relation they were to bear to the government of the United States to await the subsequent determination of congress. *Hawaii v. Mankichi*, 190 U. S. 197, 219, 47 L. Ed. 1016, per Justices White and McKenna concurring.

**Alaska incorporated into the Union by treaty.**—The text of the treaty with Russia by which Alaska was acquired shows the intention on the part of congress that said territory should be incorporated into the United States in the most complete sense of the word, thus standing on a different plane from those territories secured from Spain; consequently as to it the constitution of the United States is supreme in all its provisions and congress has no power to pass laws in violation of it or any of its amendments. *Rasmussen v. United States*, 197 U. S. 516, 525, 49 L. Ed. 862.

**Status of Florida after cession.**—The treaty with Spain, by which Florida was ceded to the United States, admitted the



**Presumption That Congress Will Incorporate or Relinquish.**—It is the presumption, however, that congress, which within its sphere is but the expression of the political concession of the people of the United States, will be faithful to its duty under the constitution, and that it will, when the unfitness of any particular territory for incorporation into the United States has been demonstrated, terminate the occupation thereof and relinquish the jurisdiction of the United States over the same.<sup>41</sup>

**But "United States" Includes Such Territory as Regards Foreign Relations.**—"In dealing with foreign sovereignties, the term 'United States' has a broader meaning than when used in the constitution, and includes all territories subject to the jurisdiction of the federal government, wherever located. In its treaties and conventions with foreign nations this government is a unit. This is so not because the territories comprised a part of the government established by the people of the states in their constitution, but because the federal government is the only authorized organ of the territories, as well as of the states, in their foreign relations. By art. 1, § 10, of the constitution, 'no state shall enter into any treaty, alliance or confederation, \* \* \* or enter into any agreement or compact with another state, or with a foreign power.' It would be absurd to hold that the territories, which are much less independent than the states, and are under the direct control and tutelage of the general government, possess a power in this particular which is thus expressly forbidden to the states."<sup>42</sup>

(c) *Government of Territory*—(aa) *Effect of Treaty of Cession.*—In a conquered territory, civil government must take effect, either by the action of the treaty-making power, or by that of the congress of the United States. The office of a treaty of cession ordinarily is to put an end to all authority of the foreign government over the territory; and to subject the territory to the disposition of the government of the United States.<sup>43</sup>

(bb) *Usage as to Conquered or Ceded Territory*—(aaa) *As to Private, Personal and Property Rights; Continuation of Existing Laws.*—The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace; if it be ceded by treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed; either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. On such transfer of territory, it has never been held that the relations of the inhabitants with each other undergo any change; their relations with their

inhabitants of Florida to the enjoyment of the privileges, rights and immunities of the citizens of the United States; they did not, however, participate in political power, nor share in the government, until Florida became a state; in the meantime, Florida continued to be a territory of the United States, governed by virtue of that clause in the constitution, which empowers "congress to make all needful rules and regulations, respecting the territory or other property belonging to the United States." *American Ins. Co. v. Canter*, 1 Pet. 511, 7 L. Ed. 243.

41. **Presumption that congress will incorporate or relinquish.**—*Downes v. Bidwell*, 182 U. S. 244, 344, 45 L. Ed. 1088 (per Justices White, Shiras and McKenna).

42. **Acquired territory is domestic as regards foreign relations.**—*Downes v. Bidwell*, 182 U. S. 244, 263, 45 L. Ed. 1088, reaffirmed in *Czarnikow v. Bidwell*, 191 U. S. 559, 48 L. Ed. 302; *Warner v. Stranahan*, 191 U. S. 560, 48 L. Ed. 302.

**"The District of Columbia and the territories are states, as that word is used in treaties with foreign powers, with respect to the ownership, disposition and inheritance of property."** *Downes v. Bidwell*, 182 U. S. 244, 270, 45 L. Ed. 1088, reaffirmed in *Czarnikow v. Bidwell*, 191 U. S. 559, 48 L. Ed. 302; *Warner v. Stranahan*, 191 U. S. 560, 48 L. Ed. 302.

**Status of Cuba as between the United States and foreign nations.**—Even Cuba, as between Spain and the United States, and indeed, between the United States and all other nations, is to be deemed a part of the United States and treated as conquered territory in the possession of the United States. *Neely v. Henkel*, 180 U. S. 109, 120, 45 L. Ed. 448; *Pearcy v. Stranahan*, 205 U. S. 257, 263, 51 L. Ed. 793.

43. **Government of territory; effect of treaty of cession.**—(Per Mr. Justice Gray.) *Downes v. Bidwell*, 182 U. S. 244, 45 L. Ed. 1088.

former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory; the same act which transfers their country, transfers the allegiance of those who remain in it, and the law which may be denominated political, is, necessarily, changed; although that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly created power of the state.<sup>44</sup> It is a well-known principle of the common law and of the law nations, recognized and repeatedly acted upon by the supreme court of the United States, that a transfer of sovereignty or division of territory does not work any forfeiture or change in the civil and property rights of individuals, and that until the new sovereign shall enact otherwise, the *lex loci*, that is, the law applicable before the division or transfer, must be the governing rule of private right under whatever jurisdiction private right comes to be examined.<sup>45</sup> Of course, in case of cession to the United

**44. Usage as to conquered or ceded territory; individual rights.**—*American Ins. Co. v. Canter*, 1 Pet. 511, 7 L. Ed. 243; *Dorr v. United States*, 195 U. S. 138, 141, 49 L. Ed. 128.

**45. Same; continuation of existing laws.**—*Dawson v. Godfrey*, 4 Cranch 321, 323, 2 L. Ed. 634; *Terrett v. Taylor*, 9 Cranch 43, 50, 3 L. Ed. 650; *Mutual Assurance Society v. Watts*, 1 Wheat. 279, 4 L. Ed. 91; *Dartmouth College v. Woodward*, 4 Wheat. 518, 651, 707, 4 L. Ed. 629; *Green v. Biddle*, 8 Wheat. 1, 98, 5 L. Ed. 547; *Society for the Propagation of the Gospel v. New Haven*, 8 Wheat. 464, 5 L. Ed. 662; *Johnson v. McIntosh*, 8 Wheat. 543, 589, 5 L. Ed. 681; *Henderson v. Poindexter*, 12 Wheat. 530, 536, 6 L. Ed. 718; *American Ins. Co. v. Canter*, 1 Pet. 511, 7 L. Ed. 243; *Soulard v. United States*, 4 Pet. 511, 7 L. Ed. 938; *Hawkins v. Barney*, 5 Pet. 457, 464, 8 L. Ed. 190; *United States v. Arredondo*, 6 Pet. 691, 8 L. Ed. 547; *United States v. Percheman*, 7 Pet. 51, 86, 87, 8 L. Ed. 604; *United States v. Clark*, 8 Pet. 445, 8 L. Ed. 1001; *Delassus v. United States*, 9 Pet. 117, 133, 9 L. Ed. 71; *Mitchel v. United States*, 9 Pet. 711, 734, 9 L. Ed. 283; *Smith v. United States*, 10 Pet. 326, 330, 9 L. Ed. 442; *New Orleans v. United States*, 10 Pet. 662, 718, 9 L. Ed. 573; *Strother v. Lucas*, 12 Pet. 410, 9 L. Ed. 1137; *Rhode Island v. Massachusetts*, 12 Pet. 657, 749, 9 L. Ed. 1233; *United States v. Wiggins*, 14 Pet. 344, 10 L. Ed. 481; *Pollard v. Kibbe*, 14 Pet. 353, 393, 10 L. Ed. 490; *Leitensdorfer v. Webb*, 20 How. 176, 15 L. Ed. 891; *Hawaii v. Manikichi*, 190 U. S. 197, 215, 47 L. Ed. 1016; *Perez v. Fernandez*, 202 U. S. 80, 100, 50 L. Ed. 942; *Ortega v. Lara*, 202 U. S. 339, 342, 50 L. Ed. 1055; *Romeu v. Todd*, 206 U. S. 358, 368, 51 L. Ed. 1093.

It is the modern usage of nations which has become law, in cases of conquest, that the allegiance of the people is changed and their relation to their sovereign dissolved, but their relations to each other and their rights of property remain undisturbed. *United States v. Percheman*, 7 Pet. 51, 86, 87, 8 L. Ed. 604; *Mitchel v. United States*, 9 Pet. 711, 9 L. Ed. 283; *Leitensdorfer v. Webb*, 20 How. 176, 15 L. Ed. 891.

"Nevertheless, and apparently largely out of abundant caution, the eighth section of the act of April 12, 1900, provided: 'That the laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended, or modified hereinafter, or as altered or modified by military orders and decrees in force when this act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions thereof, until altered, amended, or repealed by the legislative authority hereinafter provided for Porto Rico or by act of congress of the United States.'" *Ortega v. Lara*, 202 U. S. 339, 342, 50 L. Ed. 1055; *Perez v. Fernandez*, 202 U. S. 80, 100, 50 L. Ed. 942. See, also, *Kepner v. United States*, 195 U. S. 100, 122, 49 L. Ed. 114.

When a territory is acquired by treaty, cession or even conquest, the rights of the inhabitants to property are respected as sacred. *Johnson v. McIntosh*, 8 Wheat. 543, 589, 5 L. Ed. 681; *Henderson v. Poindexter*, 12 Wheat. 530, 536, 6 L. Ed. 718; *United States v. Arredondo*, 6 Pet. 691, 712, 8 L. Ed. 547; *United States v. Percheman*, 7 Pet. 51, 86, 87, 8 L. Ed. 604; *United States v. Clark*, 8 Pet. 445, 8 L. Ed. 1001; *Delassus v. United States*, 9 Pet. 117, 133, 9 L. Ed. 71; *Smith v. United States*, 10 Pet. 326, 330, 9 L. Ed. 442; *Strother v. Lucas*, 12 Pet. 410, 9 L. Ed. 1137; *Rhode Island v. Massachusetts*, 12 Pet. 657, 749, 9 L. Ed. 1233.

The modern usage of nations which has become law, would be violated; that sense of justice and of right, which is acknowledged and felt by the whole civilized world, would be outraged; if private property should be generally confiscated, and private rights annulled, on a change in the sovereignty of the country. The people change their allegiance, their relation to their ancient sovereignty is dissolved; but their relations to each other, and their rights of property remain undisturbed. *United States v. Percheman*, 7 Pet. 51, 8 L. Ed. 604.

Had Florida changed its sovereign, by an act containing no stipulation respecting the property of individuals, the right



States, laws of the ceded country inconsistent with the constitution and laws of

of property in all those who became subjects or citizens of the new government would have been unaffected by the change; it would have remained the same as under the ancient sovereign. *United States v. Percheman*, 7 Pet. 51, 8 L. Ed. 604.

The language of the second article of the treaty between the United States and Spain, of February 22d, 1819, by which Florida was ceded to the United States, conforms to this general principle. *United States v. Percheman*, 7 Pet. 51, 8 L. Ed. 604.

All the laws which were in force in Florida while a province of Spain, those excepted which were political in their character and which concerned the relations between the people and their sovereign, remained in force until altered by the government of the United States. Congress recognized this principle by using the words "laws of the territory now in force therein." No laws could then have been in force but those enacted by the Spanish government. *American Ins. Co. v. Canter*, 1 Pet. 511, 7 L. Ed. 243.

Titles to land, made by Spain, in the territory of Florida, before the 24th of January, 1818, are intrinsically valid, and need no sanction from the legislative or judicial departments of the United States. *United States v. Wiggins*, 14 Pet. 344, 10 L. Ed. 481; *Pollard v. Kibbe*, 14 Pet. 353, 393, 10 L. Ed. 490.

The cession of the District of Columbia to the national government did not affect the lien created on real property situated in the town of Alexandria by the Virginia statute of December, 1794, in the hands of bona fide purchasers without notice; but said statute could not enforce a personal liability upon such purchasers to the Mutual Assurance Society in whose favor the lien was created. *Mutual Assurance Society v. Watts*, 1 Wheat. 279, 4 L. Ed. 91.

In the treaty by which Louisiana was acquired, the United States stipulated that the inhabitants of the ceded territory should be protected in the free enjoyment of their property. The United States as a just nation, regarded this stipulation as the avowal of a principle which would have held equally sacred, though it had not been inserted in the contract. *Soulard v. United States*, 4 Pet. 511, 7 L. Ed. 938; *Delassus v. United States*, 9 Pet. 117, 9 L. Ed. 71.

The dissolution of the regal government upon the separation of the colonies from the mother country, did not operate to suspend or destroy the property or civil rights of private corporations owning property within the colonies. *Lawson v. Godfrey*, 4 Cranch 321, 323, 2 L. Ed. 634; *Terrett v. Taylor*, 9 Cranch 43, 50, 3 L. Ed. 650; *Dartmouth College v. Woodward*,

4 Wheat. 518, 4 L. Ed. 629; *Society for the Propagation of the Gospel v. New Haven*, 8 Wheat. 464, 5 L. Ed. 662.

All contract and property rights acquired by corporations or individuals from the British government before the separation of the colonies from the mother country remain, subsist, and are protected under and by the constitution of the United States and of the respective states. The states have no right to impair the contract or property rights acquired from the British crown prior to the separation. *Terrett v. Taylor*, 9 Cranch 43, 50, 3 L. Ed. 650; *Dartmouth College v. Woodward*, 4 Wheat. 518, 651, 707, 4 L. Ed. 629.

"The laws of Porto Rico remained the laws of Porto Rico except as indicated in § 8 of the Foraker Act, which section did not make all the laws of Porto Rico acts of congress." *Ortega v. Lara*, 202 U. S. 339, 342, 50 L. Ed. 1055; *Perez v. Fernandez*, 202 U. S. 80, 100, 50 L. Ed. 942.

"Cases which have come to this court from the Philippines and Porto Rico, where we have had occasion to consider the enactments making changes in the laws of those islands, show the disposition of the executive and congress not to interfere more than is necessary with local institutions, and to engraft upon the old and different system of jurisprudence established by the civil law only such changes as were deemed necessary in the interest of the people, and in order to more effectually conserve and protect their rights. *Kepner v. United States*, 195 U. S. 100, 122, 49 L. Ed. 114. This policy has been followed in dealing with the Porto Ricans. President's Message, December 5, 1899; *Walton's Civil Law in Spain and Spanish America*, 594." *Perez v. Fernandez*, 202 U. S. 80, 92, 50 L. Ed. 942.

The mere provision of the act, by which a court was created to enforce the local law, did not empower the court so created to set at naught the local law by disregarding fundamental rules of real property governing in the island, thereby creating confusion and uncertainty, and hence tending to the destruction of the rights of innocent third parties. The local law of real property prevailing in the island is controlling until changed, as provided by congress. *Perez v. Fernandez*, 202 U. S. 80, 92, 50 L. Ed. 942; *Romeu v. Todd*, 206 U. S. 358, 368, 369, 51 L. Ed. 1093. See, also, *Crowley v. United States*, 194 U. S. 461, 48 L. Ed. 1075; *Kepner v. United States*, 195 U. S. 100, 122, 49 L. Ed. 114; *Rodriguez v. United States*, 198 U. S. 156, 49 L. Ed. 994; *Serralles v. Esbri*, 200 U. S. 103, 50 L. Ed. 391; *American R. Co. v. Castro*, 204 U. S. 453, 51 L. Ed. 564.

In continuing the municipal legislation of the Hawaiian Islands not contrary to the constitution of the United States, it was not intended to abolish at once the



the United States, so far as applicable, cease to be of obligatory force; but otherwise the municipal laws of the acquired country continue.<sup>46</sup>

(bbb) *Military Governments*.—The civil government of the United States cannot extend immediately, and of its own force, over territory acquired by war. Such territory must necessarily, in the first instance, be governed by the military power under the control of the president as commander in chief. Civil government cannot take effect at once, as soon as possession is acquired under military authority, or even as soon as that possession is confirmed by treaty. It can only be put in operation by the action of the appropriate political department of the government, at such time and in such degree as that department may determine.<sup>47</sup>

**Extent of Powers of Military Commander.**—While a military commander in legislating for a conquered country may disregard the laws of that country, he is not wholly above the laws of his own.<sup>48</sup>

(ccc) *Temporary Governments Established by Congress*.—If congress is not ready to construct a complete government for the conquered territory, it may establish a temporary government, which is not subject to all the restrictions of the constitution.<sup>49</sup>

criminal procedure theretofore in force upon the islands, and to substitute immediately and without new legislation the common-law proceedings by grand and petit jury which had been held applicable to other organized territories. (See *Webster v. Reid*, 11 How. 437, 13 L. Ed. 761; *American Pub. Co. v. Fisher*, 166 U. S. 464, 41 L. Ed. 1079; *Thompson v. Utah*, 170 U. S. 343, 42 L. Ed. 1061. *Hawaii v. Mankichi*, 190 U. S. 197, 211, 47 L. Ed. 1016.

**46. Cessation of laws opposed to applicable provisions of constitution.**—*Ortega v. Lara*, 202 U. S. 339, 342, 50 L. Ed. 1055.

**47. Military governments; necessity for.**—*Downes v. Bidwell*, 182 U. S. 244, 345, 45 L. Ed. 1088. (Per Mr. Justice Gray). See, generally, as to the power of the president or of a military commander to establish a temporary government in conquered territory, the titles INTERNATIONAL LAW; MILITARY LAW; WAR.

As to the provisional governments in the Confederate States, see post, "The Provisional Governments," VI, D, 7, a, (3). (d), (aa).

**48. Powers of military commander.**—*Dooley v. United States*, 182 U. S. 222, 234, 45 L. Ed. 1074.

Thus it is said that while a military commander in occupation of a Southern port during the Civil War might have imposed duties upon merchandise arriving from abroad, he could not have imposed duties upon merchandise arriving from the ports of his own country. *Dooley v. States*, 182 U. S. 222, 234, 45 L. Ed. 1074.

So it has been held that neither the president nor the military commander could establish a court of prize, competent to take jurisdiction of a case of capture, whose judgments would be conclusive in other admiralty courts. *Jecker v. Montgomery*, 13 How. 498, 14 L. Ed. 240.

Again it has been held that where a trader entered Mexico during the war with that country, under a permission of the commander to trade with the enemy, and under the sanction of the executive power of the United States, his property was not liable to seizure by law for such trading; and that the officer directing the seizure was liable in an action for the value of the property taken. *Mitchell v. Harmony*, 13 How. 115, 14 L. Ed. 75.

So a special order by an officer in command of the forces in the state of South Carolina, annulling a decree rendered by a court of chancery in that state, was held to be void. *Raymond v. Thomas*, 91 U. S. 712, 23 L. Ed. 434.

So it was held that the authority of the president as commander in chief to exact duties upon imports from the United States into the island of Porto Rico ceased with the ratification of the treaty of the peace, and that her right to the free entry of goods from the ports of the United States continued until congress should constitutionally legislate upon the subject. *Dooley v. United States*, 182 U. S. 222, 236, 45 L. Ed. 1074; *Armstrong v. United States*, 182 U. S. 243, 45 L. Ed. 1086.

**49. Congress may establish a temporary government.**—*Downes v. Bidwell*, 182 U. S. 244, 346, 45 L. Ed. 1088. (Per Mr. Justice Gray.) See, also, ante, "As to Private, Personal and Property Rights; Continuance of Existing Laws," VI, D, 2, c, (3). (c), (bb), (aaa).

From the terms of the resolution by which the republic of Hawaii was annexed to the United States, it is evident that it was intended to be merely temporary and provisional; that no change in the government was contemplated, and that, until further legislation, the republic of Hawaii continued in existence. Even its name was not changed until 1900, when the

**Continuation of Existing Laws.**—See ante, "As to Private, Personal and Property Rights; Continuance of Existing Laws," VI, D, 2, c, (3), (c), (bb), (aaa).

**Constitutional Limitation upon Powers of Congress in Respect to Temporary Governments.**—See post "Limitations upon the Power of Congress; Operation of the Constitution within the Territories," VI, D, 2, c, (3), (c), (cc), (bbb), (cccc), (bbbbb).

(ddd) *Termination of Military or Other Temporary Government.*—A military or other temporary government established in conquered or ceded territory does not terminate ipso facto upon the ratification of a treaty ceding the country to the United States, but continues in force until congress shall supersede it by the establishment of another.<sup>50</sup>

(cc) *Power of Congress to Govern Territory*—(aaa) *Generally; Whence Derived.*—The government and disposition of territory belonging to the United States is vested in the law making power of the nation as represented by congress and the president.<sup>51</sup>

**Whence Derived.**—The exact source from whence congress derives its power to govern and dispose of territory belonging to the United States has been the subject of much controversy. In some cases it has been held that the power conferred by section three of article four of the constitution "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States," is the foundation upon which the territorial governments act.<sup>52</sup> In the case of *Scott v. Sandford*, however, Chief Justice Taney was of the opinion that the power of congress to establish governments in the territories does not rest upon the language contained in section three of article four, but is incidental to and included in the power to acquire territory. It was

"territory of Hawaii" was organized. The laws of the United States were not extended over the islands until the organic act was passed on April 30, 1900, when, so careful was congress not to disturb the existing condition of things any further than was necessary, it was provided, § 5, that only "the laws of the United States, which are not locally inapplicable, shall have the same force and effect within the said territory as elsewhere in the United states." *Hawaii v. Mankichi*, 190 U. S. 197, 215, 47 L. Ed. 1016.

**50. Termination of temporary government.**—*Cross v. Harriman*, 16 How. 164, 184, 14 L. Ed. 889; *Downes v. Bidwell*, 182 U. S. 244, 347, 45 L. Ed. 1088; *Hawaii v. Mankichi*, 190 U. S. 197, 216, 47 L. Ed. 1016.

In the absence of congressional legislation, the regulation of the revenue of the conquered territory, even after the treaty of cession, remains with the executive and military authority. (Per Mr. Justice Gray.) *Downes v. Bidwell*, 182 U. S. 244, 347, 45 L. Ed. 1088.

The formation by the military authorities of a civil government in California, when it was done, was the lawful exercise of a belligerent right over a conquered territory. It was the existing government when the territory was ceded to the United States, as a conquest, and did not cease as a matter of course, or as a consequence of the restoration of peace; and it was rightfully continued after peace was made with Mexico, until congress leg-

islated otherwise, under its constitutional power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. *Cross v. Harriman*, 16 How. 164, 14 L. Ed. 889.

So in the case of Hawaii it was held that the temporary government provided for in the resolution of annexation was operative until superseded by further legislation. *Hawaii v. Mankichi*, 190 U. S. 197, 216, 47 L. Ed. 1016.

**51. Power of congress to govern territory.**—*Downes v. Bidwell*, 182 U. S. 244, 45 L. Ed. 1088, per Mr. Justice Gray.

The government and disposition of territory so acquired belong to the government of the United States, consisting of the president, the senate, elected by the states, and the house of representatives, chosen by and immediately representing the people of the United States. (Per Mr. Justice Gray.) *Downes v. Bidwell*, 182 U. S. 244, 45 L. Ed. 1088.

**52. Same; whence derived.**—*McCulloch v. Maryland*, 4 Wheat. 316, 422, 4 L. Ed. 579; *American Ins. Co. v. Canter*, 1 Pet. 511, 542, 7 L. Ed. 243; *United States v. Gratiot*, 14 Pet. 526, 537, 10 L. Ed. 573.

The territory of Florida was governed by congress by virtue of that clause in the constitution which empowers congress to make all needful rules and regulations respecting the territory or other property belonging to the United States. *American Ins. Co. v. Canter*, 1 Pet. 511, 7 L. Ed. 243.

said, in the first place, that the words "rules and regulations," contained in this section, were not intended to confer upon congress a general power of legislation; and, in the second place, that the history of this provision and the reasons for incorporating it into the constitution show that it was intended to apply only to the territory which had been or should be ceded to the general government by the individual states, and which was originally within the chartered limits of those states. In other words, the chief justice was of the opinion that this language was used in a proprietary rather than in a governmental sense.<sup>53</sup> And so in *De Lima v. Bidwell*, it was said that: "It is an authority which arises, not necessarily from the territorial clause of the constitution, but from the necessities of the case, and from the inability of the states to act upon the subject."<sup>54</sup> On the other hand, it has been held that "regulations," as used in this provision of the constitution, must mean laws, since the territories, as well as the states, must be governed by laws.<sup>55</sup> Other cases have held that the power to govern is derived both from the express language of this section and also from the power to acquire.<sup>56</sup> But whatever the source of this power, its uninterrupted exercise by

**53. Same; opinion of Chief Justice Taney.**—See *Scott v. Sandford*, 19 How. 393, 440, 15 L. Ed. 691, opinion of Taney, C. J., two justices dissenting.

**Opinion of Marshall, C. J.**—In *Scott v. Sandford*, 19 How. 393, 15 L. Ed. 691, the opinion of Chief Justice Marshall in *American Ins. Co. v. Canter*, 1 Pet. 511, 7 L. Ed. 243, is examined and held not to conflict with the construction here given.

In *De Lima v. Bidwell*, 182 U. S. 1, 196, 45 L. Ed. 1041, it is stated that the ruling in *Scott v. Sandford*, 19 How. 393, 15 L. Ed. 691, is contradictory of that of Chief Justice Marshall in *American Ins. Co. v. Canter*, 1 Pet. 511, 542, 7 L. Ed. 243, the statement being based upon the ground that, in speaking of Florida before it became a state, Chief Justice Marshall remarked that it continued to be a territory of the United States, governed by the territorial clause of the constitution.

While the case of *American Ins. Co. v. Canter*, 1 Pet. 511, 542, 7 L. Ed. 243, is usually cited as an authority for the proposition that the power of congress to govern the territories is derived from section three of article four of the constitution, and is so cited in this article, as a matter of fact, a reading of the entire case will disclose the fact that Chief Justice Marshall did not intend to be dogmatic as to the exact source from whence it is derived, and that he was certain only of the main fact that, whatever its source, such power does exist. Witness the following language taken from his opinion in that case: "Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a state, acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular state, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the

possession of it is unquestioned." *American Ins. Co. v. Canter*, 1 Pet. 511, 542, 7 L. Ed. 243.

See, also, *Sere v. Pitot*, 6 Cranch 332, 337, 3 L. Ed. 240, in which Chief Justice Marshall, delivering the opinion of the court, said: "The power of governing and legislating for a territory is the inevitable consequence of the right to acquire and to hold territory. Could this position be contested, the constitution of the United States declares that 'congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.' Accordingly, we find congress possessing and exercising the absolute and undisputed power of governing and legislating for the territory of Orleans. Congress has given them a legislative, an executive and a judiciary, with such powers as it has been their will to assign to those departments respectively." And see, also, *Dorr v. United States*, 195 U. S. 138, 140, 49 L. Ed. 128, quoting this language.

**54. Ruling in *De Lima v. Bidwell*.**—*De Lima v. Bidwell*, 182 U. S. 1, 196, 45 L. Ed. 1041.

**55. Regulations construed to mean laws.**—*Dorr v. United States*, 195 U. S. 138, 146, 49 L. Ed. 128.

**56. Other views.**—*Murphy v. Ramsey*, 114 U. S. 15, 44, 29 L. Ed. 49; *Mormon Church v. United States*, 136 U. S. 1, 42, 34 L. Ed. 481; *Dorr v. United States*, 195 U. S. 138, 146, 49 L. Ed. 128.

"The power of congress over the territories of the United States is general and plenary, arising from and incidental to the right to acquire the territory itself, and from the power given by the constitution to make all needful rules and regulations respecting the territory or other property belonging to the United States. It would be absurd to hold that the United States has power to acquire territory, and no power to govern it when acquired." *Mormon Church v. United*



congress since the beginning of the government, and the repeated declarations of the supreme court of the United States, have settled the law that the right to acquire territory includes the right to govern and dispose of it, regardless of whether such power was intended to be conferred by section three of article four of the constitution, or whether it can be sustained upon the authority of any particular provision of the constitution or not.<sup>57</sup>

(bbb) *Nature and Extent*—(aaaa) *Generally*.—The United States having rightfully acquired the territories, and being the only government which can impose laws upon them, it is now well settled that, under the constitution, the federal government has the entire dominion and sovereignty, national and municipal, federal and state, over all the territories so long as they remain in a territorial state. In other words, they belong to the people of the United States, and are subject to their government and disposition through their representatives in congress assembled.<sup>58</sup> "Under this power congress may deal with territory acquired by treaty; may administer its government as it does that of the District of Columbia; it may organize a local territorial government; it may admit it as a state upon an equality with other states; it may sell its public lands to individual citizens or may donate them as homesteads to actual settlers. When once acquired by treaty, it belongs to the United States, and is subject to the disposition of congress."<sup>59</sup>

States, 136 U. S. 1, 42, 34 L. Ed. 481; *Murphy v. Ramsey*, 114 U. S. 15, 44, 29 L. Ed. 49.

"The cases cited have firmly established the power of the United States, like other sovereign nations, to acquire, by the methods known to civilized people, additional territory. The framers of the constitution, recognizing the possibility of future extension by acquiring territory outside the states, did not leave to implication alone the power to govern and control territory owned or to be acquired, but, in the article quoted, expressly conferred the needful powers to make regulations. Regulations in this sense must mean laws, for, as well as states, territories must be governed by laws." *Dorr v. United States*, 195 U. S. 138, 146, 49 L. Ed. 128.

**57. Existence of power undoubted.**—*Sere v. Pitot*, 6 Cranch 332, 337, 3 L. Ed. 240; *Loughborough v. Blake*, 5 Wheat. 317, 5 L. Ed. 98; *American Ins. Co. v. Canter*, 1 Pet. 511, 7 L. Ed. 243; *Scott v. Sandford*, 19 How. 393, 15 L. Ed. 691; *National Bank v. Yankton County*, 101 U. S. 129, 132, 25 L. Ed. 1046; *Murphy v. Ramsey*, 114 U. S. 15, 44, 29 L. Ed. 49; *Mormon Church v. United States*, 136 U. S. 1, 42, 43, 34 L. Ed. 481; *De Lima v. Bidwell*, 182 U. S. 1, 196, 45 L. Ed. 1041; *Downes v. Bidwell*, 182 U. S. 244, 250, 45 L. Ed. 1088; *Kepner v. United States*, 195 U. S. 100, 124, 49 L. Ed. 114; *Hawaii v. Mankichi*, 190 U. S. 197, 47 L. Ed. 1016; *Dorr v. United States*, 195 U. S. 138, 140, 49 L. Ed. 128.

But this clause in the constitution does not exhaust the powers of congress within the territorial subdivisions, or over the persons who inhabit them. Congress may exercise there all the powers of government which belong to it as the legislature of the United States, of which

the territories form a part. *Scott v. Sandford* (opinion of Campbell, J.), 19 How. 393, 514, 15 L. Ed. 691; *Loughborough v. Blake*, 5 Wheat. 317, 5 L. Ed. 98.

**58. Nature and extent of power to govern.**—*American Ins. Co. v. Canter*, 1 Pet. 511, 542, 7 L. Ed. 243; *United States v. Gratiot*, 14 Pet. 526, 537, 10 L. Ed. 573; *Benner v. Porter*, 9 How. 235, 242, 13 L. Ed. 119; *Cross v. Harriman*, 16 How. 164, 193, 14 L. Ed. 889; *Scott v. Sandford*, 19 How. 393, 513, 515, 15 L. Ed. 691; *National Bank v. Yankton County*, 101 U. S. 129, 133, 25 L. Ed. 1046; *Murphy v. Ramsey*, 114 U. S. 15, 44, 29 L. Ed. 49; *California v. Central Pac. R. Co.*, 127 U. S. 1, 39, 32 L. Ed. 150; *Mormon Church v. United States*, 136 U. S. 1, 42, 43, 34 L. Ed. 481; *McAllister v. United States*, 141 U. S. 174, 181, 35 L. Ed. 693; *Boyd v. Nebraska*, 143 U. S. 135, 169, 170, 36 L. Ed. 103; *Shively v. Bowlby*, 152 U. S. 1, 48, 38 L. Ed. 331; *Utter v. Franklin*, 172 U. S. 416, 423, 43 L. Ed. 498; *Binns v. United States*, 194 U. S. 486, 491, 48 L. Ed. 1087; *Wynn-Johnson v. Shoup*, 194 U. S. 496, 48 L. Ed. 1092; *United States v. Winans*, 198 U. S. 371, 383, 49 L. Ed. 1089; *Wilson v. Shaw*, 204 U. S. 24, 35, 51 L. Ed. 351.

**59. Same.**—*De Lima v. Bidwell*, 182 U. S. 1, 197, 45 L. Ed. 1041.

During the time it remains a territory, congress may legislate over it within the scope of its constitutional powers in relation to citizens of the United States, and may establish a territorial government. *Scott v. Sandford*, 19 How. 393, 395, 15 L. Ed. 691; *Murphy v. Ramsey*, 114 U. S. 15, 44, 29 L. Ed. 49.

Congress may secure the rights of the United States in the public domain, provide for the sale or lease of any part of it, and establish the validity of the titles of the purchasers, and may organize territorial governments, with powers of leg-

**Status of Territories Analogous to That of Municipal Subdivisions within the States.**—In short, the territories are but political subdivisions of the outlying dominion of the United States, and their relation to the general government is much the same as that which counties and municipal subdivisions within the states bear to the respective states. Congress may legislate for them as a state does for its municipal subdivisions, and they are subject to the legislative control of congress in much the same manner that municipal organizations within the states are subject to state control.<sup>60</sup>

**Congress Possessed of Plenary Power.**—Within the territories and outside of state lines congress has plenary power, save as controlled by the provisions of the constitution.<sup>61</sup>

**Constitutional Limitations.**—As to the constitutional limitations upon the power of congress when legislating for the territories, and the extent to which the constitution is operative within the territories, see post, "Limitations upon the

isolation. *Scott v. Sandford*, 19 How. 393; 500, 15 L. Ed. 691 (opinion of Campbell, J.), citing *American Ins. Co. v. Canter*, 1 Pet. 511, 7 L. Ed. 243; *Bank v. Earle*, 13 Pet. 519, 10 L. Ed. 274; *Pollard v. Hagan*, 3 How. 212, 11 L. Ed. 563; *Miners' Bank v. Iowa*, 12 How. 1, 13 L. Ed. 867; *Cross v. Harriman*, 16 How. 164, 14 L. Ed. 889.

"We have seen that congress does not dispose of or make rules and regulations respecting domain belonging to themselves, but belonging to the United States. These conferred on their mandatory, congress, authority to dispose of the territory which belonged to them in common; and to accomplish that object beneficially and effectually, they gave an authority to make suitable rules and regulations respecting it. When the power of disposition is fulfilled, the authority to make rules and regulations terminates, for it attaches only upon territory 'belonging to the United States.' Consequently, the power to make rules and regulations, from the nature of the subject, is restricted to such administrative and conservatory acts as are needful for the preservation of the public domain, and its preparation for sale or disposition. The system of land surveys; the reservation for schools, internal improvements, military sites, and public buildings; the pre-emption claims of settlers; the establishment of land offices, and boards of inquiry to determine the validity of land titles; the modes of entry and sale, and of conferring titles; the protection of the lands from trespass and waste; the partition of the public domain into municipal subdivisions, having reference to the erection of territorial governments and states; and perhaps the selection, under their authority, of suitable laws for the protection of the settlers, until there may be a sufficient number of them to form a self sustaining municipal government—these important rules and regulations will sufficiently illustrate the scope and operation of the third section of the fourth article of the constitution. But this clause in the constitution does not exhaust the powers of congress within the territorial

subdivisions, or over the persons who inhabit them. Congress may exercise there all the powers of government which belong to them as the legislature of the United States, of which these territories make a part. (*Loughborough v. Blake*, 5 Wheat. 317, 5 L. Ed. 98.) Thus the laws of taxation, for the regulation of foreign, federal, and Indian commerce, and so for the abolition of the slave trade, for the protection of copyrights and inventions, for the establishment of postal communication and courts of justice and for the punishment of crimes, are as operative there as within the states. I admit that to mark the bounds for the jurisdiction of the government of the United States within the territory, and of its power in respect to persons and things within the municipal subdivisions it has created, is a work of delicacy and difficulty, and, in a great measure, is beyond the cognizance of the judiciary department of that government. How much municipal power may be exercised by the people of the territory, before their admission to the Union, the courts of justice cannot decide. This must depend, for the most part, on political considerations, which cannot enter into the determination of a case of law or equity." (*Opinion of Campbell, J.*) *Scott v. Sandford*, 19 How. 393, 513, 515, 15 L. Ed. 691.

**Franchises in the territories.**—"The authority of congress over the territories of the United States, and its power to grant franchises exercisable therein, are, and ever have been, undoubted." *California v. Central Pac. R. Co.*, 127 U. S. 1, 39, 32 L. Ed. 150.

**60. Status analogous to that of municipal subdivisions within the states.**—*American Ins. Co. v. Canter*, 1 Pet. 511, 7 L. Ed. 243; *National Bank v. Yankton County*, 101 U. S. 129, 133, 25 L. Ed. 1046; *Utter v. Franklin*, 172 U. S. 416, 423, 43 L. Ed. 499.

**61. Congress possessed of plenary power.**—*United States v. Gratiot*, 14 Pet. 526, 537, 10 L. Ed. 573; *Binn's v. United States*, 194 U. S. 486, 491, 48 L. Ed. 1087; *Wynn-Johnson v. Shoup*, 194 U. S. 496,



Power of Congress; Operation of the Constitution within the Territories," VI, D, 2, c, (3), (c), (cc), (bbb), (cccc), (bbbb).

(bbbb) *Jurisdiction of Congress Exclusive*.—Congress has the exclusive power of legislation in and over the territories.<sup>62</sup>

(cccc) *Form and Character of Government Which Congress May Establish*—(aaaa) *Generally*.—The form of government which congress shall establish for the territories is not prescribed. It must, therefore be regulated by the discretion of congress.<sup>63</sup> The theory upon which the various governments for portions of the territory of the United States have been organized, has ever been that of leaving to the inhabitants all the powers of self government consistent with the supremacy and supervision of national authority, and with certain fundamental principles established by congress.<sup>64</sup> "We are accustomed to that generally adopted for the territories, of a quasi state government, with executive, legislative and judicial officers, and a legislature endowed with the power of local taxation and local expenditures, but congress is not limited to this form."<sup>65</sup> Neither is it required that the form of government should be the same in all the territories.<sup>66</sup>

48 L. Ed. 1092; *Wilson v. Shaw*, 204 U. S. 24, 35, 51 L. Ed. 351.

Within the territories and outside of state lines the legislative power of congress is limited only by the provisions of the constitution, and cannot conflict with the reserved power of the states. *Wilson v. Shaw*, 204 U. S. 24, 35, 51 L. Ed. 351.

The power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States is vested in congress without limitation. *United States v. Gratiot*, 14 Pet. 526, 537, 10 L. Ed. 573.

**62. Jurisdiction of congress exclusive.**—*Freeborn v. Smith*, 2 Wall. 160, 173, 17 L. Ed. 922; *National Bank v. Yankton County*, 101 U. S. 129, 132, 25 L. Ed. 1046; *Mormon Church v. United States*, 136 U. S. 1, 42, 34 L. Ed. 481.

"All territory within the jurisdiction of the United States not included in any state must necessarily be governed by or under the authority of congress." *National Bank v. Yankton County*, 101 U. S. 129, 132, 25 L. Ed. 1046.

"The territory of Louisiana, when acquired from France, and the territories west of the Rocky Mountains, when acquired from Mexico, became the absolute property and domain of the United States, subject to such conditions as the government, in its diplomatic negotiations, had seen fit to accept relating to the rights of the people then inhabiting those territories. Having rightfully acquired said territories, the United States government was the only one which could impose laws upon them, and its sovereignty over them was complete. No state of the Union had any such right of sovereignty over them; no other country or government had any such right." *Mormon Church v. United States*, 136 U. S. 1, 42, 34 L. Ed. 481.

"Deseret or Utah, had ceased to belong to the Mexican government by the treaty of Guadalupe Hidalgo, and in 1851 it be-

longed to the United States, and no government without authority from the United States, express or implied, had any legal right to exist there. The assembly of Deseret had no power to make any valid law. Congress had already passed the law for organizing the territory of Utah into a government, and no other government was lawful within the bounds of that territory." *Mormon Church v. United States*, 136 U. S. 1, 44, 34 L. Ed. 481.

**63. Form and character of territorial government.**—*Scott v. Sandford*, 19 How. 393, 395, 15 L. Ed. 691; *Murphy v. Ramsey*, 114 U. S. 15, 44, 29 L. Ed. 49; *Downes v. Bidwell*, 182 U. S. 244, 289, 45 L. Ed. 1088; *Wynn-Johnson v. Shoup*, 194 U. S. 496, 48 L. Ed. 1092; *Binns v. United States*, 194 U. S. 486, 491, 48 L. Ed. 1087.

Under the constitution congress has the power to create such municipal organizations as it may deem best for all the territories of the United States whether they have been incorporated or not. *Downes v. Bidwell*, 182 U. S. 244, 289, 45 L. Ed. 1088, per Justices White, Shiras and McKenna.

**64. Same.**—*Clinton v. Englebrecht*, 13 Wall. 434, 20 L. Ed. 659.

**65. Same.**—*Binns v. United States*, 194 U. S. 486, 491, 48 L. Ed. 1087; *Wynn-Johnson v. Shoup*, 194 U. S. 496, 48 L. Ed. 1092.

**66. Need not be the same in all the territories.**—*Binns v. United States*, 194 U. S. 486, 491, 48 L. Ed. 1087; *Wynn-Johnson v. Shoup*, 194 U. S. 496, 48 L. Ed. 1092.

In the District of Columbia it has adopted a different mode of government, and in Alaska still another. For Alaska, congress has provided no legislative body but only executive and judicial officers. It has enacted a penal and civil code. Having created no legislative body and provided for no local legislation in respect to the matter of revenue, it has



**Right of Inhabitants to Local Self-Government; Power of Congress to Exercise Direct Control.**—As congress has full power to govern a territory and its people, the latter, except as congress shall provide therefor, are not of right entitled to participate in political authority until the territory becomes a state.<sup>67</sup> Congress may legislate directly in respect to the local affairs of a territory or transfer the power of such legislation to a legislature elected by the citizens of the territory.<sup>68</sup> It rests with congress, therefore to say whether, in a given case, any of the people resident in the territory shall participate in the election of its officers or the making of its laws; and it may, therefore, take from them any right of suffrage it may have previously conferred, or at any time modify or abridge it as it may deem expedient. The right of local self-government, as known to our system as a constitutional franchise, belongs, under the constitution, to the states and to the people thereof, by whom that constitution was ordained, and to whom by its terms all power not conferred by it upon the government of the United States was expressly reserved.<sup>69</sup>

established a revenue system of its own, applicable alone to that territory. Instead of raising revenue by direct taxation upon property, it has, as it may rightfully do, provided for that revenue by means of license taxes. *Binns v. United States*, 194 U. S. 486, 492, 48 L. Ed. 1087; *Wynn-Johnson v. Shoup*, 194 U. S. 496, 48 L. Ed. 1092.

**67. Right of inhabitants to local self-government.**—*American Ins. Co. v. Canter*, 1 Pet. 511, 7 L. Ed. 243; *Murphy v. Ramsey*, 114 U. S. 15, 44, 29 L. Ed. 48; *Boyd v. Nebraska*, 143 U. S. 135, 169, 36 L. Ed. 103; *Downes v. Bidwell*, 182 U. S. 244, 289, 45 L. Ed. 1088; *Binns v. United States*, 194 U. S. 486, 491, 48 L. Ed. 1087; *Wynn-Johnson v. Shoup*, 194 U. S. 496, 48 L. Ed. 1092; *Dorr v. United States*, 195 U. S. 138, 147, 49 L. Ed. 128.

**68. Same.**—*Reynolds v. United States*, 98 U. S. 145, 25 L. Ed. 244; *National Bank v. Yankton County*, 101 U. S. 129, 133, 25 L. Ed. 1046; *Murphy v. Ramsey*, 114 U. S. 15, 44, 29 L. Ed. 49; *Mormon Church v. United States*, 136 U. S. 1, 43, 34 L. Ed. 481; *Utter v. Franklin*, 172 U. S. 416, 423, 43 L. Ed. 498; *Downes v. Bidwell*, 182 U. S. 244, 45 L. Ed. 1088; *Binns v. United States*, 194 U. S. 486, 491, 48 L. Ed. 1087; *Wynn-Johnson v. Shoup*, 194 U. S. 496, 48 L. Ed. 1092. See, also, post, "Control of Territorial Government by Congress," VI, D, 2, c, (3), (c), (cc), (bbb), (eeee).

**69. Same.**—*Boyd v. Nebraska*, 143 U. S. 135, 169, 170, 36 L. Ed. 103; *Murphy v. Ramsey*, 114 U. S. 15, 44, 29 L. Ed. 48.

In establishing territorial governments congress may give to the inhabitants thereof such degree of representation as may be conducive to the public well-being; or it may deprive such territory of representative government if it is considered just to do so. *Downes v. Bidwell*, 182 U. S. 244, 289, 45 L. Ed. 1088, per Justices White, Shiras and McKenna.

"In treating of article 4, § 3, Judge Cooley, in his work on Constitutional law, says: 'The peculiar wording of the pro-

vision (§ 3, art. 4) has led some persons to suppose that it was intended congress should exercise, in respect to the territory, the rights only of a proprietor of property, and that the people of the territories were to be left at liberty to institute governments for themselves. It is no doubt most consistent with the general theory of republican institutions that the people everywhere should be allowed self-government; but it has never been deemed a matter of right that a local community should be suffered to lay the foundations of institutions, and erect a structure of government thereon, without the guidance and restraint of a superior authority. Even in the older states, where society is most homogeneous and has fewest of the elements of disquiet and disorder, the state reserves to itself the right to shape municipal institutions; and towns and cities are only formed under its directions, and according to the rules and within the limits the state prescribes. With still less reason could the settlers in new territories be suffered to exercise sovereign powers. The practice of the government, originating before the adoption of the constitution, has been for congress to establish governments for the territories; and whether the jurisdiction over the district has been acquired by grant from the states, or by treaty with a foreign power, congress has unquestionably full power to govern it, and the people, except as congress shall provide for, are not of right entitled to participate in political authority, until the territory becomes a state. Meantime they are in a condition of temporary pupillage and dependence; and while congress will be expected to recognize the principle of self-government to such extent as may seem wise, its discretion alone can constitute the measure by which the participation of the people can be determined.' Cooley, *Principles of Constitutional Law*, 164." *Dorr v. United States*, 195 U. S. 138, 147, 49 L. Ed. 128.

**Alaska license tax imposed by direct legislation.**—Congress undoubtedly has

(bbbbb) *Limitations upon the Power of Congress: Operation of the Constitution within the Territories.*—In entering upon a discussion of this subject, we cannot do better, perhaps, than to quote the language of Mr. Justice Brown in delivering the conclusion and judgment of the court in *Downes v. Bidwell*. Speaking of the confused and unsettled state of the law upon this subject, he says: "The decisions of this court upon this subject have not been altogether harmonious. Some of them are based upon the theory that the constitution does not apply to the territories without legislation. Other cases, arising from territories where such legislation has been had, contain language which would justify the inference that such legislation was unnecessary, and that the constitution took effect immediately upon the cession of the territory to the United States. It may be remarked, upon the threshold of an analysis of these cases, that too much weight must not be given to general expressions found in several opinions that the power of congress over territories is complete and supreme, because these words may be interpreted as meaning only supreme under the Constitution; nor upon the other hand, to general statements that the Constitution covers the territories as well as the states, since in such cases it will be found that acts of congress had already extended the constitution to such territories, and that thereby it subordinated not only its own acts, but those of the territorial legislatures, to what had become the supreme law of the land."<sup>70</sup> As illustrating somewhat the confused utterances of the court upon this subject, it may be noted that as late as the year 1850, it was laid down by Chief Justice Taney, delivering the opinion of the court in the case of *Strader v. Graham*, that: "The constitution was, in the language of the Ordinance 'adopted by common consent,' and the people of the territories must necessarily be regarded as parties to it, and bound by it, and entitled to its benefits, as well as the people of the then existing states. It became the supreme law throughout the United States."<sup>71</sup> While, on the other hand, it was declared by Mr. Justice Brown in delivering the conclusion and judgment of the court in the case of *Downes v. Bidwell*, that: "The constitution was created by the people of the United States, as a union of states, to be governed solely by representatives of the states; and even the provision relied upon here, that all duties, imposts, and excises shall be uniform 'throughout the United States,' is explained by subsequent provisions of the Constitution, that 'no tax or duty shall be laid on articles exported from any state,' and 'no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear or pay duties in another.' In short, the constitution deals with states, their people, and their representatives."<sup>72</sup>

**Congress Not Subject to All the Provisions of the Constitution.**—It may be considered as settled, however, that there is a difference under the constitution between the states and the territories, and that in legislating for them, congress is not subject in every instance to all the provisions of the constitution.<sup>73</sup>

the power by direct legislation to impose license taxes upon the residents of Alaska by direct legislation provided that when collected they are paid to a treasurer of the territory and disbursed by him solely for the needs of the territory; and the fact that they are ordered to be paid into the treasury of the United States and not specifically appropriated to the expenses of the territory, when the sum total of these and all other revenues from the territory does not equal the cost and expense of maintaining its government, does not make them unconstitutional. *Binns v. United States*, 194 U. S. 486, 48 L. Ed. 1087; *Wynn-Johnson v. Shoup*, 194 U. S. 496, 48 L. Ed. 1092.

**70. Constitutional limitations upon the power of congress.**—*Downes v. Bidwell*, 182 U. S. 244, 258, 45 L. Ed. 1088, reaffirmed in *Czarnikow v. Bidwell*, 191 U. S. 559, 48 L. Ed. 302; *Warner v. Stranahan*, 191 U. S. 560, 48 L. Ed. 302.

**71. Same.**—*Strader v. Graham*, 10 How. 82, 96, 13 L. Ed. 337.

**72. Same.**—*Downes v. Bidwell*, 182 U. S. 244, 251, 45 L. Ed. 1088, reaffirmed in *Czarnikow v. Bidwell*, 191 U. S. 559, 48 L. Ed. 302; *Warner v. Stranahan*, 191 U. S. 560, 48 L. Ed. 302.

**73. Congress not subject to all the provisions of the constitution when legislating for the territories.**—*American Ins. Co. v. Canter*, 1 Pet. 511, 7 L. Ed. 243; *Ben-*

**Power Not without Limitations.**—It is equally well settled that the right of congress to make laws for the government of the territories, without being subject to all the restrictions which are imposed upon it when legislating for the United States considered as a political body of states in Union, is not without limitations.<sup>74</sup>

**General Rule.**—In the present state of the decisions, however, it is impossible to formulate any general principle that would serve as a rule of decision in every possible case, rightly dividing that which congress may constitutionally do from that which cannot be done. Indeed, the supreme court has said that the extent to which congress is subject to the limitations of the constitution in legislating for the territories must be decided as questions arise.<sup>75</sup>

**Congress Subject to the Fundamental and Implied Limitations in Favor of Personal and Civil Rights.**—Nevertheless, some of the limitations to which congress, in legislating for the territories, is subject may be regarded as settled. One of these limitations is, that the personal and civil rights of the inhabitants of the territories are secured to them by the principles of constitutional liberty which restrain all the agencies of the government, state and federal; that in legislating for the territories, congress is subject to those fundamental limitations in favor of personal rights which are formulated in the constitution and its amendments.<sup>76</sup> This limitation, however, exists rather by inference and the general spirit of the constitution from which congress derives all its powers than by any express and direct application of its provisions.<sup>77</sup> Or, as stated by Mr. Justice White in *Downes v. Bidwell*: "Whilst, therefore, there is no express or implied limitation on congress in exercising its power to create local governments for any and all of the territories, by which that body is restrained from the widest latitude of discretion, it does not follow that there may not be inherent, although unexpressed, principles which are the basis of all free government which cannot be with impunity transcended. But this does not suggest that

*ner v. Porter*, 9 How. 235, 13 L. Ed. 119; *Clinton v. Englebrecht*, 13 Wall. 434, 20 L. Ed. 659; *Good v. Martin*, 95 U. S. 90, 98, 24 L. Ed. 341; *Murphy v. Ramsey*, 114 U. S. 15, 29 L. Ed. 49; *Mormon Church v. United States*, 136 U. S. 1, 44, 34 L. Ed. 481; *McAllister v. United States*, 141 U. S. 174, 188, 35 L. Ed. 693; *Wingard v. United States*, 141 U. S. 201, 35 L. Ed. 719; *Boyd v. Nebraska*, 143 U. S. 135, 169, 170, 36 L. Ed. 103; *Downes v. Bidwell*, 182 U. S. 244, 258, 45 L. Ed. 1088 (affirmed in *Czarnikow v. Bidwell*, 191 U. S. 559, 48 L. Ed. 302; *Warner v. Stranahan*, 191 U. S. 560, 48 L. Ed. 302); *Hawaii v. Mankichi*, 190 U. S. 197, 47 L. Ed. 1016; *Kepner v. United States*, 195 U. S. 100, 49 L. Ed. 114; *Dorr v. United States*, 195 U. S. 138, 49 L. Ed. 128; *Rasmussen v. United States*, 197 U. S. 516, 521, 49 L. Ed. 862; *Lincoln v. United States*, 202 U. S. 484, 499, 50 L. Ed. 1117; *Serra v. Mortiga*, 204 U. S. 470, 474, 51 L. Ed. 571.

**74. Power of congress not without limitations.**—*Scott v. Sanford*, 19 How. 393, 15 L. Ed. 691; *Murphy v. Ramsey*, 114 U. S. 15, 29 L. Ed. 49; *Mormon Church v. United States*, 136 U. S. 1, 44, 34 L. Ed. 481; *Wingard v. United States*, 141 U. S. 201, 35 L. Ed. 719; *McAllister v. United States*, 141 U. S. 174, 188, 35 L. Ed. 693; *Boyd v. Nebraska*, 143 U. S. 135, 169, 170, 36 L. Ed. 103; *Downes v. Bidwell*, 182 U. S. 244, 45 L. Ed. 1088 (re-

affirmed in *Czarnikow v. Bidwell*, 191 U. S. 559, 48 L. Ed. 302; *Warner v. Stranahan*, 191 U. S. 560, 48 L. Ed. 302); *Hawaii v. Mankichi*, 190 U. S. 197, 47 L. Ed. 1016; *Dorr v. United States*, 195 U. S. 138, 142, 49 L. Ed. 128; *Rasmussen v. United States*, 197 U. S. 516, 49 L. Ed. 862.

**75. General rule.**—*Dorr v. United States*, 195 U. S. 138, 149, 49 L. Ed. 128; *Downes v. Bidwell*, 182 U. S. 244, 286, 45 L. Ed. 1088.

**76. Subject to fundamental limitations in favor of personal rights.**—*Scott v. Sanford*, 19 How. 393, 15 L. Ed. 691; *Murphy v. Ramsey*, 114 U. S. 15, 29 L. Ed. 49; *Mormon Church v. United States*, 136 U. S. 1, 44, 34 L. Ed. 481; *McAllister v. United States*, 141 U. S. 174, 188, 35 L. Ed. 693; *Wingard v. United States*, 141 U. S. 201, 35 L. Ed. 719; *Boyd v. Nebraska*, 143 U. S. 135, 169, 36 L. Ed. 103; *Downes v. Bidwell*, 182 U. S. 244, 45 L. Ed. 1088; *Dorr v. United States*, 195 U. S. 138, 146, 147, 49 L. Ed. 128.

**77. Same; limitation exists rather by inference.**—*Mormon Church v. United States*, 136 U. S. 1, 44, 34 L. Ed. 481; *McAllister v. United States*, 141 U. S. 174, 188, 35 L. Ed. 693; *Wingard v. United States*, 141 U. S. 201, 35 L. Ed. 719; *Downes v. Bidwell*, 182 U. S. 244, 45 L. Ed. 1088; *Dorr v. United States*, 195 U. S. 138, 146, 147, 49 L. Ed. 128.



every express limitation of the constitution which is applicable has not force, but only signifies that even in cases where there is no direct command of the constitution which applies, there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the constitution."<sup>78</sup>

**Same—Political Rights.**—Their political rights, however, are franchises which the people of the territories hold as privileges subject to the legislative discretion and control of the congress of the United States.<sup>79</sup>

**Express Limitations Operative at All Times and in All Places.**—Wherever a power is given by the constitution and there is a limitation imposed on the authority, such restriction operates upon and confines every action on the subject within its constitutional limits.<sup>80</sup> Therefore, in legislating for the territories, congress is subject to those prohibitions which go to the very root of the power of congress to act at all, irrespective of time or place.<sup>81</sup>

**Congress Subject to All Applicable Provisions of the Constitution.**—Again, some provisions of the constitution are applicable to and operative within the territories, while other provisions are not applicable. In legislating for the territories, congress is subject to all the limitations of the constitution which are applicable to the exercise of its authority with respect to the territories.<sup>82</sup> Likewise, upon the acquisition of territory, the applicable provisions of the constitution and laws of the United States become operative therein.<sup>83</sup>

78. *Downes v. Bidwell*, 182 U. S. 244, 290, 45 L. Ed. 1088. See, also, *Dorr v. United States*, 195 U. S. 138, 146, 147, 49 L. Ed. 128, in which this language is quoted with approval.

79. **As to political rights.**—*Murphy v. Ramsey*, 114 U. S. 15, 29 L. Ed. 49; *United States v. Kagama*, 118 U. S. 375, 378, 30 L. Ed. 228; *Boyd v. Nebraska*, 143 U. S. 135, 169, 170, 36 L. Ed. 103; *Shively v. Bowlby*, 152 U. S. 1, 48, 38 L. Ed. 331; *Downes v. Bidwell*, 182 U. S. 244, 290, 45 L. Ed. 1088. See, also, ante, "Generally," VI, D, 2, c, (3), (c), (cc), (bbb), (cccc), (aaaaa).

80. **Express limitations upon powers operative at all times and places.**—*Downes v. Bidwell*, 182 U. S. 244, 289, 45 L. Ed. 1088, per Justices White, Sheras and McKenna.

81. **Same.**—*Scott v. Sandford*, 19 How. 393, 614, 15 L. Ed. 691; *Downes v. Bidwell*, 182 U. S. 244, 266, 277, 45 L. Ed. 1088; *Dorr v. United States*, 195 U. S. 138, 142, 49 L. Ed. 128.

Thus, the court says, that when the constitution declares that no bill of attainder or ex post facto law shall be passed, and that no title of nobility shall be granted by the United States, it goes to the competency of congress to pass a bill of that description; in other words that the prohibition is absolute, and that congress cannot enact legislation of that character at any time or for any place, whether state or territory. *Downes v. Bidwell*, 182 U. S. 244, 277, 45 L. Ed. 1088.

Speaking of this power, Mr. Justice Curtis, in the case of *Scott v. Sandford*, 19 How. 393, 614, 15 L. Ed. 691, said: "If, then, this clause does contain a power to legislate respecting the territory, what are

the limits of that power? To this, I answer that, in common with all the other legislative powers of congress, it finds limits in the express prohibitions on congress not to do certain things; that, in the exercise of the legislative power, congress cannot pass an ex post facto law or bill of attainder; and so in respect to each of the other prohibitions contained in the constitution." See, also, *Dorr v. United States*, 195 U. S. 138, 142, 49 L. Ed. 128.

82. **Subject to all applicable provisions.**—*Downes v. Bidwell*, 182 U. S. 244, 266, 277, 291, 45 L. Ed. 1088, reaffirmed in *Czarnikow v. Bidwell*, 191 U. S. 559, 48 L. Ed. 302; *Warner v. Stranahan*, 191 U. S. 560, 48 L. Ed. 302; *Dorr v. United States*, 195 U. S. 138, 49 L. Ed. 128.

Every provision of the constitution which is applicable to the territories is also controlling therein. The question is not whether the constitution is operative in the territories, for that is self-evident, but whether the provision relied on is applicable. *Downes v. Bidwell*, 182 U. S. 244, 291, 45 L. Ed. 1088, per Justices White, Shiras and McKenna.

83. **Applicable laws and provisions become operative upon acquisition.**—*Lincoln v. United States*, 202 U. S. 484, 50 L. Ed. 1117.

"When the treaty was ratified the applicable laws of the United States became operative, but the president, nevertheless, continued in force the tariff created by the order of July 12, 1898, and by an order of April 21, 1899, established a collection district with Manila as the chief port of entry, and under these orders collections of duties were made. This involves the question whether after April 11, 1899, the president could have en-

**Same—Applicability of Constitution Depends upon Relation of Territory to United States.**—The limitations which are to be applied in any given case involving territorial government must depend upon the relation of the particular territory to the United States, concerning which congress is exercising the power conferred by the constitution.<sup>84</sup> As we have already seen, the United States may have territory which is not incorporated into the United States as a body politic;<sup>85</sup> that the power to acquire territory by treaty implies not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in what Chief Justice Marshall termed the "American Empire."<sup>86</sup> Until congress shall see fit to incorporate territory ceded by treaty into the United States, it may be regarded as settled by the decision in *Downes v. Bidwell* that the territory is to be governed under the power existing in congress to make laws for such territories and subject to such constitutional restrictions upon the powers of that body as are applicable to the situation.<sup>87</sup> There is a clear distinction, it is said, between such prohibitions as go to the very root of the power of congress to act at all, irrespective of time or place, and such as are operative only "throughout the United

forced any tariff other than such as existed under acts of congress or might be sanctioned by congress. And that question was put at rest by this ratification." *Lincoln v. United States*, 202 U. S. 484, 499, 50 L. Ed. 1117.

**84. Applicability of constitution depends upon the relation of territory to the United States.**—*Downes v. Bidwell*, 182 U. S. 244, 293, 45 L. Ed. 1088, per Justices White, Shiras and McKenna; *Dorr v. United States*, 195 U. S. 138, 182, 49 L. Ed. 128.

**85. Same.**—See ante, "May Be Subject to Jurisdiction of the United States without Being Incorporated into the Union," VI, D. 2, c, (3). (b), (bb).

**86. Same.**—*Downes v. Bidwell*, 182 U. S. 244, 279, 45 L. Ed. 1088, reaffirmed in *Czarnikow v. Bidwell*, 191 U. S. 559, 48 L. Ed. 302; *Warner v. Stranahan*, 191 U. S. 560, 48 L. Ed. 302.

"If the treaty-making power could incorporate territory into the United States without congressional action, it is apparent that the treaty with Spain, ceding the Philippines to the United States, carefully refrained from so doing; for it is expressly provided that (Article 9) 'the civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the congress.' In this language it is clear that it was the intention of the framers of the treaty to reserve to congress, so far as it could be constitutionally done, a free hand in dealing with these newly-acquired possessions." *Rasmussen v. United States*, 197 U. S. 516, 521, 49 L. Ed. 862; *Dorr v. United States*, 195 U. S. 138, 49 L. Ed. 128.

**87. Subject only to applicable provisions as regards unincorporated territory.**—*Downes v. Bidwell*, 182 U. S. 244, 45 L. Ed. 1088; *Dorr v. United States*, 195 U. S. 138, 143, 49 L. Ed. 128.

Whilst by the treaty with Spain the Philippine Islands came under the

sovereignty of the United States and were subject to its control as a dependency or possession, those islands were not incorporated into the United States as a part thereof, and therefore congress, in legislating concerning them, was subject only to the provisions of the constitution applicable to territory occupying that relation. The power to acquire territory without incorporating it into the United States as an integral part thereof was sustained upon the reasoning expounded in the opinion of three, if not of four, of the judges who concurred in the judgment in *Downes v. Bidwell*, 182 U. S. 244, 45 L. Ed. 1088. *Dorr v. United States*, 195 U. S. 138, 49 L. Ed. 128.

The island of Porto Rico is governed by the constitution in all of the phases of which the situation permits, notwithstanding the fact that while the island is under the jurisdiction of the United States it is not yet incorporated therein. Per Justices White, Shiras and McKenna, in *Downes v. Bidwell*, 182 U. S. 244, 340, 45 L. Ed. 1088.

When Alaska was ceded by Russia to the United States, it became incorporated therein under the terms of the treaty; and though not an organized territory, yet the constitution is applicable in its government in all its provisions. For congress therefore to pass an act providing for a jury of six in misdemeanor trials is unconstitutional as a violation of the sixth amendment. *Rasmussen v. United States*, 197 U. S. 516, 525, 49 L. Ed. 862. See, also, *Webster v. Reid*, 11 How. 437, 13 L. Ed. 761; *Reynolds v. United States*, 98 U. S. 145, 25 L. Ed. 244; *Callan v. Wilson*, 127 U. S. 540, 32 L. Ed. 223; *American Pub. Co. v. Fisher*, 166 U. S. 464, 41 L. Ed. 1079; *Springville v. Thomas*, 166 U. S. 707, 41 L. Ed. 1172; *Thompson v. Utah*, 170 U. S. 343, 42 L. Ed. 1061; *Capital Traction Co. v. Hof*, 174 U. S. 1, 43 L. Ed. 873; *Black v. Jackson*, 177 U. S. 349, 44 L. Ed. 801.

States," or among the several states; in short, that restrictions intended to operate only throughout the United States or among the several states, are not restrictive of the power of congress when legislating for territory which has never been incorporated into the United States.<sup>88</sup>

**Same—Same—Temporary Governments Not Subject to All the Restrictions of the Constitution.**—For example, if congress is not ready to construct a complete government for the conquered territory, it may establish a temporary government which is not subject to all the restrictions of the constitution.<sup>89</sup>

**Applicability of Particular Principles and Guaranties—Protection to Life, Liberty, and Property.**—That a congress may establish a temporary government in conquered or ceded territory without being subject to all the restrictions of the constitution, does not imply that the inhabitants of such territory are, in the matter of personal rights, unprotected by the constitution; for, even if regarded as aliens, they are entitled under the principles of the constitution to be protected in life, liberty and property.<sup>90</sup> And in no case can the power of congress over the person or property of a citizen be a mere discretionary power under our constitution and form of government. The powers of the government and the rights and privileges of the citizen are regulated and plainly defined by the constitution itself. And when the territory becomes a part of the United States, the federal government enters into possession in the character impressed upon it by those who created it. It enters upon it with its powers over the citizen strictly defined and limited by the constitution, from which it derives its own existence, and by virtue of which alone it continues to exist and act as a government and sovereignty. It has no power of any kind beyond it; and it cannot, when it enters a territory of the United States, put off its character, and assume discretionary or despotic powers which the constitution has denied to it. It cannot create for itself a new character separated from the citizens of the United States, and the duties it owes them under the provisions of the constitution. The territory being a part of the United States, the government and the citizen both enter it under the authority of the constitution, with their respective rights defined and marked out; and the federal government can exercise no power over his person or property, beyond what that instrument confers, nor lawfully deny any right which it has reserved.<sup>91</sup>

**Same—Equality of Rights of States and Citizens in Territories.**—Congress has no right to prohibit citizens of any particular state or states from taking up their home there, while it permits citizens of other states to do so. Nor has it a right to give privileges to one class of citizens which it refuses to another. The territory is acquired for their equal and common benefit, and if open to any, it must be open to all upon equal and the same terms.<sup>92</sup> Every citizen has a right to take with him into the territory any article of property which the con-

88. Restrictions applicable only to states or United States; not operative in unincorporated territory.—*Downes v. Bidwell*, 182 U. S. 244, 266, 277, 45 L. Ed. 1088.

89. Not subject to all provisions in constructing temporary governments.—*Downes v. Bidwell*, 182 U. S. 244, 45 L. Ed. 1088, per Mr. Justice Gray; *Hawaii v. Mankichi*, 190 U. S. 197, 215, 47 L. Ed. 1016. See, also, ante, "As to Private, Personal and Property Rights, Continuation of Existing Laws," VI, D, 2, c, (3), (bb), (aaa).

90. Inhabitants entitled to protection of life, liberty and property.—*Downes v. Bidwell*, 182 U. S. 244, 283, 45 L. Ed. 1088.

91. Government not possessed of despotic powers in any case.—*Scott v.*

*Sandford*, 19 How. 393, 449, 450, 15 L. Ed. 691. (Opinion of Taney, C. J.)

During the time it remains a territory, congress may legislate over it within the scope of its constitutional powers in relation to citizens of the United States—and may establish a territorial government—and the form of this local government must be regulated by the discretion of congress—but with powers not exceeding those which congress itself, by the constitution, is authorized to exercise over citizens of the United States, in respect to their rights of person or rights of property. *Scott v. Sandford*, 19 How. 393, 395, 15 L. Ed. 691.

92. Equality of rights of states and citizens in the territories.—*Scott v. Sandford*, 19 How. 393, 395, 15 L. Ed. 691.



stitution of the United States recognizes as property.<sup>93</sup> The constitution having provided that "the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states," the right to enjoy the territory as equals was reserved to the states, and to the citizens of the states, respectively. The guaranty is not that citizens of the United States shall have equal privileges in the territories, but that the citizen of each state shall come there in right of his state, and enjoy the common property. He secures his equality through the equality of his state, by virtue of that great fundamental condition of the Union—the equality of the states.<sup>94</sup>

**Same.—The Judiciary Clause of the Constitution.**—Article three of the constitution, establishing and defining the judicial power of the United States, does not apply to the territories, and congress is not subject to its restrictions in establishing judicial departments in the territorial governments.<sup>95</sup>

**93. Same.**—*Scott v. Sandford*, 19 How. 393, 395, 15 L. Ed. 691.

**94. Equality of the citizen is secured through the equality of his state.**—*Scott v. Sandford*, 19 How. 393, 527, 15 L. Ed. 691, opinion of Catron, J.

**Could not prohibit introduction of slave property.**—The constitution of the United States recognized slaves as property, and pledged the federal government to protect it. Congress could not exercise any more authority over property of that description than it may constitutionally exercise over property of any other kind. *Scott v. Sandford*, 19 How. 393, 395, 15 L. Ed. 691.

Congress had no power either to establish slavery in territories of the United States, or to prohibit the introduction of slaves. The Missouri compromise of 1820, forever prohibiting slavery within the territory north of latitude thirty-six degrees thirty minutes, was unconstitutional and void. (Two justices dissenting.) *Scott v. Sandford*, 19 How. 393, 15 L. Ed. 691.

The act of congress, therefore, prohibiting a citizen of the United States from taking with him his slaves when he removed to the territory in question to reside, was an exercise of authority over private property which was not warranted by the constitution; and the removal of a slave by his owner to that territory gave him no title to freedom. *Scott v. Sandford*, 19 How. 393, 395, 15 L. Ed. 691.

"Congress cannot do indirectly what the constitution prohibited directly. If the slaveholder is prohibited from going to the territory with his slaves, who are parts of his family in name and in fact, it will follow that men owning lawful property in their own states, carrying with them the equality of their state to enjoy the common property, may be told, you cannot come here with your slaves, and he will be held out at the border. By this subterfuge, owners of slave property, to the amount of thousands of millions, might be almost as effectually excluded from removing into the territory of Louisiana north of thirty-six degrees thirty minutes, as if the law declared that

owners of slaves, as a class, should be excluded, even if their slaves were left behind." (Opinion of Catron, J.) *Scott v. Sandford*, 19 How. 393, 527, 15 L. Ed. 691.

In *Downes v. Bidwell*, 182 U. S. 244, 274, 275, 45 L. Ed. 1088, Mr. Justice Brown delivering the conclusion and judgment of the court, criticises the decision in the *Dred Scott* case, and says that the difficulty there was that the court failed to make a distinction between property in general, and a wholly exceptional class of property, namely slaves. In the same case, however, Mr. Justice White, delivering the concurring opinion of himself and Justices Shiras and McKenna, says that as congress in governing the territories is subject to the constitution, it results that all the limitations of the constitution which are applicable to congress in exercising this authority necessarily limit its power on this subject; that it follows also that every provision of the constitution which is applicable to the territories is also controlling therein; and that a departure from this elementary principle cannot be justified by a criticism of the opinion of Chief Justice Taney in *Scott v. Sandford*, 19 How. 393, 15 L. Ed. 691. See *Downes v. Bidwell*, 182 U. S. 244, 291, 45 L. Ed. 1088.

**95. Article three, relating to the judiciary, not applicable to the territories.**—*American Ins. Co. v. Canter*, 1 Pet. 511, 7 L. Ed. 243; *Benner v. Porter*, 9 How. 235, 13 L. Ed. 119; *Clinton v. Englebrecht*, 13 Wall. 434, 20 L. Ed. 659; *Good v. Martin*, 95 U. S. 90, 98, 24 L. Ed. 341; *McAllister v. United States*, 141 U. S. 174, 35 L. Ed. 693.

"The territories are not within the clause of the constitution providing for the creation of a supreme court and such inferior courts as congress may see fit to establish." *Downes v. Bidwell*, 182 U. S. 244, 270, 45 L. Ed. 1088, reaffirmed in *Czarnikow v. Bidwell*, 191 U. S. 559, 43 L. Ed. 302; *Warner v. Stranahan*, 191 U. S. 560, 48 L. Ed. 302.

"The District of Columbia and the territories are not states, within the judicial clause of the constitution giving jurisdic-

**Same—Applicability of the Revenue Clauses—Direct Taxes.**—The provision of article 1, § 8, of the constitution of the United States, that “congress shall have power to lay and collect taxes, duties, imposts and excises \* \* \*; but all duties, imposts and excises shall be uniform throughout the United States,” confers a general power without limitation as to place; consequently such power extends to all places over which the government extends, including the District of Columbia and the territories, as well as the states.<sup>96</sup> But neither this provision nor the provisions of article 1, §§ 2, 9, that representatives and direct taxes shall be apportioned among the several states according to their respective numbers, and that “no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken,” require that congress shall extend direct taxes to the territories.<sup>97</sup>

**Same—Uniformity of Duties, Imposts and Excises throughout the United States.**—Only the states whose citizens were instrumental in framing the constitution, together with those states admitted into the Union since then on an equality with the first, compose the United States within the meaning of article 1, § 8, providing for uniformity of duties “throughout the United States.”<sup>98</sup>

tion in cases between citizens of different states.” *Hepburn v. Ellzey*, 2 Cranch 445, 2 L. Ed. 332; *New Orleans v. Winter*, 1 Wheat. 91, 4 L. Ed. 44; *Barney v. Baltimore*, 6 Wall. 280, 18 L. Ed. 825; *Hooe v. Jamieson*, 166 U. S. 395, 41 L. Ed. 1049; *Downes v. Bidwell*, 182 U. S. 244, 270, 45 L. Ed. 1088 (reaffirmed in *Czarnikow v. Bidwell*, 191 U. S. 559, 48 L. Ed. 302; *Warner v. Stranahan*, 191 U. S. 560, 48 L. Ed. 302).

Nor is a territory a state within the meaning of the twenty-fifth section of the judiciary act. See *Scott v. Jones*, 5 How. 343, 12 L. Ed. 181. See, also, the title **APPEAL AND ERROR**, vol. 1, p. 555.

**Admiralty jurisdiction in the territorial courts.**—Although admiralty jurisdiction can be exercised in the states, in those courts only which are established in pursuance of the third article of the constitution, the same limitation does not extend to the territories; in legislating for them, congress exercises the combined powers of the general and state governments. *American Ins. Co. v. Canter*, 1 Pet. 511, 7 L. Ed. 243.

**Tenure and removal of territorial judges.**—Those principles and limitations are not violated by a statute prescribing for the office of judge of a territorial court a tenure for a fixed term of years, or authorizing his suspension, in the mode indicated in § 1768 of the Revised Statutes, and his ultimate displacement from office, after suspension, by the appointment of some one in his place, by and with the advice and consent of the senate. *McAllister v. United States*, 141 U. S. 174, 188, 35 L. Ed. 693. Accord, as to the constitution of territorial courts and the tenure of territorial judges: *American Ins. Co. v. Canter*, 1 Pet. 511, 7 L. Ed. 243; *Benner v. Porter*, 9 How. 235, 13 L. Ed. 119; *Clinton v. Englebrecht*, 13 Wall. 434, 20 L. Ed. 659; *Good v. Martin*, 95 U.

S. 90, 98, 24 L. Ed. 341; *United States v. Ferreira*, 13 How. 40, 14 L. Ed. 42.

**96. Applicability of the revenue clauses; direct taxes.**—*Loughborough v. Blake*, 5 Wheat. 317, 5 L. Ed. 98; *Downes v. Bidwell*, 182 U. S. 244, 260, 45 L. Ed. 1088.

**97. Same.**—*Loughborough v. Blake*, 5 Wheat. 317, 5 L. Ed. 98.

In the case cited, it was said that the words of the ninth section of article one might be understood to give a rule, when the territories shall be taxed, without imposing the necessity of taxing them. *Loughborough v. Blake*, 5 Wheat. 317, 323, 5 L. Ed. 98.

But see *Downes v. Bidwell*, 182 U. S. 244, 260, 262, 45 L. Ed. 1088, where the statements of Chief Justice Marshall, that “the power to lay and collect duties, imposts and excises may be exercised, and must be exercised, throughout the United States,” including the territories and District of Columbia, and that “the power to impose direct taxes also extends throughout the United States,” are criticised, and where it is said that so far as they apply to the territories they were not called for by the exigencies of the case.

**98. Applicability of provision as to the uniformity of duties, imposts and excises throughout the United States.**—*Downes v. Bidwell*, 182 U. S. 244, 278, 45 L. Ed. 1088.

“The island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the constitution.” *Downes v. Bidwell*, 182 U. S. 244, 287, 45 L. Ed. 1088, reaffirmed in *Czarnikow v. Bidwell*, 191 U. S. 559, 48 L. Ed. 302; *Warner v. Stranahan*, 191 U. S. 560, 48 L. Ed. 302.

“The Foraker Act is constitutional, so far as it imposes duties upon imports from such island.” *Downes v. Bidwell*,

**Same—Same—Local Taxes.**—As congress derives its authority to levy local taxes for local purposes within the territories, not from the general grant of power to tax as expressed in the constitution, it follows that its right to locally tax is not to be measured by the provision empowering congress "To lay and collect taxes, duties, imposts and excises," and is not restrained by the requirement of uniformity throughout the United States.<sup>99</sup> Congress may, therefore, constitutionally establish a revenue system applicable solely to the territory for which it is established without infringing the uniformity provisions of § 8 of article 1 of the constitution of the United States.<sup>1</sup>

182 U. S. 244, 287, 45 L. Ed. 1088, reaffirmed in *Czarnikow v. Bidwell*, 191 U. S. 559, 48 L. Ed. 302; *Warner v. Stranahan*, 191 U. S. 560, 48 L. Ed. 302.

So far as those territories which have been incorporated into the United States are concerned, the statement of the text, based upon the authority of Mr. Justice Brown in *Downes v. Bidwell*, 182 U. S. 244, 278, 45 L. Ed. 1088, must be regarded as obiter, since the territory actually involved (*Porto Rico*) had not been incorporated into the United States. As contradicting this view, in so far as it applies to territories which are a part of the United States, see the concurring opinion of Justices White, Shiras and McKenna, where it was said: "As congress derives its authority to levy local taxes for local purposes within the territories, not from the general grant of power to tax as expressed in the constitution, it follows that its right to tax locally is not to be measured by the provision empowering congress 'To lay and collect taxes, duties, imposts and excises,' and is not restrained by the requirement of uniformity throughout the United States. But the power just referred to, as well as the qualification of uniformity, restrains congress from imposing an impost duty on goods coming into the United States from a territory which has been incorporated into and forms a part of the United States. This results because the clause of the constitution in question does not confer upon congress power to impose such an impost duty on goods coming from one part of the United States to another part thereof, and such duty besides would be repugnant to the requirement of uniformity throughout the United States." *Downes v. Bidwell*, 182 U. S. 244, 292, 45 L. Ed. 1088. (Per Justices White, Shiras and McKenna.) See, also, *Loughborough v. Blake*, 5 Wheat. 317, 322, 5 L. Ed. 98; *Woodruff v. Parham*, 8 Wall. 123, 133, 19 L. Ed. 382; *Brown v. Houston*, 114 U. S. 622, 628, 29 L. Ed. 257; *Fairbank v. United States*, 181 U. S. 283, 45 L. Ed. 862.

**99. Applicability of uniformity clause to local taxes within the territories.**—*Downes v. Bidwell*, 182 U. S. 244, 292, 45 L. Ed. 1088, per Justices White, Shiras and McKenna. See, also, *Loughborough v. Blake*, 5 Wheat. 317, 322, 5 L. Ed. 98; *Woodruff v. Parham*, 8 Wall. 123, 133, 19

L. Ed. 382; *Brown v. Houston*, 114 U. S. 622, 628, 29 L. Ed. 257; *Fairbank v. United States*, 181 U. S. 283, 45 L. Ed. 862; *Czarnikow v. Bidwell*, 191 U. S. 559, 48 L. Ed. 302; *Warner v. Stranahan*, 191 U. S. 560, 48 L. Ed. 302.

**1. Same; Alaskan license taxes.**—*Binns v. United States*, 194 U. S. 486, 48 L. Ed. 1087, affirming the constitutionality of the license taxes provided for in § 460, title 2, of the Alaska Penal Code. Followed in *Wynn-Johnson v. Shoup*, 194 U. S. 496, 48 L. Ed. 1092.

If, under any circumstances, congress has the power to levy and collect a license tax for the expenses of the Alaskan territorial government, it is not essential to their validity that the proceeds therefrom be kept constantly separate from all other moneys and specifically and solely appropriated to the interests of the territory. The constitutional power of congress in this respect does not depend entirely on the mode of its exercise. If it satisfactorily appears that the purpose of these license taxes is to raise revenue for use in Alaska, and that the total revenues derived from Alaska are inadequate to the expenses of the territory, so that congress has to draw upon the general funds of the nation, the taxes must be held valid. That the purpose of these taxes was to raise revenue in Alaska for Alaska is obvious. They were authorized in statutes dealing solely with Alaska. There is no provision for a direct property tax to be collected in Alaska for the general expenses of the territory. The entire moneys collected from these license taxes and otherwise from Alaska are inadequate for the expenses of that territory. So far as we may properly refer to the proceedings in congress, they affirm that these license taxes are charges upon the citizens of Alaska for the support of its government. *Binns v. United States*, 194 U. S. 486, 494, 48 L. Ed. 1087; *Wynn-Johnson v. Shoup*, 194 U. S. 496, 48 L. Ed. 1092.

"In reference to the power of congress, reference may be had to *Gibbons v. District of Columbia*, 116 U. S. 404, 29 L. Ed. 680, in which it was held that 'it is within the constitutional power of congress, acting as the local legislature of the District of Columbia, to tax different classes of property within the District at different rates;' and further, after refer-



**Same—Commerce Clauses.**—The provision as to preferences between ports and that regarding uniformity of duties, imposts and excises are one in purpose and in their adoption. They were originally placed together, and became separate only in arranging the constitution for the purpose of style.<sup>2</sup> Thus construed together, the purpose is irresistible that the words “throughout the United States” are indistinguishable from the words “among or between the several states,” and that the prohibitions contained in the clauses forbidding the preference of the ports of one state over those of another, the taxation of exports, and the imposition of duties upon imports or exports or upon tonnage by the states, apply only to commerce between the ports of the several states as they then existed or should thereafter be admitted into the Union.<sup>3</sup>

**Same—Jury Trial in Civil Cases; Protection to Persons Accused of Crime; Fifth, Sixth and Seventh Amendments.**—The power to govern territory, implied in the right to acquire it, and given to congress in the constitution in article 4, § 3, to whatever other limitations it may be subject, the extent of which must be decided as questions arise, does not require that body to enact for ceded territory, not made a part of the United States by congressional action, a system of laws which shall include the right of trial by jury, and the constitution does not, without legislation, and of its own force, carry such right to territory so situated.<sup>4</sup> But where territory is a part of the United States the in-

ring, to the case of *Loughborough v. Blake*, 5 Wheat. 317, 5 L. Ed. 98, it was said: “The power of congress, legislating as a local legislature for the District, to levy taxes for district purposes only, in like manner as the legislature of a state may tax the people of a state for state purposes, was expressly admitted, and has never since been doubted. *Loughborough v. Blake*, 5 Wheat. 317, 318, 5 L. Ed. 98; *Welch v. Cook*, 97 U. S. 541, 24 L. Ed. 1112; *Mattingly v. District of Columbia*, 97 U. S. 687, 24 L. Ed. 1098. In the exercise of this power congress, like any state legislature unrestricted by constitutional provisions, may, at its discretion, wholly exempt certain classes of property from taxation, or may tax them at a lower rate than other property.” *Binns v. United States*, 194 U. S. 486, 492, 48 L. Ed. 1087; *Wynn-Johnson v. Shoup*, 194 U. S. 496, 48 L. Ed. 1092.

2. *Knowlton v. Moore*, 178 U. S. 41, 44 L. Ed. 969.

3. **Commerce clauses; tonnage duties, preference of ports, taxation of exports, etc.**—*Downes v. Bidwell*, 182 U. S. 244, 278, 45 L. Ed. 1088, per Mr. Justice Brown.

4. **Right to jury trial; in unincorporated territory.**—*Hawaii v. Mankichi*, 190 U. S. 197, 219, 47 L. Ed. 1016; *Dorr v. United States*, 195 U. S. 138, 49 L. Ed. 128; *Rasmussen v. United States*, 197 U. S. 516, 521, 49 L. Ed. 862.

In *Dorr v. United States*, 195 U. S. 138, 49 L. Ed. 128, the question was whether the sixth amendment was controlling upon congress in legislating for the Philippine Islands, and in view of the status of the Philippine Islands it was decided that the sixth amendment was not applicable to those islands, and therefore congress, when it legislated concerning them, was

not controlled by the provisions of that amendment.

The mere annexation of Hawaii not having affected the incorporation of the islands into the United States, it is not an open question that the provisions of the constitution as to grand and petit juries were not applicable to them. *Hurtado v. California*, 110 U. S. 516, 28 L. Ed. 232; *In re Ross*, 140 U. S. 453, 35 L. Ed. 581; *Bolln v. Nebraska*, 176 U. S. 83, 44 L. Ed. 382; *Maxwell v. Dow*, 176 U. S. 581, 584, 44 L. Ed. 597, and *Downes v. Bidwell*, 182 U. S. 244, 45 L. Ed. 1088. *Hawaii v. Mankichi*, 190 U. S. 197, 220, 47 L. Ed. 1016.

It was said in *Hawaii v. Mankichi*, 190 U. S. 197, 47 L. Ed. 1016, that when the territory had not been incorporated into the United States these requirements were not limitations upon the power of congress in providing a government for territory in execution of the powers conferred upon congress. Opinion of Mr. Justice White, p. 220, citing *Hurtado v. California*, 110 U. S. 516, 28 L. Ed. 232; *In re Ross*, 140 U. S. 453, 473, 35 L. Ed. 581; *Bolln v. Nebraska*, 176 U. S. 83, 44 L. Ed. 382; *Maxwell v. Dow*, 176 U. S. 581, 584, 44 L. Ed. 597; *Downes v. Bidwell*, 182 U. S. 244, 45 L. Ed. 1088. In the same case Mr. Justice Brown, in the course of his opinion, said: “We would even go farther, and say that most, if not all, the privileges and immunities contained in the bill of rights of the constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case (right to trial by jury and presentment by grand jury) are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the

habitants thereof are entitled to the guaranties of the fifth, sixth and seventh amendments independently of any statute extending the benefit of those amendments to the inhabitants of such territories; and where such statute exists, it is merely declaratory of an independently existing result.<sup>5</sup>

conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property and their well being." *Dorr v. United States*, 195 U. S. 138, 144, 49 L. Ed. 128.

It was held by Justices White and McKenna concurring: "That as a consequence of the relation which the Hawaiian Islands occupied towards the United States, growing out of the resolution of annexation, the provisions of the Fifth and Sixth Amendments of the constitution concerning grand and petit juries were not applicable to that territory, because, whilst the effect of the resolution of annexation was to acquire the islands and subject them to the sovereignty of the United States, neither the terms of the resolution nor the situation which arose from it served to incorporate the Hawaiian Islands into the United States and make them an integral part thereof. In other words, in my opinion, the case is controlled by the decision in *Downes v. Bidwell*, 182 U. S. 244, 45 L. Ed. 1088." *Hawaii v. Mankichi*, 190 U. S. 197, 218, 47 L. Ed. 1016.

**5. Inhabitants of incorporated territory entitled to protection of fifth, sixth and seventh amendments.**—*Rasmussen v. United States*, 197 U. S. 516, 526, 49 L. Ed. 862, reaffirmed in *Gurvich v. United States*, 198 U. S. 581, 49 L. Ed. 1172.

In the case of *Rasmussen v. United States*, 197 U. S. 516, 525, 49 L. Ed. 862, the contention was made that even though Alaska was incorporated into the United States, that it was an unorganized territory, and that, therefore, the provisions of the sixth amendment were not controlling on congress when legislating for Alaska. Replying to this contention, it was said by Mr. Justice White, delivering the opinion of the court, that the unsoundness of the proposition was conclusively established by a long line of decisions; that the sixth amendment was of its own force operative within the territory of Alaska regardless of whether there had been any legislation of congress extending the constitution and laws of the United States to that territory. Citing *Webster v. Reid*, 11 How. 437, 13 L. Ed. 761; *Reynolds v. United States*, 98 U. S. 145, 25 L. Ed. 244; *Callan v. Wilson*, 127 U. S. 540, 32 L. Ed. 223; *American Publishing Co. v. Fisher*, 166 U. S. 464, 41 L. Ed. 1079; *Springville v. Thomas*, 166 U. S. 707, 41 L. Ed. 1172; *Thompson v. Utah*, 170 U. S. 343, 42 L. Ed. 1061; *Capital Traction Co. v. Hof*, 174 U. S. 1, 43 L. Ed. 873; *Black v. Jackson*, 177 U. S. 349, 44 L. Ed. 801.

In speaking upon this point, and referring to the cases cited, it was said by

Mr. Justice White, in substance, that while the premise as to the existence of legislation declaring the extension of the constitution to the territories, with which the cases cited were respectively concerned, was well founded, that the conclusion drawn from that fact was not justified; that the clear result of those cases is to establish the proposition that where territory is a part of the United States, the inhabitants thereof are entitled to the guaranties of the fifth, sixth and seventh amendments, irrespective of the act or acts of congress purporting to extend the constitution to the territories, and that such acts are merely declaratory of a result which existed independently by the inherent operation of the constitution, notwithstanding that in some of the decisions both the application of the constitution and the statutory provisions declaring its application were referred to. *Rasmussen v. United States*, 197 U. S. 516, 526, 49 L. Ed. 862.

As expressly illustrating the doctrine, the court cites *Springville v. Thomas*, 166 U. S. 707, 41 L. Ed. 1172; *Thompson v. Utah*, 170 U. S. 343, 42 L. Ed. 1061; *Capital Traction Co. v. Hof*, 174 U. S. 1, 43 L. Ed. 873; *Black v. Jackson*, 177 U. S. 349, 44 L. Ed. 801.

**Jury trial secured by seventh amendment.**—The seventh amendment secures a jury trial in the territorial courts, and an act of congress cannot change, nor impart to a territorial legislature the power to change, the constitutional rule. *Webster v. Reid*, 11 How. 437, 460, 13 L. Ed. 761; *American Publishing Co. v. Fisher*, 166 U. S. 464, 468, 41 L. Ed. 1079; *Springville v. Thomas*, 166 U. S. 707, 41 L. Ed. 1172; *Thompson v. Utah*, 170 U. S. 343, 346, 42 L. Ed. 1061; *Capital Traction Co. v. Hof*, 174 U. S. 1, 43 L. Ed. 873; *Black v. Jackson*, 177 U. S. 349, 44 L. Ed. 801.

In *Springville v. Thomas*, 166 U. S. 707, 708, 41 L. Ed. 1172, it was held that the seventh amendment secured unanimity in finding a verdict as an essential feature of trial by jury in common law cases, and that an act of congress could not impart the power to change the constitutional rule in the territories, and could not be treated as attempting to do so.

In *Capital Traction Co. v. Hof*, 174 U. S. 1, 43 L. Ed. 873, it was said: "It is beyond doubt \* \* \* that the provisions of the constitution of the United States securing the right of trial by jury, whether in civil or criminal cases, are applicable to the District of Columbia," no reference whatever being made to the statute of February 21, 1871, extending the provisions of

**Congress May Extend the Constitution to the Territories.**—But while not all the provisions of the constitution are of their own force operative within the territories, congress may, by statute, extend it to the territories.<sup>6</sup> And where the constitution has been once formally extended by congress to territories, neither congress nor the territorial legislature can enact laws inconsistent therewith.<sup>7</sup>

**Same—Extent to Which Constitution and Laws Made Operative.**—The extent to which the constitution and laws of the United States are operative within any territory to which they have been extended by act of congress, and in which they were not previously operative, is purely a question of construction. Such statutes are to receive a sensible construction, having regard to the effects and consequences of the law, and giving effect to the intent rather than to the strict letter of the law.<sup>8</sup>

the constitution to the District of Columbia.

**Protection to persons accused of crime.**—"It is equally beyond question that the provisions of the national constitution relating to trials by jury for crimes and to criminal prosecutions apply to the territories of the United States." *Thompson v. Utah*, 170 U. S. 343, 347, 42 L. Ed. 1061; *Capital Traction Co. v. Hof*, 174 U. S. 1, 43 L. Ed. 873.

The sixth amendment of the constitution is applicable to Alaska and is controlling upon congress in legislating for Alaska, even though it is an unorganized territory and even though there is no statute extending the constitution to the territory of Alaska. *Rasmussen v. United States*, 197 U. S. 516, 528, 49 L. Ed. 862, reaffirmed in *Gurvich v. United States*, 198 U. S. 581, 49 L. Ed. 1172.

It follows from this that § 171 of the Code for Alaska adopted by congress (31 Stat. 321, 359) depriving persons accused of a misdemeanor in Alaska of a right to trial by a common law jury was repugnant to the constitution and void. *Rasmussen v. United States*, 197 U. S. 516, 528, 49 L. Ed. 862, reaffirmed in *Gurvich v. United States*, 198 U. S. 581, 49 L. Ed. 1172.

**Ex post facto clause applicable to territories.**—In *Thompson v. Utah*, 170 U. S. 343, 42 L. Ed. 1061, the ex post facto clause of the constitution was held to apply to the case of one charged with crime committed in the territory, and it was held to invalidate a statute, enacted after the territory became a state, providing for trial by jury of only eight persons.

**6. Congress may extend the constitution to the territories.**—*Webster v. Reid*, 11 How. 437, 13 L. Ed. 761; *American Publishing Co. v. Fisher*, 166 U. S. 464, 41 L. Ed. 1079; *Downes v. Bidwell*, 182 U. S. 244, 270, 271, 45 L. Ed. 1088; *Hawaii v. Mankichi*, 190 U. S. 197, 217, 47 L. Ed. 1016; *Dorr v. United States*, 195 U. S. 138, 145, 49 L. Ed. 128; *Kepler v. United States*, 195 U. S. 100, 49 L. Ed. 114; *Serra v. Mortiga*, 204 U. S. 470, 474, 51 L. Ed. 571.

**7. Extension of constitution to territories irrevocable.**—*Downes v. Bidwell*,

182 U. S. 244, 270, 45 L. Ed. 1088, reaffirmed in *Czarnikow v. Bidwell*, 191 U. S. 559, 48 L. Ed. 302; *Warner v. Stranahan*, 191 U. S. 560, 48 L. Ed. 302.

**8. Extent to which constitution and laws made operative; construction of statutes.**—*Hawaii v. Mankichi*, 190 U. S. 197, 211, 213, 47 L. Ed. 1016.

Thus in the case of *Hawaii v. Mankichi*, 190 U. S. 197, 47 L. Ed. 1016, the joint resolution adopted by congress July 7, 1898, 30 Stat. 750, annexing the Hawaiian Islands to the United States, provided that: "The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution, nor contrary to the constitution of the United States, nor any existing treaty of the United States, shall remain in force until the congress of the United States shall otherwise determine." It was held that where the immediate application of the constitution required no new legislation to take the place of that which was inconsistent therewith, it might be held to have become immediately operative under the terms of this resolution, but that such would not be the case if the striking down of existing legislation, before other legislation could be enacted in lieu thereof, would involve inconvenient and disastrous consequences. Accordingly, the court was of the opinion that it was not the intent nor the effect of this resolution to abolish the system of criminal procedure theretofore in force upon the islands, and to substitute immediately and without new legislation the common law proceedings by grand and petit juries, guaranteed by constitutional provisions which had been held applicable to the organized territories; that it was not the intention of congress to incorporate these islands into the United States without further legislation, and that the inhabitants thereof could not claim the benefit of the constitutional guaranties of indictment by a grand jury and trial by a petit jury until there had been some new legislation superseding the existing criminal procedure. But municipal statutes of Hawaii, allowing a conviction of treason on circumstantial evidence, or on the tes-



(dddd) *Powers of Territorial Governments.*—In organizing a territorial government, congress cannot confer upon it powers exceeding those which congress itself, by the constitution, is authorized to exercise over citizens of the United States in respect to their rights of person or property.<sup>9</sup>

**Defined and Limited by Organic Act.**—The powers of a territorial government depend upon the act of congress organizing the territory, such act being the fundamental law of the territory, and as such binding upon the territorial authorities.<sup>10</sup> The power of congress reserved in the organic acts of the territories to annul the acts of their legislatures is not to be construed as authorizing the territorial legislatures, in the absence of any action by congress, to pass laws in conflict with the act of congress under which they were created.<sup>11</sup>

**Where No Restriction.**—Unless restricted by the territorial act, the powers of a territorial legislature extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States.<sup>12</sup> This is gen-

timony of one witness, depriving a person of liberty by the will of the legislature and without process, or confiscating private property for public use without compensation would not remain in force after annexation of the territory to the United States, which was conditioned upon the extinction of all legislation contrary to the constitution. Indeed, most, if not at all, the privileges and immunities contained in the bill of rights of the constitution were intended to apply from the moment of annexation; the decision of this case is placed upon the ground that the two rights alleged to have been violated are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property and their well-being. *Hawaii v. Mankichi*, 190 U. S. 197, 217, 47 L. Ed. 1016.

"It is settled that by virtue of the bill of rights enacted by congress for the Philippine Islands, 32 Stat. 691, 692, that guarantees equivalent to the due process and equal protection of the law clauses of the fourteenth amendment, the twice in jeopardy clause of the fifth amendment, and the substantial guarantees of the sixth amendment, exclusive of the right to trial by jury, were extended to the Philippine Islands. It is further settled that the guarantees which congress has extended to the Philippine Islands are to be interpreted as meaning what the like provisions meant at the time when congress made them applicable to the Philippine Islands. *Kepner v. United States*, 195 U. S. 100, 49 L. Ed. 114." *Serra v. Mortiga*, 204 U. S. 470, 474, 51 L. Ed. 571.

The president, in his instructions to the Philippine commission, while impressing the necessity of carrying into the new government the guarantees of the bill of rights securing those safeguards to life and liberty which are deemed essential to our government, was careful to reserve the right to trial by jury, which was doubtless due to the fact that the civilized

portion of the islands had a system of jurisprudence founded upon the civil law, and the uncivilized parts of the archipelago were wholly unfitted to exercise the right of trial by jury. *Dorr v. United States*, 195 U. S. 138, 145, 49 L. Ed. 128; *Kepner v. United States*, 195 U. S. 100, 49 L. Ed. 114.

**9. Powers of territorial government.**—*Scott v. Sandford*, 19 How. 393, 395, 15 L. Ed. 691; *Murphy v. Ramsey*, 114 U. S. 15, 44, 29 L. Ed. 49. See, also, ante, "Limitations upon the Power of Congress; Operation of the Constitution within the Territories," VI. D, 2, c, (3), (c), (cc), (bbb), (cccc), (bbbbb).

**10. Powers of a territorial government defined and limited by its organic act.**—*National Bank v. Yankton County*, 101 U. S. 129, 25 L. Ed. 1046; *Walker v. New Mexico*, etc., R. Co., 165 U. S. 593, 604, 41 L. Ed. 837; *American Pub. Co. v. Fisher*, 166 U. S. 464, 41 L. Ed. 1079.

A territorial legislature cannot dispense with a jury trial where congress has declared that the constitution and statutory provisions requiring a jury trial shall be in force in the territory. *American Pub. Co. v. Fisher*, 166 U. S. 464, 41 L. Ed. 1079. See, also, ante, "Limitation upon the Power of Congress; Operation of the Constitution within the Territories," VI. D, 2, c, (3), (c), (cc), (bbb), (cccc), (bbbbb).

**11. Reserved power to control territorial government not construed as an enabling clause.**—*Clayton v. Utah*, 132 U. S. 632, 642, 33 L. Ed. 455; *Jack v. Utah*, 132 U. S. 643, 33 L. Ed. 459.

**12. Powers of territorial government where no restrictions imposed.**—*Ferris v. Higley*, 20 Wall. 375, 380, 22 L. Ed. 383; *American Ins. Co. v. Canter*, 1 Pet. 511, 7 L. Ed. 243; *Maynard v. Hill*, 125 U. S. 190, 204, 31 L. Ed. 654; *Davis v. Beason*, 133 U. S. 333, 347, 33 L. Ed. 637; *Clough v. Curtis*, 134 U. S. 361, 368, 33 L. Ed. 945; *Cope v. Cope*, 137 U. S. 682, 34 L. Ed. 832; *Walker v. New Mexico*, etc., R. Co., 165 U. S. 593, 604, 41 L. Ed. 837.

The power of the territorial legislature of Florida extends to all rightful objects of legislation; subject to the restriction,

erally provided in the organic act.<sup>13</sup> Except as restrained by the federal constitution and the creating act of congress, therefore, the powers of a territorial legislature are as plenary as those of a state legislature.<sup>14</sup>

**Rightful Subjects of Legislation—How Determined.**—What were “rightful subjects of legislation” when the acts organizing the territories were passed, is not to be settled by reference to the distinctions usually made between legislative acts and such as are judicial or administrative in their character, but by an examination of the subjects upon which legislatures had been in the practice of acting with the consent and approval of the people they represented. Long acquiescence in repeated acts of legislation on particular matters is evidence that those matters have been generally considered by the people as properly within legislative control. Such acts are not to be set aside or treated as invalid, because upon a careful consideration of their character doubts may arise as to the competency of the legislature to pass them. Rights acquired or obligations incurred under such legislation are not to be impaired because of subsequent differences of opinion as to the department of the government to which the acts are properly assignable.<sup>15</sup>

The words “not inconsistent with the constitution and laws of the United States,” in the acts extending the powers of the territorial legislatures to all “rightful subjects of legislation” merely formulate a limitation which exists without express declaration to that effect.<sup>16</sup>

**Rightful Subjects of Legislation—Illustrations.**—The right to legislate upon all rightful subjects of legislation includes the right to grant charters of incorporation,<sup>17</sup> to endow institutions of learning,<sup>18</sup> to regulate the distribution and right of succession to the estates of deceased persons and provide for inheritance by illegitimate children,<sup>19</sup> to grant legislative divorces, and to numerous other subjects.<sup>20</sup>

that their laws shall not be “inconsistent with the laws and constitution of the United States.” *American Ins. Co. v. Canter*, 1 Pet. 511, 7 L. Ed. 243.

“The legislature of a territory has all legislative power except as limited by the constitution, the organic act, and the acts of congress; and its adoption of the common law rule of practice and decision is binding on this court.” *Walker v. New Mexico, etc., R. Co.*, 165 U. S. 593, 604, 41 L. Ed. 837.

13. *Same.*—*Miners’ Bank v. Iowa*, 12 How. 1, 3, 13 L. Ed. 867; *Ferris v. Higley*, 20 Wall. 375, 22 L. Ed. 383.

**Act not construed as restrictive.**—“The statute of congress of March 22, 1882, amending a previous section of the Revised Statutes in reference to bigamy, declares ‘that no polygamist, bigamist, or any person cohabiting with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this section, in any territory or other place over which the United States have exclusive jurisdiction, shall be entitled to vote at any election held in any such territory, or other place, or be eligible for election or appointment to or be entitled to hold any office or place of public trust, honor, or emolument in, under, or for any such territory or place, or under the United States.’” 22 Stat. 31, c. 47, § 8. This is a general law applicable to all territories, and other places under the exclusive jurisdiction of the United States.

It does not purport to restrict the legislation of the territories over kindred offenses or over the means of their ascertainment and prevention.” *Davis v. Beason*, 133 U. S. 333, 347, 33 L. Ed. 637.

14. *Same.*—*Maynard v. Hill*, 125 U. S. 190, 204, 31 L. Ed. 654; *Cope v. Cope*, 137 U. S. 682, 34 L. Ed. 832; *Walker v. New Mexico, etc., R. Co.*, 165 U. S. 593, 604, 41 L. Ed. 837.

15. **Rightful subjects of legislation; how determined.**—*Maynard v. Hill*, 125 U. S. 190, 204, 31 L. Ed. 654.

This principle applies with special force when the validity of acts dissolving the bonds of matrimony is assailed, since the legitimacy of children, the peace of families, and the settlement of estates, depends upon such legislation being sustained. *Maynard v. Hill*, 125 U. S. 190, 204, 31 L. Ed. 654.

16. **Operation of words, “not inconsistent with the constitution and laws of the United States.”**—*Maynard v. Hill*, 125 U. S. 190, 204, 31 L. Ed. 654.

17. **Rightful subjects of legislation; charters of incorporation.**—*Miners’ Bank v. Iowa*, 12 How. 1, 13 L. Ed. 867.

18. *Same*; **endowment of institutions of learning.**—*Trustees v. Board of Indiana*, 14 How. 268, 273, 14 L. Ed. 416.

19. *Same*; **succession of estates.**—*Cope v. Cope*, 137 U. S. 682, 34 L. Ed. 832.

20. *Same*; **legislative divorces.**—*Maynard v. Hill*, 125 U. S. 190, 31 L. Ed. 654.

**Jurisdiction of courts.**—“Of the power

(eeee) *Control of Territorial Government by Congress*.—Subject to the limitations expressly or by implication imposed by the constitution, congress has full and complete authority over a territory, and may directly legislate for the government thereof. It may declare a valid enactment of the territorial legislature void or a void enactment valid, although it reserved in the organic act no such power.<sup>21</sup> Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the territories and all the departments of the territorial governments. It may do for the territories what the people, under the constitution of the United States, may do for the states.<sup>22</sup>

**Power in congress to amend the acts of a territorial legislature** is an incident of sovereignty and continues until granted away. An express reservation of such right is not necessary.<sup>23</sup>

of the legislature of Idaho to confer original jurisdiction upon the supreme court of the territory in such cases there can be no doubt. Its power extends to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States. Rev. Stat., § 1851." *Clough v. Curtis*, 134 U. S. 361, 368, 33 L. Ed. 945.

The organic act organizing the territory of Utah, in defining the power of the territorial legislature, declared that "it shall extend to all rightful subjects of legislation consistent with the constitution of the United States, and with this act." Held, that an act defining the jurisdiction of a probate court, or of any court, was fairly included within the general meaning of the phrase "rightful subject of legislation." *Ferris v. Higley*, 20 Wall. 375, 380, 22 L. Ed. 383.

**Claims against municipal corporations.**—A territorial act making provision for the investigation and payment of claims against municipal corporations which have no legal obligations, but which rest upon strong equitable and moral considerations, is an act relating to a proper subject of legislation. *Guthrie Nat. Bank v. Guthrie*, 173 U. S. 528, 535, 43 L. Ed. 796.

**21. Congressional control of territorial governments.**—*Reynolds v. United States*, 98 U. S. 145, 25 L. Ed. 244; *National Bank v. Yankton County*, 101 U. S. 129, 133, 25 L. Ed. 1046; *Murphy v. Ramsey*, 114 U. S. 15, 44, 29 L. Ed. 49; *Clayton v. Utah*, 132 U. S. 632, 642, 33 L. Ed. 455; *Jack v. Utah*, 132 U. S. 643, 33 L. Ed. 459; *Mormon Church v. United States*, 136 U. S. 1, 43, 34 L. Ed. 481; *Utter v. Franklin*, 172 U. S. 416, 423, 43 L. Ed. 498; *Downes v. Bidwell*, 182 U. S. 244, 289, 290, 45 L. Ed. 1088, per Justices White, Shiras and McKenna.

**22. Same.**—*Reynolds v. United States*, 98 U. S. 145, 25 L. Ed. 244; *National Bank v. Yankton County*, 101 U. S. 129, 133, 25 L. Ed. 1046; *Murphy v. Ramsey*, 114 U. S. 15, 44, 29 L. Ed. 49; *Mormon Church v. United States*, 136 U. S. 1, 43, 34 L. Ed. 481; *Utter v. Franklin*, 172 U. S. 416, 423,

43 L. Ed. 498; *Downes v. Bidwell*, 182 U. S. 244, 289, 290, 45 L. Ed. 1088, per Justices White, Shiras and McKenna.

**Congress has power to change local territorial governments at its discretion.**—*Downes v. Bidwell*, 182 U. S. 244, 289, 290, 45 L. Ed. 1088, per Justices White, Shiras and McKenna.

**Ratification of unauthorized acts.**—That which congress could have originally authorized a territorial legislature or municipal corporation to do, it may subsequently confirm and ratify when it has been done without previous authorization. *American Ins. Co. v. Canter*, 1 Pet. 511, 7 L. Ed. 243; *National Bank v. Yankton County*, 101 U. S. 129, 25 L. Ed. 1046; *Utter v. Franklin*, 172 U. S. 416, 423, 43 L. Ed. 498.

**23. Power of congress to amend territorial legislation.**—*National Bank v. Yankton County*, 101 U. S. 129, 131, 25 L. Ed. 1046; *Mormon Church v. United States*, 136 U. S. 1, 43, 34 L. Ed. 481.

**May prescribe qualifications of electors.**—Thus, in the exercise of its right to legislate independently for the territories, it may prescribe the qualifications of voters and exclude polygamists from the franchise. *Murphy v. Ramsey*, 114 U. S. 15, 44, 29 L. Ed. 49.

**Validation of bonds.**—Under the statutes of congress (12 Stat. 239 and 15 Stat. 300) the legislative assembly of Dakota meets biennially and no one session thereof can exceed forty days. That assembly met December 5, 1870, and after continuing in session every day, Sundays excepted, until January 13, 1871, adjourned without day. The acting governor convened it April 5, 1871, when, after organizing, it passed, among other laws, one entitled "An act to enable organized counties and townships to vote aid to any railroad, and to provide for payment of the same." In strict conformity to its provisions, the electors of a county voted to donate a specific sum to a certain railroad company. Congress, by an act approved May 27, 1872, disapproved and annulled said territorial act, but provided that the vote



**Power Generally Reserved in Organic Act.**—"The supreme power of congress over the territories and over the acts of the territorial legislatures established therein, is generally expressly reserved in the organic acts establishing governments in said territory."<sup>24</sup>

**Control of Congress Exclusive.**—The control of these territorial governments properly appertains to that branch of the government which creates them and which can change or modify them to meet its views of public policy, namely, the congress of the United States. It does not rest with the federal supreme court.<sup>25</sup>

**Vitality of Legislation Not Dependent upon Approval of Congress.**—But while the acts of the territorial legislatures are at all times subject to the control of congress, and may be modified or superseded at its pleasure, they are not dependent for their vitality upon the approval of congress; on the other hand, if not inconsistent with the constitution and laws of the United States, they are valid and operative from the date of their enactment and stand until disapproved by congress.<sup>26</sup>

(d) *Effect of Constitution upon Ordinances of the Old Confederation.*—**Ordinance of 1787 Superseded by the Constitution.**—The ordinance of 1787 for the government of the Northwest Territory was superseded by the adoption of the constitution of the United States, which placed all the states of the Union upon a perfect equality, which equality could not exist if the ordinance continued to be in force after the adoption of the constitution. Such of the provisions of the ordinance as are yet in force in any territory owe their validity to acts of congress passed under the present constitution, and so much of it as is in force in any state is owing to the constitution and laws of that state having adopted any of the provisions thereof.<sup>27</sup>

**Ordinance of 1787 Re-Enacted.**—The new government, however, took the Northwest territory which had been ceded by Virginia to the government under the articles of confederation, as it found it, and in the condition in which it was transferred, and did not attempt to undo anything that had been done. Among the earliest laws passed by the congress under the constitution was one reviving the ordinance of 1787, which had become inoperative and a nullity upon the adoption of the constitution. They introduced no new form or principle for the government of said territory, but recited in the preamble of the act that it was passed in order that the ordinance of 1787 might continue to have full effect,

of aid for the construction of the main stem of the road of the company should not be impaired, and that the company was a valid corporation. The company complied with the requirements of congress by giving for the aid so voted an equal amount of stock to the county, and the latter issued its bonds therefor. In an action brought by a bona fide holder of them to recover certain installments of interest, held, that, independently of the question of authority to convene the extra session, or of the validity of the laws enacted thereat, the bonds were binding on the county, inasmuch as the act of congress was equivalent to a direct grant of power to issue them. *National Bank v. Yankton County*, 101 U. S. 129, 25 L. Ed. 1046. Accord, *Utter v. Franklin*, 172 U. S. 416, 423, 43 L. Ed. 498.

**24. Power to control usually expressed.**—*Mormon Church v. United States*, 136 U. S. 1, 44, 34 L. Ed. 481.

**25. Control of congress exclusive.**—*Scott v. Jones*, 5 How. 343, 12 L. Ed. 181; *Miners' Bank v. Iowa*, 12 How. 1, 7, 13 L.

Ed. 867; *Freeborn v. Smith*, 2 Wall. 160, 163, 17 L. Ed. 922.

**26. Validity of acts not dependent upon approval of congress.**—*Miners' Bank v. Iowa*, 12 How. 1, 7, 13 L. Ed. 867; *Clinton v. Englebrecht*, 13 Wall. 434, 20 L. Ed. 659.

**27. Ordinance of 1787 superseded by the constitution.**—*Strader v. Graham*, 10 How. 82, 13 L. Ed. 337.

Whatever may have been the force accorded to the ordinance in 1787 at the period of its enactment, its authority and effect ceased and yielded to the paramount authority of the constitution from the period of its adoption. After that time its operation and effect within the territories rested solely upon its adoption and re-enactment by the government under the constitution. (*Opinion of Daniel, J.*) *Scott v. Sanford*, 19 How. 393, 490, 15 L. Ed. 691; Accord: *Pollard v. Hagan*, 3 How. 212, 11 L. Ed. 565; *Permoli v. First Municipality*, 3 How. 589, 11 L. Ed. 739; *Strader v. Graham*, 10 How. 82, 13 L. Ed. 337.

and they proceeded to make only those rules and regulations which were needful to adapt it to the new government, into whose hands the power had fallen.<sup>28</sup>

**Congress Bound by the Compact Relating to Slavery.**—Congress had no power, in the face of the compact between Virginia and the twelve other states, to force slavery into the Northwest territory, because it was bound by that engagement, and could not break it.<sup>29</sup>

(e) *Right to Dispose of Territory.*—The power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States is vested in congress without limitation.<sup>30</sup> It has the same power over the territory or public domain belonging to the United States as it has over any other property belonging to the United States.<sup>31</sup>

**"Territory" Equivalent to "Land."**—The constitution of the United States, art. 4, § 3, provides that congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. The term territory, as used here, is merely descriptive of one kind of property and is equivalent to the word land.<sup>32</sup>

**Right to Dispose Includes Power to Lease.**—The power to dispose of and to make all needful rules and regulations respecting the territory belonging to the United States, includes the power to lease as well as the power to sell.<sup>33</sup>

(4) *To Execute Its Own Laws and Exercise Jurisdiction over All Persons and Places.*—The government of the United States, within the scope of its powers, operates upon all persons and over every foot of territory under its jurisdiction. It legislates for the whole nation and is not embarrassed by state lines. It has the right to use physical force in any part of the United States to compel obedience to its lawfully enacted laws and regulations and to carry into execution all the powers conferred upon it by the constitution. This is one of the attributes of federal sovereignty, which sovereignty rests upon the actual soil and territory within the states and elsewhere, and upon the individual citizen as well as upon the state governments and those assuming to act under the authority of state laws.<sup>34</sup>

28. Ordinance of 1787 re-enacted.—Scott v. Sandford, 19 How. 393, 438, 15 L. Ed. 691.

29. Congress bound by compact relating to slavery.—Scott v. Sandford, 19 How. 393, 523, 15 L. Ed. 691.

30. Power to dispose of territory.—United States v. Gratiot, 14 Pet. 526, 536, 10 L. Ed. 573. See, also, ante, "Limitations upon Treaties as the Supreme Law," IV, B, 2, d, (2). See, also, the title PUBLIC LANDS.

31. Same.—United States v. Gratiot, 14 Pet. 526, 536, 10 L. Ed. 573.

32. "Territory" equivalent to "land."—United States v. Gratiot, 14 Pet. 526, 536, 10 L. Ed. 573.

33. Right of disposal includes power to lease.—United States v. Gratiot, 14 Pet. 526, 537, 10 L. Ed. 573.

34. To execute its own laws and exercise jurisdiction over all persons and places.—Chisholm v. Georgia, 2 Dall. 419, 465, 1 L. Ed. 440; The Schooner Exchange v. McFaddon, 7 Cranch 116, 136, 3 L. Ed. 287; Martin v. Hunter, 1 Wheat. 304, 363, 4 L. Ed. 97; Cohens v. Virginia, 6 Wheat. 264, 414, 5 L. Ed. 257; Worcester v. Georgia, 6 Pet. 515, 571, 8 L. Ed. 483; Rhode Island v. Massachusetts, 12 Pet. 657, 729, 730, 9 L. Ed. 1233; Prigg v. Pennsylvania, 16 Pet. 539, 617, 10 L. Ed. 1060; Dobbins v. Commissioners, 16 Pet.

435, 10 L. Ed. 1022; Kohl v. United States, 91 U. S. 367, 23 L. Ed. 449; United States v. Cruikshank, 92 U. S. 542, 550, 23 L. Ed. 588; Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S. 1, 10, 24 L. Ed. 708; Tennessee v. Davis, 100 U. S. 257, 25 L. Ed. 648; Ex parte Siebold, 100 U. S. 371, 394, 25 L. Ed. 717; Ex parte Clarke, 100 U. S. 399, 25 L. Ed. 715; United States v. Gale, 109 U. S. 65, 66, 27 L. Ed. 857; United States v. Jones, 109 U. S. 513, 519, 27 L. Ed. 1015; Legal Tender Case, 110 U. S. 421, 438, 28 L. Ed. 204; Ex parte Yarbrough, 110 U. S. 651, 661, 28 L. Ed. 274; In re Ayers, 123 U. S. 443, 507, 31 L. Ed. 216; In re Coy, 127 U. S. 731, 752, 32 L. Ed. 274; The Chinese Exclusion Case, 130 U. S. 581, 604, 32 L. Ed. 1068; In re Neagle, 135 U. S. 1, 34 L. Ed. 55; Cherokee Nation v. Southern Kansas R. Co., 135 U. S. 641, 656, 34 L. Ed. 295; Logan v. United States, 144 U. S. 263, 295, 36 L. Ed. 429; Fong Yue Ting v. United States, 149 U. S. 698, 705, 37 L. Ed. 905; In re Debs, 158 U. S. 564, 599, 39 L. Ed. 1092; In re Quarles and Butler, 158 U. S. 532, 537, 39 L. Ed. 1080; Kansas v. Colorado, 206 U. S. 46, 81, 51 L. Ed. 956.

"The government of the United States is one having jurisdiction over every foot of soil within its territory, and acting directly upon each citizen; that while it is a government of enumerated powers, it

**Not Dependent upon the States for the Execution of Its Powers.—**

"No trace is to be found in the constitution of an intention to create a dependence of the government of the Union on those of the states for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments which might disappoint its most important designs, and is incompatible with the language of the constitution."<sup>35</sup>

has within the limits of those powers all the attributes of sovereignty." In *re Debs*, 158 U. S. 564, 599, 39 L. Ed. 1092.

The federal government is endowed with all the powers necessary for its own preservation and the accomplishment of the ends which its framers had in view. *Anderson v. Dunn*, 6 Wheat. 204, 226, 5 L. Ed. 242; *Dobbins v. Commissioners*, 16 Pet. 435, 10 L. Ed. 1022; *Prigg v. Pennsylvania*, 16 Pet. 539, 615, 10 L. Ed. 1060; *United States v. Marigold*, 9 How. 560, 568, 13 L. Ed. 257; *Broderick v. Magraw*, 8 Wall. 639, 19 L. Ed. 531; *Hepburn v. Griswold*, 8 Wall. 603, 613, 19 L. Ed. 513; *Legal Tender Cases*, 12 Wall. 457, 534, 20 L. Ed. 287; *United States v. Cruikshank*, 92 U. S. 542, 550, 23 L. Ed. 588.

"The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the nation, and all its militia, are at the service of the nation to compel obedience to its laws." In *re Debs*, 158 U. S. 564, 582, 39 L. Ed. 1092.

Whatever may be the necessities or conclusions of theoretical law as to eminent domain or anything else, it must be received as a postulate of the constitution that the government of the United States is invested with full and complete power to execute and carry out its purposes. *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641, 656, 34 L. Ed. 295.

"It was the purpose of the constitution to establish a general government independent of, and in some respects superior to, that of the state governments—one which could enforce its own laws through its own officers and tribunals; and this purpose was accomplished. That government can create all the officers and tribunals required for the execution of its powers. Upon this point there can be no question. *Kohl v. United States*, 91 U. S. 367, 23 L. Ed. 449." *United States v. Jones*, 109 U. S. 513, 519, 27 L. Ed. 1015.

"The government of the United States, within the scope of its powers, operates upon every foot of territory under its ju-

risdiction. It legislates for the whole nation, and is not embarrassed by state lines. Its peculiar duty is to protect one part of the country from encroachments by another upon the national rights which belong to all." *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 10, 24 L. Ed. 708.

**35. Not dependent upon the states for the execution of its powers.**—*Tennessee v. Davis*, 100 U. S. 257, 25 L. Ed. 648. *McCulloch v. Maryland*, 4 Wheat. 316, 405, 424, 4 L. Ed. 579; *Logan v. United States*, 144 U. S. 263, 283, 36 L. Ed. 429; In *re Debs*, 158 U. S. 564, 578, 39 L. Ed. 1092; In *re Quarles and Butler*, 158 U. S. 532, 537, 39 L. Ed. 1080.

**Acts directly upon the citizen; not dependent upon the states.**—It would be a strange anomaly, and forced construction, to suppose that the national government meant to rely for the due fulfillment of its own proper duties, and the rights it intended to secure, upon state legislation, and not upon that of the Union; a fortiori, it would be more objectionable to suppose that a power, which was to be the same throughout the Union, should be confided to state sovereignty, which could not rightfully act beyond its own territorial limits. It has never been supposed that the concurrent power of legislation extended to every possible case in which its exercise by the states has not been expressly prohibited. *Prigg v. Pennsylvania*, 16 Pet. 539, 623, 625, 10 L. Ed. 1060.

"While under the dual system which prevails with us the powers of government are distributed between the state and the nation, and while the latter is properly styled a government of enumerated powers, yet within the limits of such enumeration it has all the attributes of sovereignty, and, in the exercise of those enumerated powers, acts directly upon the citizen, and, not through the intermediate agency of the state." In *re Debs*, 158 U. S. 564, 578, 39 L. Ed. 1092.

The government of the Union is emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit. *McCulloch v. Maryland*, 4 Wheat. 316, 404, 4 L. Ed. 579; *Martin v. Hunter*, 11



**States Not Compellable to Execute the Duties Imposed upon the National Government.**—Nor can the states be compelled to execute the duties imposed solely upon the national government. It would be an unconstitutional exercise of the power of interpretation to insist that the states are bound to provide means to carry into effect duties imposed upon the national government and nowhere delegated or entrusted to the states by the constitution. On the contrary, the natural, if not the necessary, conclusion is that the national government, in the absence of all positive provisions to the contrary, is bound, through its own proper departments, legislative, judicial or executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the constitution.<sup>36</sup>

Wheat. 304, 424, 4 L. Ed. 97; *Kansas v. Colorado*, 206 U. S. 46, 81, 51 L. Ed. 956.

The constitution, which superseded the articles of confederation, erected a new government, organized it into distinct departments, assigning to each its appropriate powers, and to congress the power to pass laws for carrying into execution the powers granted to each; so that the laws of the Union could be enforced, by its own authority, upon all persons and subject matters over which the jurisdiction was granted to any department or officer of the government of the United States. *Rhode Island v. Massachusetts*, 12 Pet. 657, 729, 730, 9 L. Ed. 1233.

**Acts are as binding upon people as those of state legislature.**—Where by the constitution the power of legislation is exclusively vested in congress, they legislate for the power of the Union, and their acts are as binding as are the constitutional enactments of the state legislature, on the people of the state. (Opinion of McLean, J.) *Worcester v. Georgia*, 6 Pet. 515, 571, 8 L. Ed. 483; *Respublica v. Cobbett*, 3 Dall. 467, 473, 1 L. Ed. 683; *Cohens v. Virginia*, 6 Wheat. 264, 429, 5 L. Ed. 257; *White v. Hart*, 13 Wall. 646, 650, 20 L. Ed. 685.

**Controlling upon states and individuals acting under state authority.**—America has chosen to be, in many respects, and to many purposes, a nation; and for all these purposes, her government is complete; to all these objects, it is competent. The people have declared, that in the exercise of all powers given for these objects, it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory. *Marshall, C. J.*, delivering the opinion in *Cohens v. Virginia*, 6 Wheat. 264, 413, 414, 5 L. Ed. 257.

The United States is a government with authority extending over the whole territory of the Union, acting upon the states and the people of the states. While limited in the number of its powers, it is, so far as its sovereignty extends, supreme. No state can exclude it from exercising them, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which the constitution has committed to

it. *Tennessee v. Davis*, 100 U. S. 257, 25 L. Ed. 648.

The eleventh amendment cannot in anywise embarrass or obstruct the execution of the laws of the United States, in cases where officers of a state are guilty of acting in violation of them under color of its authority. The government of the United States, in the enforcement of its laws, deals with all persons within its territorial jurisdiction, as individuals, owing obedience to its authority. The penalties of disobedience may be visited upon them without regard to the character in which they assume to act, or the nature of the exemption they may plead in justification. Nothing can be interposed between the individual and the obligation he owes to the constitution and laws of the United States, which can shield or defend him from their just authority, and the extent and limits of that authority the government of the United States, by means, of its judicial power, interprets and applies for itself. If, therefore, an individual acting under the assumed authority of a state, as one of its officers and under color of its laws, comes into conflict with the superior authority of a valid law of the United States, he is stripped of his representative character, and subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States. *In re Ayers*, 123 U. S. 443, 507, 31 L. Ed. 216.

**36. States not compellable to execute the duties of the national government.**—*Prigg v. Pennsylvania*, 16 Pet. 539, 615, 616, 10 L. Ed. 1060.

**But power may be conferred upon a state officer, as such, to execute a duty imposed under an act of congress, and the officer may execute the same, unless its execution is forbidden by the constitution or legislation of his state.** *Robertson v. Baldwin*, 165 U. S. 275, 41 L. Ed. 715; *Dallemagne v. Moisan*, 197 U. S. 169, 174, 49 L. Ed. 709.

For example, congress may authorize the arrest and detention of deserting seamen by state officers. *Robertson v. Baldwin*, 165 U. S. 275, 41 L. Ed. 715; *Dallemagne v. Moisan*, 197 U. S. 169, 49 L.

**Involves the Power to Keep the Peace of the United States.**—The power of the government of the United States to assert and maintain by physical force its sovereignty on every foot of American soil necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent. This power to enforce its laws and to execute its functions in all places does not derogate from the power of the state to execute its laws at the same time and in the same places. The one does not exclude the other, except where both cannot be executed at the same time. In that case the words of the constitution itself show which is to yield. "This constitution, and all laws which shall be made in pursuance thereof, \* \* \* shall be the supreme law of the land." Without the concurrent sovereignty referred to, the national government would be nothing but an advisory government. There is, therefore, a peace of the United States which that government has the constitutional right to preserve.<sup>37</sup>

**Protection of Persons in Service or Custody of the United States.**—The United States are bound to protect against lawless violence all persons in their service or custody in the course of the administration of justice. This duty and the correlative right of protection are not limited to the magistrates and officers charged with expounding and executing the laws, but apply, with at least equal force, to those held in custody on accusation of crime, and deprived of all means of self-defense.<sup>38</sup> The general government must cease to exist whenever it cannot enforce the exercise of its constitutional powers within the states by the instrumentality of its officers and agents. If, when thus acting, within the scope of their authority, they can be arrested and brought to trial in a state court, for an alleged offense against the law of the state, yet warranted by the federal authority they possess, and if the general government is powerless to interfere at once for their protection—if their protection must be left to the action of the state court—the operations of the general government may at any time be arrested at the will of one of the states. No such element of weakness is to be found in the constitution.<sup>39</sup>

Ed. 709. See, also, post, "Enforcement of Federal Law," VI, D, 3, c, (5), (b), (bb), (ggg); "Delegation of Congressional Powers to the States," VI, D, 3, e, (2), (a), (bb), et seq.

**37. Involves the power to keep the peace of the United States.**—Ex parte Siebold, 100 U. S. 371, 394, 25 L. Ed. 717; In re Neagle, 135 U. S. 1, 60, 34 L. Ed. 55; Logan v. United States, 144 U. S. 263, 295, 36 L. Ed. 429; In re Debs, 158 U. S. 564, 579, 39 L. Ed. 1092; In re Quarles and Butler, 158 U. S. 532, 536, 39 L. Ed. 1080. See, also, *The Schooner Exchange v. McFaddon*, 7 Cranch 116, 136, 3 L. Ed. 287; *Cohens v. Virginia*, 6 Wheat. 264, 413, 5 L. Ed. 257; *Legal Tender Cases*, 12 Wall. 457, 555, 20 L. Ed. 287; *Tennessee v. Davis*, 100 U. S. 257, 25 L. Ed. 648; *The Chinese Exclusion Case*, 130 U. S. 581, 32 L. Ed. 1068; *Fong Yue Ting v. United States*, 149 U. S. 698, 37 L. Ed. 905.

**Preservation of peace at federal elections.**—Under its power to supervise and regulate the conduct of elections of its members, congress has the incidental and implied power of preserving the peace at the polls; and there is no merit in an objection that in so doing it encroaches upon powers exclusively confided to the states, since a breach of the peace at such time and place may constitute an offense against the national as well as against

state sovereignty. Ex parte Siebold, 100 U. S. 371, 394, 25 L. Ed. 717; Ex parte Clarke, 100 U. S. 399, 25 L. Ed. 715; *United States v. Gale*, 109 U. S. 65, 66, 27 L. Ed. 857; Ex parte Yarbrough, 110 U. S. 651, 661, 28 L. Ed. 274; In re Coy, 127 U. S. 731, 752, 32 L. Ed. 274.

Thus, the provisions of the enforcement act of May 31, 1870, and the supplement of February 28, 1871, authorizing and requiring deputy marshals to keep the peace at elections of members of congress, are not unconstitutional. Ex parte Siebold, 100 U. S. 371, 25 L. Ed. 717.

**Conspiracies to oppress citizens of the United States.**—"To leave to the several states the prosecution and punishment of conspiracies to oppress citizens of the United States, in performing the duty and exercising the right of assisting to uphold and enforce the laws of the United States, would tend to defeat the independence and the supremacy of the national government." In re Quarles and Butler, 158 U. S. 532, 536, 39 L. Ed. 1080.

**38. Protection of persons in custody or services of United States.**—Logan v. United States, 144 U. S. 263, 295, 36 L. Ed. 429.

**39. Same.**—*Tennessee v. Davis*, 100 U. S. 257, 25 L. Ed. 648; In re Neagle, 135 U. S. 1, 34 L. Ed. 55.

**Same; assault upon federal judge.**—A man assaulting a judge of the United

**Right to Use Force Does Not Preclude the National Government from Resorting to the Courts.**—The right of the government to use force does not exclude the right of appeal to the courts for a judicial determination and for the exercise of all their powers of prevention, since every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other; and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter."<sup>40</sup>

**Same—Pecuniary Interest Not Necessary.**—"While it is not the province of the government to interfere in any mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as affect the public at large, and are in respect to matters which by the constitution are entrusted to the care of the nation, and concerning which the nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge those constitutional duties."<sup>41</sup>

**Jurisdiction Absolute and Exclusive.**—"The jurisdiction of the nation within its own territory is necessarily, exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced to the consent of the nation itself. They can flow from no other legitimate source."<sup>42</sup>

States while in the discharge of his duties violates the peace of the United States; in such case the marshal of the United States stands in the same relation to the peace of the United States which the sheriff of the county does to the peace of the state of California; these are questions too clear to need argument to prove them. In *re Neagle*, 135 U. S. 1, 69, 34 L. Ed. 55.

**State prosecution of federal officer for offense committed in discharge of duty.**—

The case of *Tennessee v. Davis*, 100 U. S. 257, 25 L. Ed. 648, was the case of a criminal prosecution instituted in the state courts against a revenue officer of the United States upon a charge of homicide. The defendant set up the fact that the killing was done in self-defense and in the proper discharge of his duty in enforcing the revenue laws of the United States, and prayed for a removal of the cause into the federal courts. The petition being in conformity to law, it was held that the defendant was entitled to a removal under Revised Statutes, § 643, which provides that: "When any civil suit or criminal prosecution is commenced in any court of a state against any officer appointed under, or acting by authority of, any revenue law of the United States, now or hereafter enacted, or against any person acting by or under authority of any such officer, on account of any act done

under color of his office, or of any such law, or on account of any right, title or authority claimed by such officer or other person under any such law," the case may be removed into the federal court.

In the *Neagle Case*, 135 U. S. 1, 34 L. Ed. 55, it was held that a United States marshal, who killed a man in his efforts, to protect a federal judge, whom he had been assigned to accompany and protect from apprehended violence, was not amenable to the laws of California.

**40. Right to use force does not preclude a resort to the courts.**—In *re Debs*, 158 U. S. 564, 853, 584, 39 L. Ed. 1092.

**41. Same; pecuniary interest not necessary.**—United States *v. San Jacinto Tin Co.*, 125 U. S. 273, 285, 31 L. Ed. 747; United States *v. American Bell Tel. Co.*, 128 U. S. 315, 367, 32 L. Ed. 450; In *re Debs*, 158 U. S. 564, 586, 39 L. Ed. 1092. See, also, the title UNITED STATES.

**42. Jurisdiction absolute and exclusive.**—The *Schooner Exchange v. McFaddon*, 7 Cranch 116, 136, 3 L. Ed. 287; The *Chinese Exclusion Case*, 130 U. S. 581, 604, 32 L. Ed. 1068; *Ekiu v. United States*, 142 U. S. 651, 35 L. Ed. 1146; *Fong Yue Ting v. United States*, 149 U. S. 698, 37 L. Ed. 905; *Lem Moon Sing v. United States*, 158 U. S. 538, 541, 39 L. Ed. 1082.

Jurisdiction over its own territory is an incident of every independent nation. It is a part of its independence. If it



3. GENERALLY OF THE POWERS OF THE FEDERAL AND STATE GOVERNMENTS—*a. Powers of the Federal Government*—(1) *Whence Derived*.—The powers of the general government are made up of concessions of sovereignty from the several states.<sup>42a</sup>

(2) *Limited in Number and Scope*.—The powers of the federal government are limited in number and scope. That government was created for special purposes; beyond the scope of its powers it has no existence.<sup>43</sup>

could not exclude aliens, it would be to that extent subject to the control of another power. The Chinese Exclusion Case, 130 U. S. 581, 603, 32 L. Ed. 1068; *Ekiu v. United States*, 142 U. S. 651, 35 L. Ed. 1146; *Lem Moon Sing v. United States*, 158 U. S. 538, 541, 39 L. Ed. 1082.

**42a. Powers of federal government; whence derived.**—*United States v. Hudson*, 7 Cranch 32, 33, 3 L. Ed. 259; *Charles River Bridge v. Warren Bridge* (opinion of Baldwin, J.), 11 Pet. 420, 583d, 9 L. Ed. 773; *Passenger Cases* (opinion of Catron, J.), 7 How. 283, 449, 12 L. Ed. 702; *Dodge v. Woolsey*, 18 How. 331, 349, 15 L. Ed. 401; *Scott v. Sandford*, 19 How. 393, 448, 15 L. Ed. 691.

The judicial power of the United States is a constituent part of those concessions. *United States v. Hudson*, 7 Cranch 32, 33, 3 L. Ed. 259.

The federal government is a corporation, created by the grant or charter of the separate states. (Opinion of Baldwin, J.) *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 583d, 9 L. Ed. 773.

The powers of the federal government were derived from the states. The action of the general government by legislation or by treaty is the action of the states and of their inhabitants; these the senate, the house of representatives, and the president represent. This is the federal power. (Opinion of Catron, J.) *Passenger Cases*, 7 How. 283, 449, 12 L. Ed. 702.

**43. Powers limited in number and scope.**—*Calder v. Bull*, 3 Dall. 386, 387, 1 L. Ed. 648; *Martin v. Hunter*, 1 Wheat. 304, 326, 4 L. Ed. 97; *McCulloch v. Maryland*, 4 Wheat. 316, 405, 4 L. Ed. 579; *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23; *Ogden v. Saunders*, 12 Wheat. 213, 294, 6 L. Ed. 606; *Worcester v. Georgia*, 6 Pet. 515, 570, 8 L. Ed. 483; *New York v. Miln* (opinion of Baldwin, J.), 11 Pet. 102, 153a, 9 L. Ed. 648; *Briscoe v. Bank*, 11 Pet. 257, 9 L. Ed. 709; *Pollard v. Hagan*, 3 How. 212, 11 L. Ed. 565; *License Cases*, 5 How. 504, 588, 613, 12 L. Ed. 256; *Passenger Cases*, 7 How. 283, 399, 12 L. Ed. 702; *Scott v. Sandford*, 19 How. 393, 401, 448, 15 L. Ed. 691; *Hepburn v. Griswold*, 8 Wall. 603, 611, 19 L. Ed. 513; *Broderick v. Magraw*, 8 Wall. 639, 19 L. Ed. 531; *Collector v. Day*, 11 Wall. 113, 124, 20 L. Ed. 122; *Railroad Co. v. Otoe County*, 16 Wall. 667, 672, 21 L. Ed. 375; *Township of Pine Grove v. Talcott*, 19 Wall. 666, 676, 22 L. Ed. 227; *United States v. Cruikshank*, 92 U. S. 542, 550, 23 L. Ed. 588; *United States v. Germaine*,

99 U. S. 508, 510, 25 L. Ed. 482; *Tennessee v. Davis*, 100 U. S. 257, 25 L. Ed. 648; *Kilbourn v. Thompson*, 103 U. S. 168, 176, 182, 26 L. Ed. 377; *Hall v. Wisconsin*, 103 U. S. 5, 11, 26 L. Ed. 302; *United States v. Harris*, 106 U. S. 629, 636, 27 L. Ed. 290; *Ex parte Curtis*, 106 U. S. 371, 372, 27 L. Ed. 232; *Kidd v. Pearson*, 128 U. S. 1, 16, 32 L. Ed. 346; *Logan v. United States*, 144 U. S. 263, 283, 36 L. Ed. 429; *Fairbank v. United States*, 181 U. S. 283, 288, 45 L. Ed. 862; *Lottery Case*, 188 U. S. 321, 372, 47 L. Ed. 492; *South Carolina v. United States*, 199 U. S. 437, 448, 50 L. Ed. 261; *Burton v. United States*, 202 U. S. 344, 366, 50 L. Ed. 1057; *Hodges v. United States*, 203 U. S. 1, 51 L. Ed. 65; *Kansas v. Colorado*, 206 U. S. 46, 82, 51 L. Ed. 956.

The federal government is one of enumerated powers, and can exercise only the powers granted to it. *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *South Carolina v. United States*, 199 U. S. 437, 448, 50 L. Ed. 261.

The powers of government are limited and those limits are not to be transcended. *Fairbank v. United States*, 181 U. S. 283, 288, 45 L. Ed. 862; *McCulloch v. Maryland*, 4 Wheat. 316, 421, 4 L. Ed. 579.

The government is one of limited powers, with duties and restrictions imposed, and no authority is lodged anywhere to change those duties or restrictions, except the power reserved by the people. *Burton v. United States*, 202 U. S. 344, 366, 50 L. Ed. 1057.

"This government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted." *McCulloch v. Maryland*, 4 Wheat. 316, 405, 4 L. Ed. 579. Accord: *New York v. Miln*, 11 Pet. 102, 153a, 9 L. Ed. 648. opinion of Baldwin, J.; *Kansas v. Colorado*, 206 U. S. 46, 82, 51 L. Ed. 956.

"As heretofore stated, the constant declaration of this court from the beginning is that this government is one of enumerated powers. 'The government, then, of the United States, can claim no powers which are not granted to it by the constitution, and the powers actually granted must be such as are expressly

**Distinction between Legislative and Judicial Powers.**—"There is this significant difference in the grants of powers to these departments: The first article, treating of legislative powers, does not make a general grant of legislative power. It reads: 'Article 1, § 1. All legislative powers herein granted shall be vested in a congress,' etc.; and then in article 8 mentions and defines the legislative powers that are granted. By reason of the fact that there is no general grant of legislative power, it has become an accepted constitutional rule that this is a government of enumerated powers."<sup>44</sup> "When a legislative power is claimed for the national government, the question is whether that power is one of those granted by the constitution, either in terms or by necessary implication, whereas in respect to judicial functions the question is whether there be any limitations expressed in the constitution on the general grant of national power."<sup>45</sup>

(3) *The Federal Constitution a Grant of Powers.*—The federal constitution is a grant of powers by which the people have created a government, defined its powers, prescribed their limits, distributed them among the different departments, and directed, in general, the manner of their exercise. Neither the government so created nor any department thereof can claim any powers which are not granted to it by the constitution. Laws of the United States, in order to be binding, must be within the legitimate powers vested by the constitution, either expressly or by necessary implication.<sup>46</sup>

given, or given by necessary implication." Story, J., in *Martin v. Hunter*, 1 Wheat. 304, 326, 4 L. Ed. 97. "The government of the United States is one of delegated, limited, and enumerated powers." *Kansas v. Colorado*, 206 U. S. 46, 87, 51 L. Ed. 956. Accord: *United States v. Harris*, 106 U. S. 629, 635, 27 L. Ed. 290.

"The constitution gives no countenance to the theory that congress is vested with the full powers of the British Parliament, and that, although subject to constitutional limitations, it is the sole judge of their extent and application; and the decisions of this court from the beginning have been to the contrary." Per Fuller, C. J., Brewer, Shiras and Peckham, JJ., dissenting. *Lottery Case*, 188 U. S. 321, 372, 47 L. Ed. 492.

The powers expressly granted to congress must be exercised within the limits imposed by the restrictions contained in that instrument. *Boyd v. United States*, 116 U. S. 616, 29 L. Ed. 746; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. Ed. 463; *Fairbank v. United States*, 181 U. S. 283, 300, 301, 45 L. Ed. 862. And see, also, post, "Constitutional Limitations upon Legislative Powers," VI, D, 3, f, (1), (h), (bb), et seq.

**Revised Statutes, § 1782, not in violation of this principle.**—Section 1782 of the Revised Statutes, prohibiting members of congress from practicing before the departments of the government, was within the legislative power of congress to enact, and is no departure from the salutary doctrine that the government of the United States can claim no powers which are not granted to it by the constitution, and that the powers actually granted must be such as are expressly given or given by necessary implication.

*Burton v. United States*, 202 U. S. 344, 366, 50 L. Ed. 1057.

**44. Distinction between legislative and judicial powers.**—*Kansas v. Colorado*, 206 U. S. 46, 81, 51 L. Ed. 956.

**45. Same.**—*Kansas v. Colorado*, 206 U. S. 46, 83, 51 L. Ed. 956.

See, however, *United States v. Worrall*, 2 Dall. 384, 393, 1 Ed. 426; *Hepburn v. Griswold*, 8 Wall. 603, 611, 19 L. Ed. 513; *Broderick v. Magraw*, 8 Wall. 639, 19 L. Ed. 531, wherein it is held that the powers of all the departments, executive and judicial, as well as legislative, are derived from and limited by the constitution. See, also, post, "Nature and Extent," VI, D, 3, h, (1), (a), (bb).

**46. The constitution a grant of powers.**—*United States v. Worrall*, 2 Dall. 384, 393, 1 L. Ed. 426; *Calder v. Bull*, 3 Dall. 386, 387, 1 L. Ed. 648; *Martin v. Hunter*, 1 Wheat. 304, 326, 4 L. Ed. 97; *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23; *Ogden v. Saunders*, 12 Wheat. 213, 294, 6 L. Ed. 606; *Worcester v. Georgia*, 6 Pet. 515, 570, 8 L. Ed. 483; *Poole v. Fleeger*, 11 Pet. 185, 212b, 9 L. Ed. 680; *Briscoe v. Bank*, 11 Pet. 257, 9 L. Ed. 709; *Pollard v. Hagan*, 3 How. 212, 11 L. Ed. 565; *License Cases*, 5 How. 504, 588, 613, 12 L. Ed. 256; *Passenger Cases*, 7 How. 283, 299, 12 L. Ed. 702; *Dodge v. Woolsey*, 18 How. 331, 349, 15 L. Ed. 401; *Scott v. Sandford*, 19 How. 393, 401, 448, 506, 509, 15 L. Ed. 691; *Gilman v. Philadelphia*, 3 Wall. 713, 725, 18 L. Ed. 96; *Hepburn v. Griswold*, 8 Wall. 603, 611, 19 L. Ed. 513; *Broderick v. Magraw*, 8 Wall. 639, 19 L. Ed. 531; *Collector v. Dav.*, 11 Wall. 113, 124, 20 L. Ed. 12"; *Railroad Co. v. Otoe County*, 16 Wall. 667, 672, 21 L. Ed. 375; *Township of Pine*

**Preamble Not a Grant of Powers.**—Although the preamble indicates the general purposes for which the people ordained and established the constitu-

*Grove v. Talcott*, 19 Wall. 666, 676, 22 L. Ed. 227; *United States v. Cruikshank*, 92 U. S. 542, 551, 23 L. Ed. 588; *United States v. Germaine*, 99 U. S. 508, 510, 25 L. Ed. 482; *Tennessee v. Davis*, 100 U. S. 257, 25 L. Ed. 648; *Hall v. Wisconsin*, 103 U. S. 5, 11, 26 L. Ed. 302; *Kilbourn v. Thompson*, 103 U. S. 168, 176, 182, 26 L. Ed. 377; *Ex parte Curtis*, 106 U. S. 371, 372, 27 L. Ed. 232; *United States v. Harris*, 106 U. S. 629, 636, 27 L. Ed. 290; *Kidd v. Pearson*, 128 U. S. 1, 16, 32 L. Ed. 346; *Downes v. Bidwell*, 182 U. S. 244, 45 L. Ed. 1088; *Dorr v. United States*, 195 U. S. 138, 140, 49 L. Ed. 128; *Burton v. United States*, 202 U. S. 344, 366, 50 L. Ed. 1057; *Hodges v. United States*, 203 U. S. 1, 51 L. Ed. 65; *Grafton v. United States*, 206 U. S. 333, 354, 51 L. Ed. 1084; *Kansas v. Colorado*, 206 U. S. 46, 83, 51 L. Ed. 956.

The government of the United States was born of the constitution, and all powers which it enjoys or may exercise must be either derived expressly or by implication from the instrument. When an act of any department is challenged, because not warranted by the constitution, the existence of the authority is to be ascertained by determining whether the power has been conferred by the constitution, either in express terms or by lawful implication, to be drawn from the express authority conferred or deduced as an attribute which legitimately inheres in the nature of the powers given, and which flows from the character of the government established by the constitution. *Downes v. Bidwell*, 182 U. S. 244, 45 L. Ed. 1088; *Dorr v. United States*, 195 U. S. 138, 140, 49 L. Ed. 128; *Grafton v. United States*, 206 U. S. 333, 354, 51 L. Ed. 1084.

The constitution of the Union is the source of all the jurisdiction of the national government; so that the departments of the government can never assume any power that is not derived expressly or by implication from that instrument, nor exercise a power in any other manner than is there prescribed. *United States v. Worrall*, 2 Dall. 384, 393, 1 L. Ed. 426; *Downes v. Bidwell*, 182 U. S. 244, 288, 45 L. Ed. 1088; *Dorr v. United States*, 195 U. S. 138, 140, 49 L. Ed. 128.

Thus all the legislative power granted by the constitution belongs to congress; but it has no legislative power which is not thus granted. And the same observation applies to the executive and judicial powers granted respectively to the president and the courts. They all arise from the constitution, and are limited by its terms. *Scott v. Sandford*, 19 How. 393, 401, 15 L. Ed. 691; *Hepburn v. Griswold*, 8 Wall. 603, 611, 19 L. Ed. 513;

*Broderick v. Magraw*, 8 Wall. 639, 19 L. Ed. 531.

"That the government of the United States is one of delegated powers only, and that its authority is defined and limited by the constitution, are no longer open questions." *Ex parte Curtis*, 106 U. S. 371, 372, 27 L. Ed. 232.

The federal government cannot lawfully do whatever is not directly prohibited by the constitution. By the tenth amendment the powers of the federal government are expressly limited to the grants of the constitution. (*Opinion of Campbell, J.*) *Scott v. Sandford*, 19 How. 393, 506, 15 L. Ed. 691.

All the powers delegated by the people of the United States to the federal government are defined, and no constructive powers can be exercised by it; and all the powers that remain in the state governments are indefinite; except only in the constitution of Massachusetts. (*Opinion of Chase, J.*) *Calder v. Bull*, 3 Dall. 386, 387, 1 L. Ed. 648.

The powers actually granted must be such as are expressly given, or given by necessary implication. *Martin v. Hunter*, 1 Wheat. 304, 326, 343, 4 L. Ed. 97; *Poole v. Fleeger*, 11 Pet. 185, 212b, 9 L. Ed. 680; *Collector v. Day*, 11 Wall. 113, 124, 20 L. Ed. 122; *Township of Pine Grove v. Talcott*, 19 Wall. 666, 676, 22 L. Ed. 227; *Hall v. Wisconsin*, 103 U. S. 5, 11, 26 L. Ed. 302; *Downes v. Bidwell*, 182 U. S. 244, 288, 45 L. Ed. 1088; *Dorr v. United States*, 195 U. S. 138, 140, 49 L. Ed. 128; *Burton v. United States*, 202 U. S. 344, 366, 50 L. Ed. 1057.

"The government of the United States is one of delegated, limited and enumerated powers. *Martin v. Hunter*, 1 Wheat. 304, 4 L. Ed. 97; *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23. Therefore every valid act of congress must find in the constitution some warrant for its passage." *United States v. Harris*, 106 U. S. 629, 636, 27 L. Ed. 290.

"This is apparent by reference to the following provisions of the constitution: Section 1 of the first article declares that all legislative powers granted by the constitution shall be vested in the congress of the United States. Section 8 of the same article enumerates the powers granted to the congress, and concludes the enumeration with a grant of power 'to make all laws which shall be necessary and proper to carry into execution the foregoing powers and all other powers vested by the constitution in the government of the United States, or in any department or officer thereof.' Article 10 of the amendments to the constitution declares that 'the powers not delegated to the United States by the constitution, nor



tion, it has never been regarded as the source of any substantive power conferred on the government of the United States or on any of its departments. Such powers embrace only those expressly granted in the body of the constitution and such as may be implied from those so granted. Although, therefore, one of the declared objects of the constitution was to secure the blessings of liberty to all under the sovereign jurisdiction and authority of the United States, no power can be exerted to that end by the United States unless, apart from the preamble, it be found in some express delegation of power or in some power to be properly implied therefrom.<sup>47</sup>

(4) *No Common Law of the United States.*—There is no principle which pervades the Union and has the authority of law, that is not embodied in the constitution and laws of the Union. The common law is not a part of the federal system except in so far as it may be made so by legislative adoption.<sup>48</sup>

prohibited by it to the states are reserved to the states respectively or to the people.” *United States v. Harris*, 106 U. S. 629, 636, 27 L. Ed. 290.

“Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is whether the power be expressed in the constitution. If it be, the question is decided. If it be not expressed, the next inquiry must be whether it is properly an incident to an express power and necessary to its execution. If it be, then it may be exercised by congress. If not, congress cannot exercise it.” *United States v. Harris*, 106 U. S. 629, 636, 27 L. Ed. 290.

The powers of congress itself, when acting through the concurrence of both branches, are dependent solely on the constitution. *Railroad Co. v. Otoe County*, 16 Wall. 667, 672, 21 L. Ed. 375; *United States v. Germaine*, 99 U. S. 508, 510, 25 L. Ed. 482; *Kilbourn v. Thompson*, 103 U. S. 168, 176, 182, 26 L. Ed. 377.

Neither branch of congress, when acting separately, can lawfully exercise more power than is conferred by the constitution on the whole body, except in the few instances where authority is conferred on either house separately, as in the case of impeachments. *Kilbourn v. Thompson*, 103 U. S. 168, 176, 182, 26 L. Ed. 377.

No rights can be acquired under the constitution or laws of the United States except such as the government of the United States has the authority to grant or secure. All that cannot be so granted or secured are left under the protection of the states. *United States v. Cruikshank*, 92 U. S. 542, 551, 23 L. Ed. 588.

**Not add to its powers by treaty or compact.**—The United States have no constitutional capacity to exercise jurisdiction, sovereignty, or eminent domain within the limits of a state or elsewhere except in cases where it is delegated; and the federal government cannot add to its powers by treaty or compact. (Opinion of Campbell, J.) *Scott v. Sanford*, 19 How. 393, 509, 15 L. Ed. 691; *Pollard v. Hagan*, 3 How. 212, 11 L. Ed. 565.

Laws of the United States, in order to be binding, must be within the legitimate powers vested by the constitution. Trea-

ties, to be valid, must be made within the scope of the same powers; for there can be no “authority of the United States,” save what is derived mediately or immediately, and regularly and legitimately, from the constitution. A treaty, no more than an ordinary statute, can arbitrarily cede away any one right of a state or of any citizen of a state. (Opinion of Daniel, J.) *License Cases*, 5 How. 504, 613, 12 L. Ed. 256. See, also, ante, “Limitations upon Treaties as the Supreme Law,” IV, B, 2, d.

**47. Preamble not a grant of powers.**—*Jacobson v. Massachusetts*, 197 U. S. 11, 22, 49 L. Ed. 643.

**48. No common law of the United States.**—*United States v. Worrall*, 2 Dall. 384, 1 L. Ed. 426; *Chisholm v. Georgia*, 2 Dall. 419, 432, 1 L. Ed. 440; *Ex parte Bollman*, 4 Cranch 75, 2 L. Ed. 554; *United States v. Hudson*, 7 Cranch 32, 3 L. Ed. 259; *Martin v. Hunter*, 1 Wheat. 304, 329, 4 L. Ed. 97; *United States v. Coolidge*, 1 Wheat. 415, 4 L. Ed. 124; *Wheaton v. Peters*, 8 Pet. 591, 658, 8 L. Ed. 1055; *The Steamboat Orleans v. Phoebus*, 11 Pet. 175, 9 L. Ed. 677; *Kendall v. United States*, 12 Pet. 524, 9 L. Ed. 181; *Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. 518, 563, 14 L. Ed. 249; *Rice v. Railroad Co.*, 1 Black 358, 17 L. Ed. 147; *United States v. Britton*, 108 U. S. 199, 206, 27 L. Ed. 698; *Smith v. Alabama*, 124 U. S. 465, 31 L. Ed. 508; *In re Barry*, 136 U. S. 597, 34 L. Ed. 503; *Manchester v. Massachusetts*, 139 U. S. 240, 262, 263, 35 L. Ed. 159; *United States v. Eaton*, 144 U. S. 677, 36 L. Ed. 591. See, also, the title COMMON LAW, vol. 3, p. 970.

“With respect to the individual states, the difficulty does not occur. When the American colonies were first settled by our ancestors, it was held, as well by the settlers, as by the judges and lawyers of England, that they brought hither, as a birthright and inheritance, so much of the common law, as was applicable to their local situation and change of circumstances. But each colony judged for itself what parts of the common law were applicable to its new condition; and in various modes, by legislative acts, by judicial decisions, or by constant usage,

**Common-Law Offenses; Jurisdiction of Federal Courts as to Common-Law Crimes.**—There are no common-law offenses against the United States and no indictment can be maintained in their courts for merely common-law offenses.<sup>49</sup> Under the grant by the constitution of judicial power to the United States in all cases of admiralty and maritime jurisdiction, the courts of the United States, merely by virtue of this grant of judicial power, and in the absence of legislation by congress, have no criminal jurisdiction whatever. The criminal jurisdiction of the courts of the United States is wholly derived from the statutes of the United States.<sup>50</sup>

**Where Crime Defined with Reference to the Common Law.**—But where congress creates an offense against the United States and defines it merely by its common-law designation, the courts look to the common law to ascertain the definition and elements thereof.<sup>51</sup>

**Where Offense Amounts to a Nuisance; Equity Jurisdiction.**—But while the courts of the United States have no criminal jurisdiction of common-law offenses, yet, where such offense amounts to a public or private nuisance, the federal courts have jurisdiction, under the constitutional provisions extending the judicial power to all cases in law and equity, to entertain a bill to enjoin the same.<sup>52</sup>

**As to Interpretation of Constitution and Laws.**—There is, however, one clear exception to the statement that there is no national common law. The interpretation of the constitution and laws of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history. The code of constitutional and statutory construction which is gradually formed by the judgments of the federal supreme court, in the application of the constitution and the laws and treaties made in pursuance thereof, has for its basis so much

adopted some parts, and rejected others. Hence, he who shall travel through the different states, will soon discover that the whole of the common law of England has been nowhere introduced; that some states have rejected what others have adopted; and that there is, in short, a great and essential diversity, in the subjects to which the common law is applied, as well as in the extent of its application. The common law, therefore, of one state, is not the common law of another; but the common law of England is the law of each state, so far as each state has adopted it; and it results from that position, connected with the judicial act, that the common law will always apply to suits between citizen and citizen, whether they are instituted in a federal, or state court." *Chase, J.*, delivering the opinion in *United States v. Worrall*, 2 Dall. 384, 393, 1 L. Ed. 426. See, also, the title COMMON LAW, vol. 3, pp. 962, 963.

**49. Common-law offenses against the United States.**—*United States v. Worrall*, 2 Dall. 384, 393, 1 L. Ed. 426; *United States v. Hudson*, 7 Cranch 32, 3 L. Ed. 259; *United States v. Coolidge*, 1 Wheat. 415, 4 L. Ed. 124; *United States v. Britton*, 108 U. S. 199, 206, 27 L. Ed. 698; *Manchester v. Massachusetts*, 139 U. S. 240, 262, 263, 35 L. Ed. 159; *United States v. Eaton*, 144 U. S. 677, 36 L. Ed. 591. See, also, the title COMMON LAW, vol. 3, p. 971.

**50. Same.**—*United States v. Worrall*, 2 Dall. 384, 1 L. Ed. 426; *United States v. Coolidge*, 1 Wheat. 415, 4 L. Ed. 124; *Wheaton v. Peters*, 8 Pet. 591, 658, 8 L. Ed. 1055; *Pennsylvania v. Wheeling, etc.*, *Bridge Co.*, 13 How. 518, 563, 14 L. Ed. 249; *Rice v. Railroad Co.*, 1 Black 358, 17 L. Ed. 147; *The Belfast*, 7 Wall. 624, 19 L. Ed. 266; *The Eagle*, 8 Wall. 15, 19 L. Ed. 365; *Insurance Co. v. Dunham*, 11 Wall. 1, 20 L. Ed. 90; *Leon v. Galceran*, 11 Wall. 185, 20 L. Ed. 74; *Steamboat Co. v. Chase*, 16 Wall. 522, 21 L. Ed. 369; *United States v. Hall*, 98 U. S. 343, 345, 25 L. Ed. 180; *Schoonmaker v. Gilmore*, 102 U. S. 118, 26 L. Ed. 95; *United States v. Britton*, 108 U. S. 199, 27 L. Ed. 698; *Butler v. Boston, etc.*, *Steamship Co.*, 130 U. S. 527, 32 L. Ed. 1017; *Jones v. United States*, 137 U. S. 202, 211, 34 L. Ed. 691; *Manchester v. Massachusetts*, 139 U. S. 240, 262, 35 L. Ed. 159; *United States v. Eaton*, 144 U. S. 677, 36 L. Ed. 591; *Pettibone v. United States*, 148 U. S. 197, 37 L. Ed. 419.

**51. Where crime defined with reference to the common law.**—*United States v. McGill*, 4 Dall. 426, 1 L. Ed. 894; *United States v. Eaton*, 144 U. S. 677, 36 L. Ed. 471. See, also, the title COMMON LAW, vol. 3, p. 972.

**52. Where offense is also a nuisance.**—*Pennsylvania v. Wheeling, etc.*, *Bridge Co.*, 13 How. 518, 563, 14 L. Ed. 249.

of the common law as may be implied in the subject, and constitutes a common law resting on national authority.<sup>53</sup>

(5) *Incidental and Implied Powers of the Federal Government*—(a) *Generally*.—While it is true that the government of the United States under the constitution is one of limited powers, and that every power exercised by the federal government or any of its departments must rest upon the authority of the constitution, it is not necessary, in order to prove the existence of a particular authority, to show a particular and express grant. Those powers which are clearly implied in that instrument are as much granted as those which are expressly given. The design of the constitution was to establish a government competent to the direction and administration of the affairs of a great nation, and at the same time to mark by sufficiently definite lines the sphere of its operation. To this end it was needful only to make express grants of general powers, coupled with a further grant of such incidental and auxiliary powers as might be required for the exercise of the powers expressly granted. These powers are necessarily extensive, and it has been found, in the practical administration of the government, that a very large part of its functions have been performed in the exercise of powers thus implied.<sup>54</sup>

**53. As to interpretation of constitution and laws.**—*Rice v. Railroad Co.*, 1 Black 358, 17 L. Ed. 147; *Minor v. Happersett*, 21 Wall. 162, 169, 22 L. Ed. 627; *Moore v. United States*, 91 U. S. 270, 23 L. Ed. 346; *Smith v. Alabama*, 124 U. S. 465, 478, 31 L. Ed. 508; *United States v. Wong Kim Ark*, 169 U. S. 649, 42 L. Ed. 890; *Western Union Tel. Co. v. Call Pub. Co.*, 181 U. S. 92, 103, 45 L. Ed. 765. See, also, ante, "Construction with Reference to the Common Law and Previous Judicial Construction and Established Usage," III, B, 2. And see the title COMMON LAW, vol. 3, pp. 974, 976.

**54. Incidental and implied powers.**—*Martin v. Hunter*, 1 Wheat. 304, 326, 4 L. Ed. 97; *McCulloch v. Maryland*, 4 Wheat. 316, 406, 407, 4 L. Ed. 579; *Anderson v. Dunn*, 6 Wheat. 204, 226, 5 L. Ed. 242; *American Ins. Co. v. Canter*, 1 Pet. 511, 7 L. Ed. 243; *Poole v. Fleeger*, 11 Pet. 185, 122b, 9 L. Ed. 680; *Dobbins v. Commissioners*, 16 Pet. 435, 10 L. Ed. 1022; *Prigg v. Pennsylvania*, 16 Pet. 539, 615, 10 L. Ed. 1060; *United States v. Marigold*, 9 How. 560, 568, 13 L. Ed. 257; *Hepburn v. Griswold*, 8 Wall. 603, 613, 19 L. Ed. 513; *Broderick v. Magraw*, 8 Wall. 639, 19 L. Ed. 531; *Collector v. Day*, 11 Wall. 113, 124, 20 L. Ed. 122; *Stewart v. Kahn*, 11 Wall. 493, 20 L. Ed. 176; *Legal Tender Cases*, 12 Wall. 457, 534, 20 L. Ed. 287; *Township of Pine Grove v. Talcott*, 19 Wall. 666; 676, 22 L. Ed. 227; *Hall v. Wisconsin*, 103 U. S. 5, 11, 26 L. Ed. 302; *United States v. Harris*, 106 U. S. 629, 636, 27 L. Ed. 290; *Legal Tender Case*, 110 U. S. 421, 442, 28 L. Ed. 204; *Ex Parte Yarbrough*, 110 U. S. 651, 658, 28 L. Ed. 274; *Mormon Church v. United States*, 136 U. S. 1, 42, 34 L. Ed. 481; *In re Rahrer*, 140 U. S. 545, 562, 35 L. Ed. 572; *United States v. Gettysburg Electric R. Co.*, 160 U. S. 668, 683, 40 L. Ed. 576; *Lottery Case*, 188 U. S. 321, 358, 47 L. Ed. 492; *South Carolina v. United States*,

199 U. S. 437, 451, 50 L. Ed. 261; *Kansas v. Colorado*, 206 U. S. 46, 51 L. Ed. 956. See, also, ante, "Implied Powers," III, B, 19; post, "Auxiliary and Implied Powers of Congress" VI, D, 3, f, (h), (ee), et seq.

"Even the tenth amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word 'expressly', and declares only that the powers 'not delegated to the United States, nor prohibited to the states, are reserved to the states or to the people,' thus leaving the question, whether the particular power which may become the subject of contest has been delegated to the one government or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word in the articles of confederation, and probably omitted it to avoid those embarrassments." *McCulloch v. Maryland*, 4 Wheat. 316, 406, 407, 4 L. Ed. 579; *Legal Tender Case*, 110 U. S. 421, 442, 28 L. Ed. 204.

**That which is necessarily implied** is as clearly given as that which is expressed. *McCulloch v. Maryland*, 4 Wheat. 316, 406, 407, 4 L. Ed. 579; *American Ins. Co. v. Canter*, 1 Pet. 511, 7 L. Ed. 243; *Dobbins v. Commissioners*, 16 Pet. 435, 10 L. Ed. 1022; *Stewart v. Kahn*, 11 Wall. 493, 20 L. Ed. 176; *Legal Tender Case*, 110 U. S. 421, 442, 28 L. Ed. 204; *Ex parte Yarbrough*, 110 U. S. 651, 658, 28 L. Ed. 274; *Mormon Church v. United States*, 136 U. S. 1, 42, 34 L. Ed. 481; *South Carolina v. United States*, 199 U. S. 437, 451, 50 L. Ed. 261.

The constitution of the United States confers, absolutely, on the government of the Union, the power of making war, and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty. *American Ins. Co. v. Canter*, 1



**Powers Deduced from Combination of Express Powers; Other Express Powers Not Exclusive.**—A power may exist as an aid to the execution of an express power, or an aggregate of such powers, though there is another express power given relating in part to the same subject but less extensive. In other words such other express power is not to be construed as exclusive.<sup>55</sup> It is not indispensable to the existence of any power claimed for the federal government that it can be found specified in the words of the constitution, or clearly and directly traceable to some one of the specific powers. Its existence may be deduced fairly from more than one of the substantive powers expressly defined, or from them all combined. It is allowable to group together any number of them and infer from them all that the power claimed has been conferred. Such a treatment of the constitution is recognized by its own provisions.<sup>56</sup>

Pet. 511, 7 L. Ed. 243; *Mormon Church v. United States*, 136 U. S. 1, 42, 34 L. Ed. 481.

**Powers incidental to express powers or essential to the accomplishment of the ends of government.**—"The framers of the constitution never intended that the legislative power of the nation should find itself incapable of disposing of a subject matter specifically committed to its charge." In re *Rahrer*, 140 U. S. 545, 562, 35 L. Ed. 572; *Lottery Case*, 188 U. S. 321, 358, 47 L. Ed. 492.

The constitution is to be construed as conferring upon the government created by it the right to employ freely every means, not prohibited, necessary for its preservation and for the fulfillment of its acknowledged duties. In the nature of things enumeration and specification were impossible; but they were left to the discretion of congress, subject only to the restrictions that they be not prohibited, and be necessary and proper for carrying into execution the enumerated powers given to congress, and all other powers vested in the government of the United States, or in any department or officer thereof. *United States v. Marigold*, 9 How. 560, 568, 13 L. Ed. 257; *Legal Tender Cases*, 12 Wall. 457, 534, 20 L. Ed. 287.

It is a fundamental principle applicable to all cases of power granted to the federal government, that where the end is required, the means are given; and where the duty is enjoined, the ability to perform it is contemplated to exist on the part of the functionaries to whom it is entrusted. *Prigg v. Pennsylvania*, 16 Pet. 539, 615, 10 L. Ed. 1060.

Congress has implied power to carry into effect all the powers vested in the federal government by the constitution. *Dobbins v. Commissioners*, 16 Pet. 435, 10 L. Ed. 1022.

"The proposition that it has no such power (to protect the elections, on which its existence depends, from violence and corruption), is supported by the old argument often heard, often repeated, and in this court never assented to, that when a question of the power of congress arises, the advocate of the power must be able to place his finger on words which ex-

pressly grant it. The brief of counsel before us, though directed to the authority of that body to pass criminal laws, uses the same language. Because there is no express power to provide for preventing violence exercised on the voter as a means of controlling his vote, no such law can be enacted. It destroys at one blow, in construing the constitution of the United States, the doctrine universally applied to all instruments of writing, that what is implied is as much a part of the instrument as what is expressed. This principle, in its application to the constitution of the United States more than to almost any other writing, is a necessity, by reason of the inherent inability to put into words all derivative powers—a difficulty which the instrument itself recognizes by conferring on congress the authority to pass all laws necessary and proper to carry into execution the powers expressly granted and all other powers vested in the government or any branch of it by the constitution." *Ex parte Yarbrough*, 110 U. S. 651, 658, 28 L. Ed. 274, quoted with approval in *South Carolina v. United States*, 199 U. S. 437, 451, 50 L. Ed. 261.

"There is not in the whole of that admirable instrument a grant of powers which does not draw after it others, not expressed but vital to their exercise; not substantive and independent, indeed, but auxiliary and subordinate." (Opinion of Johnson, J.) *Anderson v. Dunn*, 6 Wheat. 204, 225, 5 L. Ed. 242.

**55. Powers derived from combination of powers; express powers not exclusive.**—*United States v. Marigold*, 9 How. 560, 13 L. Ed. 257; *Legal Tender Cases*, 12 Wall. 457, 536, 20 L. Ed. 287.

**56. Same.**—*Legal Tender Cases*, 12 Wall. 457, 534, 20 L. Ed. 287; *United States v. Gettysburg Electric R. Co.*, 160 U. S. 668, 683, 40 L. Ed. 576.

"And that important powers were understood by the people who adopted the constitution to have been created by it, powers not enumerated, and not included incidentally in any one of those enumerated, is shown by the amendments. The first ten of these were suggested in the conventions of the state, and proposed at the

(b) *Powers Implied from Restrictions upon the States*.—All the restrictions contained in the constitution of the United States on the power of state legislatures, were provided in favor of the authority of the federal government.<sup>57</sup> But "A prohibition upon a state, as to any given subject, can, by no just reasoning, enlarge or vary the powers delegated to congress, so as to bring within its jurisdiction, any matters not within the enumerations of the powers granted."<sup>58</sup>

b. *Powers of the States*—(1) *Generally*.—All powers not granted by the constitution to the federal government, either expressly or by fair implication, nor prohibited by that instrument to the states, remain to the states as sovereign powers, unaltered and unimpaired by the adoption of the federal constitution.<sup>59</sup>

first session of the first congress, before any complaint was made of a disposition to assume doubtful powers. The preamble to the resolution submitting them for adoption recited that the 'conventions of a number of the states had, at the time of their adopting the constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added.' This was the origin of the amendments, and they are significant. They tend plainly to show that, in the judgment of those who adopted the constitution, there were powers created by it, neither expressly specified not deducible from any one specified power, or ancillary to it alone, but which grew out of the aggregate of powers conferred upon the government, or out of the sovereignty instituted." *Legal Tender Cases*, 12 Wall. 457, 534, 20 L. Ed. 287.

"This is well illustrated in its language respecting the writ of habeas corpus. The power to suspend the privilege of that writ is not expressly given, nor can it be deduced from any one of the particularized grants of power. Yet it is so provided that the privileges of the writ shall not be suspended except in certain defined contingencies. This is no express grant of power. It is a restriction. But it shows irresistibly that somewhere in the constitution power to suspend the privilege of the writ was granted, either by some one or more of the specifications of power, or by them all combined." *Legal Tender Cases*, 12 Wall. 457, 534, 20 L. Ed. 287.

It is not necessary that the power of condemnation be expressly given by the constitution. The right to condemn land at all is not so given. It results from the powers that are given, and it is implied because of its necessity, or because it is appropriate in exercising those powers. *United States v. Gettysburg Electric R. Co.*, 160 U. S. 668, 681, 40 L. Ed. 576.

The power to condemn land need not be plainly and unmistakably deduced from any one of the particularly specified powers. Any number of those powers may be grouped together, and an inference from them all may be drawn that the power claimed has been conferred. *United States v. Gettysburg Electric R. Co.*, 160 U. S. 668, 683, 40 L. Ed. 576.

**57. Powers implied from restrictions upon the states.**—*Calder v. Bull*, 3 Dall. 386, 389, 1 L. Ed. 648.

The prohibitions upon the states contained in the tenth section of the first article are likewise concessions upon the parts of the states. Both raise an obligation upon the states not to legislate on either. *Dodge v. Woolsey*, 18 How. 331, 349, 15 L. Ed. 401.

**58. Same.**—*Poole v. Fleeger*, 11 Pet. 185, 212c, 9 L. Ed. 680.

**59. Powers of the states.**—*Calder v. Bull*, 3 Dall. 386, 387, 1 L. Ed. 648; *Republica v. Cobbett*, 3 Dall. 467, 1 L. Ed. 683; *United States v. Hudson*, 7 Cranch 32, 33, 3 L. Ed. 259; *Martin v. Hunter*, 1 Wheat. 304, 325, 4 L. Ed. 97; *Sturges v. Crowninshield*, 4 Wheat. 122, 193, 4 L. Ed. 529; *The General Smith*, 4 Wheat. 438, 4 L. Ed. 609; *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23; *Ogden v. Saunders*, 12 Wheat. 213, 294, 6 L. Ed. 606; *New York v. Miln*, 11 Pet. 102, 153d, 9 L. Ed. 648; *Briscoe v. Bank*, 11 Pet. 257, 9 L. Ed. 709; *Poole v. Fleeger*, 11 Pet. 185, 212b, 9 L. Ed. 680; *Dodge v. Woolsey*, 18 How. 331, 351, 15 L. Ed. 401; *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. Ed. 96; *Lane County v. Oregon*, 7 Wall. 71, 19 L. Ed. 101; *Collector v. Day*, 11 Wall. 113, 125, 20 L. Ed. 122; *Railroad Co. v. Otoe County*, 16 Wall. 667, 672, 21 L. Ed. 375; *United States v. Cruikshank*, 92 U. S. 542, 551, 23 L. Ed. 588; *Ex parte Siebold*, 100 U. S. 371, 399, 25 L. Ed. 717; *Hall v. Wisconsin*, 103 U. S. 5, 11, 26 L. Ed. 302; *Kilbourn v. Thompson*, 103 U. S. 168, 176, 182, 26 L. Ed. 377; *Kidd v. Pearson*, 128 U. S. 1, 16, 32 L. Ed. 346; *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 560, 39 L. Ed. 759; *Fairbank v. United States*, 181 U. S. 283, 288, 45 L. Ed. 862; *South Carolina v. United States*, 199 U. S. 437, 454, 50 L. Ed. 261; *Halter v. Nebraska*, 205 U. S. 34, 40, 51 L. Ed. 696; *Kansas v. Colorado*, 206 U. S. 46, 51 L. Ed. 956; *Grafton v. United States*, 206 U. S. 333, 354, 51 L. Ed. 1084.

All powers not granted to the United States, or prohibited to the states, remain as they were before the adoption of the constitution, by the express reservation of the tenth amendment. *Martin v. Hunter*, 1 Wheat. 304, 325, 4 L. Ed. 97; *The General Smith*, 4 Wheat. 438, 4 L. Ed. 609; *New York v. Miln*, 11 Pet. 102, 153a, 9 L. Ed. 648.

The tenth amendment reads: "The

(2) *Whence Derived*.—When the American people created a national legislature with certain enumerated powers, it was neither necessary nor proper to define the powers retained by the states. These powers proceeded not from the people of America, but from the people of the several states, and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument.<sup>60</sup>

(3) *Applicability of Constitutional Limitations to the Powers of the States*.—  
(a) *Limitations Contained in the Body of the Constitution*.—The constitution was ordained and established by the people of the United States for themselves; for their own government; and not for the government of individual states. Each state established a constitution for itself, and in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests; the powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally and necessarily applicable to the gov-

powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Its principal purpose was not the distribution of power between the United States and the states, but a reservation to the people of all powers not granted. The preamble of the constitution declares who framed it, "we the people of the United States," not the people of one state, but the people of all the states, and article 10 of the amendments reserves to the people of all the states the powers not delegated to the United States. *Kansas v. Colorado*, 206 U. S. 46, 90, 51 L. Ed. 956.

**Unrestrained powers of state legislatures.**—In construing the federal constitution, congress must be held to have only those powers which are granted expressly or by necessary implication, but the opposite rule is the one to be applied to the construction of a state constitution. The legislature of a state may exercise all powers which are properly legislative, unless they are forbidden by the state or national constitutions. *Railroad Co. v. Otoe County*, 16 Wall. 667, 672, 21 L. Ed. 375; *South Carolina v. United States*, 199 U. S. 437, 454, 50 L. Ed. 261; *Halter v. Nebraska*, 205 U. S. 34, 40, 51 L. Ed. 696; *Grafton v. United States*, 206 U. S. 333, 354, 51 L. Ed. 1084.

All the powers that remain in the state governments are indefinite, except only in the constitution of Massachusetts. *Calder v. Bull* (opinion of Chase, J.), 3 Dall. 386, 387, 1 L. Ed. 648.

"Another vital principle is that, except as restrained by its own fundamental law, or by the supreme law of the land, a state possesses all legislative power consistent with a republican form of government; therefore each state, when not thus restrained, and so far as this court is concerned, may, by legislation, provide not only for the health, morals and safety of its people, but for the common good, as involved in the well-being, peace, hap-

piness and prosperity of the people." *Halter v. Nebraska*, 205 U. S. 34, 40, 51 L. Ed. 696.

"In *Gibbons v. Ogden*, 9 Wheat. 1, 203, 210, 6 L. Ed. 23, this court recognized the possession by each state of a general power of legislation, that 'embraces everything within the territory of a state, not surrendered to the general government; all which can be most advantageously exercised by the states themselves.'" *Hennington v. Georgia*, 163 U. S. 299, 308, 41 L. Ed. 166.

**60. Powers of the states; whence derived.**—*Sturges v. Crowninshield*, 4 Wheat. 122, 193, 4 L. Ed. 529; *Poole v. Fleeger*, 11 Pet. 185, 212b, 9 L. Ed. 680.

If the constitution is considered as the source of the powers which are reserved to the states, it necessarily admits that its origin is from a power paramount to theirs, and limits them to the exercise of such as it recognizes or tacitly admits by imposing limited restraints. This is a principle, which, once conceded, will destroy all harmony between the state and federal governments, by resorting to implication and construction to ascertain their respective powers, instead of adopting the definite rule furnished by the tenth amendment. That refers to the constitution for the ascertainment of the specific powers granted to the United States, or prohibited to the states, as the certain and fixed standard by which to measure them; and then by express declaration, reserves all other powers to the states, or the people thereof. The grant in the one case, or the prohibition in the other, must, therefore, be shown, or the given power remains with the state, in its original plenitude, not only independent of any power of the constitution, but paramount to it, as a portion of sovereignty attaching to the soil and territory, in its original integrity. (Opinion of Baldwin, J.) *Poole v. Fleeger*, 11 Pet. 185, 212a, 9 L. Ed. 680.



ernment created by the instrument; they are limitations of power granted in the instrument itself; not of distinct governments framed by different persons and for different purposes.<sup>61</sup>

(b) *Limitations Contained in the First Ten Amendments.*—The ten amendments first engrafted upon the constitution had their origin in the apprehension that, in the investment of powers made by that instrument in the federal government, the safety of the states and their citizens had not been sufficiently guarded. These amendments were designed to be modifications of the powers vested in the federal government; their language is susceptible of no other rational, literal or verbal acceptance; and it has been uniformly held that they impose limitations only upon the federal government and not upon the states.<sup>62</sup>

**61. Applicability of constitutional limitations to state powers.**—*Barron v. Baltimore*, 7 Pet. 243, 8 L. Ed. 672.

**Provision relating to preference of ports of one state over those of another.**—Section nine of article one of the constitution of the United States, forbidding preference to the ports of one state over those of another, operates only as a limitation upon the powers of congress, and in no respect affects the states in the regulation of their domestic affairs. *Munn v. Illinois*, 94 U. S. 113, 135, 24 L. Ed. 77; *Johnson v. Chicago, etc., Elevator Co.*, 119 U. S. 388, 400, 30 L. Ed. 447; *Morgan v. Louisiana*, 118 U. S. 455, 467, 30 L. Ed. 237.

Such provision has no application to a quarantine law which requires that vessels arriving at a port of the state shall stop at a quarantine station and undergo an inspection and disinfection, and pay a fixed fee for such services. *Morgan v. Louisiana*, 118 U. S. 455, 30 L. Ed. 237.

**Provision relating to place of trial in criminal cases.**—The provision of the third article of the constitution, which declares that the trial of all crimes shall be held in the state where they have been committed, has reference only to trials in the federal courts; it has no application to trials in the state courts. *Nashville, etc., R. Co. v. Alabama*, 128 U. S. 96, 101, 32 L. Ed. 352.

**62. Same; limitations contained in the first ten amendments.**—*Barron v. Baltimore*, 7 Pet. 243, 250, 8 L. Ed. 672; *Livingston v. Moore*, 7 Pet. 469, 551, 8 L. Ed. 751; *Holmes v. Jennison*, 14 Pet. 540, 10 L. Ed. 579; *Fox v. Ohio*, 5 How. 410, 434, 12 L. Ed. 213; *West River Bridge Co. v. Dix*, 6 How. 507, 12 L. Ed. 535; *Smith v. Maryland*, 18 How. 71, 76, 15 L. Ed. 269; *Whiters v. Buckley*, 20 How. 84, 91, 15 L. Ed. 816; *Pervear v. The Commonwealth*, 5 Wall. 475, 479, 18 L. Ed. 608; *Twitchell v. Commonwealth*, 7 Wall. 321, 19 L. Ed. 223; *Hepburn v. Griswold*, 8 Wall. 603, 604, 623, 19 L. Ed. 513; *Broderick v. Magraw*, 8 Wall. 639, 19 L. Ed. 531; *The Justices v. Murray*, 9 Wall. 274, 278, 19 L. Ed. 658; *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 176, 20 L. Ed. 557; *Slaughter-House Cases*, 16 Wall. 36, 80, 21 L. Ed. 394; *Edwards v. Elliott*, 21 Wall. 532, 557, 22 L. Ed. 487; *Walker v. Sauvinet*, 92 U. S. 90, 23 L. Ed. 678; *United States*

*v. Cruikshank*, 92 U. S. 542, 552, 23 L. Ed. 588; *Pearson v. Yewdall*, 95 U. S. 294, 296, 24 L. Ed. 436; *Davidson v. New Orleans*, 96 U. S. 97, 101, 24 L. Ed. 616; *Kelly v. Pittsburg*, 104 U. S. 78, 26 L. Ed. 658; *Kring v. Missouri*, 107 U. S. 221, 226, 27 L. Ed. 506; *Presser v. Illinois*, 116 U. S. 252, 265, 29 L. Ed. 615; *Spies v. Illinois*, 123 U. S. 131, 166, 31 L. Ed. 80; *In re Sawyer*, 124 U. S. 200, 219, 31 L. Ed. 402; *Brooks v. Missouri*, 124 U. S. 394, 397, 31 L. Ed. 454; *Nashville, etc., R. Co. v. Alabama*, 128 U. S. 96, 32 L. Ed. 352; *Eilenbecker v. Plymouth County*, 134 U. S. 31, 33 L. Ed. 801; *In re Kemmler*, 136 U. S. 436, 34 L. Ed. 519; *Davis v. Texas*, 139 U. S. 651, 653, 35 L. Ed. 300; *McElvaine v. Brush*, 142 U. S. 155, 35 L. Ed. 971; *Trezza v. Brush*, 142 U. S. 160, 35 L. Ed. 974; *Thorington v. Montgomery*, 147 U. S. 490, 37 L. Ed. 252; *Miller v. Texas*, 153 U. S. 535, 38 L. Ed. 812; *Brown v. Walker*, 161 U. S. 591, 606, 40 L. Ed. 819; *Talton v. Mayes*, 163 U. S. 376, 382, 41 L. Ed. 196; *Holden v. Hardy*, 169 U. S. 366, 382, 42 L. Ed. 780; *Brown v. New Jersey*, 175 U. S. 172, 174, 44 L. Ed. 119; *Maxwell v. Dow*, 176 U. S. 581, 586, 44 L. Ed. 597; *Capital City Dairy Co. v. Ohio*, 183 U. S. 238, 245, 46 L. Ed. 171; *McFaddin v. Evans-Snyder-Buel Co.*, 185 U. S. 505, 509, 46 L. Ed. 1012; *West v. Louisiana*, 194 U. S. 258, 261, 48 L. Ed. 965; *Ohio v. Dollison*, 194 U. S. 445, 447, 48 L. Ed. 1062; *Jack v. Kansas*, 199 U. S. 372, 379, 50 L. Ed. 234; *Howard v. Kentucky*, 200 U. S. 164, 172, 50 L. Ed. 421; *Barrington v. Missouri*, 205 U. S. 483, 486, 51 L. Ed. 890.

The first ten amendments are all designed to operate as restraints on the general government, and most of them for the protection of private rights of persons and property. *Kring v. Missouri*, 107 U. S. 221, 226, 27 L. Ed. 506.

**The first amendment**, prohibiting congress from abridging the right of the people to assemble and to petition the government for a redress of grievances, is a limitation upon the powers of the federal government only. *United States v. Cruikshank*, 92 U. S. 542, 552, 23 L. Ed. 588.

**Second and fourth amendments.**—It is well settled that the second and fourth amendments to the constitution of the United States, one of which provides that the right of the people to keep and bear

**Effect of Fourteenth Amendment as Forbidding the States to Abridge the Rights Secured by the First Ten Amendments.**—The proposition sometimes advanced, that although the first ten articles of the amendments are not

arms shall not be infringed, and the other of which protects the people against unreasonable searches and seizures, operate only upon the federal power, and have no reference whatever to proceedings in state courts. *Barron v. Baltimore*, 7 Pet. 243, 8 L. Ed. 672; *Fox v. Ohio*, 5 How. 410, 12 L. Ed. 213; *Twitchell v. Commonwealth*, 7 Wall. 321, 19 L. Ed. 223; *The Justices v. Murray*, 9 Wall. 274, 19 L. Ed. 658; *United States v. Cruikshank*, 92 U. S. 542, 552, 23 L. Ed. 588; *Spies v. Illinois*, 123 U. S. 131, 31 L. Ed. 80; *Miller v. Texas*, 153 U. S. 535, 538, 38 L. Ed. 812.

The provision of the fourth amendment that no warrants shall issue but upon probable cause supported by oath or affirmation, applies only to warrants issued under the laws of the United States and has no application to state process. *Barron v. Baltimore*, 7 Pet. 243, 8 L. Ed. 672; *Livingston v. Moore*, 7 Pet. 469, 8 L. Ed. 751; *Fox v. Ohio*, 5 How. 410, 12 L. Ed. 213; *Smith v. Maryland*, 18 How. 71, 76, 15 L. Ed. 269.

**The fifth amendment.**—As regards the effect of the fifth amendment of the constitution, it has always been held to be a restriction upon the powers of the federal government, and to have no reference to the exercise of such powers by the state governments. *Barron v. Baltimore*, 7 Pet. 243, 8 L. Ed. 672; *Livingston v. Moore*, 7 Pet. 469, 8 L. Ed. 751; *Fox v. Ohio*, 5 How. 410, 434, 12 L. Ed. 213; *Withers v. Buckley*, 20 How. 84, 15 L. Ed. 816; *Twitchell v. Commonwealth*, 7 Wall. 321, 19 L. Ed. 223; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *Kelly v. Pittsburg*, 104 U. S. 78, 79, 26 L. Ed. 658; *Nashville, etc., R. Co. v. Alabama*, 128 U. S. 96, 101, 32 L. Ed. 352; *Davis v. Texas*, 139 U. S. 651, 653, 35 L. Ed. 300; *Talton v. Mayes*, 163 U. S. 376, 382, 41 L. Ed. 196; *Brown v. New Jersey*, 175 U. S. 172, 44 L. Ed. 119; *Capital City Dairy Co. v. Ohio*, 183 U. S. 238, 245, 46 L. Ed. 171; *Jack v. Kansas*, 199 U. S. 372, 380, 50 L. Ed. 234; *Howard v. Kentucky*, 200 U. S. 164, 172, 50 L. Ed. 421; *Barrington v. Missouri*, 205 U. S. 483, 486, 51 L. Ed. 890.

The provision in the fifth amendment to the constitution of the United States, declaring that private property shall not be taken for public use, without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States; and is not applicable to the legislation of the states. *Barron v. Baltimore*, 7 Pet. 243, 8 L. Ed. 672; *Withers v. Buckley*, 20 How. 84, 90, 15 L. Ed. 816; *Hepburn v. Griswold*, 8 Wall. 603, 604, 623, 19 L. Ed. 513; *Broderrick v. Magraw*, 8 Wall. 659, 19 L. Ed.

531; *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 176, 20 L. Ed. 557.

The provision of the fifth amendment that no person shall be deprived of life, liberty, or property without due process of law, is a limitation upon the powers of the federal government and not upon the powers of the state. *Slaughter-House Cases*, 16 Wall. 36, 80, 21 L. Ed. 394; *McFaddin v. Evans-Snyder-Buel Co.*, 185 U. S. 505, 509, 46 L. Ed. 1012.

**As to twice in jeopardy**, see *Fox v. Ohio*, 5 How. 410, 434, 12 L. Ed. 213.

**The sixth amendment** of the constitution of the United States is restrictive of the powers of the federal government and not a restraint upon the states. *Barron v. Baltimore*, 7 Pet. 243, 8 L. Ed. 672; *Fox v. Ohio*, 5 How. 410, 434, 12 L. Ed. 213; *Smith v. Maryland*, 18 How. 71, 76, 15 L. Ed. 269; *Withers v. Buckley*, 20 How. 84, 90, 15 L. Ed. 816; *Twitchell v. Commonwealth*, 7 Wall. 321, 19 L. Ed. 223; *Spies v. Illinois*, 123 U. S. 131, 31 L. Ed. 80; *Davis v. Texas*, 139 U. S. 651, 653, 35 L. Ed. 300; *Brown v. New Jersey*, 175 U. S. 172, 174, 44 L. Ed. 119; *Maxwell v. Dow*, 176 U. S. 581, 586, 44 L. Ed. 597; *West v. Louisiana*, 194 U. S. 258, 261, 48 L. Ed. 965; *Howard v. Kentucky*, 200 U. S. 164, 172, 50 L. Ed. 421.

The provision of the sixth article of the amendments to the federal constitution that the accused shall be entitled to a trial by an impartial jury, etc., is a limitation upon federal, not upon state, power. *Brooks v. Missouri*, 124 U. S. 394, 397, 31 L. Ed. 454, *Spies v. Illinois*, 123 U. S. 131, 136, 31 L. Ed. 80.

**The provision of the seventh amendment** to the constitution which secures to every party the right to trial by jury where the amount in controversy exceeds \$20, does not apply to trials in state courts. *Edwards v. Elliott*, 21 Wall. 532, 557, 22 L. Ed. 487; *Walker v. Sauvinet*, 92 U. S. 90, 92, 23 L. Ed. 678; *Pearson v. Yewdall*, 95 U. S. 294, 24 L. Ed. 436.

**Right of confrontation; sixth amendment not applicable to proceedings in state courts.**—See post, "Right to Confront Accusers and Witnesses," XVIII, F.

The provision of the seventh amendment that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law, cannot be invoked in a state court to prohibit it from re-examining on a writ of error facts tried by a jury in the court below. *The Justices v. Murray*, 9 Wall. 274, 278, 19 L. Ed. 658.

**The provision in the eighth article of the amendments** to the constitution, that "excessive fines" shall not be "imposed, nor cruel and unusual punishments in-

directly applicable to the states, yet, in so far as they secure the fundamental rights of the individual, they make them his privileges and immunities as a citizen of the United States, which cannot now, under the prohibition contained in the fourteenth amendment, be abridged by the states, has been held to be unsound.<sup>63</sup>

(c) *Limitations Contained in the War Amendments.*—These amendments are limitations upon the power of the states and enlargements of the powers of congress.<sup>65</sup>

**General Features of System Not Altered by War Amendments.**—Notwithstanding the pervading sentiment growing out of the Civil War for the need of a stronger national government, and however such sentiment may have contributed to the adoption of the thirteenth, fourteenth and fifteenth amendments, there is nothing in those amendments indicative of any purpose to destroy the main features of our general system of government. The states still exist with powers for domestic and local government, including the regulation

dicted," applies to national and not to state legislation. *Pervear v. The Commonwealth*, 5 Wall. 475, 18 L. Ed. 608. See, also, post, "Eighth Amendment Not Applicable to Proceedings in State Courts," XVIII, M, 2, a.

**The ninth amendment.**—An objection that proceedings by a state to foreclose a lien upon land for the satisfaction of arrearages owing to the state by a delinquent official, were contrary to the ninth article of the amendment to the federal constitution is untenable, since the first ten amendments of the federal constitution do not extend to the states. *Livingston v. Moore*, 7 Pet. 469, 551, 8 L. Ed. 751.

**63. Rights protected by first ten amendments are not privileges and immunities within the prohibition contained in the fourteenth.**—*Spies v. Illinois*, 123 U. S. 131, 166, 31 L. Ed. 80; *In re Kemmler*, 136 U. S. 436, 34 L. Ed. 519; *McElvaine v. Brush*, 142 U. S. 155, 158, 35 L. Ed. 971; *Trezza v. Brush*, 142 U. S. 160, 35 L. Ed. 974; *Maxwell v. Dow*, 176 U. S. 581, 44 L. Ed. 597.

The adoption of the fourteenth amendment did not have the effect of enlarging the former amendments so as to make them, in effect, rest upon the powers of the states as well as upon the powers of the federal government. The rights of persons secured or protected by the first eight amendments do not constitute privileges and immunities to citizens of the United States in the sense in which those words are used in the fourteenth amendment forbidding the states to abridge the privileges or immunities of citizens of the United States. *Maxwell v. Dow*, 176 U. S. 581, 44 L. Ed. 597.

The provision of the eighth amendment of the constitution of the United States, that excessive bails shall not be required, nor cruel or unusual punishment inflicted, cannot be read into the fourteenth amendment which forbids any state to make or enforce any law which shall abridge privileges or immunities of citizens of the United States, or to deprive any person of life, liberty or property without due

process of law, so as to make the inhibition of the eighth amendment applicable to the states. *In re Kemmler*, 136 U. S. 436, 448, 34 L. Ed. 519.

See, to the contrary, the dissenting opinion of Mr. Justice Harlan in *Patterson v. Colorado*, 205 U. S. 454, 464, 51 L. Ed. 879, wherein it is said, among other things: "The fourteenth amendment declares, in express words, that 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.' As the first amendment guaranteed the rights of free speech and of a free press against hostile action by the United States, it would seem clear that when the fourteenth amendment prohibited the states from impairing or abridging the privileges of citizens of the United States it necessarily prohibited the states from impairing or abridging the constitutional rights of such citizens to free speech and a free press."

See, also, the opinion of the court in *Brown v. Walker*, 161 U. S. 591, 606, 40 L. Ed. 819, wherein it is said: "It is true that the constitution does not operate upon a witness testifying in the state courts, since we have held that the first eight amendments are limitations only upon the powers of congress and of the federal courts, and are not applicable to the several states, except so far as the fourteenth amendment may have made them applicable."

**65. Limitations contained in the war amendments.**—*Slaughter-House Cases*, 16 Wall. 36, 21 L. Ed. 394; *Strauder v. West Virginia*, 100 U. S. 303, 25 L. Ed. 664; *Virginia v. Rives*, 100 U. S. 313, 25 L. Ed. 667; *Ex parte Virginia*, 100 U. S. 339, 345, 25 L. Ed. 676; *Kelly v. Pittsburg*, 104 U. S. 78, 79, 26 L. Ed. 658; *United States v. Harris*, 106 U. S. 629, 638, 27 L. Ed. 290; *Civil Rights Cases*, 109 U. S. 3, 10, 27 L. Ed. 836; *Brown v. New Jersey*, 175 U. S. 172, 176, 44 L. Ed. 119.

The fourteenth amendment operates to restrict the powers of the states. *Brown v. New Jersey*, 175 U. S. 172, 176, 44 L. Ed. 119.



of civil—the rights of person and of property—but with additional limitations imposed upon the states and with additional powers conferred upon the nation.<sup>66</sup> The fourteenth amendment to the federal constitution “did not radically change the whole theory of the relations of the state and federal governments to each other and of both governments to the people.”<sup>67</sup> The national government still remains one of enumerated powers, and the tenth amendment is not shorn of its vitality.<sup>68</sup>

(4) *Implied Prohibitions to the States*—(a) *From Grants to Federal Government*.—With the ample powers confided to the national government, for the purposes declared in the preamble of the federal constitution, are connected many express and important limitations on the sovereignty of the states, which are made for the same purposes. Thus, the powers of the Union on the great subject of war, peace and commerce, and on many others, are in themselves limitations of the sovereignty of the states; and in addition to these, the sovereignty of the states is surrendered, in many instances, where the surrender can only operate to the benefit of the people, and where, perhaps, no other power is conferred on congress than a conservative power to maintain the principles established in the constitution.<sup>69</sup> But an affirmative grant of a power to the general government is not, of itself, a prohibition of the same power to the states. There are subjects over which the federal and state governments exercise concurrent jurisdiction.<sup>70</sup> The states cannot be held to have parted with any of the attributes of sovereignty which are not plainly vested in the federal government and inhibited to the states, either expressly or by necessary implication.<sup>71</sup> This implication may arise from the nature of the power. Thus where an authority is granted to the Union, to which a similar authority in the states would be absolutely and totally contradictory and repugnant, there the authority to the federal government is necessarily exclusive; and the same power cannot be constitutionally exercised by the states. The exclusive grant of the power to the federal government implies a prohibition upon its exercise by the states.<sup>72</sup>

**66. General features of system not altered by war amendments.**—Slaughter-House Cases, 16 Wall. 36, 82, 21 L. Ed. 394; *United States v. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588; *Barbier v. Connolly*, 113 U. S. 27, 31, 28 L. Ed. 923; *In re Kemmler*, 136 U. S. 436, 448, 34 L. Ed. 519; *McPherson v. Blacker*, 146 U. S. 1, 39, 36 L. Ed. 869; *Hodges v. United States*, 203 U. S. 1, 16, 51 L. Ed. 65. See, also, post, “No Radical Change in the Theory of Government,” XVII, 3, b, (2), (b).

**67. Same.**—*In re Kemmler*, 136 U. S. 436, 438, 34 L. Ed. 519; *Brown v. New Jersey*, 175 U. S. 172, 175, 44 L. Ed. 119; *Owensboro Waterworks Co. v. Owensboro*, 200 U. S. 38, 47, 50 L. Ed. 361; *Felts v. Murphy*, 201 U. S. 123, 129, 50 L. Ed. 689.

**68. Same.**—*Hodges v. United States*, 203 U. S. 1, 16, 51 L. Ed. 65.

**69. Prohibitions implied from grants to the federal government.**—*Cohens v. Virginia*, 6 Wheat. 264, 382, 5 L. Ed. 257.

**70. Same.**—*Sturges v. Crowninshield*, 4 Wheat. 122, 193, 4 L. Ed. 529; *Houston v. Moore*, 5 Wheat. 1, 49, 5 L. Ed. 19; *Holmes v. Jennison*, 14 Pet. 540, 574, 10 L. Ed. 579; *Prigg v. Pennsylvania*, 16 Pet. 539, 622, 10 L. Ed. 1060; *License Cases*, 5 How. 504, 579, 12 L. Ed. 256; *Gilman v. Philadelphia*, 3 Wall. 713, 730,

18 L. Ed. 96; *Ex parte McNeil*, 13 Wall. 236, 240, 20 L. Ed. 624; *Railroad Co. v. Fuller*, 17 Wall. 560, 21 L. Ed. 710; *Inman Steamship Co. v. Tinker*, 94 U. S. 238, 239, 242, 24 L. Ed. 118. See, also, post, “Division of Powers between the Federal and State Governments,” VI, D, 3, c, et seq; “Concurrent Powers of State and Federal Governments,” VI, D, 3, c, (5).

“It is well known that upon this subject a difference of opinion has existed, and still exists, among the members of this court. But with every respect for the opinion of my brethren with whom I do not agree, it appears to me to be very clear, that the mere grant of power to the general government cannot, upon any just principles of construction, be construed to be an absolute prohibition to the exercise of any power over the same subject by the states.” (*Opinion of Taney, C. J.*) *License Cases*, 5 How. 504, 579, 12 L. Ed. 256.

**71. Same.**—*Passenger Cases*, 7 How. 283, 393, 12 L. Ed. 702.

**72. Prohibition implied by reason of repugnancy.**—*Sturges v. Crowninshield*, 4 Wheat. 122, 193, 4 L. Ed. 529; *Houston v. Moore*, 5 Wheat. 1, 49, 5 L. Ed. 19; *Worcester v. Georgia*, 6 Pet. 515, 8 L. Ed. 483; *Holmes v. Jennison*, 14 Pet. 540, 574, 10 L. Ed. 579; *Prigg v. Pennsylvania*, 16

**State Laws Infringing upon Exclusive Jurisdiction of Congress Are Invalid.**—Whenever the statute of a state invades the domain of legislation which belongs exclusively to the congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied it may be to powers conceded to belong to the states. Neither the power to tax, the police power, nor any other power of the state can be exercised to the extent of working a practical assumption of the powers conferred exclusively upon congress.<sup>73</sup>

(b) *Prohibition Implied from Exceptions to Restrictions upon States.*—The supreme court has always held, as to grants of powers to the United States and the restrictions upon the states, that an exception to a particular case presupposes that those which are not exceptions are embraced within the grant or prohibition; and have laid it down as a general rule that where no exception is made in terms, none will be made by mere implication or construction.<sup>74</sup>

(5) *State Powers as Dependent upon the Assent of Congress.*—**Compacts with Other States and with Foreign Powers.**—The constitution declares, that “no state shall, without the consent of congress, enter into any agreement or compact with another state;” thus plainly admitting, that with such consent it may be done.<sup>75</sup>

**Mode of Giving Consent.**—The constitution makes no provision respecting the mode or form in which the consent of congress is to be signified, very properly leaving that matter to the wisdom of that body to be decided upon according to the ordinary rules of law and of right reason. The only question in cases

Pet. 539, 622, 10 L. Ed. 1060; License Cases (opinion of McLean, J.), 5 How. 504, 588, 12 L. Ed. 256; Passenger Cases, 7 How. 283, 393, 12 L. Ed. 702; Gilman v. Philadelphia, 3 Wall. 713, 727, 18 L. Ed. 96; Munn v. Illinois, 94 U. S. 113, 124, 24 L. Ed. 77; The Roanoke, 189 U. S. 185, 197, 47 L. Ed. 770.

**73. Supremacy in case of conflict.**—Houston v. Moore, 5 Wheat. 1, 22, 25, 5 L. Ed. 19; Gibbons v. Ogden, 9 Wheat. 1, 6 L. Ed. 23; Prigg v. Pennsylvania, 16 Pet. 539, 617, 10 L. Ed. 1060; Welton v. Missouri, 91 U. S. 275, 282, 23 L. Ed. 347; Henderson v. Mayor, 92 U. S. 259, 23 L. Ed. 543; Chy Lung v. Freeman, 92 U. S. 275, 23 L. Ed. 550; Railroad Co. v. Husen, 95 U. S. 465, 471, 24 L. Ed. 527. See, also, post, “Supremacy in Case of Conflict between State and Federal Powers,” VI, D, 3, c, (6), (b), (hh); “Generally,” VI, D, 3, c, (6), (a).

Where the right to legislate upon a particular subject, as for example, foreign and interstate commerce, is exclusively vested in congress, it is no answer, to a charge that a state statute is an infringement upon this exclusive power of congress, to say that it was enacted in the exercise of the police power of the state, for, to whatever class of legislative powers it may belong, if by the constitution it is granted exclusively to congress, it is prohibited to the states. Henderson v. New York, 92 U. S. 259, 23 L. Ed. 543.

“Where congress has dealt with a subject within its exclusive power, or where such exclusive power is given to the federal courts, as in cases of admiralty and maritime jurisdiction, it is not competent for states to invade that domain of legislation, and enact laws which in any way trench upon the power of the federal gov-

ernment.” The Roanoke, 189 U. S. 185, 197, 47 L. Ed. 770.

**74. Prohibitions implied from exceptions.**—Cohens v. Virginia, 6 Wheat. 264, 378, 5 L. Ed. 257; Society for the Propagation of the Gospel v. New Haven, 8 Wheat. 464, 489, 490, 5 L. Ed. 662; Gibbons v. Ogden, 9 Wheat. 1, 206, 207, 216, 6 L. Ed. 23; Brown v. Maryland, 12 Wheat. 419, 438, 6 L. Ed. 678; Rhode Island v. Massachusetts, 12 Pet. 657, 722, 9 L. Ed. 1233. See, also, ante, “Existence of Power Implied from Exceptions,” III, B, 19, c.

**75. State powers dependent upon the assent of congress.**—Poole v. Fleegeer, 11 Pet. 185, 209, 9 L. Ed. 680.

“No state shall, without the consent of congress, enter into any agreement or compact with another state, or a foreign power.” By the terms, then, of this clause, whenever the consent of congress is given to any such agreement or compact, the prohibition is fully satisfied, and ceases to operate; the states stand towards each other, and foreign powers, as they did before the adoption of the constitution, so far as this sentence abridged their reserved powers. But as the consent of congress cannot dispense with the prohibition in the first sentence of this section, it becomes, by necessary implication, a proviso or limitation to the second. That such agreement or compact shall not be a treaty, alliance or confederation; if it does not come within the constitutional meaning of these terms, the agreement or compact is valid, if made with the consent of congress; if it does, it is void by the first part of the prohibition, which annuls whatever is done in opposition to it.” (Opinion of Baldwin, J.) Poole v. Fleegeer, 11 Pet. 185, 212d, 9 L. Ed. 680.



which involve that point is, has congress, by some positive act in relation to such agreement, signified the consent of that body to its validity.<sup>76</sup>

**Consent Cannot Remove Express Restrictions.**—"By the first clause of § 10 of article 1 of the constitution, certain powers are enumerated which the states are forbidden to exercise in any event; and by clauses two and three, certain others, which may be exercised with the consent of congress. As to those in the first class, congress cannot relieve from the positive restriction imposed. As to those in the second, their exercise may be authorized; and they include the collection of the revenue from imposts and duties on imports and exports, by state enactments, subject to the revision and control of congress; and a tonnage duty, to the exaction of which only the consent of congress is required. Beyond this, congress is not empowered to enable the states to go in this direction."<sup>77</sup>

**Congress Can Only Assent or Dissent.**—Where the consent of congress is made necessary to validate any law of a state, congress can only assent or dissent thereto or therefrom, but can exercise no legislative power over the subject matter, without some express authority to revise and control such state law, by regulations of its own. And in the absence of any power in congress, to do more than simply assent or dissent, the assent is a condition; and when once given to an act of a state, it has the same validity as if no prohibition had been made in the constitution against the exercise of any right of the state to do the act in virtue of its reserved powers, or any condition in any way imposed to affect its original inherent sovereignty. The assent of congress is made an exception to the prohibition, and when given takes the case out of the prohibition, and leaves the power of the state uncontrolled, on the common law rule, that "an exception out of an exception leaves the thing unexcepted."<sup>78</sup>

(6) *States Sovereign to What Extent*—(a) *Generally*.—The states of the Union are sovereign states, and the history of the states, and the events which are daily occurring, furnish the strongest evidence that they have adopted towards each other the laws of comity in their fullest extent.<sup>79</sup> The people of each state compose a state, having its own government, and endowed with all the functions essential to separate and independent existence.<sup>80</sup>

76. *Mode of giving consent.*—*Green v. Biddle*, 8 Wheat. 1, 86, 5 L. Ed. 547; *Virginia v. West Virginia*, 11 Wall. 39, 20 L. Ed. 67.

The compact of 1789 between Virginia and Kentucky was valid, under that provision of the constitution which declares, that "no state shall, without the consent of congress, enter into an agreement or compact with another state, or with a foreign power"—no particular mode, in which that consent must be given, having been prescribed by the constitution; and congress having consented to the admission of Kentucky into the Union, as a sovereign state, upon the conditions mentioned in the compact. *Green v. Biddle*, 8 Wheat. 1, 5 L. Ed. 547. Accord: *Virginia v. West Virginia*, 11 Wall. 39, 20 L. Ed. 67.

77. *Consent cannot remove express restriction.*—In *re Rahrer*, 140 U. S. 545, 560, 35 L. Ed. 572.

78. *Congress can only assent or dissent.*—*Poole v. Fleeger*, 11 Pet. 185, 212c, 9 L. Ed. 680.

79. *States sovereign to what extent.*—Taney, C. J., delivering the majority opinion in *Bank v. Fale*, 13 Pet. 519, 590, 10 L. Ed. 274, McKinley, J., dissenting.

80. *Same.*—*Lane County v. Oregon*, 7

Wall. 71, 76, 19 L. Ed. 101; *Texas v. White*, 7 Wall. 700, 725, 19 L. Ed. 227; *United States v. Railroad Co.*, 17 Wall. 322, 21 L. Ed. 597; *Pennoyer v. Neff*, 95 U. S. 714, 722, 24 L. Ed. 565; *Van Brocklin v. Tennessee*, 117 U. S. 151, 178, 29 L. Ed. 845; *Smith v. Alabama*, 124 U. S. 465, 476, 31 L. Ed. 508; *Plumley v. Massachusetts*, 155 U. S. 461, 472, 39 L. Ed. 223; *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 560, 39 L. Ed. 759; *Overby v. Gordon*, 177 U. S. 214, 222, 44 L. Ed. 741; *Northern Securities Co. v. United States*, 193 U. S. 197, 348, 48 L. Ed. 679; *In re Heff*, 197 U. S. 488, 505, 49 L. Ed. 848; *South Carolina v. United States*, 199 U. S. 437, 454, 50 L. Ed. 261.

Texas originally occupied towards the United States the position of an independent sovereignty. Its citizens were determined by its laws, and they prescribed the manner in which aliens might become citizens. *Contzen v. United States*, 179 U. S. 191, 195, 45 L. Ed. 148.

"The federal government is composed of twenty four sovereign and independent states each of which may have its local usages and customs, at common law." *McLean, J.*, delivering the majority opinion in *Wheaton v. Peters*, 8 Pet. 591, 658, 8 L. Ed. 1055.

In many articles of the constitution the



(b) *As Limited by the Federal Constitution.*—Independently of the grants and prohibitions of the constitution, each state was and is “a single sovereign power,” a nation over whom no external power can operate, whose jurisdiction is necessarily exclusive and absolute within its own boundaries, and susceptible of no limitation, not imposed by itself by a grant or cession to the government of the Union. The same conclusion results from the nature of an exception or reservation in a grant; the thing excepted or reserved always is in the grantor, and always was; of consequence, the reserved powers of the states remain, as stated in the treaty of alliance with France, and the confederation.<sup>81</sup>

(c) *As Parts of One Empire.*—These states are constituent parts of the United States; they are members of one great empire; for some purposes

necessary existence of the states, and, within their proper spheres, the independent authority of the states, is distinctly recognized. *Lane County v. Oregon*, 7 Wall. 71, 76, 19 L. Ed. 101; *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 560, 39 L. Ed. 759.

The states disunited might continue to exist. Without the states in the Union, there could be no such political body as the United States. *Lane County v. Oregon*, 7 Wall. 71, 76, 19 L. Ed. 101; *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 560, 39 L. Ed. 759.

“In *Texas v. White*, 7 Wall. 700, 725, 19 L. Ed. 227, the court remarked that “the people of each state compose a state, having its own government, and endowed with all the functions essential to separate and independent existence,” and that “without the states in union, there could be no such political body as the United States.” *Lane County v. Oregon*, 7 Wall. 71, 76, 19 L. Ed. 101. Not only, therefore, can there be no loss of separate and independent autonomy to the states, through their union under the constitution, but it may be not unreasonably said that the preservation of the states, and the maintenance of their governments, are as much within the design and care of the constitution as the preservation of the Union and the maintenance of the national government.’ These doctrines are at the basis of our constitutional government, and cannot be disregarded with safety.” *Northern Securities Co. v. United States*, 193 U. S. 197, 348, 48 L. Ed. 679.

**81. Sovereignty as limited by the federal constitution.**—*Chisholm v. Georgia*, 2 Dall. 419, 457, 1 L. Ed. 440; *Johnson v. McIntosh*, 8 Wheat. 543, 595, 5 L. Ed. 681; *Buckner v. Finley*, 2 Pet. 586, 590, 591, 7 L. Ed. 528; *Cherokee Nation v. Georgia*, 5 Pet. 1, 47, 8 L. Ed. 25; *New York v. Miln*, 11 Pet. 102, 153d, 9 L. Ed. 648; *Rhode Island v. Massachusetts*, 12 Pet. 657, 720, 9 L. Ed. 1233; *United States Bank v. Daniel*, 12 Pet. 32, 33, 9 L. Ed. 989; *Martin v. Waddell*, 16 Pet. 367, 408, 410, 414, 10 L. Ed. 997; *License Cases*, 5 How. 504, 588, 12 L. Ed. 256; *Ohio Life Ins., etc., Co. v. Debolt*, 16 How. 416, 428, 14 L. Ed. 997; *Dodge v. Woolsey*, 18 How. 331, 351, 15 L. Ed. 401; *Cummings v. Missouri*, 4 Wall. 277, 278, 318,

18 L. Ed. 356; *Collector v. Day*, 11 Wall. 113, 124, 20 L. Ed. 122; *Pennoyer v. Neff*, 95 U. S. 714, 722, 24 L. Ed. 565; *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 541, 24 L. Ed. 148; *Munn v. Illinois*, 94 U. S. 113, 124, 24 L. Ed. 77; *Tennessee v. Davis*, 100 U. S. 257, 267, 25 L. Ed. 648; *Ex parte Seibold*, 100 U. S. 371, 399, 25 L. Ed. 717; *Gordon v. United States*, 117 U. S., appx., 697, 705; *Arndt v. Griggs*, 134 U. S. 316, 323, 33 L. Ed. 918; *Shively v. Bowlby*, 152 U. S. 1, 14, 38 L. Ed. 331.

The states of the Union are sovereign within their respective boundaries save that portion of power which they have granted to the federal government, and foreign to each other for all but federal purposes. This has been declared to be a fundamental principle of the constitution. *Buckner v. Finley*, 2 Pet. 586, 590, 7 L. Ed. 528; *Rhode Island v. Massachusetts*, 12 Pet. 657, 720, 9 L. Ed. 1233; *United States Bank v. Daniel*, 12 Pet. 32, 33, 9 L. Ed. 989.

The states which existed previous to the adoption of the federal constitution possessed originally all the attributes of sovereignty; they still retain those attributes except as they have been surrendered by the formation of the constitution, and the amendments thereto. *Field, J.*, delivering the majority opinion in *Cummings v. Missouri*, 4 Wall. 277, 278, 318, 18 L. Ed. 356.

A state has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation, so far as that jurisdiction has not been surrendered or restrained by the constitution of the United States. *New York v. Miln*, 11 Pet. 102, 9 L. Ed. 648.

With the exception of the powers surrendered by the constitution of the United States, the people of the several states are absolutely and unconditionally sovereign within their respective territories. (*Opinion of Taney, C. J.*) *Ohio Life Ins., etc., Co. v. Debolt*, 16 How. 416, 428, 14 L. Ed. 997.

“Except as restrained and limited by the constitution, the several states of the Union possess and exercise the authority of independent states.” *Pennoyer v. Neff*, 95 U. S. 714, 722, 24 L. Ed. 565; *Overby v. Gordon*, 177 U. S. 214, 222, 44 L. Ed.

sovereign, for some subordinate.<sup>82</sup> The principle upon which our government rests, and upon which alone they continue to exist, is the union of states, sovereign and independent within their own limits in their internal and domestic concerns but bound together as one people by a general government, possessing certain enumerated and restricted powers delegated to it by the people of the several states, and exercising supreme authority within the scope of the powers granted to it, throughout the dominion of the United States.<sup>83</sup>

741; *South Carolina v. United States*, 199 U. S. 437, 454, 50 L. Ed. 261.

The powers of government which devolved upon the state of Georgia by the revolution, over her whole territory, are unimpaired by any surrender of the territorial jurisdiction, by the old confederation or the new constitution, as there was in both an express saving, as well as by the tenth article of the amendment to the constitution. (Separate opinion of Baldwin, J.) *Cherokee Nation v. Georgia*, 5 Pet. 1, 47, 8 L. Ed. 25.

"Her jurisdiction over the territory in question is as supreme as that of congress over what the nation has acquired by cession from the states, or treaties with foreign powers, combining the rights of the state and general government. Within her boundaries, there can be no other nation, community or sovereign power, which this department can judicially recognize as a foreign state, capable of demanding or claiming our interposition, so as to enable them to exercise a jurisdiction incompatible with a sovereignty in Georgia, which has been recognized by the constitution, and every department of this government acting under its authority." (Separate opinion of Baldwin, J.) *Cherokee Nation v. Georgia*, 5 Pet. 1, 47, 8 L. Ed. 25.

"Kansas is supreme, except so far as its power and authority are limited by the constitution and laws of the United States." *Arndt v. Griggs*, 134 U. S. 316, 323, 33 L. Ed. 918.

The state of Wisconsin except so far as its connection with the constitution and laws of the United States alters its position, is a foreign state, possessing all the powers of the most absolute government in the world. *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 541, 24 L. Ed. 148.

When it was found necessary to establish a national government for national purposes, a part of the powers of the states and of the people of the states was granted to the United States and to the people of the United States. This grant operated as a further limitation upon the powers of the states, so that now the governments of the states possess all the powers of the parliament of England, except such as have been delegated to the United States or reserved by the people. The reservation by the people is shown in the prohibition of the constitution. *Munn v. Illinois*, 94 U. S. 113, 124, 24 L. Ed. 77.

"Now the execution and enforcement of the laws of the United States, and the judicial determination of questions arising under them, are confided to another sovereign, and to that extent the sovereignty of the state is restricted." *Tennessee v. Davis*, 100 U. S. 257, 267, 25 L. Ed. 648.

Whatever power is deposited with the Union by the people, for their own necessary security, is so far a curtailing of the power and prerogatives of the states. (Opinion of Mr. Justice Cushing.) *Chisholm v. Georgia*, 2 Dall. 419, 468, 1 L. Ed. 440.

Over the subjects thus surrendered, the sovereignty of the states ceased to extend. *Tennessee v. Davis*, 100 U. S. 257, 25 L. Ed. 648.

"For all national purposes, embraced by the federal constitution, the states and the citizens thereof are one, united under the same sovereign authority, and governed by the same laws. In all other respects, the states are necessarily foreign to and independent of each other; their constitutions and forms of government being, although republican, altogether different, as are their laws and institutions." *Buckner v. Finley*, 2 Pet. 586, 590, 7 L. Ed. 528.

**82. States as parts of one empire.**—*Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257; *Buckner v. Finley*, 2 Pet. 586, 590, 7 L. Ed. 528. See, also, *Missouri v. Illinois*, 180 U. S. 208, 241, 45 L. Ed. 497; *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 237, 51 L. Ed. 1038.

**83. Same.**—*Scott v. Sandford*, 19 How. 393, 448, 15 L. Ed. 691.

The states are constituent parts of the United States. They are members of one great empire—for some purposes sovereign, for some purposes subordinate. The *Chinese Exclusion Case*, 130 U. S. 581, 605, 32 L. Ed. 1068.

The citizens of Georgia when they acted upon the large scale of the Union, as a part of the people of the United States, did not surrender the supreme or sovereign power to that state, but as to the purposes of the Union, retained it to themselves. As to the purposes of the Union, therefore, Georgia is not a sovereign state. (Opinion of Mr. Justice Wilson.) *Chisholm v. Georgia*, 2 Dall. 419, 457, 1 L. Ed. 440.

Georgia cannot be viewed as a single, unconnected sovereign power, on whose legislature no other restrictions are imposed than may be found in its own con-



**Unknown to Foreign Nations.**—"The states are unknown to foreign nations; their sovereignty exists only with relation to each other and the general government. Whatever regulations foreign commerce should be subjected to in the ports of the Union, the general government would be held responsible for them; and all other regulations, but those which congress had imposed, would be regarded by foreign nations as trespasses and violations of national faith and comity." "All the rights of the states as independent nations were surrendered to the United States. The states are not nations, either as between themselves or towards foreign nations. They are sovereign within their spheres, but their sovereignty stops short of nationality. Their political status at home and abroad is that of states in the United States. They can neither make war nor peace without the consent of the national government. Neither can they, except with like consent, 'enter into any agreement or compact with another state.'"<sup>84</sup>

**Relation of States to General Government as Compared with Relation to Foreign Country; Cession of Territory.**—"In their relation to the general government, the states of the Union stand in a very different position from that which they hold to foreign governments. Though the jurisdiction and authority of the general government are essentially different from those of the state, they are not those of a different country; and the two, the state and general government, may deal with each other in any way they may deem best to carry out the purposes of the constitution."<sup>85</sup> A state, whether represented by her legislature, or through a convention specially called for that purpose, is incompetent to cede her political jurisdiction and legislative authority over any part of her territory to a foreign country, without the concurrence of the general government. The jurisdiction of the United States extends over all the territory within the states, and, therefore, their authority must be obtained, as well as that of the state within which the territory is situated, before any cession of sovereignty or political jurisdiction can be made to a foreign country.<sup>86</sup> But while a state has no power to cede away its territory to a foreign country, it can transfer jurisdiction to the general government.<sup>87</sup>

**Power of State to Define Its Boundaries.**—"Within what are generally recognized as the territorial limits of states by the law of nations, a state can define its boundaries on the sea and the boundaries of its counties."<sup>88</sup>

*c. Division of Powers between the Federal and State Governments.*—(1) *Generally.*—The supreme authority in this country is divided between the govern-

stitution. She is a part of a large empire; she is a member of the American Union; and that Union has a constitution, the supremacy of which all acknowledge, and which imposes limits to the legislature of the several states, which none claim a right to pass. *Fletcher v. Peck*, 6 Cranch 87, 136, 3 L. Ed. 162.

*Quære:* Has the supreme court of the United States jurisdiction to restrain the state of Georgia, or its legislature, from the forcible exercise of legislative power over a neighboring people (Cherokee Nation) asserting their independence; their right to which the state denies. *Cherokee Nation v. Georgia*, 5 Pet. 1, 20, 8 L. Ed. 25.

**84. States unknown to foreign nations.**—*Gibbons v. Ogden*, 9 Wheat. 1, 228, 229, 6 L. Ed. 23; *New Hampshire v. Louisiana*, 108 U. S. 76, 90, 27 L. Ed. 656. See, also, ante, "Generally," VI, D, 2, a; "Generally as to Foreign Relations," VI, D, 2, c, (1).

**85. Relation of states to general government as compared with relation to foreign countries.**—*Fort Leavenworth R. Co. v. Lowe*, 114 U. S. 525, 541, 29 L. Ed. 264;

*Benson v. United States*, 146 U. S. 325, 330, 36 L. Ed. 991.

**86. Same; cession of territory.**—*Fort Leavenworth R. Co. v. Lowe*, 114 U. S. 525, 540, 29 L. Ed. 264; *Benson v. United States*, 146 U. S. 325, 330, 36 L. Ed. 991.

**87. Same.**—*Fort Leavenworth R. Co. v. Lowe*, 114 U. S. 525, 29 L. Ed. 264; *Chicago, etc., R. Co. v. McGlinn*, 114 U. S. 542, 29 L. Ed. 270; *Benson v. United States*, 146 U. S. 325, 330, 36 L. Ed. 991.

**88. Power of state to define its boundaries.**—By this test the commonwealth of Massachusetts can include Buzzard's Bay within the limits of its counties. *Manchester v. Massachusetts*, 139 U. S. 240, 264, 35 L. Ed. 159. See, also, *Harcourt v. Gaillard*, 12 Wheat. 523, 526, 6 L. Ed. 716; *Poole v. Fleeger*, 11 Pet. 185, 209, 212c, 9 L. Ed. 680; *Rhode Island v. Massachusetts*, 12 Pet. 657, 667, 725, 9 L. Ed. 1233. See, ante, "To Settle Boundaries," VI, D, 2, c, (2); post, "Boundary Questions," VI, D, 3, d, (3), (c), (ff). See, also, the titles ADMIRALTY, vol. 1, p. 119; BOUNDARIES, vol. 3, p. 461; STATES.



ment of the United States, whose action extends over the whole Union, but which possesses only certain powers enumerated in its written constitution, and the separate governments of the several states, which retain all powers not delegated to the Union.<sup>89</sup> The distinguishing feature of our system consists in the exclusion of the federal government from the local and internal concerns of the states, and in the establishment of an independent internal government within each state. The genius and character of our whole government seems to be that all matters not delegated to the federal government nor prohibited to the states, consisting for the most part of the matters of domestic and local government, are left to the states as they were before the adoption of the federal constitution, while the operations of the federal government are to be applied to all the external concerns of the nation and to those internal concerns which affect the states generally, but not to those which are constitutionally reserved to the states, which do not affect other states, and with which it is not necessary to interfere for the purpose of executing the general powers of the government.<sup>90</sup> It was in contemplation of the continued existence of this separate system of law in each state that the constitution of the United States was framed and ordained with such legislative powers as are therein granted expressly or by reasonable

**89. Division of powers between the federal government and the states.**—*Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23; *Kidd v. Pearson*, 128 U. S. 1, 16, 32 L. Ed. 346.

**90. Same; general nature of the division.**—*Respublica v. Cobbett*, 3 Dall. 467, 473, 1 L. Ed. 683; *Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257; *Gibbons v. Ogden*, 9 Wheat. 1, 195, 6 L. Ed. 23; *New York v. Miln*, 11 Pet. 102, 146, 9 L. Ed. 648; *Scott v. Sandford*, 19 How. 393, 448, 516, 15 L. Ed. 691; *Lane County v. Oregon*, 7 Wall. 71, 76, 19 L. Ed. 101; *Collector v. Day*, 11 Wall. 113, 125, 20 L. Ed. 122; *Slaughter-House Cases*, 16 Wall. 36, 82, 21 L. Ed. 394; *Transportation Co. v. Parkersburg*, 107 U. S. 691, 700, 27 L. Ed. 584; *Smith v. Alabama*, 124 U. S. 465, 476, 31 L. Ed. 508; *Plumley v. Massachusetts*, 155 U. S. 461, 472, 39 L. Ed. 223; *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 560, 39 L. Ed. 759; *Hennington v. Georgia*, 163 U. S. 299, 308, 41 L. Ed. 166; *Lottery Case*, 188 U. S. 321, 347, 47 L. Ed. 492; *South Carolina v. United States*, 199 U. S. 437, 454, 50 L. Ed. 261; *Grafton v. United States*, 206 U. S. 333, 354, 51 L. Ed. 1084.

"In this country, we are trying the novel experiment of a divided sovereignty between the national government and the states. The precise line of division between these is not always distinctly marked. Government is a moral, not a mathematical, science; and the power of such a government, especially, cannot be defined with mathematical accuracy and precision. There is a competition of opposite analogies. We arrive at a just conclusion, by reasoning from these analogies, and by a general regard to the objects and purposes of this scheme of government." *Argument of Mr. Webster in Cohens v. Virginia*, 6 Wheat. 264, 434, 435, 5 L. Ed. 257.

"The government of the United States and the governments of the several states in the exercise of their respective powers

move on different lines. The government of the United States has no power, except such as expressly or by necessary implication has been granted to it, while the several states may exert such powers as are not inconsistent with the constitution of the United States nor with a republican form of government and which have not been surrendered by them to the general government. An offense against the United States can only be punished under its authority and in the tribunals created by its laws; whereas, an offense against a state can be punished only by its authority and in its tribunals. The same act, as held in *Moore's case*, may constitute two offenses, one against the United States and the other against a state." *Grafton v. United States*, 206 U. S. 333, 354, 51 L. Ed. 1084.

"The powers affecting the internal affairs of the states not granted to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, and all powers of a national character which are not delegated to the national government by the constitution are reserved to the people of the United States. The people who adopted the constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and after making provision for an amendment to the constitution by which any needed additional powers would be granted, they reserved to themselves all powers not so delegated. This article 10 is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning." *Kansas v. Colorado*, 206 U. S. 46, 90, 51 L. Ed. 956. See *Fairbank v. United States*, 181 U. S. 283, 288, 45 L. Ed. 862.

implication.<sup>91</sup> To preserve the even balance between these two governments and to hold each in its separate sphere is the peculiar duty of all courts.<sup>92</sup>

(2) *Powers of Government Divided into Four Classes*.—In the complex system of polity which prevails in this country the powers of government may be divided into four classes: Those which belong exclusively to the states; those which belong exclusively to the national government; those which may be exercised concurrently and independently by both; and those which may be exercised by the states, but only with the consent, express or implied, of congress, or until congress shall see fit to act upon the subject, in which last case the authority of the state then retires and lies in abeyance until the occasion for its exercise shall recur.<sup>93</sup>

(3) *Exclusive Powers of Federal Government*—(a) *Generally; Foreign Relations and Matters Exclusively Delegated to the Federal Government*.—Generally speaking, the jurisdiction of the federal government is exclusive as to all the external concerns of the nation, and as to those matters of internal polity and administration which have been exclusively delegated to it by the federal constitution. The entire control of international relations is committed to the national government in peace as well as in war. It was one of the main objects of the constitution to make us, so far as regarded our foreign relations, one people and one nation, and to cut off all communications between foreign governments and the several state authorities.<sup>94</sup> In framing the constitution, the states conferred on one government all national power which it would be impossible to make uniform in a process of legislation by several distinct and independent state governments.<sup>95</sup>

91. **Same.**—*Smith v. Alabama*, 124 U. S. 465, 476, 31 L. Ed. 508; *Plumley v. Massachusetts*, 155 U. S. 461, 472, 39 L. Ed. 223. See, also, post, "The States Indestructible," VI, D, 7, b.

92. **Duty of courts to preserve constitutional division.**—*Texas v. White*, 7 Wall. 700, 725, 19 L. Ed. 227; *South Carolina v. United States*, 199 U. S. 437, 448, 50 L. Ed. 261; *In re Heff*, 197 U. S. 488, 505, 49 L. Ed. 848; *Northern Securities Co. v. United States*, 193 U. S. 197, 348, 48 L. Ed. 679.

93. **Powers divided into four classes.**—*Gilman v. Philadelphia*, 3 Wall. 713, 720, 18 L. Ed. 96; *Ex parte McNeil*, 13 Wall. 236, 240, 20 L. Ed. 624; *Railroad Co. v. Fuller*, 17 Wall. 560, 21 L. Ed. 710; *Farmers'*, etc., *Nat. Bank v. Dearing*, 91 U. S. 29, 34, 23 L. Ed. 196; *Inman Steamship Co. v. Tinker*, 94 U. S. 238, 242, 24 L. Ed. 118.

94. **Exclusive powers of the federal government.**—*Respublica v. Cobbett*, 3 Dall. 467, 473, 1 L. Ed. 683; *Gibbons v. Ogden*, 9 Wheat. 1, 195, 6 L. Ed. 23; *New York v. Miln*, 11 Pet. 102, 146, 9 L. Ed. 648; *Holmes v. Jennison*, 14 Pet. 540, 575, 10 L. Ed. 579 (opinion of Taney, C. J.); *Passenger Cases*, 7 How. 283, 449, 12 L. Ed. 702; *Scott v. Sandford*, 19 How. 393, 516, 15 L. Ed. 691; *Chy Lung v. Freeman*, 92 U. S. 275, 295, 280, 23 L. Ed. 550; *Transportation Co. v. Parkersburg*, 107 U. S. 691, 700, 27 L. Ed. 584; *Head Money Cases*, 112 U. S. 580, 28 L. Ed. 798; *United States v. Rauscher*, 119 U. S. 407, 414, 415, 30 L. Ed. 425; *United States v. Arjona*, 120 U. S. 479, 483, 30 L. Ed. 728; *The Chinese Exclusion Case*, 130 U. S. 581, 604, 609,

32 L. Ed. 1068; *Ekiu v. United States*, 142 U. S. 651, 659, 35 L. Ed. 1146; *In re Cooper*, 143 U. S. 472, 36 L. Ed. 232; *Fong Yue Ting v. United States*, 149 U. S. 698, 705, 37 L. Ed. 905; *Lem Moon Sing v. United States*, 158 U. S. 538, 543, 39 L. Ed. 1082; *Louisiana v. Texas*, 176 U. S. 1, 22, 44 L. Ed. 347; *Lottery Case*, 188 U. S. 321, 347, 47 L. Ed. 492. See, also, ante, "Dual Nature of Government," VI, D, 1; "Generally," VI, D, 2, a; "Generally as to Foreign Relations," VI, D, 2, c, (1).

95. **Same.**—*Passenger Cases*, 7 How. 283, 449, 12 L. Ed. 702. (Opinion of Catron, J.)

"The government of the United States has been vested exclusively with the power of representing the nation in all its intercourse with foreign countries. It alone can 'regulate commerce with foreign nations,' Art. 1, § 8, clause 3; make treaties and appoint ambassadors and other public ministers and consuls. Art. 2, § 2, clause 2. A state is expressly prohibited from entering into any 'treaty, alliance or confederation.' Art. 1, § 10, clause 1. Thus all official intercourse between a state and foreign nations is prevented and exclusive authority for that purpose given to the United States. The national government is in this way made responsible to foreign nations for all violations by the United States of their international obligations, and because of this, congress is expressly authorized 'to define and punish \* \* \* offenses against the law of nations.' Art. 1, § 8, clause 10." *United States v. Arjona*, 120 U. S. 479, 483, 30 L. Ed. 728.

The exclusive jurisdiction of the federal government extends to the providing for



**When Power of Federal Government Deemed Exclusive as to Matters Delegated.**—"Whether the power in any given case is vested exclusively in the general government depends upon the nature of the subject to be regulated. Wherever the terms in which a power is granted to congress, or the nature of the power requires that it should be exercised exclusively by congress, the subject is as completely taken from the state legislatures, as if they had been forbidden to act. The nature of the power, and the true objects to be attained by

the common defense against exterior injuries and violence. *Republica v. Cobbett*, 3 Dall. 467, 473, 1 L. Ed. 683.

The constitution has forbidden the states to hold negotiations with foreign nations, or to declare war, and has conferred the whole subject of foreign relations upon the national government. It has not left it in the power of the states to pass laws whose enforcement renders the general government liable to just reclamations which it must answer; it prohibits to the states acts for which the general government may be held responsible. *Chy Lung v. Freeman*, 92 U. S. 275, 280, 23 L. Ed. 550.

Thus the passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to congress and not to the states. It has the power to regulate commerce with foreign nations; and the responsibility for the character of those regulations and for the manner of their enforcement belongs exclusively to the national government. Were it otherwise, a single state could, at its pleasure, embroil the nation in international quarrels and complications. *Chy Lung v. Freeman*, 92 U. S. 275, 280, 23 L. Ed. 550.

"A right secured by the law of nations to a nation, or its people, is one which the United States, as the representatives of this nation, are bound to protect. Consequently, a law which is necessary and proper to afford this protection is one that congress may enact, because it is one that is needed to carry into execution a power conferred by the constitution on the government of the United States exclusively. There is no authority in the United States to require the passage and enforcement of such a law by the states. Therefore the United States must have the power to pass it and enforce it themselves, or be unable to perform a duty which they may owe to another nation, and which the law of nations has imposed on them as part of their international obligations. This, however, does not prevent a state from providing for the punishment of the same thing; for here, as in the case of counterfeiting the coin of the United States, the act may be an offense against the authority of a state as well as that of the United States." *United States v. Arjona*, 120 U. S. 479, 487, 30 L. Ed. 728.

**War and treaty powers.**—"That the treaty-making power has been surrendered

by the states and given to the United States, is unquestionable." The states can not make war, or enter into treaties. *Baldwin v. Franks*, 120 U. S. 678, 682, 30 L. Ed. 766; *Louisiana v. Texas*, 176 U. S. 1, 22, 44 L. Ed. 347.

**Extradition of fugitives from justice.**—The powers and duties relating to the extradition or return of fugitives from justice are matters which pertain to the foreign intercourse of the nation and are committed to the national government exclusively. The treaties of the United States upon this subject and the acts of congress enacted pursuant thereto, are in their nature exclusive. *Holmes v. Jennison*, 14 Pet. 510, 570, 10 L. Ed. 579; *United States v. Rauscher*, 119 U. S. 407, 414, 415, 30 L. Ed. 425.

In the case of *Holmes v. Jennison*, 14 Pet. 510, 10 L. Ed. 579, Chief Justice Tanney, with whom concurred Justices Story, McLean and Wayne, were of opinion that this power was exclusive in the federal government in so far as it related to the surrendering of fugitives from justice to foreign governments, and that the doctrine that it was the exercise and not the existence of the power which works a prohibition to the states had no application. Upon this question, however, the court was equally divided, Justices Thompson, Baldwin, Barber and Catron being of opinion that while an extradition law or treaty was binding on the states, so as to compel them to surrender fugitives in compliance with its provisions, that in the absence of a treaty covering a given case, there was nothing to prevent any state from surrendering a fugitive upon the request of a foreign power, as a matter of comity.

In this case it appeared that an individual charged with murder in the Dominion of Canada had sought refuge in the state of Vermont. Upon the request of the Canadian authorities, the governor of Vermont issued his warrant for the arrest of said fugitive and ordered that he be conveyed to the state boundary and there delivered to such persons as might be authorized by the Canadian government to take him into custody. The prisoner sued out a writ of habeas corpus and carried the case to the federal supreme court, where the opinion of the lower court upholding the validity of the warrant and the authority of the government to deliver him up was affirmed by a divided court as before stated. *Holmes v. Jennison*, 14 Pet. 540, 598, 10 L. Ed. 579.



it, are then as important to be weighed in considering the question of its exclusiveness, as the words in which it is granted.<sup>96</sup> The correct principle is that the powers granted to the federal government are never exclusive of similar and concurrent powers existing in the states, except where the constitution has expressly, in terms, made it exclusive, or the exercise of a like power is prohibited to the states, or there is a direct repugnancy or incompatibility in the exercise of a like power by the states.<sup>97</sup>

(b) *Jurisdiction in the District of Columbia and Places under Exclusive Federal Control.*—Within the District of Columbia, and within the forts, magazines, arsenals, dock yards and needful buildings, acquired and used pursuant to the provisions of the 10th clause of the 8th section of the first article of the constitution, the national and municipal powers of government of every description are united in the government of the Union.<sup>98</sup> But these are the only cases, within the United States, in which all the powers of government are united in a single government, except in the case of the temporary territorial governments, and even there local governments exist.<sup>99</sup>

Forts, arsenals, and other buildings for public uses constructed within the states, as instrumentalities for the execution of the powers of the general

96. When powers of federal government deemed exclusive.—*Sturges v. Crowninshield*, 4 Wheat. 122, 195, 4 L. Ed. 529; *Prigg v. Pennsylvania*, 16 Pet. 519, 522, 10 L. Ed. 1050; *Gilman v. Philadelphia*, 3 Wall. 713, 727, 18 L. Ed. 96. See, also, ante, "From Grants to Federal Government," VI, D. 3, 4, 111, 61.

97. Same.—*Sturges v. Crowninshield*, 4 Wheat. 122, 193, 4 L. Ed. 529; *Houston v. Moore*, 5 Wheat. 1, 5 L. Ed. 19; *Cohens v. Virginia*, 6 Wheat. 264, 382, 5 L. Ed. 257; *Worcester v. Georgia*, 6 Pet. 515, 8 L. Ed. 483; *Prigg v. Pennsylvania*, 16 Pet. 539, 622, 10 L. Ed. 1060; *License Cases*, 5 How. 504, 588, 12 L. Ed. 256; *Passenger Cases*, 7 How. 283, 393, 12 L. Ed. 702; *Gilman v. Philadelphia*, 3 Wall. 713, 727, 18 L. Ed. 96; *Ex parte McNeil*, 13 Wall. 236, 240, 20 L. Ed. 624; *Railroad Co. v. Fuller*, 17 Wall. 560, 21 L. Ed. 710; *Munn v. Illinois*, 94 U. S. 113, 124, 24 L. Ed. 77; *Inman Steamship Co. v. Tinker*, 94 U. S. 238, 242, 24 L. Ed. 118.

**Powers made exclusive in express terms.**

—An example of the exclusive powers of congress made so in express terms is to be found in the exclusive delegation to congress of the right to legislate over places purchased by the consent of the legislature in which the same may be for ports, arsenals, dock yards, etc. *Houston v. Moore*, 5 Wheat. 1, 49, 5 L. Ed. 19.

**Powers expressly prohibited to states.**

—An example of powers expressly prohibited to the states is the prohibition to the states to coin money or emit bills of credit. *Houston v. Moore*, 5 Wheat. 1, 49, 5 L. Ed. 19.

**Powers exclusive by reason of repugnancy.**—An example of powers of congress

exclusive by reason of a direct repugnancy or incompatibility in the exercise of it by the states, is the power to establish a uniform rule of naturalization. *Chirac v. Chirac*, 2 Wheat. 259, 269, 4 L. Ed. 234; *Houston v. Moore*, 5 Wheat. 1, 49, 5 L. Ed. 19.

The delegation of admiralty and maritime jurisdiction to congress is also exclusive because there is a direct repugnancy or incompatibility in the exercise of a like power by the states. *Martin v. Hunter*, 1 Wheat. 304, 327, 4 L. Ed. 97; *Houston v. Moore*, 5 Wheat. 1, 49, 5 L. Ed. 19.

**Offenses against constitution and laws of United States.**—See post, "Enforcement of Federal Law," VI, D. 3, 4, (5), (6), (10), (12).

98. Jurisdiction in places under exclusive federal control.—*United States v. Beaman*, 5 Wheat. 304, 327, 4 L. Ed. 97; *Cohens v. Virginia*, 6 Wheat. 264, 428, 5 L. Ed. 257; *Kendall v. United States*, 12 Pet. 519, 4 L. Ed. 119; *Rhode Island v. Massachusetts*, 12 Pet. 657, 733, 9 L. Ed. 1233; *Pollard v. Hagan*, 3 How. 212, 223, 11 L. Ed. 565.

"The congress of the United States, being empowered by the constitution 'to exercise exclusive legislation in all cases whatsoever' over the seat of the national government, has the entire control over the District of Columbia for every purpose of government, national or local. It may exercise within the District all legislative powers that the legislature of a state might exercise within the state; and may vest and distribute the judicial authority in and among courts and magistrates, and regulate judicial proceedings before them, as it may think fit, so long as it does not contravene any provision of the constitution of the United States. *Kendall v. United States*, 12 Pet. 524, 619, 9 L. Ed. 1181; *Mattingly v. District of Columbia*, 97 U. S. 687, 690, 24 L. Ed. 1050; *Gibbons v. District of Columbia*, 116 U. S. 404, 407, 29 L. Ed. 680; *Shoemaker v. United States*, 147 U. S. 282, 390, 37 L. Ed. 170; *Capital Traction Co. v. Hof*, 174 U. S. 1, 5, 43 L. Ed. 873.

99. Same.—*Pollard v. Hagan*, 3 How. 212, 223, 224, 11 L. Ed. 565.

government, are exempt from such control of the states as would defeat or impair their use for those purposes.<sup>1</sup> "Such is the law with reference to all instrumentalities created by the general government. Their exemption from state control is essential to the independence and sovereign authority of the United States within the sphere of their delegated powers. But, when not used as such instrumentalities, the legislative power of the state over the places acquired will be as full and complete as over any other places within her limits."<sup>2</sup> So the state, in ceding to the federal government exclusive jurisdiction over places within state limits, may accompany such cession with any conditions not inconsistent with the effective use of the property for the public purposes for which it is intended.<sup>3</sup>

**As to places purchased to be used for forts, arsenals, etc.,** the constitution provides for exclusive jurisdiction "only when such purchase is made with the consent of the state;" therefore where the purchase is made without the consent of the state, the state, in ceding jurisdiction over the same, may stipulate that the jurisdiction of the federal government shall continue only so long as the place is used for the specified purposes.<sup>4</sup>

**But Some State Laws May Continue Operative.**—In some instances state laws regulating private rights and matters of police and in force at the time of the cession, have been held to continue to operate within the ceded territory after it had been ceded to the federal government.<sup>5</sup>

**1. Forts, arsenals and other buildings.**—Fort Leavenworth R. Co. *v.* Lowe, 114 U. S. 525, 541, 29 L. Ed. 264; Benson *v.* United States, 146 U. S. 325, 330, 36 L. Ed. 991.

**2. Same.**—Fort Leavenworth R. Co. *v.* Lowe, 114 U. S. 525, 539, 29 L. Ed. 264.

**Crime committed in a fort.**—Thus congress has a right to punish murder or other felony committed in a fort or other place within its exclusive jurisdiction; and if the felon should escape out of the court or other place in which the felony may have been committed, congress has the power to authorize his apprehension wherever he may be found, without the necessity of demanding his surrender from the executive of the state in which he may be found. Marshall, C. J., delivering the opinion in *Cohens v. Virginia*, 6 Wheat. 264, 428, 5 L. Ed. 257.

**3. State may accompany cession with conditions.**—Fort Leavenworth R. Co. *v.* Lowe, 114 U. S. 525, 29 L. Ed. 264; Chicago, etc., R. Co. *v.* McGlinn, 114 U. S. 542, 29 L. Ed. 270; Benson *v.* United States, 146 U. S. 325, 331, 36 L. Ed. 991.

Thus it was competent for the state of Kansas, in ceding to the United States exclusive jurisdiction over the Fort Leavenworth military reservation, to make certain reservations and exceptions with regard to the service of process and taxation by state authorities within the ceded territory; and although such cession was made without the request of the general government, yet, since it conferred a benefit, its acceptance subject to the exceptions and reservations is presumed. Benson *v.* United States, 146 U. S. 325, 36 L. Ed. 991.

Except as to the jurisdiction reserved to the state of Kansas, by the act of cession, the United States government has

jurisdiction over the entire Fort Leavenworth military reservation. Benson *v.* United States, 146 U. S. 325, 331, 36 L. Ed. 991.

**4. As to places purchased with the consent of the state.**—Palmer *v.* Barrett, 162 U. S. 399, 40 L. Ed. 1015. See, also, United States *v.* Bevans, 3 Wheat. 336, 4 L. Ed. 404.

Thus where property was ceded, subject to such a condition, to be used for a navy yard and hospital, and the government afterwards leased a part of the land to a city of the state to be used for city market purposes, it was held that the exclusive jurisdiction of the general government over the portion so leased ceased while the lease continued in force, and that the state courts had jurisdiction of a controversy over the right of possession of a market stall. Palmer *v.* Barrett, 162 U. S. 399, 40 L. Ed. 1015.

**5. Same laws operative after cession.**—Mutual Assurance Society *v.* Watts, 1 Wheat. 279, 4 L. Ed. 91; Chicago, etc., R. Co. *v.* McGlinn, 114 U. S. 542, 29 L. Ed. 270.

Thus a law of the state of Kansas, making all railroad companies within that state, whose roads were not inclosed by a lawful fence, liable to the owners of cattle killed or wounded by their engines and cars, regardless of whether such killing or wounding was due to negligence or not, was held to continue in force after the cession of the Fort Leavenworth reservation, as to a railroad company whose line was located within the reservation after the cession. Chicago, etc., R. Co. *v.* McGlinn, 114 U. S. 542, 29 L. Ed. 270.

So a statute of the state of Virginia (Act of Va., Dec. 22, 1794, § 6) providing that the subscribers to a mutual insurance society should bind their property in-



**Power Conferred on Congress as the Legislature of the Union.**—In the enumeration of the powers of congress, in the eighth section of the first article, we find that of exercising exclusive legislation over such district as shall become the seat of government. This power, like all others which are specified, is conferred on congress as the legislature of the Union. In no other character can it be exercised. In legislating for the district, they necessarily preserve the character of the legislature of the Union; for it is in that character alone that the constitution confers on them this power of exclusive jurisdiction.<sup>6</sup>

**Right to Make Power Effectual.**—The power vested in congress, as the legislature of the United States, to legislate exclusively within any place ceded by a state, carries with it, as an incident, the right to make that power effectual.<sup>7</sup>

(c) *Exclusive Control and Disposition of Property.*—**As to Public Lands within the States.**—As to the public lands held by the United States within state limits, the right and title of the United States thereto is based upon the deeds of cession made to the federal government by the state within whose limits the lands originally were, and upon the statutes connected with them, and not upon any municipal sovereignty which the United States may be supposed to possess, or to have reserved by compact with new states for that particular purpose. The provisions of the constitution of the United States, art. 1, § 8, clause 16, shows that no such power can be exercised by the United States within a state. Such a power is not only repugnant to the constitution, but it is inconsistent with the spirit and intention of the deeds of cession.<sup>8</sup> As to those lands within the limits of the states, at least of the Western States, the national government is the most considerable owner, and has power to dispose of and make all needful rules and regulations respecting its property; not, however, to the extent that its legislation can override state laws in respect to the general subject of reclamation.<sup>9</sup> The full scope of the second paragraph of § 3, art. 4, reading: "The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States, or of any particular state," has never been definitely settled. Primarily, at least, it is a grant of power to the United States of control over its property. That is implied by the words "territory or other property." But clearly it does not grant to congress any leg-

sured as security for the payment of assessments, and creating a lien upon such property, was held to continue in force as to property situated in the city of Alexandria even after it had been ceded out of the jurisdiction of Virginia. *Mutual Assurance Society v. Watts*, 1 Wheat. 279, 4 L. Ed. 91.

**6. Powers conferred upon congress as the legislature of the Union.**—*Cohens v. Virginia*, 6 Wheat. 264, 424, 5 L. Ed. 257.

**7. Right to make power effectual.**—*Cohens v. Virginia*, 6 Wheat. 264, 328, 5 L. Ed. 257.

**8. As to public lands within the states.**—*Pollard v. Hagan*, 3 How. 212, 224, 11 L. Ed. 565.

**9. Same.**—*Kansas v. Colorado*, 206 U. S. 46, 92, 51 L. Ed. 956.

**As to reclamation of arid lands.**—While arid lands are to be found mainly if not only in the Western and newer states, yet the powers of the national government within the limits of those states are the same (no greater and no less) than

those within the limits of the original thirteen, and it would be strange if, in the absence of a definite grant of power, the national government could enter the territory of the states along the Atlantic and legislate in respect to improving by irrigation or otherwise the lands within their borders. *Kansas v. Colorado*, 206 U. S. 46, 92, 51 L. Ed. 956.

It may well be that no power is adequate for the reclamation of arid lands other than that of the national government. But if no such power has been granted, none can be exercised, except where these arid lands are within the territories, and over them by virtue of the second paragraph of § 3 of article 4 heretofore quoted, or by virtue of the power vested in the national government to acquire territory by treaties, congress has full power of legislation, subject to no restrictions other than those expressly named in the constitution, and, therefore, it may legislate in respect to all arid lands within their limits. *Kansas v. Colorado*, 206 U. S. 46, 92, 51 L. Ed. 956.



islative control over the states, and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits.<sup>10</sup>

**State Taxation of Public Lands within Their Borders.**—It is familiar law that a state has no power to tax the property of the United States within its limits. This exemption of their property from state taxation—and by state taxation we mean any taxation by authority of the state, whether it be strictly for state purposes or for mere local and special objects—is founded upon that principle which inheres in every independent government, that it must be free from any such interference of another government as may tend to destroy its powers or impair their efficacy. If the property of the United States could be subjected to taxation by the state, the object and extent of the taxation would be subject to the state's discretion. It might extend to buildings and other property essential to the discharge of the ordinary business of the national government, and in the enforcement of the tax those buildings might be taken from the possession and use of the United States. The constitution vests in congress the power to “dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.” And this implies an exclusion of all other authority over the property which could interfere with this right or obstruct its exercise.<sup>11</sup>

**With respect to lands within the territories,** congress has, by virtue of § 3, art. 4, of the constitution, or by virtue of the power vested in the national government to acquire territory by treaty, full power of legislation, subject to no restrictions other than those expressly named in the constitution.<sup>12</sup>

**Disposition of the Public Domain.**—With respect to the public domain, the constitution vests in congress the power of disposition and of making all needful rules and regulations. This power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. No state legislation can interfere with this right or embarrass its exercise.<sup>13</sup>

**Dignity and Effect of Titles Emanating from the United States.**—Congress has the sole power to declare the dignity and effect of titles emanating from the United States.<sup>14</sup> Where a patent has been issued for a part of the

10. Scope of § 3, art. 4.—*Kansas v. Colorado*, 206 U. S. 46, 88, 51 L. Ed. 956.

**Proprietary rights, police regulations.**—The government has, with respect to its own lands, the rights of an ordinary proprietor, to maintain its possession when situated within a state, and to prosecute trespassers. It may deal with such lands precisely as a private individual may deal with his farming property. The general government has a power over its own property analogous to the police power of the several states, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case. The admission of a territory as a state does not deprive it of the power of legislating for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the police power, so long as such power is directed solely to its own protection. A different rule would place the public domain of the United States completely at the mercy of state legislation. *Camfield v. United States*, 167 U. S. 518, 524, 42 L. Ed. 260.

11. **State taxation of public lands within their borders.**—*Van Brocklin v. Tennessee*, 117 U. S. 151, 168, 29 L. Ed. 845; *Wisconsin Cent. R. Co. v. Price County*, 133 U. S. 496, 504, 33 L. Ed. 687. See, also, post, “Taxation of Property Owned by the Federal Government,” VI, D, 3, c, (6), (b), (cc), (fff), (dddd).

12. **Lands in the territories.**—*Kansas v. Colorado*, 206 U. S. 46, 92, 51 L. Ed. 956. See, also, ante, “Power of Congress to Govern Territory,” VI, D, 2, c, (3), (c), (cc), et seq.

13. **Disposition of the public domain.**—*McClung v. Silliman*, 6 Wheat. 598, 605, 5 L. Ed. 340; *Wilcox v. Jackson*, 13 Pet. 498, 10 L. Ed. 264; *Gibson v. Chouteau*, 13 Wall. 92, 99, 20 L. Ed. 534; *Butte City Water Co. v. Baker*, 196 U. S. 119, 49 L. Ed. 409. See, also, ante, “Right to Dispose of Territory,” VI, D, 2, c, (3), (e).

14. **Dignity and effect of titles emanating from the United States.**—*Bagnell v. Broderick*, 13 Pet. 436, 450, 10 L. Ed. 235; *Langdon v. Sherwood*, 124 U. S. 74, 83, 31 L. Ed. 344.

public lands, a state has no power to declare any title, less than a patent, valid against a claim of the United States to the land; or against a title held under a patent granted by the United States.<sup>15</sup> Whenever the question in any court, state or federal, is, whether the title to property belonging to the United States has passed, that question must be resolved by the laws of the United States; but whenever the property has passed according to those laws, then the property, like all other in the state, is subject to state legislation; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States.<sup>16</sup>

(d) *Jurisdiction and Procedure of Federal Courts.*—Under the constitution the federal government has exclusive power to legislate concerning the jurisdiction and the forms and modes of procedure in the federal courts. State laws are of no efficacy for these purposes except in so far as they may be adopted by act of congress or lawfully prescribed rules of court.<sup>17</sup>

**But Federal Courts Will Enforce Rights Dependent upon State Law.**—While it is true that it has been ruled many times by the federal supreme court that the rules of practice of the federal courts in suits in equity cannot be controlled by the laws of the states, yet this principle is not to be carried so far

**15. Same.**—*Wilcox v. Jackson*, 13 Pet. 498, 10 L. Ed. 264.

**16. Same.**—*Wilcox v. Jackson*, 13 Pet. 498, 10 L. Ed. 264.

When the title to the public land has passed out of the United States, by conflicting patents, there can be no objection to the practice adopted by the courts of a state, to give effect to the better right, in any form of remedy the legislature or courts of the state may prescribe. (McLean, J., dissenting.) *Bagnell v. Broderick*, 13 Pet. 436, 10 L. Ed. 235.

No doubt is entertained of the power of the states to pass laws, authorizing purchasers of lands from the United States to prosecute actions of ejectment upon certificates of purchase, against trespassers on the lands purchased; but it is denied that the states have any power to declare certificates of purchase of equal dignity with a patent; congress alone can give them such effect. (McLean, J., dissenting.) *Bagnell v. Broderick*, 13 Pet. 436, 10 L. Ed. 235.

**17. Jurisdiction and procedure of federal courts.**—*Young v. Bank*, 4 Cranch 384, 397, 2 L. Ed. 655; *United States v. Peters*, 5 Cranch 115, 136, 3 L. Ed. 53; *Wayman v. Southard*, 10 Wheat. 1, 6 L. Ed. 253; *United States Bank v. Halstead*, 10 Wheat. 51, 63, 6 L. Ed. 264; *Bank v. Dudley*, 2 Pet. 492, 7 L. Ed. 496; *Parsons v. Bedford*, 3 Pet. 433, 7 L. Ed. 732; *Boyle v. Zacharie*, 6 Pet. 348, 8 L. Ed. 423; *Beers v. Haughton*, 9 Pet. 329, 9 L. Ed. 145; *The Steamboat Orleans v. Phoebus*, 11 Pet. 175, 184, 9 L. Ed. 677; *Clark v. Smith*, 13 Pet. 195, 10 L. Ed. 123; *Keary v. The Farmers*, etc., *Bank*, 16 Pet. 88, 94, 10 L. Ed. 897; *Amis v. Smith*, 16 Pet. 303, 10 L. Ed. 973; *Bronson v. Kinzie*, 1 How. 311, 315, 11 L. Ed. 143; *The Moses Taylor*, 4 Wall. 411, 18 L. Ed. 397; *Riggs v. Johnson County*, 6 Wall. 166, 195, 18 L. Ed. 768; *Weber v. Lee County*, 6 Wall. 210, 18 L.

Ed. 781; *Payne v. Hook*, 7 Wall. 425, 427, 19 L. Ed. 260; *Railway Co. v. Whitton*, 13 Wall. 270, 286, 20 L. Ed. 571; *Ex parte McNiel*, 13 Wall. 236, 243, 20 L. Ed. 624; *Insurance Co. v. Morse*, 20 Wall. 445, 453, 22 L. Ed. 365; *Nudd v. Burrows*, 91 U. S. 426, 441, 23 L. Ed. 286; *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, 299, 23 L. Ed. 898; *Brine v. Insurance Co.*, 96 U. S. 627, 639, 24 L. Ed. 858; *Van Norden v. Morton*, 99 U. S. 378, 25 L. Ed. 453; *Cummings v. National Bank*, 101 U. S. 153, 157, 25 L. Ed. 903; *Vicksburg, etc., R. Co. v. Putnam*, 118 U. S. 545, 30 L. Ed. 257; *St. Louis, etc., Railway v. Vickers*, 122 U. S. 360, 363, 30 L. Ed. 1161; *Scott v. Neely*, 140 U. S. 106, 35 L. Ed. 358; *Cates v. Allen*, 149 U. S. 451, 456, 37 L. Ed. 804; *In re Tyler*, 149 U. S. 164, 189, 37 L. Ed. 689; *Hollins v. Brierfield Coal, etc., Co.*, 150 U. S. 371, 37 L. Ed. 1113; *Norwood v. Baker*, 172 U. S. 269, 292, 43 L. Ed. 443. See, also, the title COURTS.

A state constitution cannot, any more than a state statute, prohibit the judges of the courts of the United States from charging juries with regard to matters of fact. *St. Louis, etc., Railway v. Vickers*, 122 U. S. 360, 363, 30 L. Ed. 1161.

The seventh amendment of the federal constitution declares that in suits at common law, where the value of the matter in controversy shall exceed \$20, the right to trial by jury shall be preserved. Held, that a person seeking to recover for the value of improvements upon real estate in the federal courts, under the Ohio law which provided for the value of such improvement by commissioners, instead of by a jury, must proceed on the equity side of the court, since the Ohio statute cannot authorize the dispensing with juries in the federal courts in trials at common law, where the amount of the controversy exceeds \$20. *Bank v. Dudley*, 2 Pet. 492, 7 L. Ed. 496.

as to deny to a party in those courts substantial rights conferred by the statutes of a state.<sup>18</sup> Where a statute of a state creates a new right or provides a new remedy, the federal courts will enforce that right either on the common law or equity side of its docket, as the nature of the new right or new remedy requires.<sup>19</sup>

**Rules of Evidence in Federal Courts.**—It is within the acknowledged power of congress to prescribe the evidence which shall be received, and the effects of that evidence, in the courts of the United States.<sup>20</sup>

(e) *Modification of Maritime Law.*—Under the constitution of the United States, the power to modify the general maritime law by statute is vested in congress and not in the state legislatures.<sup>21</sup>

(f) *Bonds of Federal Officers.*—The federal government has the power of prescribing, under its own laws, what kind of security shall be given by its officers and agents for a faithful discharge of their public duties. And in such cases the local laws cannot affect the contract or the form or validity of the security taken. In contemplation of law it is made at the seat of the federal government, the place where its principal powers are exercised. The state has no power to control or affect it in any way.<sup>22</sup>

**Same; Construction.**—A bond given in pursuance of a law of the United States is governed, as to its construction, not by the local law of a particular state, but by the principles of law as determined by the federal supreme court, and operative throughout the courts of the United States.<sup>23</sup>

(g) *Regulation of Coinage and the Currency.*—See post, "Power to Borrow Money and Provide a Currency," VI, D, 2, f, (1), (g), (dd), (qqq).

**As to the exclusive control of national banks,** see the title BANKS AND BANKING, vol. 3, pp. 16, 17. See, also, post, "Taxation of National Banks," VI, D, 3, c, (6), (b), (cc), (fff), (hhhh), (ccccc), (ddddd); "State Regulation of National Banks," VI, D, 3, c, (6), (b), (cc), (jjj).

(h) *To Establish a Uniform Rule of Naturalization.*—See the title NATURALIZATION.

(4) *Exclusive Powers of the States*—(a) *Generally.*—It is a familiar rule of construction of the constitution of the Union that the sovereign powers vested in the state governments by their respective constitutions remained unaltered and unimpaired, except so far as they were granted to the government of the United States. That the intention of the framers of the constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the tenth article of the amendments, namely: "The powers not dele-

**18. But will enforce new rights created by state law.**—*Brine v. Insurance Co.*, 96 U. S. 627, 639, 24 L. Ed. 858.

**19. Same.**—*Steamboat Orleans v. Phœbus*, 11 Pet. 175, 184, 9 L. Ed. 677; *Ex parte McNeil*, 13 Wall. 236, 243, 20 L. Ed. 624; *Railway Co. v. Whitton*, 13 Wall. 270, 286, 20 L. Ed. 571; *Van Norden v. Morton*, 99 U. S. 378, 25 L. Ed. 453; *Cummings v. National Bank*, 101 U. S. 153, 157, 25 L. Ed. 903; *Norwood v. Baker*, 172 U. S. 269, 292, 43 L. Ed. 443.

Thus the right of redemption allowed to a mortgagor under the state law, after a sale under a decree of foreclosure, is as obligatory on the federal courts sitting in equity, as on the state courts; and their rules of practice must be made to conform to the law of the state, so far as may be necessary to give full effect to the right. *Brine v. Insurance Co.*, 96 U. S. 627, 639, 24 L. Ed. 858.

**20. Rules of evidence in the federal courts.**—*Ogden v. Saunders*, 12 Wheat. 213,

349, 6 L. Ed. 606; *Pillow v. Roberts*, 13 How. 472, 476, 14 L. Ed. 228; *Cliquot's Champagne*, 3 Wall. 114, 143, 18 L. Ed. 116; *Ex parte Fisk*, 113 U. S. 713, 721, 28 L. Ed. 1117; *Fong Yue Ting v. United States*, 149 U. S. 698, 729, 37 L. Ed. 905; *Li Sing v. United States*, 180 U. S. 486, 493, 45 L. Ed. 634.

**21. Modification of maritime law.**—*Martin v. Hunter*, 1 Wheat. 304, 337, 4 L. Ed. 97; *Houston v. Moore*, 5 Wheat. 1, 49, 5 L. Ed. 19; *Butler v. Boston, etc., Steamship Co.*, 130 U. S. 527, 557, 32 L. Ed. 1017.

**22. Bonds of Federal Officers.**—*Cox v. United States*, 6 Pet. 172, 8 L. Ed. 359; *Duncan v. United States*, 7 Pet. 435, 449, 8 L. Ed. 739.

**23. Same; construction.**—*Cox v. United States*, 6 Pet. 172, 8 L. Ed. 359; *Duncan v. United States*, 7 Pet. 435, 8 L. Ed. 739; *Bein v. Heath*, 12 How. 168, 13 L. Ed. 939; *Tullock v. Mulvane*, 184 U. S. 497, 514, 46 L. Ed. 657.



gated to the United States are reserved to the states respectively, or, to the people.”<sup>24</sup> The states, resting upon their original basis of sovereignty, subject only to the exceptions stated, exercise their powers over everything connected with their social and internal condition. A state regulates its domestic commerce, contracts, the transmission of estates, real and personal, and acts upon all internal matters which relate to its moral and political welfare. Over these subjects the federal government has no power. They appertain to the state sovereignty as exclusively as powers exclusively delegated appertain to the general government. All those powers which relate merely to municipal legislation, or which may more properly be called internal police, are not surrendered or restrained; and consequently, in relation to these, the authority of the state is complete, unqualified and exclusive.<sup>25</sup>

**24. Exclusive powers of the states.**—*Collector v. Day*, 11 Wall. 113, 124, 20 L. Ed. 122; *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 560, 39 L. Ed. 759; *South Carolina v. United States*, 199 U. S. 437, 454, 50 L. Ed. 261; *Halter v. Nebraska*, 205 U. S. 34, 40, 51 L. Ed. 699; *Kansas v. Colorado*, 206 U. S. 46, 90, 51 L. Ed. 956; *Grafton v. United States*, 206 U. S. 333, 354, 51 L. Ed. 1084.

The reservation to the states respectively can only mean the reservation of the rights of sovereignty which they respectively possessed before the adoption of the constitution of the United States, and which they had not parted from by that instrument. And any legislation by congress beyond the limits of the power delegated would be trespassing upon the rights of the states or the people, and would not be the supreme law of the land, but null and void; and it would be the duty of the courts to declare it so. *Gordon v. United States*, 117 U. S., appx., 697, 705.

**25. Same.**—*Respublica v. Cobbett*, 3 Dall. 467, 473, 1 L. Ed. 683; *New York v. Miln*, 11 Pet. 102, 106, 146, 9 L. Ed. 648; *Gibbons v. Ogden*, 9 Wheat. 1, 195, 6 L. Ed. 23; *License Cases*, 5 How. 504, 588, 12 L. Ed. 256; *Scott v. Sandford*, 19 How. 393, 448, 516, 15 L. Ed. 691; *Lane County v. Oregon*, 7 Wall. 71, 76, 19 L. Ed. 101; *Collector v. Day*, 11 Wall. 113, 125, 20 L. Ed. 122; *United States v. Railroad Co.*, 17 Wall. 322, 21 L. Ed. 597; *Transportation Co. v. Parkersburg*, 107 U. S. 691, 700, 27 L. Ed. 584; *Smith v. Alabama*, 124 U. S. 465, 476, 31 L. Ed. 508; *Plumley v. Massachusetts*, 155 U. S. 461, 472, 39 L. Ed. 223; *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 560, 39 L. Ed. 759; *Hennington v. Georgia*, 163 U. S. 299, 308, 41 L. Ed. 166; *South Carolina v. United States*, 199 U. S. 437, 454, 50 L. Ed. 261; *Halter v. Nebraska*, 205 U. S. 34, 40, 51 L. Ed. 699; *Kansas v. Colorado*, 206 U. S. 46, 90, 51 L. Ed. 956.

“Taking it as a settled principle that those subjects of legislation which are not enumerated in the surrender to the general government remain subject to state regulations, it follows that the sovereignty of the states over them, not having been abridged, impaired or altered by the constitution, is as perfect as if it had not been

adopted.” (*Opinion of Baldwin, J.*) *New York v. Miln*, 11 Pet. 102, 153b, 9 L. Ed. 648.

The right of the states to administer their own affairs through their legislative, executive and judicial departments, in their own manner, through their own agencies, is conceded by the uniform decisions of the federal supreme court, and by the practice of the federal government from its organization. *United States v. Railroad Co.*, 17 Wall. 322, 21 L. Ed. 597.

The internal affairs of a state are matters of its own discretion. *South Carolina v. United States*, 199 U. S. 437, 454, 50 L. Ed. 261.

**Contracts other than maritime.**—“Concerning contracts not maritime in their nature, the state has authority to make laws and enforce liens, and it is no valid objection that the enforcement of such laws may prevent or obstruct the prosecution of a voyage of an interstate character. The laws of the states enforcing attachment and execution in cases cognizable in state courts have been sustained and upheld. *Johnson v. Chicago & Pac. Elevator Co.*, 119 U. S. 388, 398, 30 L. Ed. 447. The state may pass laws enforcing the rights of its citizens which affect interstate commerce but fall short of regulating such commerce in the sense in which the constitution gives exclusive jurisdiction to congress.” *Sherlock v. Alling*, 93 U. S. 99, 103, 23 L. Ed. 819; *Kidd v. Pearson*, 128 U. S. 1, 23, 32 L. Ed. 346; *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 48 L. Ed. 268; *The Winnebago*, 205 U. S. 354, 362, 51 L. Ed. 836.

Mr. Justice Brown, speaking for the court in *Knapp, etc., Co. v. McCaffrey*, 177 U. S. 638, 642, 44 L. Ed. 921, said: “As the admiralty jurisdiction does not extend to a contract for building a vessel, or to work done or materials furnished in the construction (*People's Ferry Co. v. Beers*, 20 How. 393, 15 L. Ed. 961; *Roach v. Chapman*, 22 How. 129, 16 L. Ed. 294), we held in *Edwards v. Elliott*, 21 Wall. 532, 22 L. Ed. 487, that in respect to such contracts it was competent for the states to enact such laws as their legislatures might deem just and expedient, and to provide for their enforcement in rem.” *The Winnebago*, 205 U. S. 354, 363, 51 L. Ed. 836.

(b) *Local Municipal Jurisdiction, Sovereignty and Eminent Domain.*—Subject to the constitution of the United States and the laws made in pursuance thereof, each state in the Union, regardless of the time of its admission, has full jurisdiction, sovereignty and eminent domain over its own soil and territory throughout its borders. In other words, aside from the powers granted by the constitution, either expressly or by necessary implication, the national government has no capacity to exercise local municipal jurisdiction or sovereignty within the states. This power of sovereignty originally belonged to the states, and remains with them except in so far as it has been limited by the grants and prohibitions contained in the federal constitution.<sup>26</sup>

**State Cannot Constitutionally Cede Its Rights to Federal Government.**—And should any state, by express agreement and stipulation with the United States, grant to the United States the municipal right of sovereignty and eminent domain within such state, such stipulation would be void and inoperative, for the reason that the United States has no constitutional capacity to exercise such powers within the limits of a state or elsewhere except in the cases expressly provided for by the constitution.<sup>27</sup> See, also, post, "Neither Government to Authorize the Other to Pass the Limits Fixed by the Constitution," VI, D, 3, c, (6), (b), (gg).

**26. Local jurisdiction, sovereignty and eminent domain.**—United States *v.* Bevens, 3 Wheat. 336, 4 L. Ed. 404; New York *v.* Miln, 11 Pet. 102, 153d, 9 L. Ed. 648; Rhode Island *v.* Massachusetts, 12 Pet. 657, 733, 9 L. Ed. 1233; Martin *v.* Waddell, 16 Pet. 367, 10 L. Ed. 997; Pollard *v.* Hagan, 3 How. 212, 223, 11 L. Ed. 565; Goodtitle *v.* Kibbe, 9 How. 471, 13 L. Ed. 220; Den *v.* Jersey Co., 15 How. 426, 14 L. Ed. 757; Smith *v.* Maryland, 18 How. 71, 15 L. Ed. 269; Doyle *v.* Continental Ins. Co., 94 U. S. 535, 541, 24 L. Ed. 148; Barney *v.* Keokuk, 94 U. S. 324, 24 L. Ed. 224; St. Louis *v.* Myers, 113 U. S. 566, 28 L. Ed. 1131; Packer *v.* Bird, 137 U. S. 661, 34 L. Ed. 819; Hardin *v.* Jordan, 140 U. S. 371, 35 L. Ed. 428; Manchester *v.* Massachusetts, 139 U. S. 240, 263, 35 L. Ed. 159; Kaukauna Water Power Co. *v.* Green Bay, etc., Canal Co., 142 U. S. 254; 35 L. Ed. 1004; Shively *v.* Bowlby, 152 U. S. 1, 38 L. Ed. 331; St. Anthony Falls Water Power Co. *v.* St. Paul Water Commissioners, 168 U. S. 349, 42 L. Ed. 497; Hardin *v.* Shedd, 190 U. S. 508, 519, 47 L. Ed. 1156; Kean *v.* Calumet Canal, etc., Co., 190 U. S. 452, 47 L. Ed. 1134; Mobile Transp. Co. *v.* Mobile, 187 U. S. 479, 483, 47 L. Ed. 266; Kansas *v.* Colorado, 206 U. S. 46, 93, 51 L. Ed. 956.

The jurisdiction of a state is co-extensive with its territory; co-extensive with its legislative power. If the place described is unquestionably within the original territory of a state, it is then within the jurisdiction of that state unless that jurisdiction has been ceded to the United States. Manchester *v.* Massachusetts, 139 U. S. 240, 263, 35 L. Ed. 159; United States *v.* Bevens, 3 Wheat. 336, 4 L. Ed. 404; Rhode Island *v.* Massachusetts, 12 Pet. 657, 733, 9 L. Ed. 1233; Martin *v.* Waddell, 16 Pet. 367, 10 L. Ed. 997; Pollard *v.* Hagan, 3 How. 212, 11 L.

Ed. 565; Den *v.* Jersey Co., 15 How. 426, 14 L. Ed. 757; Smith *v.* Maryland, 18 How. 71, 15 L. Ed. 269.

The original jurisdiction of the state adheres to its territory as a portion of sovereignty not yet given away, and, subject to the grant of power, the residuary powers of legislation remain in the state. (Opinion of Baldwin, J.) New York *v.* Miln, 11 Pet. 102, 153d, 9 L. Ed. 648.

Alabama is entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine is to deny that Alabama has been admitted into the Union on an equal footing with the original states, the state constitution, laws and compact to the contrary notwithstanding; her rights to sovereignty and jurisdiction being governed by the common law as modified by our constitution, laws and institutions. Pollard *v.* Hagan, 3 How. 212, 229, 11 L. Ed. 565.

When Alabama was admitted into the Union, on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction and eminent domain which Georgia possessed at the time she ceded the territory of Alabama to the United States, and nothing remained to the latter, according to the terms of the agreement, but the public lands. Pollard *v.* Hagan, 3 How. 212, 11 L. Ed. 565; Mobile Transp. Co. *v.* Mobile, 187 U. S. 479, 483, 47 L. Ed. 266.

When the states of Kansas and Colorado were admitted into the Union they were admitted with the full powers of local sovereignty which belonged to the other states. Kansas *v.* Colorado, 206 U. S. 46, 95, 51 L. Ed. 956.

**27. State cannot cede its jurisdiction to the United States.**—Pollard *v.* Hagan, 3 How. 212, 223, 224, 11 L. Ed. 565.



**Federal Government Not to Enact Police Regulations for the States.**

—See the title **POLICE POWER.**

**State Control of Navigable Waters; Dams, Bridges, and Other Obstructions.**—See the titles **BRIDGES**, vol. 3, p. 516; **FERRIES**; **INTERSTATE AND FOREIGN COMMERCE**; **NAVIGABLE WATERS.**

**Soil under or Adjacent to Navigable or Public Waters.**—When the Revolution took place, the people of each state became themselves sovereign; and in that character they hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government. The shores of navigable and tide waters, and the soils under them, were not granted by the constitution to the United States, but reserved to the states respectively. The new states have the same rights, sovereignty and jurisdiction over this subject as the original states. The right of the United States to the public lands within a state, and the power of congress to make all needful rules and regulations for the sale and disposition thereof, confers no power upon congress to make a grant of land or soils under the navigable waters within the state limits or upon the shores thereof.<sup>28</sup> The same doctrine is applicable to lands covered by

**28. Soil under or adjacent to navigable waters.**—*Johnson v. McIntosh*, 8 Wheat. 543, 595, 5 L. Ed. 681; *Martin v. Waddell*, 16 Pet. 367, 408, 410, 414, 10 L. Ed. 997; *Mobile v. Esclava*, 16 Pet. 234, 10 L. Ed. 948; *Pollard v. Hagan*, 3 How. 212, 230, 11 L. Ed. 565; *Goodtitle v. Kibbe*, 9 How. 471, 13 L. Ed. 220; *Hallet v. Beebe*, 13 How. 25, 14 L. Ed. 35; *Weber v. Board of Harbor Comm'rs*, 18 Wall. 57, 21 L. Ed. 798; *Barney v. Keokuk*, 94 U. S. 324, 24 L. Ed. 224; *St. Louis v. Myers*, 113 U. S. 566, 28 L. Ed. 1131; *Packer v. Bird*, 137 U. S. 661, 34 L. Ed. 819; *Hardin v. Jordan*, 140 U. S. 371, 35 L. Ed. 428; *Knight v. United States Land Ass'n*, 142 U. S. 161, 185, 35 L. Ed. 974; *Kaukauna Water Power Co. v. Green Bay, etc.*, Canal Co., 142 U. S. 254, 35 L. Ed. 1004; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 436, 36 L. Ed. 1018; *Shively v. Bowlby*, 152 U. S. 1, 26, 38 L. Ed. 331; *St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners*, 168 U. S. 349, 359, 42 L. Ed. 497; *Mobile Transp. Co. v. Mobile*, 187 U. S. 479, 483, 47 L. Ed. 266; *Kean v. Calumet Canal, etc., Co.*, 190 U. S. 452, 47 L. Ed. 1134; *Kansas v. Colorado*, 206 U. S. 46, 93, 51 L. Ed. 956. See, also, post, "Power of Congress to Impose Conditions Incompatible with the Equality of the State as a Member of the Union," VI, D, 6, b, (2).

That the state of Alabama, when admitted into the Union, became entitled to the soil under the navigable waters, below high-water mark within the limits of the state, not previously granted, was conclusively settled in *Pollard v. Hagan*, 3 How. 212, 11 L. Ed. 565; *Mobile Transp. Co. v. Mobile*, 187 U. S. 479, 482, 47 L. Ed. 266.

The stipulation contained in the 6th section of the act of Congress passed on the 2d of March, 1819, for the admission of the state of Alabama into the Union, viz: "That all navigable waters within the said state shall forever remain public

highways, free to the citizens of said state, and to the United States, without any tax, duty impost, or toll therefor, imposed by said state," is nothing more than a regulation of commerce to that extent among the several states, and conveys no more power over the navigable waters of Alabama, to the government of the United States, than it possesses over the navigable waters of other states under the provisions of the constitution; and it leaves as much right in the state of Alabama over them as the original states possessed over navigable waters in their respective limits. *Pollard v. Hagan*, 3 How. 212, 230, 11 L. Ed. 565.

Upon the admission of California into the Union upon equal footing with the original states, absolute property in, and dominion and sovereignty over, all soils under the tidewaters within her limits passed to the state, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several states, the regulation of which was vested in the general government. *Weber v. Board of Harbor Comm'rs*, 18 Wall. 57, 21 L. Ed. 798.

The state of Kentucky having been admitted into the Union upon an equality in all respects with existing states, and its power of taxation being in no sense limited or restrained, except as its exercise is expressly or impliedly limited by the constitution itself, the property of a bridge company situated between the respective high-water marks on either side of the Ohio river is property within the territorial limits of Kentucky, and is therefore property over which the state may exert its power of taxation. *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 622, 43 L. Ed. 823.



fresh water in the Great Lakes.<sup>29</sup>

**Same; Grants by Congress within the Territories.**—"Grants by congress of portions of the public lands within a territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below high-water mark, and do not impair the title and dominion of the future state when created; but leave the question of the use of the shores by the owners of uplands to the sovereign control of each state, subject only to the rights vested by the constitution of the United States."<sup>30</sup> But the right of the states to exercise exclusive jurisdiction, sovereignty and eminent domain within their limits, and particularly with regard to navigable waters and the soils beneath or bordering on the same, does not prevent the United States from creating rights in the territories which will be binding upon them as states after their admission into the Union. Congress has the power to make grants of lands below high-water mark of navigable waters in any territory of the United States whenever it becomes necessary to do so in order to perform international obligations or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects for which the United States holds the territory; and such grants will be binding upon the states after admission into the Union.<sup>31</sup>

**Same—Law Governing Rights of Riparian Owners.**—Each state may determine for itself the rule of law by which the rights of riparian owners shall be governed. Whether the common law with respect to riparian rights of the doctrine which obtains in the arid regions of the West shall control is a matter for the state to decide. Congress cannot force either rule upon any state. The property rights of riparian owners, therefore, are to be measured by the rules and decisions of state courts: and no distinction is to be made on account of the time of the admission of the state into the Union.<sup>32</sup>

**Same—Limitations of Rule.**—There are two limitations, however, upon the right of the state to prescribe the rule of law governing the rights of riparian owners within its borders: First, that in the absence of specific authority from congress a state cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property. Second, that it is limited by the superior power of the gen-

29. *Soil under the great lakes.*—Illinois Cent. R. Co. v. Illinois, 146 U. S. 387, 436, 36 L. Ed. 1018.

30. *Grants by congress within the territories.*—Barney v. Keokuk, 94 U. S. 324, 337, 24 L. Ed. 224; Packer v. Bird, 137 U. S. 661, 669, 34 L. Ed. 819; Hardin v. Jordan, 140 U. S. 371, 372, 384, 35 L. Ed. 428; Shively v. Bowlby, 152 U. S. 1, 58, 38 L. Ed. 331; Eldridge v. Trezevant, 160 U. S. 452, 468, 40 L. Ed. 490.

31. *Same.*—Shively v. Bowlby, 152 U. S. 1, 38 L. Ed. 331; United States v. Winans, 198 U. S. 371, 383, 49 L. Ed. 1089.

It follows, therefore, that the dicta contained in some of the opinions previously rendered, to the effect that congress has no power to grant any land below high-water mark of navigable waters in a territory of the United States, are not strictly true. Shively v. Bowlby, 152 U. S. 1, 38 L. Ed. 331; United States v. Winans, 198 U. S. 371, 383, 49 L. Ed. 1089.

Thus it is competent for congress, in treating with the Indians in a territory

for the surrender of their lands, to reserve to them, by treaty stipulations, the right of taking fish at all usual and accustomed places in common with the citizens of the territory; and to make such stipulation binding upon the territory and upon parties acquiring private titles to the lands, after its admission into the Union. United States v. Winans, 198 U. S. 371, 49 L. Ed. 1089.

32. *Rights of riparian owners; by what law governed.*—Barney v. Keokuk, 94 U. S. 324, 24 L. Ed. 224; St. Louis v. Myers, 113 U. S. 566, 28 L. Ed. 1131; Packer v. Bird, 137 U. S. 661, 34 L. Ed. 819; Hardin v. Jordan, 140 U. S. 371, 35 L. Ed. 428; St. Louis v. Rutz, 138 U. S. 226, 242, 34 L. Ed. 941; Kaukauna Water Power Co. v. Green Bay, etc., Canal Co., 142 U. S. 254, 35 L. Ed. 1004; Shively v. Bowlby, 152 U. S. 1, 38 L. Ed. 331; St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners, 168 U. S. 349, 358, 42 L. Ed. 497; Kansas v. Colorado, 206 U. S. 46, 94, 51 L. Ed. 956. See, also, the title NAVIGABLE WATERS.

eral government to secure the uninterrupted navigability of all navigable streams within the limits of the United States.<sup>33</sup>

**As to Public Lands within the States.**—See ante, "Exclusive Control and Disposition of Property," VI, D, 3, c, (3), (c).

**Effect of the Grant of Admiralty and Maritime Jurisdiction.**—The grant to the United States, in the constitution, of all cases of admiralty and maritime jurisdiction, does not extend to a cession of the waters in which those cases may arise, or of general jurisdiction over the same; congress may pass all laws which are necessary for giving the most complete effect to the exercise of the admiralty and maritime jurisdiction granted to the government of the Union; but the general jurisdiction over the place, subject to this grant, adheres to the territory, as a portion of territory not yet given away; and the residuary powers of legislation still remain in this state.<sup>34</sup> It is in the 8th section of the 2d article, we are to look for cessions of territory and of exclusive jurisdiction. Congress has power to exercise exclusive jurisdiction over this district, and over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings. It is observable, that the power of exclusive legislation (which is jurisdictional) is united with cession of territory, which is to be the free act of the states.<sup>35</sup>

**Doctrine Not Prevalent over Right of Federal Government to Condemn Land within the States.**—The argument based upon the doctrine that the states have the eminent domain or highest dominion in the lands comprised within their limits, and that the United States have no dominion in such lands, cannot avail to frustrate the supremacy given by the constitution to the government of the United States in all matters within the scope of its sovereignty. This is not a matter of words, but of things. If it is necessary that the United States government should have an eminent domain still higher than that of the state, in order that it may fully carry out the objects and purposes of the constitution, then it has it. Whatever may be the necessities or conclusions of theoretical law as to eminent domain or anything else, it must be received as a postulate of the constitution that the government of the United States is invested with full and complete power to execute and carry out its purposes.<sup>36</sup> Whenever it becomes necessary, for the accomplishment of any object within the authority of congress, to exercise the right of eminent domain and take private lands, making just compensation to the owners, congress may do this, with or without a concurrent act of the state in which the lands lie.<sup>37</sup>

**33. Same—Limitations of rule.**—United States *v.* Rio Grande, etc., Irrigation Co., 174 U. S. 690, 703, 43 L. Ed. 1136; Kansas *v.* Colorado, 206 U. S. 46, 85, 51 L. Ed. 956. See, also, the titles NAVIGABLE WATERS; WATERS AND WATER-COURSES.

**34. Effect of grant of admiralty and maritime jurisdiction.**—United States *v.* Bevens, 3 Wheat. 336, 4 L. Ed. 404; Rhode Island *v.* Massachusetts, 12 Pet. 657, 733, 9 L. Ed. 1233.

**35. Same.**—United States *v.* Bevens, 3 Wheat. 336, 388, 4 L. Ed. 404.

**36. Doctrine not to prevail over right of federal government to condemn lands within the states.**—Cherokee Nation *v.* Southern Kansas R. Co., 135 U. S. 641, 656, 34 L. Ed. 295.

**37. Same.**—Van Brocklin *v.* Tennessee, 117 U. S. 151, 154, 29 L. Ed. 845; Cherokee Nation *v.* Southern Kansas R. Co., 135 U. S. 641, 656, 34 L. Ed. 295; Luxton *v.*

North River Bridge Co., 153 U. S. 525, 529, 38 L. Ed. 808. See, also, the title EMINENT DOMAIN.

"It is now well settled that whenever, in the execution of the powers granted to the United States by the constitution, lands in any state are needed by the United States, for a fort, magazine, dockyard, lighthouse, custom house, courthouse, postoffice, or any other public purpose, and cannot be acquired by agreement with the owners, the congress of the United States, exercising the right of eminent domain, and making just compensation to the owners, may authorize such lands to be taken, either by proceedings in the courts of the state with its consent, or by proceedings in the courts of the United States, with or without any consent or concurrent act of the state, as congress may direct or permit. Harris *v.* Elliott, 10 Pet. 25, 9 L. Ed. 333; Kohl *v.* United States, 91 U. S. 367, 23 L. Ed. 449; United



**Right of State to Frame Its System of Laws; Subdivision of Territory for Municipal Purposes.**—"The constitution of the United States, which is necessarily and to a large extent inflexible and exceedingly difficult of amendment, should not be so construed as to deprive the states of the power to so amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare without bringing them into conflict with the supreme law of the land."<sup>38</sup> Each state has full power to make, for municipal purposes, political subdivisions of its territory, and to regulate their local governments within such subdivisions, including the constitution of their courts of justice, the extent of their jurisdiction and the forms and modes of procedure therein.<sup>39</sup> The provision of the fourteenth amendment that no state shall deny to any person the equal protection of the laws, contemplates the protection of persons and classes of persons against unjust discriminations by the state; it does not relate to territorial or municipal arrangements for different portions of the state.<sup>40</sup> There is nothing in the constitution to prevent any state from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the state of New York, for example, should see fit to adopt the civil law and its method of procedure for New York city and the surrounding counties, and the common law and its method of procedure for the rest of the state, there is nothing in the constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the fourteenth amendment, be a denial to any person of the equal protection of the laws.<sup>41</sup> But this power is not unlimited. "While the people of each state may

*States v. Jones*, 109 U. S. 513, 27 L. Ed. 1015; *Fort Leavenworth R. Co. v. Lowe*, 114 U. S. 525, 531, 532, 29 L. Ed. 264; *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641, 656, 34 L. Ed. 295; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. Ed. 463; *Luxton v. North River Bridge Co.*, 147 U. S. 337, 37 L. Ed. 194; *Luxton v. North River Bridge Co.*, 153 U. S. 525, 38 L. Ed. 808." *Chappell v. United States*, 160 U. S. 499, 509, 40 L. Ed. 510; *United States v. Gettysburg Electric R. Co.*, 160 U. S. 668, 681, 40 L. Ed. 576.

"Such an authority, as was said in *Köhl v. United States*, 91 U. S. 367, 23 L. Ed. 449, is essential to the independent existence and perpetuity of the United States, and is not dependent upon the consent of the States. *United States v. Fox*, 94 U. S. 315, 320, 24 L. Ed. 192; *United States v. Jones*, 109 U. S. 513, 27 L. Ed. 1015; *United States v. Great Falls Mfg. Co.*, 112 U. S. 645, 28 L. Ed. 846; *Van Brocklin v. Tennessee*, 117 U. S. 151, 154, 29 L. Ed. 845." *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641, 656, 34 L. Ed. 295.

"The proposition that the Cherokee Nation is sovereign in the sense that the United States is sovereign, or in the sense that the several states are sovereign, and that that nation alone can exercise the power of eminent domain within its limits, finds no support in the numerous treaties with the Cherokee Indians, or in the decisions of this court, or in the acts of congress defining the relations of that people with the United States. From the beginning of the government to the present time, they have been treated as 'wards of the nation,' 'in a state of pupillage,' 'de-

pendent political communities' holding such relations to the general government that they and their country, as declared by Chief Justice Marshall in *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L. Ed. 25, 'are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory and an act of hostility.' *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641, 653, 34 L. Ed. 295; *Accord*: *United States v. Rogers*, 4 How. 567, 572, 11 L. Ed. 1105; *United States v. Kagama*, 118 U. S. 375, 20 L. Ed. 228; distinguished in *Worcester v. Georgia*, 6 Pet. 515, 569, 8 L. Ed. 483.

**38. Right of state to frame its own laws and system of government.**—*Holden v. Hardy*, 169 U. S. 366, 387, 42 L. Ed. 780.

**39. Same.**—*Missouri v. Lewis*, 101 U. S. 22, 25 L. Ed. 989; *Hurtado v. California*, 110 U. S. 516, 530, 28 L. Ed. 232; *Hayes v. Missouri*, 120 U. S. 68, 30 L. Ed. 578; *Holden v. Hardy*, 169 U. S. 366, 387, 42 L. Ed. 780.

**40. Same; effect of fourteenth amendment.**—*Missouri v. Lewis*, 101 U. S. 22, 25 L. Ed. 989; *Hurtado v. California*, 110 U. S. 516, 530, 28 L. Ed. 232; *Hayes v. Missouri*, 120 U. S. 68, 30 L. Ed. 578. See, also, post "Nor in All Portions of the Same States," VII, B, 2, h, (5).

**41. Same.**—*Missouri v. Lewis*, 101 U. S. 22, 31, 25 L. Ed. 989; *Hurtado v. California*, 110 U. S. 516, 530, 28 L. Ed. 232; *Hayes v. Missouri*, 120 U. S. 68, 30 L. Ed. 578.



doubtless adopt such systems of laws as best conform to their own traditions and customs, the people of the entire country have laid down in the constitution of the United States certain fundamental principles to which each member of the Union is bound to accede as a condition of its admission as a state. Thus, the United States are bound to guarantee to each state a republican form of government, and the tenth section of the first article contains certain other specified limitations upon the power of the several states, the object of which was to secure to congress paramount authority with respect to matters of universal concern. In addition, the fourteenth amendment contains a sweeping provision forbidding the states from abridging the privileges and immunities of citizens of the United States, or denying them the benefit of due process or equal protection of the laws."<sup>42</sup>

(c) *Persons and Property within State Limits*—(aa) *Generally of Persons and Property*.—A state has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation, so far as that jurisdiction has not been surrendered or restrained by the constitution of the United States.<sup>43</sup> Every person, every corporation, everything within the territorial limits of a state, is, while there, subject to the constitutional authority of the state government.<sup>44</sup> By virtue of this, it is not only the right but the bounden and solemn duty of a state to advance the safety, happiness and prosperity of its people, and to provide for its general welfare by any and every act of legislation which it may deem to be conducive to these ends, where the power over the particular subject or the manner of its exercise is not surrendered or restrained by the constitution and laws of the United States.<sup>45</sup>

(bb) *To Define Property, Prescribe the Tenures Therein, and Regulate Its Descent, Distribution and Transfer*.—The right to prescribe what may be held as property and the tenures by which it may be so held is one of the reserved rights of the states. Whatever the state validity determines to be property it is the duty of the federal government to recognize as property.<sup>46</sup> "A prescription, therefore, of the constitution and laws of one or more states, determining property, on the part of the federal government, by which the stability of its social system may be endangered, is plainly repugnant to the conditions on which the federal constitution was adopted, or which that government was designed to

**42. Same; limitations.**—*Holden v. Hardy*, 169 U. S. 366, 389, 42 L. Ed. 780.

**43. As to persons and property within state limits.**—*New York v. Miln*, 11 Pet. 102, 9 L. Ed. 648; *Scott v. Sandford*, 19 How. 393, 460, 461, 15 L. Ed. 691; *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 541, 24 L. Ed. 148; *Pennoyer v. Neff*, 95 U. S. 714, 723, 24 L. Ed. 565; *Hoyt v. Sprague*, 103 U. S. 613, 630, 26 L. Ed. 585; *Presser v. Illinois*, 116 U. S. 252, 268, 29 L. Ed. 615; *Railroad Commission Cases (Stone v. Farmer's Loan & Trust Co.)*, 116 U. S. 307, 334, 29 L. Ed. 636; *Coe v. Errol*, 116 U. S. 517, 524, 29 L. Ed. 715.

"Every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory." *Pennoyer v. Neff*, 95 U. S. 714, 722, 24 L. Ed. 565.

**44. Same.**—*Hoyt v. Sprague*, 103 U. S. 613, 630, 26 L. Ed. 585; *Railroad Commission Cases (Stone v. Farmer's Loan & Trust Co.)*, 116 U. S. 307, 334, 29 L. Ed. 636; *Coe v. Errol*, 116 U. S. 517, 29 L. Ed. 715.

Subject to the laws and constitution of the United States, full power and control over its territory, its citizens, and its busi-

ness, belong to the state. *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 541, 24 L. Ed. 148.

**45. Same.**—*New York v. Miln*, 11 Pet. 102, 139, 9 L. Ed. 648; *Presser v. Illinois*, 116 U. S. 252, 268, 29 L. Ed. 615. See, also, *Gibbons v. Ogden*, 9 Wheat. 1, 203, 6 L. Ed. 23; *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. Ed. 96; *License Tax Cases*, 5 Wall. 462, 18 L. Ed. 497; *United States v. Dewitt*, 9 Wall. 41, 19 L. Ed. 593; *United States v. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588.

**46. To define property, prescribe the tenures therein, and regulate its descent, distribution and transfer.**—*Scott v. Sandford*, 19 How. 393, 515, 15 L. Ed. 691.

"But the great powers of war and negotiation, finance, postal communication and commerce, in general, when employed in respect to the property of a citizen, refer to, and depend upon, the municipal laws of the states, to ascertain and determine what is property, and the rights of the owner, and the tenure by which it is held. Whatever these constitutions and laws validly determine to be property, it is the duty of the federal government, through the domain of jurisdiction merely

accomplish."<sup>47</sup>

**Transfer of Property.**—The question of the mode of transferring property is one peculiarly within the legislative power of the state in which situated. Each state has the power to regulate the manner and conditions upon which property, both real and personal, situated within its territory, may be acquired and enjoyed, and the manner of its descent, distribution or alienation.<sup>48</sup>

federal, to recognize to be property." (Opinion of Campbell, J.) *Scott v. Sandford*, 19 How. 393, 515, 15 L. Ed. 691.

**47. Same.**—*Scott v. Sandford*, 19 How. 393, 516, 15 L. Ed. 691.

"This court have determined that the intermigration of slaves was not committed to the jurisdiction or control of congress. Wherever a master is entitled to go within the United States, his slave may accompany him, without any impediment from, or fear of, congressional legislation or interference." (Opinion of Campbell, J.) *Scott v. Sandford*, 19 How. 393, 516, 15 L. Ed. 691.

**48. Same; transfer of property.**—*McCormick v. Sullivant*, 10 Wheat. 192, 202, 6 L. Ed. 300; *Smith v. Union Bank*, 5 Pet. 518, 526, 8 L. Ed. 212; *Clark v. Smith*, 13 Pet. 195, 203, 10 L. Ed. 123; *Wilcox v. Jackson*, 13 Pet. 498, 10 L. Ed. 264; *Beauregard v. New Orleans*, 18 How. 497, 15 L. Ed. 469; *Parker v. Overman*, 18 How. 137, 140, 15 L. Ed. 318; *Suydam v. Williamson*, 24 How. 427, 16 L. Ed. 742; *Crapo v. Kelly*, 16 Wall. 610, 630, 21 L. Ed. 430; *United States v. Fox*, 94 U. S. 315, 320, 24 L. Ed. 192; *Pennoyer v. Neff*, 95 U. S. 714, 722, 24 L. Ed. 565; *Christian Union v. Yount*, 101 U. S. 352, 25 L. Ed. 888; *Langdon v. Sherwood*, 124 U. S. 74, 81, 31 L. Ed. 344; *Denny v. Bennett*, 128 U. S. 489, 498, 32 L. Ed. 491; *Walworth v. Harris*, 129 U. S. 355, 32 L. Ed. 712; *Geilinger v. Philippi*, 133 U. S. 246, 257, 33 L. Ed. 614; *Arndt v. Griggs*, 134 U. S. 316, 321, 33 L. Ed. 918; *Cope v. Cope*, 137 U. S. 682, 684, 34 L. Ed. 832; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 22, 35 L. Ed. 613; *Brown v. Smart*, 145 U. S. 454, 457, 36 L. Ed. 773; *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 188, 46 L. Ed. 1113; *Cunnius v. Reading School District*, 198 U. S. 458, 469, 49 L. Ed. 1125.

**Generally as to questions respecting titles.**—The duty of determining uncertain questions respecting the title to real estate is local in its nature, and may be discharged in such mode as may be provided by the state in which the land is situated where such mode does not conflict with some special inhibition of the constitution and is not against natural justice. *Lynch v. Murphy*, 161 U. S. 247, 251, 40 L. Ed. 688; reaffirming *Arndt v. Griggs*, 134 U. S. 316, 33 L. Ed. 918.

There is nothing in the case of *Hart v. Sansom*, 110 U. S. 151, 28 L. Ed. 101, inconsistent with this doctrine. *Lynch v. Murphy*, 161 U. S. 247, 251, 40 L. Ed. 688, reaffirming *Arndt v. Griggs*, 134 U. S. 316, 33 L. Ed. 918.

The state of Kentucky has an undoubted right to regulate and protect individual rights to her soil, and to declare what shall form a cloud on title. She may prescribe any policy in regard to conflicting titles which she may deem necessary for the protection of the agricultural interests in the state; and having declared, in effect, that junior patents issued for previously granted land shall be delivered up and canceled, and that the junior patentee shall execute a release for the benefit of the persons claiming under the elder patent, it is the duty of the courts, federal as well as state, to execute the policy. *Clark v. Smith*, 13 Pet. 195, 10 L. Ed. 123.

The well-being of every community requires that the title of real estate therein shall be secure, and that there be convenient and certain methods of determining any unsettled questions respecting it. The duty of accomplishing this is local in its nature; it is not a matter of national concern or vested in the general government; it remains with the state; and as this duty is one of the state, the manner of discharging it must be determined by the state, and no proceeding which it provides can be declared invalid, unless in conflict with some special inhibitions of the constitution, or against natural justice. *McCormick v. Sullivant*, 10 Wheat. 192, 202, 6 L. Ed. 300; *Clark v. Smith*, 13 Pet. 195, 203, 10 L. Ed. 123; *Parker v. Overman*, 18 How. 137, 140, 15 L. Ed. 318; *Beauregard v. New Orleans*, 18 How. 497, 15 L. Ed. 469; *Suydam v. Williamson*, 24 How. 427, 16 L. Ed. 742; *United States v. Fox*, 94 U. S. 315, 320, 24 L. Ed. 192; *Christian Union v. Yount*, 101 U. S. 352, 25 L. Ed. 888; *Arndt v. Griggs*, 134 U. S. 316, 321, 33 L. Ed. 918.

"The question of the mode of transferring real estate is one peculiarly within the jurisdiction of the legislative power of the state in which the land lies. As this court has repeatedly said, the mode of conveyance is subject to the control of the legislature of the state." *Wilcox v. Jackson*, 13 Pet. 498, 10 L. Ed. 264; *Langdon v. Sherwood*, 124 U. S. 74, 81, 31 L. Ed. 344.

**Descent and distribution; wills, probate and administration.**—The power to regulate inheritances and the testamentary disposition of property is vested in the states and not in congress. It is for the state to prescribe the course of descent, the persons competent to dispose of property by will, the formalities to be observed in making of wills, the persons who may be



(cc) *Property or Business of Nonresidents.*—"The right to legislate concerning the estate or property of absentees is an attribute, which, in its very essence, must belong to all governments, to the end that they may be able to perform the purposes for which government exists."<sup>49</sup> So long as it does not impair the obligation of contracts or deprive the owner of his property in violation of any of the constitutional safeguards, the state may deal with the property of a nonresident as freely as it may with that owned by citizens of the state.<sup>50</sup> As regards the power of taxation, it is immaterial that the property within the state is owned by nonresidents and subject to taxation in the state of the domicile; this does not preclude the state in which it is actually situated from taxing it also.<sup>51</sup>

**Corporations.**—Under this rule a state may govern a corporation, incorporated under the laws of two states, as it does all domestic corporations, in

made devisees or legatees, and the conditions upon which heirs, distributees, devisees or legatees may take. *McCormick v. Sullivan*, 10 Wheat. 192, 202, 6 L. Ed. 300; *Wilcox v. Jackson*, 13 Pet. 498, 10 L. Ed. 264; *Mager v. Grima*, 8 How. 490, 493, 12 L. Ed. 1168; *United States v. Fox*, 94 U. S. 315, 320, 24 L. Ed. 192; *Ellis v. Davis*, 109 U. S. 485, 497, 27 L. Ed. 1006; *Cope v. Cope*, 137 U. S. 682, 684, 34 L. Ed. 832; *United States v. Perkins*, 163 U. S. 625, 41 L. Ed. 287; *Magoun v. Illinois Trust, etc., Bank*, 170 U. S. 283, 289, 42 L. Ed. 1037; *Knowlton v. Moore*, 178 U. S. 41, 58, 44 L. Ed. 969; *Plummer v. Coler*, 178 U. S. 115, 44 L. Ed. 998; *Murdock v. Ward*, 178 U. S. 139, 44 L. Ed. 1009; *Snyder v. Bettman*, 190 U. S. 249, 47 L. Ed. 1035; *Farrell v. O'Brien*, 199 U. S. 89, 50 L. Ed. 101.

The power to regulate inheritances and the testamentary disposition of property is one belonging to the states and therefore subject to such conditions as the state may see fit to impose. *McCormick v. Sullivan*, 10 Wheat. 192, 202, 6 L. Ed. 300; *Mager v. Grima*, 8 How. 490, 493, 12 L. Ed. 1168; *United States v. Fox*, 94 U. S. 315, 320, 24 L. Ed. 192; *United States v. Perkins*, 163 U. S. 625, 41 L. Ed. 287; *Magoun v. Illinois Trust, etc., Bank*, 170 U. S. 283, 289, 42 L. Ed. 1037; *Snyder v. Bettman*, 190 U. S. 249, 47 L. Ed. 1035.

The authority to make wills is derived from the state and the requirement of probate is but a regulation to make a will effective and is also a matter within the control of the state. *Farrell v. O'Brien*, 199 U. S. 89, 50 L. Ed. 101; *Ellis v. Davis*, 109 U. S. 485, 497, 27 L. Ed. 1006.

The right to regulate successions is vested in the states and not in congress. *Knowlton v. Moore*, 178 U. S. 41, 58, 44 L. Ed. 969; *Plummer v. Coler*, 178 U. S. 115, 44 L. Ed. 998; *Murdock v. Ward*, 178 U. S. 139, 44 L. Ed. 1009.

**But congress may impose an inheritance tax.**—Congress may, however, impose an inheritance and legacy tax upon the succession of property. The doctrine that the national government cannot tax or otherwise impose burdens upon the exclusive powers of the states does not ap-

ply in such case, since the power of congress to tax extends to all property subject to taxation. *Knowlton v. Moore*, 178 U. S. 41, 58, 59, 44 L. Ed. 969; *Murdock v. Ward*, 178 U. S. 139, 44 L. Ed. 1009; *Sherman v. United States*, 178 U. S. 150, 44 L. Ed. 1014.

**Corporate ownership of lands.**—Without the consent of the state, no corporation created by another sovereignty can succeed to lands within its limits. *Greer County v. Texas*, 197 U. S. 235, 242, 49 L. Ed. 736.

By the decision in *United States v. Texas*, 162 U. S. 1, 40 L. Ed. 867, it was ascertained that Greer county was not within the boundaries of Texas, but within the limits of Oklahoma territory. That decision did not therefore operate as a transfer of territory from Texas to the United States, but merely ascertained that the territory included in Greer county always belonged to the United States. Such being the case, it was incompetent for congress to confer upon the county, after its reorganization as an Oklahoma county, the title to lands in Texas granted by the state to Greer county, Texas, for school purposes prior to the decision in *United States v. Texas*. In other words, there is no identity between Greer county, Oklahoma, and that which was the de facto county of Greer in the state of Texas; and it would be incompetent for congress to attempt to transfer to Greer county, Oklahoma, lands in the state of Texas which that state had purported to convey to the creation of its own known as Greer county, Texas. *Greer County v. Texas*, 197 U. S. 235, 242, 243, 49 L. Ed. 736.

**49. Property or business of nonresidents.**—*Cunnius v. Reading School District*, 198 U. S. 458, 469, 49 L. Ed. 1125.

**50. Same.**—*Denney v. Bennett*, 128 U. S. 489, 32 L. Ed. 491; *Brown v. Smart*, 145 U. S. 454, 457, 36 L. Ed. 773; *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 188, 46 L. Ed. 1113.

**51. As regards the power of taxation.**—*Coe v. Errol*, 116 U. S. 517, 524, 29 L. Ed. 715.



respect to every act and everything within the state which is the lawful subject of state government.<sup>52</sup>

(dd) *Civil Status and Capacity of Persons*.—Every state has the power to determine for itself the civil status and capacities of its inhabitants; to prescribe the subjects upon which they may contract, the forms and solemnities with which their contracts shall be executed, the rights and obligations arising from them, and the mode in which their validity shall be determined and their obligations enforced.<sup>53</sup>

(ee) *Marriage and Divorce*.—At the time of the adoption of the constitution, the states possessed full power over the subject of marriage and divorce.<sup>54</sup> "The constitution confers no power whatever upon the government of the United States to regulate marriage in the states or its dissolution."<sup>55</sup> It follows, therefore, that the states retain full control over the subject of marriage and divorce so far as concerns their own citizens and the enforcement of decrees of divorce within their own borders.<sup>56</sup>

**As Affected by Full Faith and Credit Clause.**—The destruction of this power cannot be brought about by the operation of the full faith and credit clause of the constitution.<sup>57</sup>

(d) *Qualification, Tenure and Removal of State Officers; Congress Not to Enforce State Laws nor Coerce State Officers*.—Each state has the power to prescribe the qualification of its officers and the manner in which they shall be

**52. Corporations.**—Railroad Commission Cases (*Stone v. Farmers' Loan & Trust Co.*), 116 U. S. 307, 334, 29 L. Ed. 636. See, generally, the titles CORPORATIONS; FOREIGN CORPORATIONS.

**53. Civil status and capacity of persons.**—*Pennoyer v. Neff*, 95 U. S. 714, 722, 24 L. Ed. 565.

The laws of Kentucky alone can decide upon the domestic and social conditions of the persons domiciled within its territory except so far as the powers of the state in this respect are restrained, or duties and obligations imposed upon them by the constitution of the United States. There is nothing in the constitution of the United States that can in any degree control the law of Kentucky upon this subject. *Strader v. Graham*, 10 How. 82, 13 L. Ed. 337.

Thus the question whether or not slaves, who had been permitted by their master to pass occasionally from Kentucky into Ohio, acquired thereby a right to freedom after their return to Kentucky, a question to be decided under the law of Kentucky, since their status as slave or free was controlled by the laws of that state. *Strader v. Graham*, 10 How. 82, 13 L. Ed. 337.

**Rights and privileges of Indians who have become citizens.**—"When the United States grants the privileges of citizenship to an Indian, gives to him the benefit of and requires him to be subject to the laws, both civil and criminal, of the state, it places him outside the reach of police regulations on the part of congress. The emancipation from federal control thus created cannot be set aside at the instance of the government without the consent of the individual Indian and the state; and this eman-

cipation from federal control is not affected by the fact that the lands it has granted to the Indian are granted subject to a condition against alienation and encumbrance, or the further fact that it guarantees to him an interest in tribal or other property." In *re Heff*, 197 U. S. 488, 509, 49 L. Ed. 848.

If it be true that there can be no divided authority between state and nation over the property of the Indian, who has once become a citizen of the state, a fortiori must it be true as to his political status and rights. Subjection to both state and national law in the same matter might often be impossible. The power to punish a sale to an Indian implies an equal power to punish a sale by an Indian. If by national law a sale to or by an Indian was punished solely by imprisonment and by state law solely by fine, how could both laws be enforced in respect to the same sale? The question is not whether a particular right may be enforced in either a court of the state or one of the nation, but whether two sovereignties can create independent duties and compel obedience. In *re Heff*, 197 U. S. 488, 506, 49 L. Ed. 848.

**54. Marriage and divorce.**—*Haddock v. Haddock*, 201 U. S. 562, 575, 50 L. Ed. 867.

**55. Same.**—*Andrews v. Andrews*, 188 U. S. 14, 32, 47 L. Ed. 366; *Haddock v. Haddock*, 201 U. S. 562, 575, 50 L. Ed. 867.

**56. Same.**—*Andrews v. Andrews*, 188 U. S. 14, 32, 47 L. Ed. 366; *Haddock v. Haddock*, 201 U. S. 562, 575, 50 L. Ed. 867; *Maynard v. Hill*, 125 U. S. 190, 31 L. Ed. 654.

**57. As affected by full faith and credit clause.**—*Haddock v. Haddock*, 201 U. S. 562, 575, 50 L. Ed. 867. See, also, the title DIVORCE.

chosen, the tenure of their office, and the manner in which the title of office shall be tried, whether in judicial courts or otherwise. Where controversies over the election of state officers have reached the state courts in the manner provided by, and been there determined in accordance with the state constitution and laws, the cases must necessarily be rare in which the interference of the federal supreme court can properly be invoked.<sup>58</sup> Where, however, the procedure for trying title provided by the state law involves a denial of a right or privilege under the constitution and laws of the United States, and the trial is in the courts, and a defense is interposed under the constitution and laws of the United States, and is overruled, then the federal supreme court has jurisdiction upon writ of error to the highest court of the state, as in other cases.<sup>59</sup>

**Congress Not to Enforce State Laws nor Coerce State Officers.**—As a general proposition, congress has no power to enforce state laws or to punish state officers, and it especially has no power to punish them for violating the laws of their own state.<sup>60</sup> Congress cannot coerce a state officer, as such, to perform any duty by act of congress. The state officer may perform it if he thinks proper, and it may be a moral duty to perform it. But if he refuses, no law of congress can compel him.<sup>61</sup>

**Where State Officers Also Owe Duty to Federal Government.**—But when in the performance of their functions state officers are called upon to fulfill duties which they owe to the United States as well as to the state, the former has the power to compel the fulfillment of such duties.<sup>62</sup>

(e) *State Courts; Their Constitution, Jurisdiction and Procedure.*—The establishment of courts of justice, the appointment of judges, and the making of regulations for the administration of justice within each state, according to its laws, on all subjects not intrusted to the federal government, are within the peculiar and exclusive province and duty of the state legislatures.<sup>63</sup> The right to establish and maintain a judicial department, and to prescribe the jurisdiction of its several courts, both territorially and as to subject matter, was one of the sovereign powers vested in the states at the time of the adoption of the constitution which remains unaltered and unimpaired by that instrument.<sup>64</sup>

**58. Qualifications and tenure of state officers.**—*Boyd v. Nebraska*, 143 U. S. 135, 36 L. Ed. 103; *Wilson v. North Carolina*, 169 U. S. 586, 42 L. Ed. 865; *Taylor v. Beckham* (No. 1), 178 U. S. 548, 571, 44 L. Ed. 1187.

**59. Same.**—*Kennard v. Louisiana*, 92 U. S. 480, 23 L. Ed. 478; *Foster v. Kansas*, 112 U. S. 201, 28 L. Ed. 629; *Missouri v. Andriano*, 138 U. S. 496, 34 L. Ed. 1012; *Boyd v. Nebraska*, 143 U. S. 135, 36 L. Ed. 103; *Taylor v. Beckham* (No. 1), 178 U. S. 548, 571, 44 L. Ed. 1187.

**60. Enforcement of state law; coercion of state officers.**—Ex parte Siebold, 100 U. S. 371, 387, 25 L. Ed. 717.

**61. Same.**—*Kentucky v. Dennison*, 24 How. 66, 16 L. Ed. 717.

Thus it is the duty of the governor of the state, upon demand made by the governor of another state for the arrest and return of a fugitive from justice from such other state, to cause such fugitive to be apprehended and delivered to the authorities of the state from which he fled. The performance of this duty, however, is left to depend on the fidelity of the state executive to the compact entered into with the other states when it adopted the constitution of the United States, and became a member of the Union. It was so

left by the constitution, and if he neglects or disregards the obligation so imposed, he cannot be coerced by the judiciary or any other department of the general government. *Kentucky v. Dennison*, 24 How. 66, 109, 16 L. Ed. 717.

**62. Where officer owes duty to federal government also.**—Ex parte Siebold, 100 U. S. 371, 387, 25 L. Ed. 717; Ex parte Clarke, 100 U. S. 399, 404, 25 L. Ed. 715.

Thus, under its power to regulate the election of members of congress, that body may be content to leave the state laws upon that subject just as they are and merely prescribe additional means for their enforcement in the form of additional penalties for their violation. This is simply an exercise of its powers to make additional regulations. Ex parte Seibold, 100 U. S. 371, 388, 25 L. Ed. 717; Ex parte Clarke, 100 U. S. 399, 404, 25 L. Ed. 715.

**63. Constitution, jurisdiction and procedure of state courts.**—*Calder v. Bull*, 3 Dall. 386, 387, 1 L. Ed. 648.

**64. Same.**—*Collector v. Day*, 11 Wall. 113, 126, 20 L. Ed. 122; *Missouri v. Lewis*, 101 U. S. 22, 30, 25 L. Ed. 989; *Hurtado v. California*, 110 U. S. 516, 530, 28 L. Ed. 232; *Hayes v. Missouri*, 120 U. S. 68, 30 L. Ed. 578; *Holden v. Hardy*, 169 U. S. 366, 387, 42 L. Ed. 780; *Maxwell v. Dow*, 176

**Remedies and Procedure.**—Each state has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the federal constitution. "The state is not tied down by any provision of the federal constitution to the practice and procedure which existed at the common law. Subject to the limitations heretofore named, it may avail itself of the wisdom gathered by the experience of the century to make such changes as may be necessary."<sup>65</sup>

U. S. 581, 599, 44 L. Ed. 597; *Freeport Water Co. v. Freeport City*, 180 U. S. 587, 601, 45 L. Ed. 679; *Anglo-American Prov. Co. v. Davis Prov. Co.* (No. 1), 191 U. S. 373, 48 L. Ed. 225. See, also, post, "Nor in All Portions of the Same State," VII, B, 2, h, (5); "As Requiring Equal and Impartial Justice," VII, B, 4, et seq.

With what functions the circuit courts of a state may be invested is not a matter of federal concern. Whether they shall be given power to exercise legislative functions in the establishment of rates is a matter to be decided by the state and not by the United States. *Freeport Water Co. v. Freeport City*, 180 U. S. 587, 601, 45 L. Ed. 679.

**65. Remedies and procedure in state courts.**—*Wilcox v. Jackson*, 13 Pet. 498, 10 L. Ed. 264; *Prigg v. Pennsylvania*, 16 Pet. 539, 614, 10 L. Ed. 1060; *Kentucky v. Dennison*, 24 How. 66, 107, 16 L. Ed. 717; *Missouri v. Lewis*, 101 U. S. 22, 25 L. Ed. 989; *Antoni v. Greenhow*, 107 U. S. 769, 27 L. Ed. 468; *Ex parte Reggel*, 114 U. S. 642, 651, 29 L. Ed. 250; *Hayes v. Missouri*, 120 U. S. 68, 30 L. Ed. 578; *York v. Texas*, 137 U. S. 15, 20, 34 L. Ed. 604; *Hallinger v. Davis*, 146 U. S. 314, 322, 36 L. Ed. 986; *Iowa Cent. R. Co. v. Iowa*, 160 U. S. 389, 40 L. Ed. 467; *Chicago, etc., R. Co. v. Chicago*, 166 U. S. 226, 41 L. Ed. 979; *Brown v. New Jersey*, 175 U. S. 172, 175, 44 L. Ed. 119; *Maxwell v. Dow*, 176 U. S. 581, 599, 44 L. Ed. 597; *Murphy v. Massachusetts*, 177 U. S. 155, 163, 44 L. Ed. 711, reaffirmed in *Watson v. Rhode Island*, 179 U. S. 679, 45 L. Ed. 383; *West v. Louisiana*, 194 U. S. 258, 263, 48 L. Ed. 965; *In the Matter of Strauss*, 197 U. S. 324, 331, 49 L. Ed. 774; *Coffey v. Harlan County*, 204 U. S. 659, 662, 51 L. Ed. 666.

Every state is perfectly competent, and has the exclusive right, to prescribe the remedies in its own judicial tribunal, to limit the time as well as the modes of redress, and to deny jurisdiction over cases, which its own policy and its own institutions either prohibit or discountenance. *Story, J.*, delivering the opinion of the court in *Prigg v. Pennsylvania*, 16 Pet. 539, 614, 10 L. Ed. 1060.

"The state has full power over remedies and procedure in its own courts, and can make any order it pleases in respect thereto, provided that substance of right is secured without unreasonable burden to parties and litigants. *Wilcox v. Jackson*,

13 Pet. 498, 10 L. Ed. 264; *Antoni v. Greenhow*, 107 U. S. 769, 27 L. Ed. 468; *York v. Texas*, 137 U. S. 15, 20, 34 L. Ed. 604.

For instance, while at the common law an indictment by the grand jury was an essential preliminary to trial for felony, it is within the power of a state to abolish the grand jury entirely and proceed by information. *West v. Louisiana*, 194 U. S. 258, 263, 48 L. Ed. 965.

In what courts crime shall be prosecuted and by what courts such prosecutions shall be reviewed is a question of state law and practice to be determined free of federal interference. *Rodgers v. Peck*, 199 U. S. 425, 50 L. Ed. 256.

It is a question to be determined by the state courts whether the state law allows the convicted party twelve months within which to file a motion for a new trial and prohibits the execution for sentence within that time. *Storti v. Massachusetts*, 183 U. S. 138, 46 L. Ed. 120.

Whether it is lawful for the governor of the state to grant a respite to a person condemned to death, and whether such a respite was lawfully granted, is purely a question of state law to be determined by the state courts. Neither the due process clause nor any other provision of the federal constitution grants or forbids to the governor of the state the right to stay the execution or sentence. *Storti v. Massachusetts*, 183 U. S. 138, 142, 46 L. Ed. 120; *Rogers v. Peck*, 199 U. S. 425, 436, 50 L. Ed. 256.

Where a person has been duly convicted and sentenced to death and then reprieved by the governor, the reprieve specifying a new date for the execution, it is a question of state law and practice, uncontrolled by the federal constitution and laws, whether it is necessary for the court to also name a new date for the execution. *Lambert v. Barrett*, 159 U. S. 660, 40 L. Ed. 296; *Rogers v. Peck*, 199 U. S. 425, 50 L. Ed. 256.

Whether an indictment sufficiently charged the crime of which the accused stands convicted in a state court is a question of state law. *Howard v. Fleming*, 191 U. S. 126, 136, 48 L. Ed. 121.

Whether an indictment sufficiently charged the crime of murder in the first degree is a question of state law and practice to be determined by the tribunals of the state. *Caldwell v. Texas*, 137 U. S. 692, 698, 34 L. Ed. 816; *Bergemann v. Backer*, 157 U. S. 655, 656, 39 L. Ed. 845;



**Restrictions Applicable to the States.**—As to what rights are fundamental and what provisions of the constitution applicable, it may be observed that the states cannot disregard those provisions designed to affect the security, of person or property, and operating upon the states, particularly the inhibitions of the fourteenth amendment against the denial of the equal protection of the laws and the deprivation of life, liberty or property without due process of law.<sup>66</sup> But even with respect to the fourteenth amendment, it is no longer open to doubt that neither the equal protection clause nor the due process clause operate to control mere forms of procedure in state courts nor to regulate the practice therein. All the requirements of the fourteenth amendment are satisfied if the condemned party has been accorded equal and impartial justice after reasonable and adequate notice and opportunity to defend.<sup>67</sup> The fourteenth amendment does not prohibit the states from prescribing the jurisdiction of the several courts within the states, either as to subject matter or territorially, or the amount and finality of their respective judgments or decrees, or the modes of procedure therein, or prevent the states prescribing a different

*Kohl v. Lehlback*, 160 U. S. 293, 296, 40 L. Ed. 432.

Accord, as to indictment under a state law which divides the crime of burglary into burglary of the first and second degrees. *Moore v. Missouri*, 159 U. S. 673, 679, 40 L. Ed. 301.

Whether an indictment charging the accused with a major offense is sufficient to sustain a conviction of a lower offense included within the major (as where an indictment charges a crime in the first degree and the accused is convicted of the crime only in the second degree), is a question to be determined by the state courts. *Caldwell v. Texas*, 137 U. S. 692, 34 L. Ed. 816; *Moore v. Missouri*, 159 U. S. 673, 40 L. Ed. 301.

So far as respects technical objections, the sufficiency of the indictment is to be determined by the court in which it was found, and is not a matter of inquiry in removal proceedings (*Greene v. Henkel*, 183 U. S. 249, 46 L. Ed. 177.) The defendant has there no right to an investigation of the proceedings before the grand jury, or an inquiry concerning what testimony was presented to or what witnesses were heard by that body. In other words, he may not impeach an indictment by evidence tending to show that the grand jury did not have testimony before it sufficient to justify its action. *Beavers v. Henkel*, 194 U. S. 73, 87, 48 L. Ed. 882.

The general rule, in extradition proceeding is that the legal sufficiency of the indictment is only to be determined by the court in which it was found. *Benson v. Henkel*, 198 U. S. 1, 10, 49 L. Ed. 919, citing *Ex parte Reggel*, 114 U. S. 642, 650, 29 L. Ed. 250; *Roberts v. Reilly*, 116 U. S. 80, 96, 29 L. Ed. 544; *Horne v. United States*, No. 2, 143 U. S. 570, 577, 36 L. Ed. 266; *Greene v. Henkel*, 183 U. S. 249, 260, 46 L. Ed. 177; *Beavers v. Henkel*, 194 U. S. 73, 87, 48 L. Ed. 882.

Hence, upon a requisition issued for the return of a fugitive from justice un-

der the constitutional provision, an objection that the indictment is not sufficient, as tested by the strict rules of criminal practice, is entitled to no consideration, where the indictment conforms to the requirements of law in the state where the crime was committed. *Kentucky v. Dennison*, 24 How. 66, 107, 16 L. Ed. 717; *Ex parte Reggel*, 114 U. S. 642, 651, 29 L. Ed. 250.

Kentucky has an undoubted right to regulate the forms of pleading and process in her own courts, in criminal as well as civil cases, and is not bound to conform to those of any other state. *Kentucky v. Dennison*, 24 How. 66, 107, 16 L. Ed. 717.

Thus, where the executive of Kentucky demanded of the executive of Ohio the return of a fugitive from justice from the former state, and accompanied such demand with a duly certified copy of the indictment against such fugitive, which indictment was in conformity with the laws of Kentucky regulating criminal procedure in that state, the executive of Ohio had no authority to refuse to honor such demand upon the ground that the indictment was insufficient under the common law or the laws of Ohio. *Kentucky v. Dennison*, 24 How. 66, 107, 16 L. Ed. 717.

**66. Restrictions applicable to the states.**—*Ex parte Reggel*, 114 U. S. 642, 651, 29 L. Ed. 250; *Maxwell v. Dow*, 176 U. S. 581, 603, 44 L. Ed. 597; *Coffey v. Harlan County*, 204 U. S. 659, 663, 51 L. Ed. 666. See, ante, "Applicability of Constitutional Limitations to the Powers of the States," VI, D, 3, b, (3), et seq; post, "Equal Protection of the Laws, Class Legislation," VII, et seq. And see, generally, the titles CIVIL RIGHTS, vol. 3, p. 814; DUE PROCESS OF LAW.

**67. Fourteenth amendment not controlling as to forms and remedies.**—*Iowa Cent. R. Co. v. Iowa*, 160 U. S. 389, 40 L. Ed. 467; *Wilson v. North Carolina*, 169 U. S. 586, 42 L. Ed. 865; *Louisville, etc., R. Co. v. Schmidt*, 177 U. S. 230, 236, 44 L. Ed. 747.

jurisdiction and procedure for courts in one part of the state from that which obtains in like courts in other parts of the state.<sup>68</sup>

**Rules of Evidence.**—It is within the acknowledged power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence, in the courts of its own government.<sup>69</sup>

(f) *To Define and Punish Crime.*—"It is within the power of the state to enact laws creating and defining crimes against its sovereignty, regulating the procedure in the trial of those who are charged with committing them, and prescribing the character of the sentence which shall be awarded against those who have been found guilty. In these respects the state is supreme and its power absolute, and without any limits other than those prescribed by the constitution of the United States. The exercise of the power of the state in this field cannot be drawn in question in the federal supreme court or elsewhere than in its own courts, except for the purpose of restraining it within the limits thus established.<sup>70</sup>

**68. Same; jurisdiction of courts.**—*Missouri v. Lewis*, 101 U. S. 22, 25 L. Ed. 989; *Hayes v. Missouri*, 120 U. S. 68, 30 L. Ed. 578; *Hallinger v. Davis*, 146 U. S. 314, 322, 36 L. Ed. 986; *Hodgson v. Vermont*, 168 U. S. 262, 42 L. Ed. 461; *Holden v. Hardy*, 169 U. S. 366, 42 L. Ed. 780; *Brown v. New Jersey*, 175 U. S. 172, 44 L. Ed. 119; *Mallett v. North Carolina*, 181 U. S. 589, 598, 45 L. Ed. 1015. See, also, the title COURTS; DUE PROCESS OF LAW.

**69. Rules of evidence.**—*Ogden v. Saunders*, 12 Wheat. 213, 262, 349, 6 L. Ed. 606; *Pillow v. Roberts*, 13 How. 472, 476, 14 L. Ed. 228; *Cliquot's Champagne*, 3 Wall. 114, 143, 18 L. Ed. 116; *Ex parte Fisk*, 113 U. S. 713, 721, 28 L. Ed. 1117; *Fong Yue Ting v. United States*, 149 U. S. 698, 729, 37 L. Ed. 905; *Tregea v. Modesto Irrigation District*, 164 U. S. 179, 189, 41 L. Ed. 395; *Adams v. New York*, 192 U. S. 585, 48 L. Ed. 575.

The state may determine for itself in what way it will secure evidence of the regularity of the proceedings of any of its municipal corporations, and unless in the course of such proceeding some constitutional right is denied to the individual, this court cannot interfere on the ground that the evidence may thereafter be used in some further action in which there are adversary claims. *Tregea v. Modesto Irrigation District*, 164 U. S. 179, 189, 41 L. Ed. 395.

Thus there can be no constitutional objection to a provision which permits the board of directors of an irrigation district to file a petition in the courts of the state for the purpose of obtaining in advance a judicial opinion as to whether or not its proceedings looking to a proposed bond issue were valid and regular; the method of obtaining evidence to establish their regularity being a matter within the discretion of the legislature of the state. *Tregea v. Modesto Irrigation District*, 164 U. S. 179, 189, 41 L. Ed. 395.

**70. To define and punish crime.**—*Easton v. Iowa*, 188 U. S. 220, 238, 47 L. Ed. 452; *New York v. Miln*, 11 Pet. 102, 139, 9

L. Ed. 648; *Moore v. Illinois*, 14 How. 13, 18, 14 L. Ed. 306; *Kentucky v. Dennison*, 24 How. 66, 16 L. Ed. 717; *Ex parte Reggle*, 114 U. S. 642, 650, 29 L. Ed. 250 (reaffirmed in *Dodge v. Ellis*, 195 U. S. 626), 49 L. Ed. 350; *Pettibone v. Nichols*, 203 U. S. 192, 51 L. Ed. 148; *Moyer v. Nichols*, 203 U. S. 221, 51 L. Ed. 160; *Appleyard v. Massachusetts*, 203 U. S. 222, 227, 51 L. Ed. 161; *Coffey v. Harlan County*, 204 U. S. 659, 662, 51 L. Ed. 666.

"At present, the uncontrollable exercise of criminal jurisdiction is most securely confided to the state tribunals. The courts of the United States are vested with no power to scrutinize into the proceedings of the state courts in criminal cases; on the contrary, the general government has, in more than one instance, exhibited their confidence, by a wish to vest them with the execution of their own penal law. And extreme, indeed, I flatter myself, must be the case, in which the general government could ever be induced to assert this right. If ever such a case should occur, it will be time enough to decide upon their constitutional power to do so." (Opinion of Johnson, J.) *Martin v. Hunter*, 1 Wheat. 304, 377, 4 L. Ed. 97.

"Neither the constitution nor the congress ever contemplated that any court under the United States should take cognizance of anything savoring of criminality against a state." *Republica v. Cobbett*, 3 Dall. 467, 476, 1 L. Ed. 683.

"Certain implied powers must necessarily result to our courts of justice, from the nature of their institution. But jurisdiction of crimes against the state is not among those powers." *United States v. Hudson*, 7 Cranch 32, 34, 3 L. Ed. 259.

"By the constitution, the judicial power of the United States is vested in the courts of the United States. Art. 3, § 1. By the statutes of the United States, those courts have jurisdiction, exclusive of the courts of the several states, of 'all crimes and offenses cognizable under the authority of the United States,' Rev. Stat., § 711, cl. 1; and the circuit courts of the United States have exclusive cognizance of all

**Nonresidents are subject to the criminal laws of the state** while within its jurisdiction.<sup>71</sup>

**Federal Interference with Penal Laws of State.**—The courts of the United States have no power to execute the penal laws of the individual states.<sup>72</sup> Offenses exclusively against the states are exclusively cognizable in the state courts, and offenses exclusively against the United States are exclusively cognizable in the federal courts.<sup>73</sup> “The prosecution and punishment of crimes and offenses committed against one of the states of the Union appropriately belong to the courts and authorities of the state, and can be interfered with by the circuit court of the United States so far only as congress, in order to maintain the supremacy of the constitution and laws of the United States, has expressly authorized either a removal of the prosecution into the circuit court

such crimes and offenses, except where otherwise provided by law, the principal exception being where concurrent jurisdiction is given to the district courts of the United States; Rev. Stat., § 629, cl. 20; Act of August 13, 1888, c. 866, § 1, 25 Stat. 434; and it is declared by way of greater caution, that nothing contained in the Crimes Act of the United States ‘shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof.’ Rev. Stat., § 5328.” In re Loney, 134 U. S. 372, 373, 33 L. Ed. 949.

It is within the power of each state, except as her authority may be limited by the constitution of the United States, to declare what shall be offenses against her laws. *Ex parte Reggel*, 114 U. S. 642, 650, 29 L. Ed. 250.

It is the province of the court of each state to declare what its laws are, and to determine whether particular acts on the part of an alleged offender constitutes a crime under such laws. *Kentucky v. Denison*, 24 How. 66, 16 L. Ed. 717; *Ex parte Reggel*, 114 U. S. 642, 650, 29 L. Ed. 250; *Appleyard v. Massachusetts*, 203 U. S. 222, 227, 51 L. Ed. 161.

“The punishment of a cheat or a misdemeanor practiced within the state, and against those whom she is bound to protect, is peculiarly and appropriately within her functions and duties, and it is difficult to imagine an interference with those duties and functions which would be regular or justifiable.” *Fox v. Ohio*, 5 How. 410, 434, 12 L. Ed. 213.

Upon a requisition for the return of a person charged with a crime in another state the question of his guilt or innocence of the crime charged is one to be determined in the courts of the state from whence he has fled. It rests with that state to define and punish the crime and determine his guilt or innocence. *Pettibone v. Nichols*, 203 U. S. 192, 51 L. Ed. 148, followed in *Moyer v. Nichols*, 203 U. S. 221, 51 L. Ed. 160.

“Undoubtedly a state has the legitimate power to define and punish crimes by general laws applicable to all persons within its jurisdiction. So, likewise, it may de-

clare, by special laws, certain acts to be criminal offenses when committed by officers or agents of its own banks and institutions. But it is without lawful power to make such special laws applicable to banks organized and operating under the laws of the United States.” *Easton v. Iowa*, 188 U. S. 220, 239, 47 L. Ed. 452.

**71. Nonresidents subject to criminal laws while within the jurisdiction of the state.**—*Ex parte Reggel*, 114 U. S. 642, 650, 29 L. Ed. 250, reaffirmed *Dodge v. Ellis*, 195 U. S. 626, 49 L. Ed. 350.

**72. Federal interference with penal laws of states.**—*Gwin v. Breedlove*, 2 How. 29, 36, 37, 11 L. Ed. 167; *Gwin v. Barton*, 6 How. 7, 12 L. Ed. 321; *Huntington v. Attrill*, 146 U. S. 657, 673, 36 L. Ed. 1123.

**73. Same.**—*Pettibone v. United States*, 148 U. S. 197, 209, 37 L. Ed. 419; *Grafton v. United States*, 206 U. S. 333, 354, 51 L. Ed. 1084.

It (the Constitution) declares, among other things, that the judicial power shall extend to cases in law and equity arising under the constitution, laws, and treaties of the United States, and to various controversies to which a state is a party; but it does not include in its enumeration controversies between a state and its own citizens. There can be no ground, therefore, for the assumption by a federal court of jurisdiction of offenses against the laws of a state. The judicial power granted by the constitution does not cover any such case or controversy. And whilst it is well settled that the exercise of the power granted may be extended to new cases as they arise under the Constitution and laws, the power itself cannot be enlarged by congress. The constitution creating a government of limited powers puts a bound upon those which are judicial as well as those which are legislative, which cannot be lawfully passed. *Virginia v. Rives*, 100 U. S. 313, 336, 337, 25 L. Ed. 667. (Opinion of Clifford, J.)

“Embezzlement by an officer of a bank organized under a state statute is not an offense which can be inquired into or punished by a federal court. Such an offense is against the authority and laws of the state.” *Harkrader v. Wadley*, 172 U. S. 148, 168, 43 L. Ed. 399.



of the United States for trial, or a discharge of the prisoner by writ of habeas corpus issued by that court or by a judge thereof.<sup>74</sup>

**Intention to Interfere Must Clearly Appear.**—To interfere with the penal laws of a state, where they are not levelled against the legitimate powers of the Union, but have for their sole object the internal government of the country, is a very serious measure, which congress cannot be supposed to adopt lightly or inconsiderately. The motives for it must be serious and weighty. It would be taken deliberately, and the intention would be clearly and unequivocally expressed. An act ought not to be so construed as to imply this intention, unless its provisions are such as to render the construction inevitable.<sup>75</sup>

**Power of Congress to Suppress Crime and Immorality by Denying the Use of the Mails, etc.**—But while the power to suppress crime and immorality within the states rests with the states, congress has the power to forbid the use of the mails in aid of the perpetration of crime or immorality.<sup>76</sup> And there is no distinction in this respect between that which is mala in se and that which is mala prohibita; and even if there were, it would rest with congress to determine what was mala in se and what was mala prohibita.<sup>77</sup>

(g) *Actions for Injuries to Person or Property.*—The power to protect its people in the enjoyment of their rights of property, and to provide for the redress of wrongs within their limits, is a power with which the states did not part upon entering into the Union. It is not to be understood, however, that this power may be so exerted as to defeat or burden the exercise of any power granted to congress.<sup>78</sup> Thus congress having the power to restrain illegal combinations in the restraint of trade, has the incidental power to authorize a recovery of damages by persons injured by the operation of the persons or corporations engaged in such illegal combinations, and may prescribe the measure of damages recoverable. And it is immaterial that the damage was suffered wholly within the boundaries of a state.<sup>79</sup>

**74. Same.**—United States *v.* McBratney, 104 U. S. 621, 26 L. Ed. 869; Tennessee *v.* Davis, 100 U. S. 257, 25 L. Ed. 648; Virginia *v.* Rives, 100 U. S. 313, 25 L. Ed. 667; Davis *v.* South Carolina, 107 U. S. 597, 27 L. Ed. 574; In re Neagle, 135 U. S. 1, 34 L. Ed. 55; Huntington *v.* Attrill, 146 U. S. 657, 672, 36 L. Ed. 1123; Virginia *v.* Paul, 148 U. S. 107, 114, 37 L. Ed. 386.

The division and apportionment of judicial power made by the constitution of the United States, left to the states the right to make and enforce their own criminal laws. Harkrader *v.* Wadley, 172 U. S. 148, 162, 43 L. Ed. 399.

**75. Intention to interfere must clearly appear.**—Cohens *v.* Virginia, 6 Wheat. 264, 443, 5 L. Ed. 257.

**Sale of lottery tickets in state under federal authority.**—The act of congress of the 4th of May, 1812, entitled, "an act further to amend the charter of the city of Washington," which provides (§ 6), that the corporation of the city shall be empowered, for certain purposes, and under certain restrictions, to authorize the drawing of lotteries, does not extend to authorize the corporation to force the sale of the tickets in such lottery in a state where such sale may be prohibited by the state laws. Cohens *v.* Virginia, 6 Wheat. 264, 5 L. Ed. 257. See, also, Horner *v.* United States, 147 U. S. 449, 462, 37 L. Ed. 237.

**76. Power of congress to suppress**

**crime and immorality within the states by denying the use of the mails.**—In re Rapier, 143 U. S. 110, 134, 36 L. Ed. 93.

**77. Same; no distinction as to mala in se and mala prohibita.**—In re Rapier, 143 U. S. 110, 134, 36 L. Ed. 93.

Thus congress has the power to exclude letters, postals, newspapers, circulars and advertisements concerning or advertising lotteries and gift enterprises from the mails notwithstanding the regulation or suppression of lotteries is a subject falling under the reserved police power of the state. In re Rapier, 143 U. S. 110, 134, 36 L. Ed. 93.

**78. Actions for injuries to person and property.**—Missouri, etc., R. Co. *v.* Haber, 169 U. S. 613, 626, 42 L. Ed. 878; Martin *v.* Pittsburg, etc., R. Co., 203 U. S. 284, 295, 51 L. Ed. 184.

The power to legislate upon the subject of the right to recover damages for persons injured and to prescribe in what cases they may be recovered is within the power of the states. Martin *v.* Pittsburg, etc., R. Co., 203 U. S. 284, 295, 51 L. Ed. 184.

"A state has an unquestionable right by its constitution and laws to regulate actions for negligence." Cincinnati, etc., R. Co. *v.* Bohon, 200 U. S. 221, 226, 50 L. Ed. 448.

**79. Congress may prescribe measure of damages, when.**—Chattanooga Foundry & Pipe Works *v.* Atlanta, 203 U. S. 390, 397,

(h) *The Taxing Power*.—See post, “The Taxing Power,” VI, D, 3, c, (5), (b), (bb), (bbb).

(i) *Internal Commerce of the States*.—There is an internal commerce subject only to the control of the state within which it is carried on. The power delegated to congress is limited to commerce “among the several states,” with foreign nations, and with the Indian tribes. This limitation necessarily excludes from federal control all commerce not thus designated, and of course that commerce which is carried on entirely within the limits of a state. Every state, therefore, may regulate its own internal traffic according to its own judgment and upon its own views as to the interest and well being of its citizens.<sup>80</sup> Under this power the states may prescribe the form of all commercial contracts, as well as the terms and conditions upon which internal trade may be carried on.<sup>81</sup>

**Power of Congress to Authorize Business within State; So-Called Federal Licenses.**—No interference by congress with the business of citizens transacted within a state is warranted by the constitution, except such as is strictly incidental to the exercise of powers clearly granted to the national legislature. The power to authorize a business within a state is plainly repugnant to the exclusive power of the state over the same subject.<sup>82</sup> So far as these so-called licenses relate to trade within state limits, they give no authority to carry on the business upon which the license tax is imposed, and can give none. They simply express the purpose of the government not to interfere by penal proceedings with the trade nominally licensed if the required taxes are paid.<sup>83</sup>

<sup>80</sup> 51 L. Ed. 241; Accord: *Montague v. Lowry*, 193 U. S. 38, 48 L. Ed. 608.

<sup>81</sup> **80. Internal commerce of the states.**—License Cases, 5 How. 504, 574, 12 L. Ed. 256; *Nathan v. Louisiana*, 8 How. 73, 82, 12 L. Ed. 992; *Woodruff v. Parham*, 8 Wall. 123, 125, 19 L. Ed. 382; *Hinson v. Lott*, 8 Wall. 148, 19 L. Ed. 389; *The Daniel Ball*, 10 Wall. 557, 564, 19 L. Ed. 999; *State Tonnage Tax Cases*, 12 Wall. 204, 215, 20 L. Ed. 370; *Webber v. Virginia*, 103 U. S. 344, 26 L. Ed. 565; *Wallington v. Michigan*, 116 U. S. 446, 29 L. Ed. 691; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 38 L. Ed. 1047; *Emert v. Missouri*, 156 U. S. 296, 39 L. Ed. 430; *Geer v. Connecticut*, 161 U. S. 519, 531, 40 L. Ed. 793; *Osborne v. Florida*, 164 U. S. 650, 41 L. Ed. 586; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. Ed. 136; *Illinois Cent. R. Co. v. McKendree*, 203 U. S. 514, 51 L. Ed. 298 (reaffirmed in *Illinois Cent. R. Co. v. Edwards*, 203 U. S. 531, 51 L. Ed. 305).

The federal government can no more regulate the commerce of a state than a state can regulate the commerce of the federal government. *Nathan v. Louisiana*, 8 How. 73, 82, 12 L. Ed. 992.

Thus, congress has no power to authorize the secretary of agriculture to establish a quarantine line and forbid intrastate shipments of cattle from one side of said line to the other; and an order made by the secretary, establishing such line and attempting to forbid such shipments, is invalid whether made under a purported authority of congress or not. *Illinois Cent. R. Co. v. McKendree*, 203 U. S. 514, 51 L. Ed. 298, reaffirmed in *Illinois Cent. R. Co. v. Edwards*, 203 U. S. 531, 51 L. Ed. 305.

**81. Same; commercial contracts.**—*United States v. Dewitt*, 9 Wall. 41, 19 L. Ed. 593; *Patterson v. Kentucky*, 97 U. S. 501, 24 L. Ed. 1115; *Trade-Mark Cases*, 100 U. S. 82, 25 L. Ed. 550; *Covington, etc., Bridge Co. v. Kentucky*, 154 U. S. 204, 211, 38 L. Ed. 962.

**82. Power of congress to authorize business within the states.**—*License Tax Cases*, 5 Wall. 462, 461, 18 L. Ed. 497; *Pervear v. Commonwealth*, 5 Wall. 475, 18 L. Ed. 608; *Covington, etc., Bridge Co. v. Kentucky*, 154 U. S. 204, 210, 38 L. Ed. 962.

**83. Same; so-called federal licenses.**—*License Cases*, 5 How. 504, 12 L. Ed. 256; *McGuire v. Commonwealth*, 3 Wall. 387, 18 L. Ed. 226; *License Tax Cases*, 5 Wall. 462, 18 L. Ed. 497; *Pervear v. Commonwealth*, 5 Wall. 475, 18 L. Ed. 608; *In re Heff*, 197 U. S. 488, 505, 49 L. Ed. 848; *Hammond v. Massachusetts*, 154 U. S. 550, 18 L. Ed. 229.

“It is true the national government exacts licenses as a condition of the sale of intoxicating liquors, but that is solely for the purposes of revenue and is no attempted exercise of the police power. A license from the United States does not give the licensee authority to sell liquor in a state whose laws forbid its sale, and neither does a license from a state to sell liquor enable the licensee to sell without paying the tax and obtaining the license required by the federal statute. *License Cases*, 5 How. 504, 12 L. Ed. 256; *McGuire v. Commonwealth*, 3 Wall. 387, 18 L. Ed. 226; *License Tax Cases*, 5 Wall. 462, 18 L. Ed. 497.” *In re Heff*, 197 U. S. 488, 505, 49 L. Ed. 848.

Thus licenses under the act of June 30, 1864, “to provide internal revenue to support the government,” etc. (13 Stat. at Large 223), and the amendatory acts, con-



(j) *Construction, Regulation and Control of Highways, Tollroads, Railroads, etc.*—The establishment, maintenance and care of its highways is a public right of great extent reserved to the states.<sup>84</sup>

(5) *Concurrent Powers of State and Federal Governments*—(a) *As to Persons and Places.*—The people of the United States resident within any state, are subject to two sovereignties, the one state, the other national, which governments exercise concurrent jurisdiction as to persons and places within the states. The power of the federal government to enforce its laws and to execute its functions in all places does not derogate from the power of the state to execute its laws at the same time and in the same places. The one does not exclude the other, except where both cannot be executed at the same time, in which case, the language of the constitution, "that this constitution and the laws made in pursuance thereof shall be the supreme law of the land," shows that the state authority must give way to the federal.<sup>85</sup>

**Distinction between Concurrent and Exclusive Jurisdiction.**—This concurrent jurisdiction of the national government with that of the states, which it has in the exercise of its powers of sovereignty in every part of the United States, is distinct from that exclusive jurisdiction which it has by the constitution in the District of Columbia, and in those places acquired for the erection of forts, magazines, arsenals, etc.<sup>86</sup>

(b) *As to Subject Matter*—(aa) *General Principles.*—Under our system of government there are very few subjects which are made subject to the joint action of the state and national governments. Generally the powers given by the constitution to the federal government are given over distinct branches of sovereignty from which the state governments, either expressly or by necessary implication, are excluded. In some cases, however, as in the case of pilotage, and the conduct of elections of members of congress, a concurrent jurisdiction is contemplated, that of the state, however, being subordinate to that of the United States, whereby all question of precedence is eliminated.<sup>87</sup> The mere

veyed to the licensee no authority to carry on the licensed business within a state. The requirement of payment for such licenses in only a mode of imposing taxes on the licensed business, and the prohibition, under penalties, against carrying on the business without license is only a mode of enforcing the payment of such taxes. *McGuire v. Commonwealth*, 3 Wall. 387, 18 L. Ed. 226; *License Tax Cases*, 5 Wall. 462, 18 L. Ed. 497; *Pervear v. Commonwealth*, 5 Wall. 475, 18 L. Ed. 608; *Hammond v. Massachusetts*, 154 U. S. 550, 18 L. Ed. 229.

**84. Construction, maintenance and control of highways, toll roads, railroads, etc.**—*West Chicago, St. R. Co. v. Illinois*, 201 U. S. 506, 50 L. Ed. 845; *Fair Haven, etc., R. Co. v. New Haven*, 203 U. S. 379, 390, 51 L. Ed. 237. See, generally, the titles **BRIDGES**, vol. 3, p. 516; **INTERSTATE AND FOREIGN COMMERCE**; **FERRIES**; **RAILROADS**; **STREETS AND HIGHWAYS**; **TURNPIKES AND TOLLROADS**. (See *Railroad Co. v. Maryland*, 21 Wall. 456, 22 L. Ed. 678.)

**85. Generally as to the concurrent powers of state and nation.**—*United States v. Worrall*, 2 Dall. 384, 393, 1 L. Ed. 429; *Ableman v. Booth*, 21 How. 506, 516, 16 L. Ed. 169; *Collector v. Day*, 11 Wall. 113, 124, 20 L. Ed. 122; *Tarble's Case*, 13 Wall. 397, 20 L. Ed. 597; *United States v. Cruikshank*, 92 U. S. 542, 549, 23 L. Ed.

588; *Claffin v. Houseman*, 93 U. S. 130, 136, 23 L. Ed. 833; *Ex parte Siebold*, 100 U. S. 371, 25 L. Ed. 717; *Robb v. Connolly*, 111 U. S. 624, 28 L. Ed. 542; *Transportation Co. v. Parkersburg*, 107 U. S. 691, 700, 27 L. Ed. 584; *In re Neagle*, 135 U. S. 1, 60, 34 L. Ed. 55. See, also, ante, "Dual Nature of Government," VI, D, 1; "To Execute Its Own Laws and Exercise Jurisdiction over All Persons and Places," VI, D, 2, c, (4).

**86. Concurrent and exclusive jurisdiction distinct.**—*Ex parte Siebold*, 100 U. S. 371, 25 L. Ed. 717. See, also, ante, "Jurisdiction in the District of Columbia and Places under Exclusive Federal Control," VI, D, 3, c, (3), (b).

**87. Concurrent jurisdiction as to subject matter.**—*Ex parte Siebold*, 100 U. S. 371, 392, 25 L. Ed. 717; *Ex parte Clarke*, 100 U. S. 399, 404, 25 L. Ed. 715.

"It is no objection to the existence of distinct, substantive powers, that, in their application, they bear upon the same subject. The same bale of goods, the same cask of provisions, or the same ship, that may be the subject of commercial regulation, may also be the vehicle of disease. And the health laws that require them to be stopped and ventilated, are no more intended as regulations of commerce, than the laws which permit their importation, are intended to inoculate the community with disease. Their different purposes



grant of a power to congress does not imply a prohibition on the states to exercise the same power. But it has never been supposed that this concurrent power of legislation extends to every possible case in which its exercise by the states has not been expressly prohibited. The correct principle is that the powers granted to the federal government are never exclusive of similar and concurrent powers existing in the state, except where the constitution has expressly, in terms, given an exclusive power to congress, or the exercise of a like power is prohibited to the states, or there is a direct repugnancy or incompatibility in the exercise of it by the states, in which last case the subject is as completely taken from the state legislatures as if they had been expressly forbidden to act on it.<sup>88</sup> In keeping with this principle, it is held that the states may exercise concurrent or independent power in all cases but three: 1. Where the power is lodged exclusively in the federal constitution. 2. Where it is given to the United States and prohibited to the states. 3. Where from the nature and subjects of the power, it must necessarily be exercised by the national government exclusively.<sup>89</sup>

**Where Congress Has Not Acted.**—As to those powers of the federal government which are not exclusive of similar powers in the states, the federal congress may, in its discretion, decline to legislate at all, leaving the field open to state legislation until it shall see fit to occupy it. As has been said, it is not the mere existence of federal power to legislate concerning a particular subject matter, but its exercise, that is exclusive of the power of the states to legislate concerning the same.<sup>90</sup> “Whenever the will of the nation intervenes ex-

mark the distinction between the powers brought into action; and while frankly exercised, they can produce no serious collision.” (Opinion of Johnson, J.) *Gibbons v. Ogden*, 9 Wheat. 1, 235, 239, 6 L. Ed. 23.

**88. Grant to congress not necessarily exclusive of the states.**—*Sturges v. Crowninshield*, 4 Wheat. 122, 193, 4 L. Ed. 529; *Houston v. Moore*, 5 Wheat. 1, 49, 5 L. Ed. 19; *Cohens v. Virginia*, 6 Wheat. 264, 382, 5 L. Ed. 257; *Worcester v. Georgia*, 6 Pet. 515, 8 L. Ed. 483; *Prigg v. Pennsylvania*, 16 Pet. 539, 622, 10 L. Ed. 1060; *Licenses Cases*, 5 How. 504, 588, 12 L. Ed. 256; *Passenger Cases*, 7 How. 283, 393, 12 L. Ed. 702; *Gilman v. Philadelphia*, 3 Wall. 713, 727, 18 L. Ed. 96; *Ex parte McNeil*, 13 Wall. 236, 240, 20 L. Ed. 624; *Railroad Co. v. Fuller*, 17 Wall. 560, 21 L. Ed. 710; *Munn v. Illinois*, 94 U. S. 113, 124, 24 L. Ed. 77; *Inman Steamship Co. v. Tinker*, 94 U. S. 238, 242, 24 L. Ed. 118.

“The principle is stated in a nutshell by Chief Justice Marshall in *Sturges v. Crowninshield*, 4 Wheat. 122, 193, 4 L. Ed. 529: ‘But it has never been supposed that this concurrent power of legislation extended to every possible case in which its exercise by the states has not been expressly prohibited. The confusion resulting from such a practice would be endless. \* \* \* Whenever the terms in which a power is granted to congress, or the nature of the power, require that it should be exercised exclusively by congress, the subject is as completely taken from the state legislatures as if they had been expressly forbidden to act on it.’” *The Roanoke*, 189 U. S. 185, 197, 47 L. Ed. 770.

**89. States have concurrent power in all but three cases.**—*Gilman v. Philadelphia*, 3 Wall. 713, 730, 18 L. Ed. 96; *Inman*

*Steamship Co. v. Tinker*, 94 U. S. 238, 242, 24 L. Ed. 118.

**90. Where congress has not acted.**—*Sturges v. Crowninshield*, 4 Wheat. 122, 196, 4 L. Ed. 529; *Ogden v. Saunders*, 12 Wheat. 213, 6 L. Ed. 606; *Wilson v. Blackbird Creek Marsh Co.*, 2 Pet. 245, 7 L. Ed. 412; *Holmes v. Jennison*, 14 Pet. 540, 10 L. Ed. 579; *Cooley v. Board of Wardens*, 12 How. 229, 13 L. Ed. 996; *Bank v. Horn*, 17 How. 157, 161, 15 L. Ed. 70; *The Brig James Gray v. The Ship John Fraser*, 21 How. 184, 16 L. Ed. 106; *Baldwin v. Hale*, 1 Wall. 223, 228, 17 L. Ed. 531; *Steamship Co. v. Joliffe*, 2 Wall. 450, 17 L. Ed. 805; *Van Allen v. The Assessors*, 3 Wall. 573, 585, 18 L. Ed. 229; *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. Ed. 96; *Lane County v. Oregon*, 7 Wall. 71, 19 L. Ed. 101; *Ex parte McNeil*, 13 Wall. 236, 240, 20 L. Ed. 624; *Farmers’, etc., Nat. Bank v. Dearing*, 91 U. S. 29, 34, 23 L. Ed. 196; *Tua v. Carriere*, 117 U. S. 201, 29 L. Ed. 855; *Sprague v. Thompson*, 118 U. S. 90, 30 L. Ed. 115; *Denny v. Bennett*, 128 U. S. 489, 498, 32 L. Ed. 491; *Brown v. Smart*, 145 U. S. 454, 36 L. Ed. 773; *Butler v. Goreley*, 146 U. S. 303, 36 L. Ed. 981; *Pollock v. Farmers’ Loan & Trust Co. (rehearing)*, 158 U. S. 601, 620, 39 L. Ed. 1108; *Lake Shore, etc., R. Co. v. Ohio*, 165 U. S. 365, 366, 368, 41 L. Ed. 747; *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113; *Reid v. Colorado*, 187 U. S. 137, 151, 47 L. Ed. 108; *Easton v. Iowa*, 188 U. S. 220, 236, 47 L. Ed. 452; *Cummings v. Chicago*, 188 U. S. 410, 428, 47 L. Ed. 525; *The Roanoke*, 189 U. S. 185, 47 L. Ed. 770; *Halter v. Nebraska*, 205 U. S. 34, 42, 51 L. Ed. 699.

As respects the subject matter over which congress and the state may exercise

clusively in this class of cases, the authority of the state retires and lies in abeyance until a proper occasion for its exercise shall recur.<sup>91</sup>

**Where Congress Has Not Occupied the Full Sphere of Its Power.**—And in some instances, even the exercise of its powers by the federal government is not to be deemed exclusive of the exercise of a similar power by the states, since congress, in its discretion, may legislate without occupying the full sphere of federal authority, leaving its enactments to be supplemented by state legislation operating within the same sphere and upon the same subject matter.<sup>92</sup>

**When Legislation or Even the Nonaction of Congress Deemed Exclusive.**—Then again, even as to those matters over which the jurisdiction of the state and federal governments is in some instances conceded to be concurrent, other instances may arise in which the particular feature or branch of the subject is of a purely national character or of such a nature that any legislation by congress, whether covering the entire ground or not, or as to which even the nonaction of congress, must be deemed exclusive of the right of the states to enact any legislation touching the matter, auxiliary or otherwise. In this class of cases, the inaction of congress is deemed equivalent to a declaration that the subject shall remain free and untrammelled by regulation either state or federal.<sup>93</sup>

a concurrent power, but from the exercise of which congress, by reason of its paramount authority, may exclude the states, there is no doubt congress may withhold the exercise of that authority and leave the states free to act. *Van Allen v. The Assessors*, 3 Wall. 573, 585, 18 L. Ed. 229.

"There are matters which, by legislation, may be brought within the exclusive control of the general government, but over which, in the absence of national legislation, the state may exert some control in the interest of its own people. For instance, it is well established that in the absence of legislation by congress a state may, by different methods, improve and protect the navigation of a waterway of the United States wholly within the boundary of such state. So, a state may exert its power to strengthen the bonds of the Union, and, therefore, to that end, may encourage patriotism and love of country among its people." *Halter v. Nebraska*, 205 U. S. 34, 42, 51 L. Ed. 699.

**91. Same; exclusive intervention supersedes state enactments.**—*Gilman v. Philadelphia*, 3 Wall. 713, 18 L. Ed. 96; *Ex parte McNeil*, 13 Wall. 236, 240, 20 L. Ed. 624; *Farmers', etc., Nat. Bank v. Dearing*, 91 U. S. 29, 34, 23 L. Ed. 196.

**92. Where congress has not occupied the full sphere of its powers.**—*Sturges v. Crowninshield*, 4 Wheat. 122, 196, 4 L. Ed. 529; *Ogden v. Saunders*, 12 Wheat. 213, 6 L. Ed. 606; *Cooley v. Board of Wardens*, 12 How. 229, 13 L. Ed. 996; *Moore v. Illinois*, 14 How. 13, 14 L. Ed. 306; *The Brig James Gray v. The Ship John Fraser*, 21 How. 184, 16 L. Ed. 106; *Steamship Co. v. Joliffe*, 2 Wall. 450, 17 L. Ed. 805; *Van Allen v. The Assessors*, 3 Wall. 573, 585, 18 L. Ed. 229; *Sprague v. Thompson*, 118 U. S. 90, 30 L. Ed. 115; *Butler v. Goreley*, 146 U. S. 303, 36 L. Ed. 981.

"The practice of our government certainly has been, on many subjects, to occupy so much only of the field open to them, as they think the public interests require. Witness the jurisdiction of the circuit courts, limited both as to cases and as to amount; and various other instances that might be cited. But the license furnishes a full answer to this objection; for although one grant of power over commerce, should not be deemed a total relinquishment of power over the subject, but amounting only to a power to assume, still the power of the states must be at an end, so far as the United States have, by their legislative act, taken the subject under their immediate superintendence." (*Opinion of Johnson, J.*) *Gibbons v. Ogden*, 9 Wheat. 1, 234, 6 L. Ed. 23.

**93. Where any legislation or even the nonaction of congress deemed exclusive.**—*Houston v. Moore*, 5 Wheat. 1, 23, 5 L. Ed. 19; *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23; *Prigg v. Pennsylvania*, 16 Pet. 539, 617, 618, 10 L. Ed. 1060; *Gilman v. Philadelphia*, 3 Wall. 713, 730, 18 L. Ed. 96; *Welton v. Missouri*, 91 U. S. 275, 282, 23 L. Ed. 347; *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. Ed. 550; *Henderson v. Mayor*, 92 U. S. 259, 23 L. Ed. 543; *Inman Steamship Co. v. Tinker*, 94 U. S. 238, 242, 24 L. Ed. 118; *Railroad Co. v. Husen*, 95 U. S. 465, 471, 24 L. Ed. 527; *Brown v. Houston*, 114 U. S. 622, 29 L. Ed. 257; *Walling v. Michigan*, 116 U. S. 446, 29 L. Ed. 691; *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 30 L. Ed. 694; *Davis v. Beason*, 133 U. S. 333, 373, 348, 33 L. Ed. 637; *Leisy v. Hardin*, 135 U. S. 100, 108, 34 L. Ed. 128; *Easton v. Iowa*, 188 U. S. 220, 236, 47 L. Ed. 452.

"If congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that



(bb) *Illustrations*—(aaa) *Bankruptcy and Insolvency Laws*.—That the power given by the constitution to congress, to establish uniform laws on the subject of bankruptcies throughout the United States, does not withdraw the subject entirely from the states, is settled by the case of *Sturges v. Crowninshield*. It is there expressly held, that “until the power to pass uniform laws on the subject of bankruptcies is exercised by congress, the states are not forbidden to pass a bankrupt law, provided it contain no principle which violates the 10th section of the first article of the constitution of the United States.” And this case also decides, that the right of the states to pass bankrupt laws is not extinguished, but is only suspended by the enactment of a general bankrupt law by congress, and that a repeal of that law removes this disability to the exercise of the power by the states.<sup>94</sup> And even the exercise by congress of its power to establish uniform laws on the subject of bankruptcies throughout the United States does not supersede state legislation on the same subject, except when the state laws are incompatible or in conflict with those of congress.<sup>95</sup>

(bbb) *The Taxing Power*.—Previous to the adoption of the constitution the states respectively possessed plenary powers of taxation. By the constitution they gave up portions of this power to the federal government, making its power concurrent with that of the states, the powers of both the states and of the national government being subject to the requirements and limitations imposed by the constitution itself;<sup>96</sup> otherwise it is not abridged by the grant of a similar power to the union, but is to be concurrently exercised by the two governments.<sup>97</sup>

state legislatures have a right to interfere, and, as it were, by way of complement to the legislation of congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such case, the legislation of congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject matter. Its silence as to what it does not do, is as expressive of what its intention is as the direct provisions made by it.” *Prigg v. Pennsylvania*, 16 Pet. 539, 10 L. Ed. 1060; *Easton v. Iowa*, 188 U. S. 220, 236, 47 L. Ed. 452.

“The cases in which the legislation of congress will supersede the legislation of a state or territory, without specific provisions to that effect, are those in which the same matter is the subject of legislation by both. There the action of congress may well be considered as covering the entire ground.” *Davis v. Beason*, 133 U. S. 333, 348, 33 L. Ed. 637.

**94. Bankruptcy and insolvency.**—*Sturges v. Crowninshield*, 4 Wheat. 122, 191, 4 L. Ed. 529. Accord: *Ogden v. Saunders*, 12 Wheat. 213, 296, 6 L. Ed. 606; *Boyle v. Zacharie*, 6 Pet. 348, 8 L. Ed. 423; *Holmes v. Jennison*, 14 Pet. 540, 10 L. Ed. 579; *Cook v. Moffat*, 5 How. 295, 12 L. Ed. 159; *Bank v. Horn*, 17 How. 157, 161, 15 L. Ed. 70; *Baldwin v. Hale*, 1 Wall. 223, 228, 17 L. Ed. 531; *Baldwin v. Bank*, 1 Wall. 234, 17 L. Ed. 534; *Gilman v. Lockwood*, 4 Wall. 409, 18 L. Ed. 432; *Crapo v. Kelly*, 16 Wall. 610, 21 L. Ed. 430; *Tua v. Carriere*, 117 U. S. 201, 29 L. Ed. 855; *Denny v. Bennett*, 128 U. S. 489, 32 L. Ed. 491; *Cole v. Cunningham*, 133 U. S. 107, 33 L. Ed. 538; *Geilinger v. Philippi*,

133 U. S. 246, 33 L. Ed. 614; *Brown v. Smart*, 145 U. S. 454, 36 L. Ed. 773; *Bulter v. Goreley*, 146 U. S. 303, 313, 36 L. Ed. 981; *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113. See, also, the title **BANKRUPTCY**, vol. 2, p. 804, 805.

By an act of the legislature of Louisiana, passed in 1826, all the property of an insolvent petitioner mentioned in his schedule became vested in his creditors, from and after the cession and acceptance; and the syndic was directed to take possession of it, and to administer and sell it for the benefit of the creditors. Held, that the power of the states to constitutionally enact such laws is not open to question. *Bank v. Horn*, 17 How. 157, 161, 15 L. Ed. 70.

**95. Same.**—*Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. Ed. 529; *Ogden v. Saunders*, 12 Wheat. 213, 272, 6 L. Ed. 606, distinguishing *McMillan v. McNeill*, 4 Wheat. 209, 4 L. Ed. 552; *Baldwin v. Hale*, 1 Wall. 223, 228, 17 L. Ed. 531. See, also, the title **BANKRUPTCY**, vol. 2, p. 804, 805.

**96. The taxing power.**—*Pollock v. Farmers' Loan & Trust Co.* (rehearing), 158 U. S. 601, 620, 39 L. Ed. 1108.

As to the constitutional limitation imposed upon the exercise of the power to tax by congress with reference to the apportionment of direct taxes, the uniformity of duties, imposts and excises, and the prohibition of a tax upon exports, see the title **TAXATION**. And see, also, ante, “Limitations upon the Power of Congress; Operation of the Constitution within the Territories,” VI, D, 2, c, (3), (c), (cc), (bbb), (cccc), (bbbbb).

**97. Same.**—*McCulloch v. Maryland*, 4 Wheat. 316, 425, 4 L. Ed. 579; *Van Allen*



**In What Respects the Power of the States Remains Unabridged.**—Except as to the constitutional prohibition against taxing exports and imports and laying duties on tonnage, and the implied prohibition against imposing a tax upon any of the agencies of the federal government, the power of taxation remains in the states as an inherent sovereign power, and congress has no power to abridge the same.<sup>98</sup> It extends to all objects within the sovereign power of the states, except the means and instruments of the federal government.<sup>99</sup> And if a state should require the collection of its taxes in kind, that is to say, by the delivery to the proper officer of a certain proportion of products, or that they should be paid in gold and silver bullion, or in gold and silver coin, it would not be competent for the national legislature to compel the state to accept national treasury notes declared by congress to be a legal tender for all debts, dues, and demands, public and private, etc.<sup>1</sup>

**Where Incompatible with Power of Congress or Nature of Government.**—But the paramount character of the federal constitution is such that the federal government may restrain a state from the exercise of even the taxing power, and withdraw from the state power to tax any subject to which it extends, in so far as such exercise on the part of the state of its power to tax may, in its nature, be incompatible with and repugnant to the constitution and laws of the Union; since the federal constitution and the laws of congress enacted pursuant thereto, being the supreme law of the land, operate to repeal such state laws as may be found to be absolutely repugnant thereto.<sup>2</sup>

**Same; Means and Instruments of Federal Government.**—One of the qualifications of the exercise of the power by the states is the exclusion of the states from the taxation of the means and instruments employed in the exercise of the functions of the federal government.<sup>3</sup>

**Claim of United States Preferred in Case of Conflict.**—In the case of a

*v. The Assessors*, 3 Wall. 573, 18 L. Ed. 229; *Lane County v. Oregon*, 7 Wall. 71, 77, 19 L. Ed. 101; *Pollock v. Farmers' Loan & Trust Co.* (rehearing), 158 U. S. 601, 618, 620, 39 L. Ed. 1108; *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 624, 43 L. Ed. 823; *Knowlton v. Moore*, 178 U. S. 41, 60, 44 L. Ed. 969.

"To the extent just indicated, it is as complete in the states as the like power, within the limits of the constitution, is complete in congress." *Lane County v. Oregon*, 7 Wall. 71, 19 L. Ed. 101; *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 561, 39 L. Ed. 759.

A law of a state taxing or prohibiting a business already taxed by congress, as for example, keeping and sale of intoxicating liquors—congress having declared that the imposition of a tax should not be taken to abridge the power of the state to tax or prohibit the licensed business—is not unconstitutional. *Pervear v. Commonwealth*, 5 Wall. 475, 18 L. Ed. 608.

**98. Same; extent of state power.**—*Lane County v. Oregon*, 7 Wall. 71, 77, 19 L. Ed. 101.

**99. Same.**—*McCulloch v. Maryland*, 4 Wheat. 316, 425, 4 L. Ed. 579; *State Tonnage Tax Cases*, 12 Wall. 204, 212, 20 L. Ed. 370. See, also, post, "State Encroachment through Exercise of Taxing Power," VI, D, 3, c, (6), (b), (cc), (ff).

**1. Same, as to manner of collecting taxes.**—*Lane County v. Oregon*, 7 Wall. 71, 77, 19 L. Ed. 101.

**2. Where incompatible with power of congress or nature of government.**—*McCulloch v. Maryland*, 4 Wheat. 316, 425, 4 L. Ed. 579; *Lane County v. Oregon*, 7 Wall. 71, 77, 19 L. Ed. 101. See, also, post, "State Encroachment through Exercise of Taxing Power," VI, D, 3, c, (6), (b), (cc), (ff).

**3. McCulloch v. Maryland, 4 Wheat. 316, 425, 4 L. Ed. 579; *Osborn v. United States Bank*, 9 Wheat. 738, 6 L. Ed. 204; *Van Allen v. The Assessors*, 3 Wall. 573, 585, 18 L. Ed. 229; *State Tonnage Tax Cases*, 12 Wall. 204, 212, 20 L. Ed. 370; *Delaware Railroad Tax*, 18 Wall. 206, 232, 21 L. Ed. 888; *Telegraph Co. v. Taxes*, 105 U. S. 460, 464, 26 L. Ed. 1067; *Yale Lock Mfg. Co. v. James*, 125 U. S. 447, 460, 464, 31 L. Ed. 807; *Marye v. Baltimore*, etc., R. Co., 127 U. S. 117, 123, 124, 32 L. Ed. 94; *Leloup v. Mobile*, 127 U. S. 640, 649, 32 L. Ed. 311; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. Ed. 613; *Cleveland*, etc., R. Co. v. *Backus*, 154 U. S. 439, 445, 38 L. Ed. 1041; *Western Union Tel. Co. v. Taggart*, 163 U. S. 1, 14, 41 L. Ed. 49; *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664, 667, 43 L. Ed. 850; *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 624, 43 L. Ed. 823; *Knowlton v. Moore*, 178 U. S. 41, 60, 44 L. Ed. 969. See, also, post, "State Encroachment through Exercise of Taxing Power," VI, D, 3, c, (6), (b), (cc), (ff).**

tax on the same subject by both governments, the claim of the United States, as the supreme authority, must be preferred.<sup>4</sup>

(ccc) *Foreign and Interstate Commerce*.—Under the constitution the controlling and supreme power over foreign and interstate commerce is conferred upon congress.<sup>5</sup> This does not imply, however, that the jurisdiction of congress is in every instance exclusive of that of the states. Where the subject matter is of a purely national character or one that requires a uniform rule, or where the state legislation is in its essence and of necessity a regulation of interstate commerce, and therefore of national importance the power of congress is exclusive, and any regulation imposed by a state is an encroachment upon the exclusive power of congress over the subject and is therefore void, even though congress may never have legislated upon the subject. On the other hand, there are many matters of local or minor importance which may well vary with the varying circumstances of different localities, and concerning which the states, may prescribe the rules to be observed until congress shall supersede them.<sup>6</sup>

**4. Claims of the United States preferred in case of conflict.**—*Lane County v. Oregon*, 7 Wall. 71, 19 L. Ed. 101; *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 561, 39 L. Ed. 759.

**5. Foreign and interstate commerce.**—*Respublica v. Cobbett*, 3 Dall. 467, 473, 1 L. Ed. 683; *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23; *Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678; *License Cases*, 5 How. 504, 579, 12 L. Ed. 256; *Passenger Cases*, 7 How. 283, 400, 411, 450, 12 L. Ed. 702; *Cooley v. Board of Wardens*, 12 How. 229, 13 L. Ed. 996; *Crandall v. Nevada*, 6 Wall. 35, 18 L. Ed. 745; *Ex parte McNeil*, 13 Wall. 236, 240, 20 L. Ed. 624; *Ex parte Siebold*, 100 U. S. 371, 385, 25 L. Ed. 717; *Transportation Co. v. Parkersburg*, 107 U. S. 691, 700, 27 L. Ed. 584; *Covington, etc., Bridge Co. v. Kentucky*, 154 U. S. 204, 38 L. Ed. 962. See, also, the title INTERSTATE AND FOREIGN COMMERCE.

**6. Same; jurisdiction exclusive or concurrent when.**—*Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23; *Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678; *Wilson v. Black-Bird Creek Marsh Co.*, 2 Pet. 245, 7 L. Ed. 412; *License Cases*, 5 How. 504, 579, 608, 624, 12 L. Ed. 256; *Cooley v. Board of Wardens*, 12 How. 229, 319, 13 L. Ed. 996; *The Brig James Gray v. The Ship John Fraser*, 21 How. 184, 16 L. Ed. 106; *Steamship Co. v. Joliffe*, 2 Wall. 450, 17 L. Ed. 805; *Van Allen v. The Assessors*, 3 Wall. 573, 585, 18 L. Ed. 229; *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. Ed. 96; *Crandall v. Nevada*, 6 Wall. 35, 18 L. Ed. 745; *Ex parte McNeil*, 13 Wall. 236, 240, 20 L. Ed. 624; *State Freight Tax*, 15 Wall. 232, 21 L. Ed. 146; *Railroad Co. v. Fuller*, 17 Wall. 560, 568, 21 L. Ed. 710; *The Lottawanna*, 21 Wall. 558, 22 L. Ed. 654; *Welton v. Missouri*, 91 U. S. 275, 23 L. Ed. 347; *Henderson v. Mayor*, 92 U. S. 259, 23 L. Ed. 543; *Pound v. Turk*, 95 U. S. 459, 462, 24 L. Ed. 525; *Railroad Co. v. Husen*, 95 U. S. 465, 24 L. Ed. 527; *Hall v. De Cuir*, 95 U. S. 485, 490, 24 L. Ed. 547; *Ex parte Siebold*, 100 U. S. 371,

25 L. Ed. 717; *County of Mobile v. Kimball*, 102 U. S. 691, 26 L. Ed. 238; *Cardwell v. American Bridge Co.*, 113 U. S. 205, 28 L. Ed. 959; *Brown v. Houston*, 114 U. S. 622, 29 L. Ed. 257; *Huse v. Glover*, 119 U. S. 543, 30 L. Ed. 487; *Walling v. Michigan*, 116 U. S. 446, 29 L. Ed. 368, 41 L. Ed. 747; *Sprague v. Thompson*, 118 U. S. 90, 30 L. Ed. 115; *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455, 30 L. Ed. 237; *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 30 L. Ed. 694; *Smith v. Alabama*, 124 U. S. 465, 31 L. Ed. 508; *Leisy v. Hardin*, 135 U. S. 100, 108, 34 L. Ed. 128; *Covington, etc., Bridge Co. v. Kentucky*, 154 U. S. 204, 209, 38 L. Ed. 962; *Pittsburg, etc., Coal Co. v. Bates*, 156 U. S. 577, 587, 39 L. Ed. 538; *New York, etc., R. Co. v. New York*, 165 U. S. 628, 41 L. Ed. 853; *Lake Shore, etc., R. Co. v. Ohio*, 165 U. S. 365, 366, 691; *Reid v. Colorado*, 187 U. S. 137, 151, 47 L. Ed. 108; *Cummings v. Chicago*, 188 U. S. 410, 428, 47 L. Ed. 525. See, also, the titles BRIDGES, vol. 3, p. 516; INTERSTATE AND FOREIGN COMMERCE; NAVIGABLE WATERS; POLICE POWER.

"The adjudications of this court with respect to the power of the states over the general subject of commerce are divisible into three classes. First, those in which the power of the state is exclusive; second, those in which the states may act in the absence of legislation by congress; third, those in which the action of congress is exclusive and the states cannot interfere at all. \* \* \* The first class, including all those wherein the states have plenary power, and congress has no right to interfere, concern the strictly internal commerce of the state, and while the regulations of the state may affect interstate commerce indirectly, their bearing upon it is so remote that it cannot be termed in any just sense an interference. Under this power, the states may authorize the construction of highways, turnpikes, railways, and canals between points in the



**Supremacy in Case of Conflict.**—"If the power of the state and that of the federal government come in conflict, the latter must control and the former yield. This necessarily follows from the position given by the constitution to legislation in pursuance of it, as the supreme law of the land."<sup>7</sup>

(ddd) *Pilots and Pilotage.*—See the titles INTERSTATE AND FOREIGN COMMERCE; PILOTS.

(eee) *Bridges, Dams and Ferries.*—See the titles BRIDGES, vol. 3, p. 516; FERRIES; INTERSTATE AND FOREIGN COMMERCE; NAVIGABLE WATERS.

(fff) *Wharves and Wharfage.*—See the titles INTERSTATE AND FOREIGN COMMERCE; WHARVES.

(ggg) *Enforcement of Federal Law.*—It has been held that offenses exclusively against a state are exclusively cognizable in the state courts, and offenses exclusively against the United States are exclusively cognizable in the federal courts.<sup>8</sup> But in all cases in which the state tribunals are not excluded by act

same state, and regulate the tolls for the use of the same, *Railroad Co. v. Maryland*, 21 Wall. 456, 22 L. Ed. 678; and may authorize the building of bridges over nonnavigable streams, and otherwise regulate the navigation of the strictly internal waters of the state—such as do not, by themselves or by connection with other waters, form a continuous highway over which commerce is or may be carried on with other states or foreign countries. *Veazie v. Moor*, 14 How. 568, 14 L. Ed. 545; *The Montello*, 11 Wall. 411, 20 L. Ed. 191; S. C., 20 Wall. 430, 22 L. Ed. 391. This is true notwithstanding the fact that the goods or passengers carried or traveling over such highway between points in the same state may ultimately be destined for other states, and, to a slight extent, the state regulations may be said to interfere with interstate commerce. The states may also exact a bonus, or even a portion of the earnings of such corporation, as a condition to the granting of its charter. *Society for Savings v. Coite*, 6 Wall. 594, 18 L. Ed. 897; *Provident Institution v. Massachusetts*, 6 Wall. 611, 18 L. Ed. 907; *Hamilton Co. v. Massachusetts*, 6 Wall. 632, 18 L. Ed. 904; *Railroad Co. v. Maryland*, 21 Wall. 456, 22 L. Ed. 678; *Ashley v. Ryan*, 153 U. S. 436, 38 L. Ed. 773. \* \* \* Within the second class of cases—those of what may be termed concurrent jurisdiction—are embraced laws for the regulation of pilots: *Cooley v. Board of Wardens*, 12 How. 299, 13 L. Ed. 996; *Steamship Co. v. Joliffe*, 2 Wall. 450, 17 L. Ed. 805; *Ex parte McNiel*, 13 Wall. 236, 20 L. Ed. 624; *Wilson v. McNamee*, 102 U. S. 572, 26 L. Ed. 234; quarantine and inspection laws and the policing of harbors: *Gibbons v. Ogden*, 9 Wheat. 1, 203, 6 L. Ed. 23; *New York v. Miln*, 11 Pet. 102, 9 L. Ed. 648; *Turner v. Maryland*, 107 U. S. 38, 27 L. Ed. 370; *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455, 30 L. Ed. 237; the improvement of navigable channels: *County of Mobile v. Kimball*, 102 U. S. 691, 26 L. Ed. 238; *Escanaba Co. v. Chicago*, 107 U. S. 678, 27 L. Ed. 442; *Huse v. Glover*, 119 U. S.

543, 30 L. Ed. 487; the regulation of wharfs, piers, and docks: *Cannon v. New Orleans*, 20 Wall. 577, 22 L. Ed. 417; *Packet Co. v. Keokuk*, 95 U. S. 80, 24 L. Ed. 377; *Packet Co. v. St. Louis*, 100 U. S. 423, 25 L. Ed. 688; *Packet Company v. Catlettsburg*, 105 U. S. 559, 26 L. Ed. 1169; *Transportation Co. v. Parkersburg*, 107 U. S. 691, 27 L. Ed. 584; *Ouachita Packet Co. v. Aiken*, 121 U. S. 444, 30 L. Ed. 976; the construction of dams and bridges across the navigable waters of a state; *Wilson v. Black-Bird Creek Marsh Co.*, 2 Pet. 245, 7 L. Ed. 412; *Cardwell v. American Bridge Co.*, 113 U. S. 205, 28 L. Ed. 959; *Pound v. Turk*, 95 U. S. 459, 24 L. Ed. 525; and the establishment of ferries: *Conway v. Taylor*, 1 Black. 603, 17 L. Ed. 191. \* \* \* But wherever such laws, instead of being of a local nature and not affecting interstate commerce, but incidentally, are national in their character, the nonaction of congress indicates its will that such commerce shall be free and untrammelled, and the case falls within the third class—of those laws wherein the jurisdiction of congress is exclusive. *Brown v. Houston*, 114 U. S. 622, 29 L. Ed. 257; *Bowman v. Chicago*, etc., R. Co., 125 U. S. 465, 31 L. Ed. 700." *Covington*, etc., *Bridge Co. v. Kentucky*, 154 U. S. 204, 212, 38 L. Ed. 962, quoted with approval in *Western Union Tel. Co. v. James*, 162 U. S. 650, 653, 40 L. Ed. 1105. See, also, the titles, vol. 3, p. 516; BRIDGES; INTERSTATE AND FOREIGN COMMERCE; PILOTS; WHARVES, etc.

**7. Supremacy in case of conflict.**—*Cummings v. Chicago*, 188 U. S. 410, 428, 47 L. Ed. 525. See, also, post, "Supremacy in Case of Conflict between State and Federal Powers," VI, D, 3, c, (6), (b), (hh).

**8. Enforcement of federal law.**—*Pettibone v. United States*, 148 U. S. 197, 209, 37 L. Ed. 419; *Grafton v. United States*, 206 U. S. 333, 354, 51 L. Ed. 1084.

Offenses against the constitution and laws of the United States are punishable only under the laws of the United States, the jurisdiction of congress to prescribe



of congress, they may take cognizance, if authorized by state law, of offenses arising under the constitution and laws of the United States and enforce the punishment prescribed by the act of congress. In other words, the state courts may exercise concurrent jurisdiction unless congress has withdrawn the case from the jurisdiction of the state tribunals.<sup>9</sup>

**Under the Judiciary Act.**—"The judiciary act \* \* \* vested in the federal courts exclusive jurisdiction of all offenses cognizable under the authority of the United States, except where the laws of the United States should otherwise direct."<sup>10</sup> The state courts, therefore, can exercise no jurisdiction whatever over such offenses, unless where, in particular cases, other laws of the United States have otherwise provided; and wherever such provision is made, the claim of exclusive jurisdiction to the particular cases is withdrawn by the United States, and the concurrent jurisdiction of the state courts is eo instanti restored, not by way of grant from the national government, but by the removal of a disability before imposed upon the state tribunals.<sup>11</sup>

the punishment of such offenses being in its nature exclusive. *Houston v. Moore*, 5 Wheat. 1, 22, 25, 5 L. Ed. 19.

"There can be no criminal prosecution initiated in any state court for that which is merely an offense against the general government." *Ableman v. Booth*, 21 How. 506, 523, 16 L. Ed. 169; *Tennessee v. Davis*, 100 U. S. 257, 262, 25 L. Ed. 648; *Easton v. Iowa*, 188 U. S. 220, 238, 47 L. Ed. 452.

"If, in a specified case, the people have thought proper to bestow certain powers on congress, as the safest depository of them, and congress has legislated within the scope of them, the people have reason to complain, that the same powers should be exercised at the same time by the state legislatures. To subject them to the operation of two laws upon the same subject, dictated by distinct wills, particularly in a case inflicting pains, and penalties, is, to my apprehension, something very much like oppression, if not worse. In short, I am altogether incapable of comprehending how two distinct wills, can, at the same time, be exercised in relation to the same subject, to be effectual and at the same time, compatible with each other. If they correspond in every respect, then the latter is idle and inoperative; if they differ, they must, in the nature of things, oppose each other, so far as they do differ. If the one imposes a certain punishment, for a certain offense, the presumption is, that this was deemed sufficient, and, under all circumstances, the only proper one. If the other legislature impose a different punishment, in kind or degree, I am at loss to conceive, how they can both consist harmoniously together." (Opinion of Washington, J.) *Houston v. Moore*, 5 Wheat. 1, 23, 5 L. Ed. 19.

A state may, by special laws, declare certain acts to be criminal offenses when committed by officers or agents of its own banks and institutions; but it is without lawful power to make such special laws applicable to banks organized and operating under the laws of the United States.

*Easton v. Iowa*, 188 U. S. 220, 238, 47 L. Ed. 452.

**9. Where state courts not excluded by statute.**—*Houston v. Moore*, 5 Wheat. 1, 25, 5 L. Ed. 19.

**10. Under the judiciary act.**—*Houston v. Moore*, 5 Wheat. 1, 27, 5 L. Ed. 19.

**11. Same.**—*Houston v. Moore*, 5 Wheat. 1, 28, 5 L. Ed. 19. See, also, *Martin v. Hunter*, 1 Wheat. 304, 377, 4 L. Ed. 97.

This will account for the proviso in the act of the 24th of February, 1807, ch. 75, concerning the forgery of the notes of the Bank of the United States, "that nothing in that act contained should be construed to deprive the courts of the individual states of jurisdiction, under the laws of the several states, over offenses made punishable by that act." A similar proviso is to be found in the act of the 21st of April, 1806, ch. 49, concerning the counterfeiters of the current coin of the United States. \* \* \* The states could not, therefore, exercise a concurrent jurisdiction in those cases, without coming into direct collision with the laws of congress. But by these savings, congress did provide, that the jurisdiction of the federal courts, in the specified cases, should not be exclusive; and the concurrent jurisdiction of the state courts was instantly restored, so far as, under state authority, it could be exercised by them. There are many other acts of congress which permit jurisdiction over the offenses therein described, to be exercised by state magistrates and courts; not, because such permission was considered to be necessary, under the constitution, in order to vest a concurrent jurisdiction in those tribunals; but because, without it, the jurisdiction was exclusively vested in the national courts, by the judiciary act, and consequently, could not be otherwise exercised by the state courts. Congress cannot confer jurisdiction upon any courts, but such as exist under the constitution and laws of the United States, although the state courts may exercise jurisdiction in cases authorized by the laws of the state, and act

### **Punishment of Offenses for Which Congress Has Not Provided.—**

While congress has exercised its power over some of the subjects submitted by the constitution, and as to some arising under its laws, its omission to legislate concerning other subjects, of which the states had a pre-existing cognizance, may be considered as a *casus omissus* by its laws; and until it shall, by some act, exercise its authority over the subject by designating the crime, prescribing the punishment, and giving to the courts of the United States exclusive jurisdiction, the state courts may, constitutionally, take cognizance of the cause,

prohibited by the exclusive jurisdiction of the federal courts. *Houston v. Moore*, 5 Wheat. 1, 27, 5 L. Ed. 19.

**Section 5328 of Revised Statutes of the United States**, providing that "nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof," is to be construed as an exception to the 20th subdivision of § 629 of the Revised Statutes, which provides, among other things, that the United States circuit courts shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where it is or may be otherwise provided by law, and as an exception to § 711 of the Revised Statutes which provides that the jurisdiction vested in the courts of the United States in the cases and proceedings thereafter mentioned shall be exclusive of the courts of the several states. *Sexton v. California*, 189 U. S. 319, 324, 47 L. Ed. 833.

**Extortion by threats to accuse one of violating federal statutes.**—Accordingly it was held that under §§ 518, 519 of the Criminal Code of California, providing for the punishment of extortion, the courts of that state have concurrent jurisdiction with the federal courts to try a person accused of attempting to extort money from another by threatening to accuse him of an offense against the revenue laws of the United States, notwithstanding such attempted extortion is itself made a federal offense by § 5484 of the Revised Statutes, since § 5484 is contained in the same title as § 5328, and therefore offenses committed under § 5484 come within the exception created by § 5328. *Sexton v. California*, 189 U. S. 319, 324, 47 L. Ed. 833.

**Military offenses.**—"Military offenses are not included in the act of congress, conferring jurisdiction upon the circuit and district courts; no person has ever contended that such offenses are cognizable before the common-law courts. The militia laws have, therefore, provided, that the offenses of disobedience to the president's call upon the militia shall be cognizable by a court martial of the United States; but an exclusive cognizance it not conferred upon that court, as it has been upon the common-law courts, as to other offenses, by the judiciary act." *Houston v. Moore*, 5 Wheat. 1, 28, 5 L. Ed. 19. See the title *MILITIA*.

In *Houston v. Moore*, 5 Wheat. 1, 23, 5 L. Ed. 19, it was held that an act of congress providing for the punishment of militiamen who refused to serve when called into the active service of the United States did not confer exclusive jurisdiction upon the court martial provided for in the act, and that a law of the state of Pennsylvania authorizing a state tribunal to try offenders guilty of infractions of the national law was not repugnant to the constitution of the United States.

It was further held, however, that in so far as congress had prescribed the punishment to be awarded, the power of the states to prescribe additional punishment was excluded; that the state tribunal could only enforce the law of congress. *Houston v. Moore*, 5 Wheat. 1, 22, 23, 5 L. Ed. 19.

**Return of fugitive slaves.**—It was held in the majority opinion in the case of *Prigg v. Pennsylvania*, 16 Pet. 539, 617, 10 L. Ed. 1060, that it was the exclusive province and duty of congress to legislate in aid of the constitutional provision relating to fugitive slaves, in so far as that provision was not self-executing, and that the states had no right to legislate in aid of that provision.

Speaking of the exclusive power of congress to legislate in aid of the provisions relating to the return of fugitive slaves, Mr. Justice Story, delivering the majority opinion in the case of *Prigg v. Pennsylvania*, 16 Pet. 539, 617, 618, 10 L. Ed. 1060, says: "If this be so, then it would seem, upon just principles of construction, that the legislation of congress, if constitutional, must supersede all state legislation upon the same subject; and by necessary implication prohibit it. For, if congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be, that the state legislatures have a right to interfere, and, as it were, by way of complement to the legislation of congress, to prescribe additional regulations, and what they may deem auxiliary provisions of the same purpose. In such a case, the legislation of congress, in what it does prescribe, manifestly indicates, that it does not intend that there shall be any further legislation to act upon the subject matter. Its silence as to what it does not do, is as expressive of what its intention is, as the direct provisions made by it. This doc-



and punish the offense, by the laws of the state. Therefore, the eleventh section of the judiciary act, which gives to the circuit court exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, may be reasonably supposed not to have contemplated a case which by no act of congress is designated as a crime, and for which it has appointed no punishment.<sup>12</sup> "To say that the constitution of the United States operated any abridgment of the jurisdiction of the state courts, as to crimes generally, of forgery, perjury, larceny, merely because they related to the interest or concerns of the United States, or their officers, acting under their laws, before they themselves, by their own acts, shall have provided for the punishment of such crimes, and taken order as to the jurisdiction of them, would lead to this consequence, that for a time, consistent with such doctrine, some crimes would, by law, be subject

trine was fully recognized by this court, in the case of *Houston v. Moore*, 5 Wheat. 1, 21, 5 L. Ed. 19, where it was expressly held, that where congress have exercised a power over a particular subject given them by the constitution, it is not competent for state legislation to add to the provisions of congress upon that subject; for that the will of congress upon the whole subject is as clearly established by what it has not declared, as by what it has expressed."

In *Moore v. Illinois*, 14 How. 13, 14 L. Ed. 306, it was held that under its general and admitted power to define and punish offenses against its own peace and policy, a state might repel from its borders an unacceptable population, whether paupers or criminals, or fugitive or liberated slaves; and that a state law which provided for the punishment of any citizen who harbored, secreted or in any way assisted any fugitive slave was constitutional and valid notwithstanding that, incidentally, it tended to benefit the owners of such fugitives and to further the enforcement of the federal law and policy with reference to fugitive slaves.

The point decided in *Prigg v. Pennsylvania*, 16 Pet. 539, 10 L. Ed. 1060, was that any state law or regulation which tended to interrupt, impede, limit, or embarrass, delay or postpone the right of the owner to the immediate possession of his fugitive slave and the immediate command of his services was void. (See *Moore v. Illinois*, 14 How. 13, 14 L. Ed. 306.) It was not decided that state legislation in aid of the claimant, and which did not directly nor indirectly delay, impede, or frustrate the master in the exercise of his right under the constitution, or in the pursuit of his remedy given by the act of congress, was void. (See *Moore v. Illinois*, 14 How. 13, 14 L. Ed. 306.) See, also, ante, "To Execute Its Own Laws and Exercise Jurisdiction over All Persons and Places," VI, D. 2, c, (4).

**Perjury committed by witness testifying in federal court or in contest growing out of federal election.**—It is essential to the impartial and efficient administration of justice in the tribunals of the nation that witnesses should be able to testify

freely before them, unrestrained by legislation of the state and without liability to prosecution and punishment in the courts of the state upon a charge of perjury under the state law, preferred by a disappointed suitor or contestant, or instituted by local passion or prejudice. Therefore a witness testifying in a cause pending in a federal court, or in a contest growing out of a federal election, whether he testifies in the presence of the tribunal constituted to try the cause or contest, or before any magistrate or officer, either of the nation or state, designated by act of congress for the purpose, is accountable for the truth of his testimony to the United States alone; and perjury committed by him while so testifying cannot be punished in the state tribunals under the state law defining perjury and prescribing the punishment therefor. In *re Loney*, 134 U. S. 372, 375, 33 L. Ed. 949; *United States v. Bailey*, 9 Pet. 238, 9 L. Ed. 113.

Testimony taken with the single object of being returned to and considered by the house of representatives of the United States exercising the judicial power, vested in it by the constitution, of judging of the elections of its members, and taken before an officer designated by congress as competent for this purpose and deriving his authority to do this from no other source, stands upon the same ground as testimony taken before any judge or officer of the United States, and perjury in giving such testimony is punishable in the courts of the United States, and the state courts are without jurisdiction. In *re Loney*, 134 U. S. 372, 33 L. Ed. 949; *United States v. Bailey*, 9 Pet. 238, 9 L. Ed. 113.

**Forgery and counterfeiting.**—A case of counterfeiting money of the United States is excepted by statute from the law giving exclusive jurisdiction to the United States courts of offenses against the laws of the United States. *Fox v. Ohio*, 5 How. 410, 12 L. Ed. 213. See, also, *Houston v. Moore*, 5 Wheat. 1, 5 L. Ed. 19; *Sexton v. California*, 189 U. S. 319, 322, 47 L. Ed. 833.

**12. Offenses for which congress has not provided.**—*Commonwealth v. Schaffer*, 4 Dall., appx. xxv, xxx, 1 L. Ed. 926.



to no prosecution or punishment."<sup>13</sup> The important question is—what has been the effect of the constitution of the United States (and the laws which have been enacted under it), to divest the states of a jurisdiction of which, at the time it was made, it found the states constitutionally possessed?<sup>14</sup>

**Judgment in One Jurisdiction as Barring a Prosecution in the Other.**—If the jurisdiction of the state and federal courts over an offense be concurrent, the sentence of either court, either of conviction or acquittal, may be pleaded in bar of a prosecution before the other, as much so as the judgment of a state court in a civil case of concurrent jurisdiction may be pleaded in bar of an action for the same cause instituted in a circuit court of the United States.<sup>15</sup> But an acquittal in the state courts cannot be pleaded in bar to a prosecution in the courts of the United States in any instances but those in which jurisdiction is vested in the state courts by statutory provisions of the United States. In contracts, the law is otherwise. The decision of any court of competent jurisdiction is final, whatever be the government that gives existence to the court. But crimes against a government are only cognizable in its own courts, or in those which derive their right of holding jurisdiction from the offended government.<sup>16</sup>

**Where Same Act Offends against Both Sovereignities.**—The same act, or acts, may, however, constitute an offense against the laws of the state as well as against those of the United States, in which event each sovereignty may inflict punishment for the offense against its own laws.<sup>17</sup>

(hhh) *Use of National Flag for Advertising Purposes.*—In the absence of congressional enactment covering the subject, it is within the competency of a state legislature to prohibit the use of the national flag for advertising purposes. Such a statute is not unconstitutional, either as infringing any right protected or secured by the constitution of the United States, or as relating to a subject exclusively committed to the national government.<sup>18</sup>

**13. Same.**—*Commonwealth v. Schaffer*, 4 Dall., appx. xxv, xxx, 1 L. Ed. 926.

**14. Same.**—*Commonwealth v. Schaffer*, 4 Dall., appx. xxv, xxx, 1 L. Ed. 926.

**Forgery of power of attorney.**—The jurisdiction of the state courts extends to the case of a forgery of powers of attorney, to receive warrants for lands granted by acts of congress, for military services. *Commonwealth v. Schaffer*, 4 Dall., appx. xxv, 1 L. Ed. 926.

**Fraud in the election of federal officers.**—Congress has never attempted to legislate upon the manner of appointing or electing presidential electors, nor to punish any fraud in voting for electors. These matters have been left to the control of the states, and the state courts have jurisdiction to punish offenders under state laws for illegal voting for electors for president and vice president of the United States. *In re Green*, 134 U. S. 377, 33 L. Ed. 951.

"The question whether the state has concurrent power with the United States to punish fraudulent voting for representatives in congress is not presented by the record before us. It may be that it has. *Ex parte Siebold*, 100 U. S. 371, 25 L. Ed. 717. But even if the state has no such power in regard to votes for representatives in congress, it clearly has such power in regard to votes for presidential electors, unaffected by anything in the constitution and laws of the United

States." *In re Green*, 134 U. S. 377, 380, 33 L. Ed. 951.

**15. Judgment in one jurisdiction as barring a prosecution in the other.**—*Houston v. Moore*, 5 Wheat. 1, 31, 5 L. Ed. 19. See the title AUTREFOIS, ACQUIT AND CONVICT, vol. 2, pp. 754, 758.

**16. Same.**—*Houston v. Moore*, 5 Wheat. 1, 35, 5 L. Ed. 19.

**17. Where same act offends against both sovereignities.**—*Fox v. Ohio*, 5 How. 410, 433, 12 L. Ed. 213. *Ex parte Siebold*, 100 U. S. 371, 390, 25 L. Ed. 717; *Cross v. North Carolina*, 132 U. S. 131, 33 L. Ed. 287. See the title AUTREFOIS, ACQUIT AND CONVICT, vol. 2, p. 754.

**18. Use of national emblem for advertising purposes.**—*Halter v. Nebraska*, 205 U. S. 34, 51 L. Ed. 699, affirming the validity of the Nebraska statute, 1 *Cobbe's Ann. Stat. Neb.* 1903, c. 139, §§ 2375g-2375i.

"Congress has established no regulation as to the use of the flag, except that in the act, approved February 20, 1905, authorizing the registration of trademarks in commerce with foreign nations and among the states, it was provided that no mark shall be refused as a trademark on account of its nature 'unless such mark \* \* \* consists of or comprises the flag or coat of arms or other insignia of the United States, or any simulation thereof or of any state or municipality or of any

(6) *Each Government Supreme within the Scope of Its Authority*—(a) *Generally*.—The general government and the states, although existing and exercising their powers within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other within their respective spheres. Each is sovereign with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other.<sup>19</sup>

foreign nation.' 33 Stat. 724, § 5." *Halter v. Nebraska*, 205 U. S. 34, 39, 51 L. Ed. 699.

**19. Each government supreme within the scope of its authority.**—*Respublica v. Cobbett* (Sup. Ct. Rep.), 3 Dall. 467, 473, 1 L. Ed. 683; *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *Worcester v. Georgia*, 6 Pet. 515, 571, 8 L. Ed. 483; License cases (opinion of McLean, J.), 5 How. 504, 588, 12 L. Ed. 256; *Ableman v. Booth*, 21 How. 506, 16 L. Ed. 169; *Lane County v. Oregon*, 7 Wall. 71, 76, 19 L. Ed. 101; *Texas v. White*, 7 Wall. 700, 725, 19 L. Ed. 227; *Collector v. Day*, 11 Wall. 113, 124, 20 L. Ed. 122; *Tarble's Case*, 13 Wall. 397, 20 L. Ed. 597; *White v. Hart*, 13 Wall. 646, 650, 20 L. Ed. 685; *United States v. Railroad Co.*, 17 Wall. 322, 21 L. Ed. 597; *United States v. Cruikshank*, 92 U. S. 542, 549, 23 L. Ed. 588; *Claffin v. Houseman*, 93 U. S. 130, 136, 23 L. Ed. 833; *Van Brocklin v. Tennessee*, 117 U. S. 151, 178, 29 L. Ed. 845; *Smith v. Alabama*, 124 U. S. 465, 476, 31 L. Ed. 508; *Plumley v. Massachusetts*, 155 U. S. 461, 472, 39 L. Ed. 223; *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 584, 39 L. Ed. 759; *Northern Securities Co. v. United States*, 193 U. S. 197, 348, 48 L. Ed. 679; *In re Heff*, 197 U. S. 488, 505, 49 L. Ed. 848; *South Carolina v. United States*, 199 U. S. 437, 448, 50 L. Ed. 261.

Within the limits of the powers granted to the federal government, it is supreme. Within the sphere allotted to them the co-ordinate branches of the general government revolve, unobstructed by any legitimate exercise of power by the state governments. The powers expressly given to the federal government are limitations upon the state authority. But with the exception of these limitations the states are supreme; and their sovereignty can be no more invaded by the action of the general government, than the action of the state governments can arrest or obstruct the course of the national power. (Opinion of McLean, J.) *Worcester v. Georgia*, 6 Pet. 515, 570, 8 L. Ed. 483.

Although the state of Wisconsin is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the constitution of the United States. And the powers of the general government and of the state, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties acting separately and independently of each other within their respective spheres. *Ableman v. Booth*, 21 How. 506, 516, 16 L. Ed. 169.

"The government of the nation and the government of the states are each alike absolute and independent of each other in their respective spheres of action; but the former is as much a part of the government of the people of each state, and as much entitled to their allegiance and obedience as their own local state governments—the constitution of the United States and the laws made in pursuance thereof, being in all cases where they apply, the supreme law of the land." *White v. Hart*, 13 Wall. 646, 650, 20 L. Ed. 685; *Worcester v. Georgia*, 6 Pet. 515, 571, 8 L. Ed. 483; *Respublica v. Cobbett*, (Sup. N. Pa.) 3 Dall. 467, 473, 1 L. Ed. 683.

**The federal government supreme within the sphere of its authority.**—While the powers of the federal government are limited in number, they are not limited in degree. Within the scope of its powers, as enumerated and defined by the constitution, it is supreme and above the states; but beyond, it has no existence. *Chisholm v. Georgia*, 2 Dall. 419, 463, 1 L. Ed. 440; *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *Cohens v. Virginia*, 6 Wheat. 264, 381, 5 L. Ed. 257; *Gibbons v. Ogden*, 9 Wheat. 1, 189, 196, 6 L. Ed. 23; *Brown v. Maryland*, 12 Wheat. 419, 446, 6 L. Ed. 678; *Worcester v. Georgia*, 6 Pet. 515, 570, 8 L. Ed. 483; *Dobbins v. Commissioners*, 16 Pet. 435, 10 L. Ed. 1022; License Cases (opinion of McLean, J.), 5 How. 504, 588, 12 L. Ed. 256; *Scott v. Sandford*, 19 How. 393, 448, 15 L. Ed. 691; *United States v. Booth*, 18 How. 476, 15 L. Ed. 464; *Ableman v. Booth*, 21 How. 506, 16 L. Ed. 169; *New York v. Commissioners of Texas*, 2 Black 620, 632, 17 L. Ed. 451; *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. Ed. 96; *Mayor v. Cooper*, 6 Wall. 247, 253, 18 L. Ed. 851; *Lane County v. Oregon*, 7 Wall. 71, 76, 19 L. Ed. 101; *Collector v. Day*, 11 Wall. 113, 124, 20 L. Ed. 122; *Legal Tender Cases*, 12 Wall. 457, 545, 20 L. Ed. 287; *Tarblis' Case*, 13 Wall. 397, 20 L. Ed. 597; *United States v. Railroad Co.*, 17 Wall. 322, 21 L. Ed. 597; *United States v. Cruikshank*, 92 U. S. 542, 550, 23 L. Ed. 588; *Claffin v. Houseman*, 93 U. S. 130, 136, 23 L. Ed. 833; *Tennessee v. Davis*, 100 U. S. 257, 25 L. Ed. 648; *Transportation Co. v. Parkersburg*, 107 U. S. 691, 700, 27 L. Ed. 584; *Legal Tender Case*, 110 U. S. 421, 438, 28 L. Ed. 204; *Robb v. Connolly*, 111 U. S. 624, 631, 28 L. Ed. 542; *Van Brocklin v. Tennessee*, 117 U. S. 151, 178, 29 L. Ed. 845; *Logan v. United States*, 144 U. S. 263, 283, 36 L. Ed. 429; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 38 L. Ed. 1047;



(b) *Neither Government to Intrude upon the Jurisdiction, Interfere with the Operation, nor Burden the Instrumentalities of the Other*—(aa) *Generally*.—Within the limits of each state, the state and federal governments operate, with one exception, as distinctly and independently of each other as they would if their authority embraced distinct territories. Each has its separate departments; each has its tribunals for their enforcement. Neither government can intrude within the jurisdiction of the other, nor authorize any interference with, nor in any manner hamper the operations of the other, nor burden the instrumentalities or agencies employed by the other for the purpose of accomplishing the objects of government and carrying its powers into execution. Such are the checks and balances in our complicated system of state and national polity.<sup>20</sup>

*Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 560, 39 L. Ed. 759; *In re Quarles & Butler*, 158 U. S. 532, 535, 39 L. Ed. 1080; *Downes v. Bidwell*, 182 U. S. 244, 45 L. Ed. 1088; *Lottery Case*, 188 U. S. 321, 348, 47 L. Ed. 492; *South Carolina v. United States*, 199 U. S. 437, 448, 50 L. Ed. 261.

"The sovereignty of congress, though limited to specified objects, is plenary as to those objects." *Lottery Case*, 188 U. S. 321, 347, 47 L. Ed. 492.

"A power enumerated and delegated by the constitution to congress is comprehensive and complete, without other limitations than those found in the constitution itself." *South Carolina v. United States*, 199 U. S. 437, 448, 50 L. Ed. 261.

Whilst confined to its constitutional orbit, the government of the United States is supreme within its lawful sphere. *Downes v. Bidwell*, 182 U. S. 244, 45 L. Ed. 1088.

"The framers of the constitution designed to make a government not only independent and self-sustained, but supreme in every function within the scope of its authority. The judgments of the federal supreme court have uniformly held that it is so. *Mayor v. Cooper*, 6 Wall. 247, 253, 18 L. Ed. 851.

"The powers granted by the people of the states to the general government, and embodied in the constitution, are supreme within their scope and operation, and \* \* \* this government may exercise these powers in its appropriate departments, free and unobstructed by any state legislation or authority. \* \* \* Within this limit this government is sovereign and independent, and any interference by the state governments, tending to the interruption of the full legitimate exercise of the powers thus granted, is in conflict with that clause which declares that the constitution and the laws of the United States passed in pursuance thereof shall be 'the supreme law of the land.'" *New York v. Commissioners of Taxes*, 2 Black 620, 623, 17 L. Ed. 451.

The general government, though limited as to its objects, is supreme with respect to those objects. This principle is a part of the constitution, and if it could be doubted whether from its nature, it were

not supreme, in all cases where it was empowered to act, that doubt would be removed by the declaration, that the constitution and laws of the United States made in pursuance thereto, and all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land. *Cohens v. Virginia*, 6 Wheat. 264, 381, 5 L. Ed. 257.

Within the sphere of their authority, both the legislative and judicial power of the nation are supreme. *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. Ed. 96.

**State governments supreme within the sphere of their authority.**—Every state has a sphere of action where the authority of the national government may not intrude. Within that domain the state is as independent as if the union were not. Within the limits of their powers not granted, or, in the language of the tenth amendment, "reserved," the states are as independent of the general government as that government within its sphere is independent of the states. *Worcester v. Georgia* (opinion of McLean, J.), 6 Pet. 515, 570, 8 L. Ed. 483; *License Cases* (opinion of McLean, J.), 5 How. 504, 588, 12 L. Ed. 256; *Dodge v. Woolsey*, 18 How. 331, 351, 15 L. Ed. 401; *Scott v. Sandford*, 19 How. 393, 448, 15 L. Ed. 691; *Lane County v. Oregon*, 7 Wall. 71, 76, 19 L. Ed. 101; *Collector v. Day*, 11 Wall. 113, 126, 127, 20 L. Ed. 122; *United States v. Railroad Co.*, 17 Wall. 322, 21 L. Ed. 597; *Farrington v. Tennessee*, 95 U. S. 679, 685, 24 L. Ed. 558; *Ex parte Siebold*, 100 U. S. 371, 399, 25 L. Ed. 717; *Van Brocklin v. Tennessee*, 117 U. S. 151, 178, 29 L. Ed. 845; *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 584, 39 L. Ed. 759; *Northern Securities Co. v. United States*, 193 U. S. 197, 348, 48 L. Ed. 679; *In re Heff*, 197 U. S. 488, 505, 49 L. Ed. 848; *South Carolina v. United States*, 199 U. S. 437, 448, 50 L. Ed. 261.

**20. Neither government to intrude upon the jurisdiction nor burden the instrumentalities of the other.**—*McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *Osborn v. United States Bank*, 9 Wheat. 738, 6 L. Ed. 204; *Weston v. Charleston*, 2 Pet. 449, 7 L. Ed. 481; *Worcester v. Georgia*, 6 Pet. 515, 570, 8 L. Ed. 483; *License Cases* (opinion of McLean, J.), 5 How. 504, 588,



**Exception.**—The exception consists in the supremacy conferred by the constitution upon the federal government when a conflict arises through the exercise of the constitutional powers of the two governments.<sup>21</sup>

**Duty of Courts to Prevent Encroachment and Maintain Supremacy of Each Government.**—It is the duty of all courts, pre-eminently so of the supreme court of the United States, to preserve the even balance of power between the state and national governments, to restrict each to its separate sphere of action, and to protect each from encroachments and trespasses by the other.<sup>22</sup>

(bb) *Encroachment through Implied or Constructive Powers, or through Strained or Unusual Construction.*—There is nothing in the constitution which authorizes congress to encroach upon the reserved rights of the states upon the assumption that such encroachment is necessary and proper for carrying into execution its enumerated powers. Likewise, there is no warrant to the states in that instrument to encroach upon the powers delegated to the national government or prohibited to the states under color of carrying into execution their powers of police and taxation, or any other of their reserved powers. Powers of either description are wholly unknown to the constitution and utterly incompatible with its spirit and provisions.<sup>23</sup> And in dealing with rights reserved to the

12 L. Ed. 256; *Ableman v. Booth*, 21 How. 506, 16 L. Ed. 169; *New York v. Commissioners of Taxes*, 2 Black 620, 632, 17 L. Ed. 451; *Bank Tax Case*, 2 Wall. 200, 17 L. Ed. 793; *The Banks v. Mayor*, 7 Wall. 16, 19 L. Ed. 57; *Texas v. White*, 7 Wall. 700, 705, 19 L. Ed. 227; *Tarble's Case*, 13 Wall. 397, 406, 20 L. Ed. 597; *Claffin v. Houseman*, 93 U. S. 130, 137, 23 L. Ed. 833; *Farrington v. Tennessee*, 95 U. S. 679, 685, 24 L. Ed. 558; *Robb v. Connolly*, 111 U. S. 624, 631, 28 L. Ed. 542; *Logan v. United States*, 144 U. S. 263, 284, 36 L. Ed. 429; *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 583, 39 L. Ed. 759; *In re Heff*, 197 U. S. 488, 505, 49 L. Ed. 848; *Jacobson v. Massachusetts*, 197 U. S. 11, 38, 49 L. Ed. 643; *Northern Securities Co. v. United States*, 193 U. S. 197, 348, 48 L. Ed. 679; *South Carolina v. United States*, 199 U. S. 437, 448, 50 L. Ed. 261.

"The constitution contemplates the independent exercise by the nation and the state, severally, of their constitutional powers." *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 583, 39 L. Ed. 759.

"The two governments, national and state, are each to exercise their powers so as not to interfere with the free and full exercise by the other of its powers. This proposition, so far as the nation is concerned, was affirmed at an early day in the great case of *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579, in which it was held that the state had no power to pass a law imposing a tax upon the operations of a national bank. The case is familiar and needs not to be quoted from. No answer has ever been made to the argument of Mr. Chief Justice Marshall, and the propositions there laid down have become fundamental in our constitutional jurisprudence. *Osborn v. United States Bank*, 9 Wheat. 738, 6 L. Ed. 204; *Weston v.*

*Charleston*, 2 Pet. 449, 7 L. Ed. 481; *New York v. Commissioners of Taxes*, 2 Black 620, 17 L. Ed. 451; *Bank Tax Case*, 2 Wall. 200, 17 L. Ed. 793; *The Banks v. The Mayor*, 7 Wall. 16, 19 L. Ed. 57." *South Carolina v. United States*, 199 U. S. 437, 452, 50 L. Ed. 261.

The federal government is supreme in the exercise of powers delegated to it, but beyond this its acts are unconstitutional and void. So the acts of the states are void when they do that which is inhibited to them, or exercise a power which they have exclusively delegated to the federal government. (*Opinion of McLean, J.*) *License Cases*, 5 How. 504, 588, 12 L. Ed. 256.

21. See post, "Supremacy in Case of Conflict between State and Federal Powers," VI, D, 3, c, (6), (b), (hh).

22. **Duty of courts to prevent encroachments.**—*Texas v. White*, 7 Wall. 700, 725, 19 L. Ed. 227; *Railroad Co. v. Husen*, 95 U. S. 465, 24 L. Ed. 527; *Smith v. Alabama*, 124 U. S. 465, 476, 31 L. Ed. 508; *Plumley v. Massachusetts*, 155 U. S. 461, 472, 39 L. Ed. 223; *Northern Securities Co. v. United States*, 193 U. S. 197, 348, 48 L. Ed. 679; *Jacobson v. Massachusetts*, 197 U. S. 11, 38, 49 L. Ed. 643; *In re Heff*, 197 U. S. 488, 505, 49 L. Ed. 848; *South Carolina v. United States*, 199 U. S. 437, 448, 50 L. Ed. 261.

"While this court should guard with firmness every right appertaining to life, liberty or property as secured to the individual by the supreme law of the land, it is of the last importance that it should not invade the domain of local authority except when it is plainly necessary to do so in order to enforce that law." *Jacobson v. Massachusetts*, 197 U. S. 11, 38, 49 L. Ed. 643.

23. **Encroachment through implied or constructive powers, strained and unusual construction, etc.**—*McCulloch v. Mary-*

states, the federal supreme court cannot by legal intendment and mere technical reasoning take away from them any portion of that power over their own internal police and improvement, which is so necessary to their well being and prosperity.<sup>24</sup>

(cc) *State Encroachment upon Federal Power and Prerogatives*.—(aaa) *Generally*.—Neither the unlimited powers of a state to tax, its large police powers, nor any other of its reserved powers can be exercised to such an extent as to work a practical assumption of the powers conferred by the constitution upon the national government. The states cannot in any manner retard, impede, or burden the operation of the constitutional laws enacted by congress to carry into effect the powers of the national government.<sup>25</sup> Whenever the statutes of a state invade the domain of legislation, which, by the constitution, is exclusively confided to congress, they are void, no matter under which class of powers they may fall, or how closely allied they may be to powers conceded to belong to the states.<sup>26</sup>

(bbb) *State Interference with Proceedings in Federal Courts*.—Repeated decisions of the federal supreme court have determined that state laws, whether general or enacted for the particular case, cannot in any manner limit or affect the operation of the process or proceedings in the federal courts.<sup>27</sup> The state

land, 4 Wheat. 316, 4 L. Ed. 579; *Weston v. Charleston*, 2 Pet. 449, 7 L. Ed. 481; *Railroad Co. v. Peniston*, 18 Wall. 5, 34, 21 L. Ed. 787; *Railroad Co. v. Husen*, 95 U. S. 465, 24 L. Ed. 527; *New York v. Miln* (opinion of Baldwin, J.), 11 Pet. 102, 153k, 9 L. Ed. 648.

In our system there are limitations upon the powers of both the state and federal governments; where there is a concurrent right of legislation in the states as in the United States both are restrained by the express prohibition in the constitution; the states cannot exercise their right in such case so as to conflict with the perfect execution of another sovereign power delegated to the United States. *Dobbins v. Commissioners*, 16 Pet. 435, 10 L. Ed. 1022.

**24. Same.**—*Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. Ed. 773. "The constitution unavoidably deals in general language" (1 Wheat. 326); "it marks only its great outlines and designates its important objects" (4 Wheat. 407); but these outlines and objects are all enumerated; none can be added or taken away; what is so marked and designated in general terms, comprehends the subject matter in its detail. A grant of legislative power over any given subject, comprehends the whole subject; the corpus, the body, and all its constituent parts; so does a prohibition to legislate; yet the framers of the constitution could not have intended to leave it in the power of congress to so extend the details of a granted power, as to embrace any part of the corpus of a reserved power. A power reserved or excepted in general terms, as internal police, is reserved as much in detail and in all its ramifications, as the granted power to regulate commerce with foreign nations; the parts or subdivisions of the one cannot be carried into the other, by any assumed necessity of carrying the given power in one case into execution

which could not be done in the other." (Opinion of Baldwin, J.) *New York v. Miln*, 11 Pet. 102, 153k, 9 L. Ed. 648.

**25. State encroachment upon federal powers and prerogatives.**—*McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *Brown v. Maryland*, 12 Wheat. 419, 448, 449, 6 L. Ed. 678; *Weston v. Charleston*, 2 Pet. 449, 467, 7 L. Ed. 481; *Dobbins v. Commissioners*, 16 Pet. 435, 10 L. Ed. 1022; *Crandall v. Nevada*, 6 Wall. 35, 46, 18 L. Ed. 745; *Ward v. Maryland*, 12 Wall. 418, 427, 20 L. Ed. 449; *Railroad Co. v. Peniston*, 18 Wall. 534, 21 L. Ed. 787; *Henderson v. Mayor*, 92 U. S. 259, 272, 23 L. Ed. 543; *Railroad Co. v. Husen*, 95 U. S. 465, 24 L. Ed. 527; *Transportation Co. v. Wheeling*, 99 U. S. 273, 25 L. Ed. 412.

**26. Same.**—*Henderson v. Mayor*, 92 U. S. 259, 272, 23 L. Ed. 543. See, also, post, "Supremacy in Case of Conflict between State and Federal Powers," VI, D, 3, c, (6), (b), (hh).

"Against the national will 'the states have no power, by taxation or otherwise, to retard, impede, burthen, or in any manner control, the operation of the constitutional laws enacted by congress to carry into execution the powers vested in the general government.' *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *Weston v. Charleston*, 2 Pet. 449, 466, 7 L. Ed. 481; *Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678; *Dobbins v. Commissioners*, 16 Pet. 435, 10 L. Ed. 1022." *Farmers', etc., Nat. Bank v. Dearing*, 91 U. S. 29, 34, 23 L. Ed. 196.

Since the range of a state's police power comes very near to the field committed by the constitution to congress, it is the duty of courts to guard vigilantly against any needless intrusion. *Railroad Co. v. Husen*, 95 U. S. 465, 24 L. Ed. 527.

**27. State interference with proceedings in federal courts.**—*Riggs v. Johnson*

courts have no jurisdiction to revise the action of the federal courts and cannot in any case interfere with proceedings therein. Within their sphere of action, they are as wholly independent of, and as far beyond the reach of process issued by a state judge or a state court, as if the line of division between the two sovereignties was traceable by landmarks and monuments visible to the eye.<sup>28</sup>

**Injunction from State Court.**—The injunction of a state court is inoperative to control, or in any manner to affect, the process or proceedings of a federal circuit court.<sup>29</sup>

**Property in Custody of United States Marshal.**—Based on this consideration, the settled rule is, that the remedy of a party whose property is wrongfully attached under process issued from a circuit court, if he wishes to pursue it in a state tribunal, is trespass, and not replevin, as the sheriff cannot take the property out of the possession and custody of the marshal.<sup>30</sup>

**Property in Custody of Receiver Appointed by Federal Court.**—Whether the sheriff is armed with a writ from a state court or with a distress warrant from a county treasurer, property in the custody of a receiver appointed by a federal court is as much withdrawn from his reach as if it were beyond the territorial limits of the state.<sup>31</sup>

**Prisoner in Custody of United States Marshal.**—Persons arrested and held pursuant to laws enacted by congress are in the exclusive custody of the United States, and are not subject to the judicial process or executive warrant of any state.<sup>32</sup> Therefore, a state has no more power to authorize its judges and courts to take from a United States marshal, by habeas corpus proceedings, a prisoner lawfully in his custody upon a charge of violating the laws of the United States, than if such prisoner were lawfully confined in another state of the Union upon a charge of violating the laws of such other state.<sup>33</sup>

County, 6 Wall. 166, 195, 18 L. Ed. 768; Weber v. Lee County, 6 Wall. 210, 18 L. Ed. 781.

**28. Same.**—United States v. Peters, 5 Cranch 115, 3 L. Ed. 53; New York v. Commissioners of Taxes, 2 Black 620, 633, 17 L. Ed. 451; Ableman v. Booth, 21 How. 506, 16 L. Ed. 169; Riggs v. Johnson County, 6 Wall. 166, 196, 18 L. Ed. 768; Weber v. Lee County, 6 Wall. 210, 18 L. Ed. 781; United States v. Council, 6 Wall. 518, 520, 18 L. Ed. 918; Tarble's Case, 13 Wall. 397, 399, 405, 20 L. Ed. 597; Claflin v. Houseman, 93 U. S. 130, 137, 23 L. Ed. 833; Covell v. Heyman, 111 U. S. 176, 182, 28 L. Ed. 390; Robb v. Connolly, 111 U. S. 624, 631, 28 L. Ed. 542; In re Loney, 134 U. S. 372, 375, 33 L. Ed. 949; Logan v. United States, 144 U. S. 263, 284, 36 L. Ed. 429; In re Neagle, 135 U. S. 1, 64, 86, 34 L. Ed. 55; In re Swan, 150 U. S. 637, 652, 37 L. Ed. 1207.

**29. Same; injunctions from state courts.**—Riggs v. Johnson County, 6 Wall. 166, 196, 18 L. Ed. 768; Weber v. Lee County, 6 Wall. 210, 18 L. Ed. 781; United States v. Council, 6 Wall. 518, 520, 18 L. Ed. 918. See, also, the title INJUNCTIONS.

**30. Property in custody of federal courts or officers.**—Freeman v. Howe, 24 How. 450, 455, 16 L. Ed. 749; Buck v. Colbath, 3 Wall. 334, 341, 18 L. Ed. 257; Riggs v. Johnson County, 6 Wall. 166, 196, 18 L. Ed. 768; Covell v. Heyman, 111 U. S. 176, 182, 28 L. Ed. 390. See, also, the title COURTS.

**31. Same.**—In re Tyler, 149 U. S. 164,

186, 37 L. Ed. 689. See, also, In re Swan, 150 U. S. 637, 652, 37 L. Ed. 1207. See, also, the title COURTS.

An officer of the state constabulary of South Carolina had no right to seize, without permission of the court, liquors in the possession of a receiver appointed by a federal circuit court. In re Swan, 150 U. S. 637, 652, 37 L. Ed. 1207.

"These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they coexist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that res is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void." In re Tyler, 149 U. S. 164, 186, 37 L. Ed. 689; Covell v. Heyman, 111 U. S. 176, 182, 28 L. Ed. 390.

**32. Persons in custody of federal officers.**—Ableman v. Booth, 21 How. 506, 16 L. Ed. 169; Tarble's Case, 13 Wall. 397, 20 L. Ed. 597; Robb v. Connolly, 111 U. S. 624, 28 L. Ed. 542; Logan v. United States, 144 U. S. 263, 284, 36 L. Ed. 429.

**33. Same.**—Ableman v. Booth, 21 How. 506, 516, 16 L. Ed. 169; Tarble's Case, 13 Wall. 397, 20 L. Ed. 597; Robb v. Connolly, 111 U. S. 624, 631, 28 L. Ed. 542. See, also, the title HABEAS CORPUS.

A state court or judge, who is authorized



**Perjury Committed by Witness in Federal Court.**—It is essential to the impartial and efficient administration of justice in the tribunals of the nation that witnesses should be able to testify freely before them, unrestrained by state legislation or the fear of prosecution in the state courts. Consequently a witness called to testify in a case pending in a court or other judicial tribunal of the United States, whether he testifies in the presence of that tribunal, or before any magistrate or officer, either of the nation or of the state, designated by congress for the purpose, is accountable for the truth of his testimony to the United States alone, and is not liable to indictment and punishment in the state tribunals under a state law defining perjury and prescribing the punishment therefor.<sup>34</sup>

**Statute Annulling Judgment of Federal Court.**—A state legislature has no power to annul the judgment of a federal court and destroy rights acquired under it.<sup>35</sup>

(ccc) *Coercion of Federal Officers by States; Punishment of Federal Officers for Acts Committed in Discharge of Duty.*—A state court cannot enter a mandamus to an officer of the United States, as, for example, to the register of a land office. Whether such officer is to be regarded as an officer of the government, or as its private agent, in either capacity, his conduct can only be controlled by the power that created him.<sup>36</sup>

by the laws of the state to issue the writ of habeas corpus, may issue it in any case where the party is imprisoned within its territorial limits, provided it does not appear, when the application is made, that the person imprisoned is in custody under the authority of the United States. The court or judge has a right to inquire, in this mode of proceeding, for what cause and by what authority the prisoner is confined within the territorial limits of the state sovereignty. And it is the duty of the marshal, or other person having the custody of the prisoner, to make known to the judge or court, by a proper return, the authority by which he holds him in custody. This right to inquire by process of habeas corpus, and the duty of the officer to make a return, grows necessarily, out of the complex character of our government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each, within its sphere of action prescribed by the constitution of the United States, independent of the other. But, after the return is made, and the state judge or court judicially apprized that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of habeas corpus, nor any other process issued under state authority can pass over the line of division between the two sovereignties. *Robb v. Connolly*, 111 U. S. 624, 631, 28 L. Ed. 542; *Ableman v. Booth*, 21 How. 506, 16 L. Ed. 169; *Tarble's Case*, 13 Wall. 397, 20 L. Ed. 597. See, also, the title HABEAS CORPUS.

**Otherwise as to a state extradition officer authorized to receive and return fugitive.**

—But an agent of the state in which the crime was committed, appointed and authorized under the laws of that state to go into another state and receive and bring back a fugitive from justice, is not an officer of the United States, but of the state in which the crime was committed, and therefore he is not entitled to make return to a writ of habeas corpus from a state court that he is an officer of the United States and that he holds the accused in custody under and by authority of the constitution and laws of the United States and as an officer thereof. *Robb v. Connolly*, 111 U. S. 624, 634, 28 L. Ed. 542.

**34. Perjury committed by witness in federal court.**—*In re Loney*, 134 U. S. 372, 375, 33 L. Ed. 949.

**35. Statute annulling judgment of federal court.**—*United States v. Peters*, 5 Cranch 115, 3 L. Ed. 53; *New York v. Commissioners of Taxes*, 2 Black 620, 633, 17 L. Ed. 451.

**36. Coercion of federal officers by the states.**—*McClung v. Silliman*, 6 Wheat. 598, 605, 5 L. Ed. 340.

State authorities are without jurisdiction to compel a United States collector of internal revenue to file with his deposition in a state court copies of certain reports, made to him by distillers of liquors, and forming a part of the records and papers of his office and of the treasury department of the United States government, in violation of valid regulations prescribed by the secretary of the treasury under authority of the laws governing the conduct of the business of his department and the custody, use, and preservation of such records, papers and property. *Boske v. Comingore*, 117 U. S. 459, 44 L. Ed. 846.

**Punishment of Federal Officers for Acts Committed in Discharge of Duty.**—See ante, "To Execute Its Own Laws and Exercise Jurisdiction over All Persons and Places," VI, D, 2, c, (4).

(ddd) *Federal Debtor Not Absolved by Discharge under State Insolvent Law.*—An insolvent debtor who has received a certificate of discharge from arrest and imprisonment, under a state insolvent law, is not entitled to be discharged from execution at the suit of the United States.<sup>37</sup>

(eee) *Power of State to Restrict Negotiability of United States Bonds.*—It was formerly held that a state owning United States bonds could limit their negotiability by an act of its legislature and make such limitation binding upon subsequent purchasers notwithstanding the bonds were, upon their face, payable to bearer.<sup>38</sup> Subsequent cases, however, have limited this doctrine in important particulars,<sup>39</sup> and it must be regarded as overruled.<sup>40</sup>

(fff) *State Encroachment through Exercise of Taxing Power.*—(aaaa) *Generally; The Power to Tax the Power to Destroy.*—Undoubtedly the states may tax every subject of value within the sovereignty of the states, belonging to the citizens as mere private property. Nevertheless, the power is not without its limits. The power to tax, says Chief Justice Marshall, involves the power to destroy; the power to destroy may defeat and render useless the power to create; and there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control.<sup>41</sup> This power of the states does not, therefore, extend to the instrumentalities and agencies of the federal government, nor to the constitutional means employed by congress to carry into execution the powers conferred by the federal constitution. It cannot reach and restrain the action of the national government within its proper sphere; it cannot reach the administration of justice in the courts of the Union, or the collection of the taxes of the United States, or restrain the operation of any law which congress may constitutionally pass; nor can the states, through its exercise, assume any power which has been exclusively conferred upon the national government or prohibited to the states.<sup>42</sup>

37. Federal debtor not discharged by state insolvent law.—United States v. Wilson, 8 Wheat. 253, 5 L. Ed. 610.

38. Power of states to restrict negotiability of United States bonds.—Texas v. White, 7 Wall. 700, 19 L. Ed. 227.

39. Same.—Huntington v. Texas, 16 Wall. 402, 21 L. Ed. 316; National Bank v. Texas, 20 Wall. 72, 22 L. Ed. 295; Vermilye v. Adams Express Co., 21 Wall. 138, 22 L. Ed. 609.

40. Same.—Morgan v. United States, 113 U. S. 476, 496, 28 L. Ed. 1044.

The decision in reference to the Texas indemnity bonds in Texas v. White, 7 Wall. 700, 19 L. Ed. 227, has been questioned and limited in important particulars in the subsequent cases involving the same questions. Huntington v. Texas, 16 Wall. 402, 21 L. Ed. 316; National Bank v. Texas, 20 Wall. 72, 22 L. Ed. 295; Vermilye v. Adams Express Co., 21 Wall. 138, 22 L. Ed. 609. The position there taken that the legislature of Texas, while the state was owner of the bonds, could limit their negotiability by an act of legislation, of which all subsequent purchasers were charged with notice, although the bonds on their face were payable to bearer, must be regarded as overruled

41. State encroachment through exercise of taxing power.—McCulloch v. Maryland, 4 Wheat. 316, 431, 4 L. Ed. 579.

"The power to create carries with it the power to preserve. The latter is a corollary from the former." Farmers', etc., Nat. Bank v. Dearing, 91 U. S. 29, 34, 23 L. Ed. 196.

42. Same.—McCulloch v. Maryland, 4 Wheat. 316, 431, 4 L. Ed. 579; Brown v. Maryland, 12 Wheat. 419, 448, 449, 6 L. Ed. 678; Weston v. Charleston, 2 Pet. 449, 7 L. Ed. 481; Dobbins v. Commissioners, 16 Pet. 434, 10 L. Ed. 1022; Crandall v. Nevada, 6 Wall. 35, 46, 18 L. Ed. 745; Society for Savings v. Coite, 6 Wall. 594, 605, 18 L. Ed. 897; Provident Institution v. Massachusetts, 6 Wall. 611, 622, 18 L. Ed. 907; Hamilton v. Massachusetts, 6 Wall. 632, 639, 18 L. Ed. 904; State Tonnage Tax Cases, 12 Wall. 204, 212, 20 L. Ed. 370; Collector v. Day, 11 Wall. 113, 123, 20 L. Ed. 122; Railroad Co. v. Peniston, 18 Wall. 5, 30, 21 L. Ed. 787; Ward v. Maryland, 12 Wall. 418, 427, 20 L. Ed. 449; Delaware Railroad Tax, 18 Wall. 206, 232, 21 L. Ed. 888; Farmers, etc., Nat. Bank v. Dearing, 91 U. S. 29, 34, 23 L. Ed. 196; Farrington v. Tennessee, 95 U. S. 679, 688, 24 L. Ed. 558; Railroad Co. v. Husen, 95 U. S. 465, 24 L. Ed. 527; Edwards v.



### Limitation of Doctrine That Power to Tax Is the Power to Destroy.

—The principle announced by Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 315, 431, "that the power to tax involves the power to destroy," is pertinent only when there is no power to tax a particular subject; it has no relation to a case where such right exists. In other words, the power to destroy which may be the consequence of taxation is a reason why the right to tax should be confined to subjects which may be lawfully embraced therein, even though it happens that in some particular instance no great harm may be caused by the exercise of the taxing authority as to a subject which is beyond its scope. But this reasoning has no application to a lawful tax, for if it had there would be an end to all taxation; that is to say, if a lawful tax can be defeated because the power which is manifested by its imposition may when further exercised be destructive, it would follow that every lawful tax would become unlawful, and therefore no taxation whatever could be levied. Under our constitutional system, both the national and the state governments, moving in their respective orbits, have a common authority to tax many and diverse objects, but this does not cause the exercise of its lawful attributes by one to be a curtailment of the powers of government of the other, for if it did there would practically be an end of the dual system of government which the constitution established.<sup>43</sup>

(bbbb) *State Taxation of Foreign and Interstate Commerce*.—See the title INTERSTATE AND FOREIGN COMMERCE.

(cccc) *Access of Citizens to Seat of Government; Transportation of Troops*.—The United States has a right to require the service of its citizens at the seat of federal government in all executive, legislative and judicial departments;

Kearzey, 96 U. S. 595, 602, 24 L. Ed. 793; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 666, 24 L. Ed. 1036; *Transportation Co. v. Wheeling*, 99 U. S. 273, 281, 25 L. Ed. 412; *Telegraph Co. v. Texas*, 105 U. S. 460, 464, 26 L. Ed. 1067; *Van Brocklin v. Tennessee*, 117 U. S. 151, 155, 178, 29 L. Ed. 845; *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, 31 L. Ed. 790; *Marye v. Baltimore, etc., R. Co.*, 127 U. S. 117, 123, 124, 32 L. Ed. 94; *Leloup v. Mobile*, 127 U. S. 640, 649, 32 L. Ed. 311; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. Ed. 613; *Cleveland, etc., R. Co. v. Backus*, 154 U. S. 439, 445, 38 L. Ed. 1041; *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 585, 39 L. Ed. 759; *Pollock v. Farmers' Loan & Trust Co. (rehearing)*, 158 U. S. 601, 621, 39 L. Ed. 1108; *Western Union Tel. Co. v. Taggart*, 163 U. S. 1, 14, 41 L. Ed. 49; *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 624, 43 L. Ed. 823.

An agency created for carrying into effect national powers granted by the constitution is not, either in its capital, franchises or operations, subject to the taxing power of the state, except as may be permitted by the consent of the government. *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *Osborn v. United States Bank*, 9 Wheat. 738, 6 L. Ed. 204; *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664, 667, 43 L. Ed. 850.

"State tax laws cannot restrain the action of the national government, nor can they abridge the operation of any law which congress may constitutionally pass. They may extend to every object of value within the sovereignty of the state, but

they cannot reach the administration of justice in the federal courts, nor the collection of the public revenue, nor interfere with any constitutional regulation of commerce." *Society for Savings v. Coite*, 6 Wall. 594, 605, 18 L. Ed. 897.

**The power to tax is the power to destroy.**—*McCulloch v. Maryland*, 4 Wheat. 316, 431, 4 L. Ed. 579; *Crandall v. Nevada*, 6 Wall. 35, 46, 18 L. Ed. 745; *Farrington v. Tennessee*, 95 U. S. 679, 688, 24 L. Ed. 558; *Edwards v. Keazey*, 96 U. S. 595, 602, 24 L. Ed. 793; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 666, 24 L. Ed. 1036; *Van Brocklin v. Tennessee*, 117 U. S. 151, 155, 29 L. Ed. 845; *California v. Central Pac. R. Co.*, 127 U. S. 1, 40, 41, 32 L. Ed. 150; *Pollock v. Farmers' Loan & Trust Co. (rehearing)*, 158 U. S. 601, 621, 39 L. Ed. 1108.

**43. Limitation of doctrine.**—*Knowlton v. Moore*, 178 U. S. 41, 60, 44 L. Ed. 969. See, also, *Lottery Case*, 188 U. S. 321, 47 L. Ed. 492; *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23; *McCray v. United States*, 195 U. S. 27, 56, 49 L. Ed. 78.

Thus it was held that although the right to regulate the succession of property is vested solely in the states, congress is not precluded from levying an inheritance and legacy tax upon the succession of property, since the power of congress to tax extends to all property subject to taxation. *Knowlton v. Moore*, 178 U. S. 41, 58, 44 L. Ed. 969; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 42 L. Ed. 1037; *Murdock v. Ward*, 178 U. S. 139, 44 L. Ed. 1009; *Sherman v. United States*, 178 U. S. 150, 44 L. Ed. 1014.



and at all the points in the several states where the functions of government are to be performed.<sup>44</sup> The citizens of the United States have the correlative right to approach the great departments of the government, the ports of entry through which commerce is conducted, and the various federal offices in the states.<sup>45</sup> By virtue of its power to make war and to suppress insurrection, the government also has a right to transport troops through all parts of the Union by the usual and most expeditious modes of transportation.<sup>46</sup> The taxing power being in its nature unlimited over the subjects within its control, would enable the state governments to destroy the above mentioned rights of the federal government and of its citizens if the right of transit through the states by railroad and other ordinary modes of travel were one of the legitimate objects of state taxation. The existence of such a power in the states is, therefore, inconsistent with objects for which the federal government was established, and with rights conferred by the constitution on that government and on the people. An exercise of such a power is accordingly void.<sup>47</sup>

**A special tax on railroad and stage companies for every passenger carried out of the state** by them is a tax on the passenger for the privilege of passing through the state by the ordinary modes of travel, and is not a simple tax on the business of the companies.<sup>48</sup>

(dddd) *Taxation of Property Owned by Federal Government.*—Whether the property of the United States shall be taxed under the laws of a state depends upon the will of its owner, the United States. No state can tax the property of the United States without their consent.<sup>49</sup>

(eeee) *Franchise Granted by Federal Government.*—Franchises granted by congress to a private corporation, as for example, to construct and operate a railroad, are not subject to state taxation, since the power to tax is the power to destroy.<sup>50</sup>

**44. Access of citizens to seat of government.**—Crandall v. Nevada, 6 Wall. 35, 18 L. Ed. 745.

**45. Correlative right of the citizen.**—Crandall v. Nevada, 6 Wall. 35, 18 L. Ed. 745.

**46. Transportation of troops.**—Crandall v. Nevada, 6 Wall. 35, 18 L. Ed. 745.

**47. Right inconsistent with object of government.**—Crandall v. Nevada, 6 Wall. 35, 18 L. Ed. 745.

**48. Tax on passage through state.**—Crandall v. Nevada, 6 Wall. 35, 18 L. Ed. 745.

**49. Taxation of federal property by states.**—Van Brocklin v. Tennessee, 117 U. S. 151, 175, 29 L. Ed. 845; Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 585, 39 L. Ed. 759; United States v. Perkins, 163 U. S. 625, 41 L. Ed. 287; Stearns v. Minnesota, 179 U. S. 223, 243, 45 L. Ed. 162; South Carolina v. United States, 199 U. S. 437, 452, 50 L. Ed. 261.

Lands belonging to the United States within a state are exempt from taxation by the state. Stearns v. Minnesota, 179 U. S. 223, 243, 45 L. Ed. 162; Van Brocklin v. Tennessee, 117 U. S. 151, 29 L. Ed. 845.

"It is true that in most of the enabling acts for the admission of new states there is express provision that the property of the nation shall be free from state taxation, but as shown by Mr. Justice Gray, delivering the opinion of the court in Van

Brocklin v. Tennessee, 117 U. S. 151, 29 L. Ed. 845, this provision is merely declaratory and unnecessary to establish the exemption of national property from state taxation." South Carolina v. United States, 199 U. S. 437, 452, 50 L. Ed. 261. See, generally, as to state taxation of public lands, the titles PUBLIC LANDS; TAXATION.

**Lands bought in by government at tax sale.**—This principle extends to the exemption from taxation of lands sold by the United States for the purpose of enforcing a direct tax and bought in by the federal government. No state tax can be levied upon such land while it is owned by the government, nor can a tax levied upon the land while it was held by the government be enforced against a subsequent purchaser thereof. Van Brocklin v. Tennessee, 117 U. S. 151, 29 L. Ed. 845.

**Inheritance and legacy taxes.**—A state law imposing an inheritance or legacy tax is not unconstitutional as applied to personal property bequeathed by will to the United States, since the tax is imposed upon the legacy before it reaches the hands of the legatee. In other words the legacy, in such case, becomes the property of the United States only after it has suffered a diminution to the amount of the tax. United States v. Perkins, 163 U. S. 625, 41 L. Ed. 287.

**50. Taxation of franchises granted by federal government.**—California v. Central

**Where Corporation Has Received Franchise from Both State and Federal Governments.**—Where a corporation which has received a franchise from the federal government accepts a franchise from the state, the latter franchise is subject to state taxation, notwithstanding the continued existence of the former.<sup>51</sup> So far as the ability of the company to discharge its duties and obligations to the general government is concerned, taxation of the state franchise does not tend to impair that ability any more than taxation of the roadway, roadbed, rails and rolling stock. If the necessary effect of a tax on such tangible property is not to unconstitutionally hinder the efficient exercise of the power to serve the government, neither can it be so in respect of the state franchise.<sup>52</sup>

**Presumption as to Franchise Taxed.**—Where the corporation includes the franchise in its statement, if there are two franchises, one of which can be assessed and the other cannot, the presumption is that the franchise thus included in its return and by the board in its assessment is the franchise which is not exempt under the laws of the United States, and that the board has acted upon property within its jurisdiction rather than upon property which it has no power to include in the assessment.<sup>53</sup> Whether the corporation operates its road under the franchise derived from the United States or from the state is immaterial.<sup>54</sup>

(ffff) *Salary of Federal Official; Right or Title to Office.*—The principle that the state governments cannot lay a tax upon the constitutional means em-

Pac. R. Co., 127 U. S. 1, 40, 41, 32 L. Ed. 150.

**Permission to construct bridge not a franchise.**—The act of congress of December 17, 1872, c. 4, 17 Stat. 398, entitled "An act to authorize the construction of bridges across the Ohio River, and to prescribe the dimensions of the same," which provided that any such bridge should be recognized as a post route; and the act supplementary to that act approved February 14, 1883, c. 44, 22 Stat. 414, conferred no right or franchise on the company to erect the bridge or to collect tolls for its use. They merely regulated the height of bridges over that river and the width of their spans, in order that they might not interfere with its navigation. *Henderson Bridge Co. v. Henderson City*, 141 U. S. 679, 689, 35 L. Ed. 900; *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 152, 154, 41 L. Ed. 953; *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 602, 43 L. Ed. 823.

**51. Corporations operating under both state and federal franchise.**—*Central Pac. R. Co. v. California*, 162 U. S. 91, 126, 40 L. Ed. 903, followed in *Southern Pac. R. Co. v. California*, 162 U. S. 167, 40 L. Ed. 929.

**52. Same.**—*Central Pac. R. Co. v. California*, 162 U. S. 91, 126, 40 L. Ed. 903, followed in *Southern Pac. R. Co. v. California*, 162 U. S. 167, 40 L. Ed. 929.

**53. Presumption as to franchise taxed.**—*Central Pac. R. Co. v. California*, 162 U. S. 91, 113, 40 L. Ed. 903, followed in *Southern Pac. R. Co. v. California*, 162 U. S. 167, 40 L. Ed. 929.

The Central Pacific Railroad Company, operating under franchises obtained from

the federal government and the state of California respectively, made return of its property for purposes of taxation, as required by the state law, including therein its franchise, without designating whether the franchise so returned for taxation was the one derived from the state or the one derived from the federal government. The board of equalization having increased the valuation placed upon such franchise and other taxable property from the sum of \$12,273,785 to the sum of \$18,000,000, it was held that the presumption was that the franchise returned for taxation was the one taxable by the state, namely, the franchise derived from the state, and that the state court did not err in deciding against the contention of the company that the board of equalization had imposed a tax upon its franchise derived from the federal government. *Central Pac. R. Co. v. California*, 162 U. S. 91, 128, 40 L. Ed. 903, followed in *Southern Pac. R. Co. v. California*, 162 U. S. 167, 40 L. Ed. 929.

"If it had intended to claim that its state and federal franchises were so merged as to render the former not subject to taxation, or that it had no franchise subject to taxation, it was its duty to so indicate in making the return. Nothing in the law and nothing in the blank form could have compelled to make a statement contrary to the facts." *Central Pac. R. Co. v. California*, 162 U. S. 91, 114, 40 L. Ed. 903, followed in *Southern Pac. R. Co. v. California*, 162 U. S. 167, 40 L. Ed. 929.

**54. Same.**—*Central Pac. R. Co. v. California*, 162 U. S. 91, 127, 40 L. Ed. 903, followed in *Southern Pac. R. Co. v. California*, 162 U. S. 167, 40 L. Ed. 929.

ployed by the government of the Union to execute its constitutional powers, extends to exempt all federal officers from state taxation in so far as concerns their right and title to their respective offices and to the salary or other emoluments attached thereto.<sup>55</sup>

(gggg) *State Taxation of United States Bank*.—During the days of the old United States Bank, it was held that a state could not tax a bank created by the United States as a part of the monetary system of the country and to aid in the fiscal operation of the government; and that any attempt on the part of the officers or agents of a state to collect such a tax might be restrained by an injunction from the federal circuit court.<sup>56</sup>

**Taxation of Business, Franchise or Privilege of Bank**.—Since the power to lend money to individuals and to carry on the general banking business in its private as well as its public capacity is necessary to the life and continued existence of a bank created for the purposes of aiding in the fiscal operations of the government, such privilege, or such trade or business, can no more be taxed than the bank itself. To tax its faculties, its trade and occupation, is to tax the bank itself. To destroy or preserve the one, is to destroy or preserve the other. There is no foundation, therefore, for such a distinction.<sup>57</sup> As to what powers and functions are necessary to enable a bank, created to aid in the fiscal operations of the government, to perform the services for which it was created, is a question proper for the consideration of congress.<sup>58</sup>

**Taxation of Branch Offices**.—The bank of the United States had, constitutionally, a right to establish its branches or offices of discount and deposit

**55. Salaries of federal officers; right and title to office**.—*Dobbins v. Commissioners*, 16 Pet. 435, 10 L. Ed. 1022; *National Bank v. Commonwealth*, 9 Wall. 353, 19 L. Ed. 701.

A captain of a revenue cutter, on the Erie station, in Pennsylvania, was rated and assessed for county taxes, as an officer of the United States, for his office. Held, that such officer was a part of the means and agencies employed by the United States for the purpose of regulating foreign and interstate commerce, and as such was exempted from all state taxation as to his office and the emoluments thereof; that aside from his exemption upon this ground, he was exempt upon general principles as to his office and salary as an officer of the United States government; that congress has exclusive power to fix the salaries of the officers of the government, and that no state has the power to diminish the same by exacting any part thereof under the power of taxation. *Dobbins v. Commissioners*, 16 Pet. 435, 10 L. Ed. 1022.

But while the salary of a federal officer is not subject to state taxation, and while he is exempt from any personal service which interferes with the discharge of his official duties, he is, nevertheless, subject to all the laws of the state which affect his family or social relations, or his property; and he is liable to punishment for crime, though that punishment be imprisonment or death. *National Bank v. Commonwealth*, 9 Wall. 353, 362, 19 L. Ed. 701.

**56. State taxation of Bank of the United States**.—*McCulloch v. Maryland*, 4 Wheat.

316, 4 L. Ed. 579; *Osborn v. United States Bank*, 9 Wheat. 738, 6 L. Ed. 204.

The law passed by the legislature of Maryland imposing a tax upon the Bank of the United States was unconstitutional and void. *McCulloch v. Maryland*, 4 Wheat. 316, 436, 4 L. Ed. 579.

The whole opinion of the court in the case of *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579, is founded on, and sustained by, the idea that the bank was an instrument which was necessary and proper for carrying into effect the powers vested in the government of the United States. *Osborn v. United States Bank*, 9 Wheat. 738, 860, 6 L. Ed. 204.

**57. Taxation of business, franchise or privilege of bank**.—*Osborn v. United States Bank*, 9 Wheat. 738, 862, 6 L. Ed. 204.

**58. Essential powers and privileges a question for congress**.—*Osborn v. United States Bank*, 9 Wheat. 738, 864, 6 L. Ed. 204.

As to the right of the states to tax or otherwise control the operations of a bank created to aid the fiscal operations of the government, Chief Justice Marshall says: "The question on which this right would depend must always be, are these faculties so essential to the fiscal operations of the government, as to authorize congress to confer them? Let this be admitted, and the question does the right to preserve them exist? must always be answered in the affirmative." The chief justice then adds that this question is one proper for the consideration of the national legislature. *Osborn v. United States Bank*, 9 Wheat. 738, 864, 6 L. Ed. 204.



within any state; and the state within which any such branch was established, could not, without violating the constitution, tax such branch.<sup>59</sup>

**Not Extend to Real Property of Bank nor to Shares of Stockholders.**—This principle was held not to extend to a tax paid by the real property of the Bank of the United States in common with the other real property in a particular state, nor to a tax imposed on the proprietary interest which the citizens of that state might hold in such institution in common with other property of the same description throughout the state.<sup>60</sup>

(hhhh) *State Taxation of United States Bonds, Certificates of Indebtedness, etc.*—(aaaaa) *Generally.*—Under the constitution congress is authorized to borrow money on the credit of the United States. This power may be exercised directly, or indirectly by issuing government obligations for debts or services. In whatever manner it may be exercised there is not only a plain repugnance in permitting one government to exercise a restraint over the borrowing powers of the other, but the very grant of the power carries with it on the one hand the implied authority to employ all lawful means to carry such power into execution, and an implied prohibition upon the states from interfering by unfriendly legislation of any character, upon the other.<sup>61</sup> It follows from this that a state tax upon the bonds or obligations of the United States for the payment of money is a tax upon the exercise of the power of congress to borrow money, a tax which, if permitted, would be limited in amount only by the discretion of the state, and might, therefore, be carried to an extent impairing, if not, destroying the power to borrow, to the serious detriment of the general government. As stated by Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 431, 436, 4 L. Ed. 579, the power to tax involves the power to destroy, and the states have no power to impede, burden, or in any manner control the operations of the federal government or to obstruct the laws enacted by congress to carry into execution the powers vested in the general government. Any state law, therefore, imposing a tax upon the bonds or other obligations of the United States to pay money, is unconstitutional and void.<sup>62</sup>

**59. Taxation of branch offices.**—*McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *Osborn v. United States Bank*, 9 Wheat. 738, 868, 6 L. Ed. 204.

The act of Ohio of February-8, 1819, imposing a tax of \$50,000 upon each office of discount and deposit of the United States Bank located in that state, was repugnant to a law of the United States made in pursuance of the federal constitution, and was therefore unconstitutional and void. *Osborn v. United States Bank*, 9 Wheat. 738, 868, 6 L. Ed. 204.

**60. Limitations of doctrine; property of bank; shares of stockholders.**—*McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579.

**61. Taxation of United States bonds or other obligations, of the United States.**—*Weston v. Charleston*, 2 Pet. 449, 7 L. Ed. 481; *New York v. The Commissioners of Taxes*, 2 Black 620, 17 L. Ed. 451; *Society for Savings v. Coite*, 6 Wall. 594, 18 L. Ed. 897; *Provident Institution v. Massachusetts*, 6 Wall. 611, 622, 18 L. Ed. 907; *Hamilton v. Massachusetts*, 6 Wall. 632, 639, 18 L. Ed. 904; *Bank v. Mayor*, 7 Wall. 16, 19 L. Ed. 57; *Bank v. Supervisors*, 7 Wall. 26, 19 L. Ed. 60; *Home Ins. Co. v. New York*, 134 U. S. 594, 598, 33 L. Ed. 1025.

**62. Same.**—*Weston v. Charleston*, 2

Pet. 449, 7 L. Ed. 481; *New York v. The Commissioners of Taxes*, 2 Black 620, 17 L. Ed. 451; *Society for Savings v. Coite*, 6 Wall. 594, 18 L. Ed. 897; *Provident Institution v. Massachusetts*, 6 Wall. 611, 622, 18 L. Ed. 907; *Hamilton v. Massachusetts*, 6 Wall. 632, 639, 18 L. Ed. 904; *Bank v. Mayor*, 7 Wall. 16, 19 L. Ed. 57; *Bank v. Supervisors*, 7 Wall. 26, 19 L. Ed. 60; *Legal Tender Case*, 110 U. S. 421, 444, 28 L. Ed. 204; *Home Ins. Co. v. New York State*, 134 U. S. 594, 598, 33 L. Ed. 1025; *Plummer v. Coler*, 178 U. S. 115, 117, 44 L. Ed. 998; *Home Sav. Bank v. Des Moines*, 205 U. S. 503, 513, 51 L. Ed. 901.

It is not the want of original power in an independent sovereign state to prohibit loans to a foreign government, which restrains the state legislature from direct opposition to those made by the United States; the restraint is imposed by our constitution. The American people have conferred the power of borrowing money on the government, and by making that government supreme, have shielded its action in the exercise of that power, from the action of the local governments; the grant of the power, and the declaration of supremacy, is a declaration that no such restraining or controlling power shall be exercised. *Weston v. Charleston*, 2 Pet. 449, 7 L. Ed. 481.

**Immaterial Whether Tax Imposed *Eo Nomine* or upon Bonds as Included in the Aggregate of the Taxpayers' Property.**—A state law for that purpose is unconstitutional, whether it imposes the tax on United States' stock *eo nomine*, or includes it in the aggregate of the taxpayer's property, to be valued, like the rest, at its worth.<sup>63</sup>

**Or for What Purpose.**—The securities issued by the United States, declared by act of congress to be exempt from taxation, cannot be taxed by the states for any purpose.<sup>64</sup>

**Extends to Obligations of Every Character.**—In whatever form they are issued, being instruments of the national government, stocks, bonds, bills and notes of the United States are exempt from taxation by the governments of the several states.<sup>65</sup>

**Whether Held by Corporations or Individuals.**—And it is immaterial whether such bonds or other securities be held by corporations or individuals; they are alike exempt from state taxation in either case.<sup>66</sup>

(bbbbbb) *States Not to Do Indirectly That Which They Are Prohibited from Doing Directly.*—Nor can this inhibition upon the states be evaded by any change in the mode or form of the taxation, provided the same result is effected—that is, an impediment is thereby interposed to the exercise of a power of the United States. That which cannot be accomplished directly cannot be accomplished indirectly. Through all such attempts the court will look to the end sought to be reached, and if that would trench upon a power of the government, the law creating it will be set aside or its enforcement restrained."<sup>67</sup>

(ccccc) *What Constitutes a Tax on United States Bonds*—(aaaaaa) *Capital Invested in Bonds.*—Such immunity from state taxation not only exempts such securities from taxes levied directly on the holder of the same, but even where such securities form a part of the capital stock of a bank the rule is equally well established that a state cannot tax such capital stock without deducting such portion thereof as is made up of such public securities.<sup>68</sup>

(bbbbbb) *Tax upon Franchise or Business.*—The tax upon a corporate franchise is not a tax upon United States bonds if they happen to compose a

**63. Manner of imposing tax immaterial.**—New York *v. Commissioners of Taxes*, 2 Black 620, 17 L. Ed. 451.

**64. Object of tax immaterial.**—Provident Inst. *v. Massachusetts*, 6 Wall. 611, 622, 18 L. Ed. 907; *Society for Savings v. Coite*, 6 Wall. 594, 18 L. Ed. 897; *Hamilton v. Massachusetts*, 6 Wall. 632, 639, 18 L. Ed. 904.

**65. Doctrine extends to all obligations of the United States.**—*Weston v. Charleston*, 2 Pet. 449, 7 L. Ed. 481; *Bank v. Mayor*, 7 Wall. 16, 19 L. Ed. 57; *Bank v. Supervisors*, 7 Wall. 26, 19 L. Ed. 60; *Legal Tender Case*, 110 U. S. 421, 444, 28 L. Ed. 204.

**Notes issued under acts of 1862 and 1863.**—United States notes issued under the loan and currency acts of 1862 and 1863, intended to circulate as money, and actually constituting, with the national bank notes, the ordinary circulating medium of the country, are, obligations of the national government, and exempt from state taxation. *Bank v. Supervisors*, 7 Wall. 26, 19 L. Ed. 60.

**Certificates of indebtedness for supplies.**—Certificates of indebtedness issued by the United States to creditors of the government, for supplies furnished to it in

carrying on the recent war for the integrity of the Union, and by which the government promised to pay the sums of money specified in them, with interest, at the time named, are beyond the taxing power of the states. *Bank v. Mayor*, 7 Wall. 16, 19 L. Ed. 57.

**66. And whether held by corporations or individuals.**—New York *v. Commissioners of Taxes*, 2 Black 620, 628, 17 L. Ed. 451; *Provident Inst. v. Massachusetts*, 6 Wall. 611, 629, 18 L. Ed. 907; *Bank v. Mayor*, 7 Wall. 16, 23, 19 L. Ed. 57.

**67. States not to do indirectly that which they are forbidden to do directly.**—*Home Ins. Co. v. New York State*, 134 U. S. 594, 598, 33 L. Ed. 1025.

**68. Capital invested in bonds.**—New York *v. Commissioners of Taxes*, 2 Black 620, 628, 17 L. Ed. 451; *Bank Tax Case*, 2 Wall. 200, 17 L. Ed. 793; *Provident Inst. v. Massachusetts*, 6 Wall. 611, 629, 18 L. Ed. 907.

A tax laid by a state on banks, "on a valuation equal to the amount of their capital stock paid in, or secured to be paid in," is a tax on the property of the institution; and when that property consists of stocks of the federal government, the law laying the tax is void. *Bank Tax Case*, 2 Wall. 200, 17 L. Ed. 793.

part of the capital or property of the corporation.<sup>69</sup> In such case the tax is to be regarded as imposed, not upon the specific property, but upon the rights and privileges bestowed by the state, and it may be measured by the aggregate amount of the property or capital stock of the corporation even though such property or capital stock includes United States bonds issued under a statute declaring them exempt from state taxation.<sup>70</sup>

(ccccc) *Tax on Bank Shares*.—Shares in banks, whether state banks or those organized under the act of June 3d, 1864, "to provide a national currency," etc., are liable to taxation by the state under certain limitations (set forth in section forty-first of the act), without regard to the fact that the capital of such banks is invested in bonds of the United States, declared by statutes creating them, to be exempt from taxation by or under state authority.<sup>71</sup> If the rate of taxation by the state on such shares is the same as, or not greater than, upon the moneyed capital of the individual citizen which is subject or liable to taxation; that is to say, if no greater proportion or percentage of tax on the valuation of the shares is levied than upon other moneyed taxable capital in the hands of its citizens, the shares are taxed in conformity with that proviso

**69. Tax upon franchise or business.**—*Plummer v. Coler*, 178 U. S. 115, 44 L. Ed. 998; *Murdock v. Ward*, 178 U. S. 139, 44 L. Ed. 1009.

**70. Same.**—*Society for Savings v. Coite*, 6 Wall. 594, 18 L. Ed. 897; *Provident Inst. v. Massachusetts*, 6 Wall. 611, 18 L. Ed. 907; *Hamilton v. Massachusetts*, 6 Wall. 632, 18 L. Ed. 904; *Plummer v. Coler*, 178 U. S. 115, 44 L. Ed. 998; *Murdock v. Ward*, 178 U. S. 139, 44 L. Ed. 1009.

A tax upon "the corporate franchise or business of all corporations within the state, although measured by the amount of the dividends earned by such corporations, is not to be deemed a tax upon the capital stock of the companies, but upon the privilege or franchise which they may exercise after incorporation. Such a tax is not invalid, therefore, as tax upon United States bonds, although the dividends upon which it is laid are in part earned from such securities. *Home Ins. Co. v. New York State*, 134 U. S. 594, 33 L. Ed. 1025.

A tax on the nominal capital of a bank, without regard to the nature or value of the property composing it, is annexed to the franchise as a royalty for the grant, and not a burden imposed on the property itself. *New York v. Commissioners of Taxes*, 2 Black 620, 17 L. Ed. 451.

A statute of a state requiring savings societies, authorized to receive deposits, but without authority to issue bills, and having no capital stock, to pay annually into the state treasury a sum equal to three-fourths of one per cent. on the total amount of their deposits on a given day, imposes a franchise tax, not a tax on property. Such a tax is valid. *Society for Savings v. Coite*, 6 Wall. 594, 18 L. Ed. 897; *Provident Inst. v. Massachusetts*, 6 Wall. 611, 18 L. Ed. 907.

Consequently the fact that a savings society so taxed has invested a part of its deposits in securities of the United States,

declared by congress, in the act which authorized their issue, to be exempt from taxation by state authority, does not exempt the society from taxation to the extent of deposits so invested. *Society for Savings v. Coite*, 6 Wall. 594, 18 L. Ed. 897; *Provident Inst. v. Massachusetts*, 6 Wall. 611, 18 L. Ed. 907.

A statute of Massachusetts which requires corporations having a capital stock divided into shares to pay a tax of a certain percentage (one-sixth of one per cent.) upon "the excess of the market value," of all such stock over the value of its real estate and machinery, is, under the settled course of decision in the state of Massachusetts of its constitution and laws, a statute which imposes a franchise tax. The tax is lawful notwithstanding a portion of such excess capital stock is invested in nontaxable United States bonds. *Hamilton v. Massachusetts*, 6 Wall. 632, 18 L. Ed. 904.

**71. Tax on bank shares.**—*Van Allen v. The Assessors*, 3 Wall. 573, 18 L. Ed. 229; *People v. The Commissioners*, 4 Wall. 244, 18 L. Ed. 344; *National Bank v. Commonwealth*, 9 Wall. 353, 19 L. Ed. 701; *Lionberger v. Rouse*, 9 Wall. 468, 19 L. Ed. 721; *Churchill v. Utica*, 154 U. S. 550, 18 L. Ed. 229; *Williams v. Nolan*, 154 U. S. 551, 18 L. Ed. 236; *Van Slyke v. Wisconsin*, 154 U. S. 581, 20 L. Ed. 240.

The act of June 3, 1864, "To provide a national currency," etc., rightly construed, subjects the shares of the banking associations authorized by it, and in the hands of shareholders, to taxation by the states under certain limitations (set forth in its 41st section), without regard to the fact that a part or the whole of the capital of such association is invested in national securities declared by the statutes authorizing them to be "exempt from taxation by or under state authority." The act thus construed is constitutional. *Van Allen v. The Assessors*, 3 Wall. 573, 18 L. Ed. 229.



of the forty-first section, which says that they may be assessed, "but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state."<sup>72</sup>

**A tax on the capital of a bank is not the same thing as a tax upon the shares of which the capital is composed.** And where a state imposes on the state banks a tax on their capital (the shares in the hands of the shareholders being exempt from tax), it cannot lay a tax on the shares of banks organized under the act of June 3d, 1864, to provide a national currency.<sup>73</sup>

(ddddd) *Taxation of National Banks.*—National banks are instrumentalities of the federal government created for a public purpose, and the respective states are wholly without power to levy any tax upon them either directly or indirectly, their property, assets or franchises, except such as may be allowed through the permissive legislation of congress.<sup>74</sup> See, generally, the titles BANKS AND BANKING, vol. 3, p. 1; TAXATION.

**The extent to which the states may tax national banks** is defined by the Revised Statutes, § 5219. By that section the states are permitted to impose a tax upon the shares of stock in the names of the share holders and to levy an assessment upon real estate owned by the bank.<sup>75</sup>

(eeeeee) *Inheritance and Legacy Taxes.*—A state law imposing an inheritance or legacy tax is not unconstitutional because the property bequeathed or descended is composed in whole or in part of United States bonds. The tax is not upon the property itself but upon the privilege of acquiring the same by will or by inheritance, which privilege is derived entirely from the law of the state and may be subjected to such conditions as the state may see fit to impose.<sup>76</sup> This doctrine is not affected by the declaration printed upon the face of the bonds pursuant to the act of congress of July 14, 1870, that said bonds are exempt from state taxation in any form, since, as stated, the taxation is not upon the bonds, but upon the privilege of acquiring the same by will or inheritance.<sup>77</sup> Neither is the fact that such tax may remotely affect the borrowing power of the United States sufficient to invalidate the same.<sup>78</sup>

(iiii) *Postal Department; Post Roads; Toll Charges upon Mail Coaches.*—The declaration in an act of congress authorizing the construction of bridges

**72. Same.**—People *v.* The Commissioners, 4 Wall. 244, 18 L. Ed. 344.

The act of March 9th, 1865, of the legislature of New York, sometimes called the enabling act, and which enacts that shares in any of these national banking associations held by any person or body corporate shall be "included in the valuation of the personal property of such person or body corporate, in the assessment of taxes in the town or ward where such banking association is located and not elsewhere," etc., but which did not provide that the tax imposed should not exceed the rate imposed upon the shares of any of the banks organized under the authority of the state, is not warranted by the act of congress, and is void; there having been under the legislation of the state no tax laid on shares in state banks at all; though there was a tax on the capital of such banks. Van Allen *v.* The Assessors, 3 Wall. 573, 18 L. Ed. 229.

**73. Distinction between tax on shares and tax on capital stock.**—Van Allen *v.* The Assessors, 3 Wall. 573, 18 L. Ed. 229; Bradley *v.* The People, 4 Wall. 459, 18 L. Ed. 433.

**74. State taxation of national banks.**—Owensboro Nat. Bank *v.* Owensboro, 173

U. S. 664, 667, 43 L. Ed. 850. See, in accord, Farmers', etc., Nat. Bank *v.* Dearing, 91 U. S. 29, 35, 23 L. Ed. 196; Davis *v.* Elmire Savings Bank, 161 U. S. 275, 283, 40 L. Ed. 700; Kentucky Bank Tax Cases, 174 U. S. 408, 439, 43 L. Ed. 1027. See, also, the titles BANKS AND BANKING, vol. 3, p. 1; TAXATION.

As to whether any particular tax is or is not within the limits of the conditions granted by § 5219 of the Revised Statutes, see the titles BANKS AND BANKING, vol. 3, p. 1; TAXATION.

**75. Extent defined by statute.**—Owensboro Nat. Bank *v.* Owensboro, 173 U. S. 664, 43 L. Ed. 850.

**76. Inheritance and legacy taxes.**—Plummer *v.* Coler, 178 U. S. 115, 139, 44 L. Ed. 998.

**77. Not affected by declaration of exemption contained in face of bond.**—Plummer *v.* Coler, 178 U. S. 115, 44 L. Ed. 998; Murdock *v.* Ward, 178 U. S. 139, 44 L. Ed. 1009.

**78. Nor by the fact that it may remotely affect power to borrow.**—Plummer *v.* Coler, 178 U. S. 115, 44 L. Ed. 998; Murdock *v.* Ward, 178 U. S. 139, 44 L. Ed. 1009.

across the Ohio River, that such bridges should be regarded as post roads, did not interfere with the right of the state to impose taxes. The contrary view would withdraw from the taxing power of the states nearly all the railroads and stage routes throughout the country.<sup>79</sup>

**Taxation of Mail Coaches.**—Under the acts of congress and of the state of Ohio, relating to the surrender and acceptance of the Cumberland road, toll charges upon passengers traveling in the mail stages, without being charged also upon passengers traveling in other stages, were not only void as an impairment of the contract, but were, in effect, an attempt to impose a charge upon the post office department, since the contractor would be obliged to make provision when bidding for the contract, and regulate his bid so as to cover it. Therefore they were void for this reason also.<sup>80</sup>

(jjjj) *Telegraph Companies Employed as Federal Agencies; Messages Sent by the United States.*—Congress, to facilitate the erection of telegraph lines, has by statute authorized the use of the public domain and the military and post roads, and the crossing of the navigable streams and waters of the United States for that purpose. As a return for this privilege those who avail themselves of it are bound to give the United States precedence in the use of their lines for public business at rates to be fixed by the Postmaster General. Thus, as to government business, companies of this class become government agencies, and no state can enforce a tax upon messages sent over their lines by officers of the United States upon public business.<sup>81</sup> But the acceptance by a telegraph company of the provisions of Rev. Stats., § 5263, authorizing telegraph companies organized under the laws of any state to construct and operate lines over any portion of the public domain and upon and along any of the military or post roads of the United States, while it prevents the states from laying any tax upon messages sent over such lines by the federal government, or into or out of the state, and from excluding such companies either directly or by the imposition of inadmissible conditions, does not prevent the taxation of its property within the state the same as other property.<sup>82</sup>

**79. Postoffices and post roads.**—Postal Telegraph Cable Co. v. Charleston, 153 U. S. 692, 700, 38 L. Ed. 871; Henderson Bridge Co. v. Kentucky, 166 U. S. 150, 154, 41 L. Ed. 953.

**80. Taxation of mail coaches.**—Neil, etc., Co. v. Ohio, 3 How. 720, 741, 11 L. Ed. 801. See, also, Searight v. Stokes, 3 How. 151, 163, 11 L. Ed. 537.

**81. Telegraph companies employed as federal agencies; messages sent by the United States.**—Telegraph Co. v. Texas, 105 U. S. 460, 464, 26 L. Ed. 1067; Massachusetts v. Western Union Tel. Co., 141 U. S. 40, 45, 35 L. Ed. 628; Ashley v. Ryan, 153 U. S. 436, 38 L. Ed. 773; Postal Tel. Cable Co. v. Charleston, 153 U. S. 692, 697, 38 L. Ed. 871; Postal Tel. Cable Co. v. Adams, 155 U. S. 688, 696, 39 L. Ed. 311.

**82. Same; effect of acceptance of revised statutes, § 5263.**—Telegraph Co. v. Texas, 105 U. S. 460, 26 L. Ed. 1067; Western Union Tel. Co. v. Massachusetts, 125 U. S. 530, 548, 31 L. Ed. 790; Leloup v. Mobile, 127 U. S. 640, 32 L. Ed. 311; Massachusetts v. Western Union Tel. Co., 141 U. S. 40, 45, 35 L. Ed. 628; Ashley v. Ryan, 153 U. S. 436, 38 L. Ed. 773; Postal Tel. Cable Co. v. Charleston, 153 U. S. 692, 700, 38 L. Ed. 871; Postal Tel. Cable

Co. v. Adams, 155 U. S. 688, 696, 39 L. Ed. 311; Western Union Tel. Co. v. Taggart, 163 U. S. 1, 28, 41 L. Ed. 49.

A Massachusetts statute which required every telegraph company, whether incorporated in Massachusetts or not, owning a line of telegraph in Massachusetts, to be there taxed on such proportion only of the whole value of its capital stock as the length of its line in Massachusetts bears to the whole length of its lines everywhere, with deductions to the amount of the value of any taxable property owned by it in Massachusetts and subject to local taxation in the cities and towns, is not forbidden by the acceptance on the part of a telegraph company of the rights conferred by § 5263 of the Revised Statutes. Massachusetts v. Western Union Tel. Co., 141 U. S. 40, 45, 35 L. Ed. 628, following Western Union Tel. Co. v. Massachusetts, 125 U. S. 530, 31 L. Ed. 790.

A statute of the state of Mississippi (Code of 1880, ch. 10, § 585; Sess. Laws, ch. 3), which imposes a tax upon telegraph companies doing business within the state, said tax being graduated according to the amount and value of the property measured by miles, and being in lieu of taxes levied directly on the property, is not open to constitutional objec-

**Otherwise as to Interstate Business.**—With regard to the taxation of telegraph companies which have accepted the provisions of Revised Statutes of the United States, §§ 5263-5268, the rule that the states may levy a tax upon all messages, or the receipts arising from messages, carried and delivered exclusively within the state, but not upon messages from points within the state to points without, is based, not upon any distinction having reference to the powers or duties of those companies as federal agencies, but upon the ground that the messages of the former class are elements of internal commerce solely within the limits and jurisdiction of the state and therefore subject to its taxing power, while the latter are elements of interstate commerce and not subject to the legislative control of the states. The cases cited in the note have fully developed and established this proposition.<sup>83</sup>

(kkkk) *State Taxation of Patented Articles.*—The right conferred by the patent laws of the United States to inventors to sell their inventions and discoveries does not take the tangible property, in which the invention or discovery may be exhibited or carried into effect, from the operation of the tax and license laws of the state.<sup>84</sup>

(llll) *State Taxation of Interstate Bridge.*—The taxation of the bridge over the Ohio River at Henderson, Ky., by the city of Henderson, is not the taxation of any agency of the federal government.<sup>85</sup>

(mmmm) *Limitation of Doctrine*—(aaaaa) *Validity of Tax Dependent upon Its Effect.*—The exemption of agencies of the federal government from taxation by the states is dependent, not upon the nature of the agents, nor upon the mode of their constitution, nor upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth

tion. *Postal Telegraph Cable Co. v. Adams*, 155 U. S. 688, 700, 39 L. Ed. 311.

The Indiana statute of March 6, 1893, ch. 171, regarding telegraph companies, as construed and applied by the supreme court of that state, while it takes, as the basis of valuation of the company's property within the state, the proportion of the value of its whole capital stock which the length of its lines within the state bears to the whole length of all its lines, makes it the duty of the state board of tax commissioners to make such deductions, on account of a greater proportional value of the company's property outside of the state, or for any other reason, and to assess its property within the state at its true cash value only. So construed the statute is not unconstitutional as an attempt by the state to tax the telegraph companies as a federal agency, or as an attempt to tax the franchise granted by the federal government, or as an attempt to tax property situated without the state. *Western Union Tel. Co. v. Taggart*, 163 U. S. 1, 27, 41 L. Ed. 49, following *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, 31 L. Ed. 790; *Pittsburg, etc., R. Co. v. Backus*, 154 U. S. 421, 31 L. Ed. 1031; *Indianapolis, etc., R. Co. v. Backus*, 154 U. S. 438, 38 L. Ed. 1040; *Cleveland, etc., R. Co. v. Backus*, 154 U. S. 439, 38 L. Ed. 1041.

**83. Same; distinction as to interstate business of such companies.**—*Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 24 L. Ed. 708; *Telegraph Co. v. Texas*, 105 U. S. 460, 26 L. Ed. 1067; *Fargo v. Michigan*, 121 U. S. 230, 30 L. Ed. 888;

*Philadelphia, etc., Steamship Co. v. Pennsylvania*, 122 U. S. 326, 30 L. Ed. 1200; *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, 31 L. Ed. 790; *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411, 32 L. Ed. 229; *Leloup v. Mobile*, 127 U. S. 640, 32 L. Ed. 311; *Western Union Tel. Co. v. Alabama State Board of Assessment*, 132 U. S. 472, 473, 33 L. Ed. 409; *Postal Tel. Cable Co. v. Charleston*, 153 U. S. 692, 697, 38 L. Ed. 871; *Ashley v. Ryan*, 153 U. S. 436, 38 L. Ed. 773; *Postal Tel. Cable Co. v. Adams*, 155 U. S. 688, 696, 39 L. Ed. 311. See, also, the title INTERSTATE AND FOREIGN COMMERCE.

A license tax of five hundred dollars upon the business of a telegraph company done wholly within the limits of the city is not invalid as an attempt to impose a tax upon an agency of the federal government by reason of the company's having accepted the provisions of Revised Statutes §§ 5263, 5268. *Postal Tel. Cable Co. v. Charleston*, 153 U. S. 692, 700, 38 L. Ed. 871.

**84. State taxation of patented articles.**—*Weber v. Virginia*, 103 U. S. 344, 347, 26 L. Ed. 565. See, also, *Patterson v. Kentucky*, 97 U. S. 501, 24 L. Ed. 1115; *Allen v. Riley*, 203 U. S. 347, 51 L. Ed. 216; *Woods v. Carl*, 203 U. S. 358, 51 L. Ed. 219.

**85. Henderson Bridge Co. v. Henderson City, 141 U. S. 679, 689, 35 L. Ed. 900; *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 152, 154, 41 L. Ed. 953; *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 602, 43 L. Ed. 823.**



deprive them of power to serve the government as they were intended to serve it, or hinder the efficient exercise of their power.<sup>86</sup> State interference or intrusion being only impliedly prohibited, it is limited by the principle that state legislation which does not impair the usefulness or capability of such instruments to serve that government is not within the rule of prohibition.<sup>87</sup> A state tax which remotely affects the efficient exercise of a federal power is not for that reason alone inhibited by the constitution. To hold that would be to deny to the states all power to tax persons or property.<sup>88</sup>

**Immaterial Whether Corporation Was Created by State or Federal Government.**—The implied inhibition, if any exists, is against the obstruction of the constitutional laws and means employed by congress to carry into execution the powers vested in the general government, and that inhibition must be the same whether the corporation whose property is taxed was created by congress or by a state legislature.<sup>89</sup>

(bbbb) *Distinction between Tax upon Property and Tax upon Operation of Federal Agencies.*—A tax merely upon the property of corporations employed as federal agencies, not having the necessary effect of depriving them of power to serve the government as they were intended to serve it, and leaving them free to discharge the duties they have undertaken to perform, may be rightfully laid by the states. A tax upon their operations, being a direct obstruction to the exercise of federal powers, may not be.<sup>90</sup>

86. Limitations of doctrine as to state taxation of federal agencies.—*Railroad Co. v. Peniston*, 18 Wall. 5, 21 L. Ed. 787.

87. Same.—*National Bank v. Commonwealth*, 9 Wall. 353, 19 L. Ed. 701.

88. Tax which only remotely affects exercise of federal power.—*Railroad Co. v. Peniston*, 18 Wall. 5, 30, 21 L. Ed. 787.

89. Immaterial whether corporation created by state or federal government.—*Weston v. Charleston*, 2 Pet. 449, 7 L. Ed. 481; *Railroad Co. v. Peniston*, 18 Wall. 5, 34, 21 L. Ed. 787.

90. Distinction as to tax upon property and tax upon operation.—*Thomson v. Pacific Railroad*, 9 Wall. 579, 19 L. Ed. 792; *Railroad Co. v. Peniston*, 18 Wall. 5, 21 L. Ed. 787; *Van Brocklin v. Tennessee*, 117 U. S. 151, 177, 29 L. Ed. 845; *Central Pac. R. Co. v. California*, 162 U. S. 91, 119, 40 L. Ed. 903; *Southern Pac. R. Co. v. California*, 162 U. S. 167, 40 L. Ed. 929; *Western Union Tel. Co. v. Taggart*, 163 U. S. 1, 19, 41 L. Ed. 49; *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 624, 43 L. Ed. 823.

Speaking upon this point Chief Justice Chase says: "We fully recognize the soundness of the doctrine, that no state has a right to tax the means employed by the government of the Union for the execution of its powers." But we think there is a clear distinction between the means employed by the government and the property of agents employed by the government. Taxation of the agency is taxation of the means; taxation of the property of the agent is not always, or generally, taxation of the means. No one questions that the power to tax all property, business, and persons, within their respective limits, is original in the states and has never been surrendered. It cannot be so used, indeed, as to defeat or

hinder the operations of the national government; but it will be safe to conclude, in general, in reference to persons and state corporations employed in government service, that when congress has not interposed to protect their property from state taxation, such taxation is not obnoxious to that objection." *Thomson v. Pacific Railroad*, 9 Wall. 579, 591, 19 L. Ed. 792.

It may be regarded as firmly settled that although corporations may be agents of the United States, their property is not the property of the United States, but the property of the agents, and that a state may tax the property of the agents, subject to the limitations pointed out in *Railroad Co. v. Peniston*, 18 Wall. 5, 36, 21 L. Ed. 787. *Van Brocklin v. Tennessee*, 117 U. S. 151, 177, 29 L. Ed. 845; *Central Pac. R. Co. v. California*, 162 U. S. 91, 125, 40 L. Ed. 903, followed in *Southern Pac. R. Co. v. California*, 162 U. S. 167, 40 L. Ed. 929.

"In respect to railway corporations created by act of congress the claim of an exemption of their property from state taxation has been repeatedly denied. This was so ruled in *Railroad Co. v. Peniston*, 18 Wall. 5, 30, 36, 21 L. Ed. 787." *Central Pac. R. Co. v. California*, 162 U. S. 91, 119, 40 L. Ed. 903, followed in *Southern Pac. R. Co. v. California*, 162 U. S. 167, 40 L. Ed. 929.

This doctrine applied to the case of a tax by a state upon the real and personal property, as distinguished from its franchises, of the Union Pacific Railroad Company, a corporation chartered by congress for private gain, and all of whose stock was owned by individuals, but which congress assisted by donations and loans, of whose board of directors the government appoints two, which makes annual reports

**Property of Corporation Created by State, but Employed as Federal Agency.**—Although, confessedly, congress may constitutionally make or authorize contracts with individuals or corporations for services to the government, may grant aids by money or land in preparation for and in the performance of such services; may make any stipulation and condition in relation to such aids not contrary to the constitution, and may exempt, in its discretion, the agencies employed in such services from any state taxation which will really prevent or impede the performance of them; yet in the absence of all legislation on the part of congress to indicate that such an exemption is deemed by it essential to the full performance of the party's obligations to the government, the exemption cannot be applied to the case of a corporation deriving its existence from state law, exercising its franchise under such law, and holding its property within state jurisdiction and under state protection, solely because of the employment of the corporation in the service of the government.<sup>91</sup> The point decided in *McCulloch v. Maryland*, does not establish a broader doctrine even if some of its reasoning may seem to do so.<sup>92</sup>

**Same—Property of Telegraph Companies Accepting Provisions of Act of July 24, 1866.**—In regard to telegraph companies which have accepted the provisions of the act of congress of July 24, 1866, §§ 5263-5268 of the Revised Statutes of the United States, authorizing telegraph companies organized under the laws of any state to construct and operate lines over any portion of the public domain and upon and along any of the military or post roads of the United States, while it prevents the states from laying any tax upon messages sent over such lines by the federal government, or into or out of the state, does

to the government, whose operations in laying, constructing and working its railroad and telegraph lines, as well as its rates of toll, are subject to regulations imposed by its charter, and to such further regulations as congress may hereafter make; on whose failure to comply with the terms and conditions of its charter, or to keep the road in repair and use, congress may assume the control and management thereof, and devote the income to the use of the United States; the loan of the United States to which, amounting to many millions, is a lien on all the property, and on failure to redeem which loan, the secretary of the treasury is authorized to take possession of the road with all its rights, functions, immunities, and appurtenances, for the use and benefit of the United States; and, finally, where all the grants made to the company are declared to be upon the condition that, besides paying the government bonds advanced, the company shall keep the railroad and telegraph lines in repair and use, and shall at all times transmit dispatches and transport mails, troops, and munitions of war, supplies and public stores for the government, whenever required to do so by any department thereof; and that the government shall have the preference at rates not to exceed those charged to private parties, and payable by being applied to the payment of the bonds aforesaid; and in addition to which control, and the obligations and liabilities of the company, congress, not forbidding a state tax, reserves the right to add to, alter, amend, or repeal the charter. *Railroad Co. v. Peniston*, 18 Wall. 5, 21 L. Ed. 787.

This principle was held to extend to a tax paid by the real property of the bank of the United States, in common with the other real property in a particular state, and to a tax imposed on the proprietary interests which the citizens of that state might hold in such institution, in common with other property of the same description throughout the state. *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *Osborn v. United States Bank*, 9 Wheat. 738, 6 L. Ed. 204.

**91. As to property of corporation created by state, but employed as a federal agency.**—*Thomson v. Pacific Railroad*, 9 Wall. 579, 19 L. Ed. 792.

**92. Same.**—*Thomson v. Pacific Railroad*, 9 Wall. 579, 19 L. Ed. 792.

Speaking upon this point, Chief Justice Chase says: "That such taxes cannot be imposed on the operations of the government is a proposition which needs no argument to support it. And the same reasoning will apply to instruments of the government, created by itself for public and constitutional ends. But we are not aware of any case in which the real estate, or other property of a corporation not organized under an act of congress, has been held to be exempt, in the absence of express legislation to that effect, to just contribution, in common with other property, to the general expenditure for the common benefit, because of the employment of the corporation in the service of the government." *Thomson v. Pacific Railroad*, 9 Wall. 579; 590, 19 L. Ed. 792.



not prevent the taxation of its property within the state the same as other property.<sup>93</sup>

**Same—State Not Enjoin Company from Prosecuting Business While Taxes in Arrears.**—The state cannot, however, enjoin such company from prosecuting its business within the state while its taxes are in arrear, since that would be to revoke the authority given by congress to the company to operate its lines upon and along the post and military roads of the United States.<sup>94</sup>

**Nor Require Company to Take Out License.**—Nor can a state require a telegraph company which has accepted the provisions, §§ 5263, 5269, of the Revised Statutes, to take out a license for the transaction of business within the state.<sup>95</sup>

(ggg) *State Obstruction of Rights under Federal License.*—No state law can hinder or obstruct the free use of a license granted under an act of congress.<sup>96</sup>

**Internal Revenue Tax Receipt Not a License.**—See ante, "Internal Commerce of the States," VI, D, 3, c, (4), (i).

(hhh) *State Regulation of Rates Where Corporation Was Organized under Law of the United States.*—A corporation organized under the laws of the United States is subject to the control of the state as to rates which are wholly within the state. The fact that it receives all its franchises from congress, that among those franchises is the right to charge and collect tolls, does not exempt it, as to business done wholly within the state, from the control of the state in all matters of taxation, rates, and other police regulations.<sup>97</sup>

**93. As to property of telegraph companies accepting provisions, of Revised Statutes, §§ 5263, 5268.**—*Telegraph Co. v. Texas*, 105 U. S. 460, 26 L. Ed. 1067; *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, 548, 31 L. Ed. 790; *Leloup v. Mobile*, 127 U. S. 640, 32 L. Ed. 311; *Massachusetts v. Western Union Tel. Co.*, 141 U. S. 40, 45, 35 L. Ed. 628; *Western Union Tel. Co. v. Taggart*, 163 U. S. 1, 19, 41 L. Ed. 49. See, also, ante, "Telegraph Companies Employed as Federal Agencies; Messages Sent by the United States," VI, D, 3, c, (6), (b), (cc), (fff), (jjjj).

**94. Same; power of state to restrain operations while company in arrears.**—*Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, 554, 31 L. Ed. 790.

**95. Power of state to require a license.**—*Leloup v. Mobile*, 127 U. S. 640, 32 L. Ed. 311.

**96. State obstruction of rights conferred by federal license.**—*Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. 518, 566, 14 L. Ed. 249.

**97. State regulation of rates of company incorporated by United States.**—*Reagan v. Mercantile Trust Co.*, 154 U. S. 413, 417, 38 L. Ed. 1028 (following the doctrine of *Thomson v. Pacific Railroad*, 9 Wall. 579, 19 L. Ed. 792, and *Railroad Co. v. Peniston*, 18 Wall. 5, 36, 21 L. Ed. 787, in which it was held that the exemption of federal agencies from state taxation of federal agencies from state taxation of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the taxation). *Smyth v. Ames*, 169 U. S. 466, 519, 522, 42 L. Ed. 819.

That the Union Pacific Railway Company received its franchises from the federal government and was created for the accomplishment of national objects, does not prevent the state of Nebraska, one of the states traversed by its line of road, from prescribing reasonable maximum rates for the carriage of freight within state limits. *Smyth v. Ames*, 169 U. S. 466, 519, 522, 42 L. Ed. 819, following *Reagan v. Mercantile Trust Co.*, 154 U. S. 413, 416, 38 L. Ed. 1028.

Nor is the power of the state to prescribe a reasonable maximum rate for transportation wholly within the state upon such a road ipso facto taken away by reason of the fact that congress has reserved to itself the power to regulate or reduce rates of transportation. The reservation of such a power by congress is not equivalent to a declaration that the states through which the road runs shall not regulate rates of intrastate transportation, but such power remains with the states until congress shall have exercised its reserved power to regulate. *Smyth v. Ames*, 169 U. S. 466, 522, 42 L. Ed. 819.

Until congress, in the exercise either of the power specifically reserved by the eighteenth section of the act of 1862, or its power under the general reservation made of authority to add to, alter, amend or repeal that act, prescribes rates to be charged by the Union Pacific Railroad Company, it remains with the states through which the road passes to fix rates for transportation beginning and ending within their respective limits. *Smyth v. Ames*, 169 U. S. 466, 522, 42 L. Ed. 819.



(iii) *State Encroachment through the Exercise of the Police Power.*—See the title POLICE POWER. And see, also, ante, "Generally," VI, D, 3, c, (6), (b), (cc), (aaa).

(jjj) *State Regulation of National Banks.*—National banks are instruments devised to secure the better administration of an important branch of the public service. As such they are agencies of the national government over which the states can exercise no control except in so far as the national government may permit.<sup>98</sup>

**Taxation of National Banks.**—See ante, "Taxation of National Banks," VI, D, 3, c, (6), (b), (cc), (ff), (hhh), (cccc), (ddddd). See, generally, the title TAXATION.

(kkk) *State Interference with Patent Rights.*<sup>99</sup>—**Assignment and Transfer of Patent Rights.**—As to the intangible right conferred by the letters patent, the state cannot burden the right to assign or transfer the same with oppressive or unreasonable restrictions, but it may, in the absence of congressional legislation upon the subject, make reasonable regulations governing the assignment or transfer of patent rights for the purpose of protecting its citizens from fraud. But the act must be a reasonable and fair exercise of the power of the state for the purpose of checking a well-known evil and to prevent, as far as possible, fraud and imposition in the sale of patent rights.<sup>1</sup>

**Taxation of Patented Articles.**—See ante, "State Taxation of Patented Articles," VI, D, 3, c, (6), (b), (cc), (ff), (kkk).

(lll) *Federal Institutions within the States; Soldiers' Homes, etc.*—The states have no jurisdiction over federal officers who are engaged in the internal admin-

**98. State regulation of national banks.**—Farmers', etc., Nat. Bank *v.* Dearing, 91 U. S. 29, 23 L. Ed. 196; Pacific Nat. Bank *v.* Mixer, 124 U. S. 721, 31 L. Ed. 567; Van Reed *v.* People's Nat. Bank, 198 U. S. 554, 557, 49 L. Ed. 1161; Rankin *v.* Barton, 199 U. S. 228, 232, 50 L. Ed. 163. See, generally, the title BANKS AND BANKING, vol. 3, pp. 17, 156, note 93.

**99. State interference with patent rights; control of patented articles.**—Patterson *v.* Kentucky, 97 U. S. 501, 24 L. Ed. 1115; Weber *v.* Virginia, 103 U. S. 344, 26 L. Ed. 565.

A party to whom such letters patent were, in the usual form, issued for "an improved burning oil," whereof he claimed to be the inventor, was convicted in Kentucky for there selling that oil. It had been condemned by the state inspector as "unsafe for illuminating purposes," under a statute requiring such inspection, and imposing a penalty for selling or offering to sell within the state oils or fluids, the product of coal, petroleum or other bituminous substances, which could be used for such purposes, and which had been so condemned. It was admitted on the trial that the oil could not, by any chemical combination described in the specification annexed to the letters patent, be made to conform to the standard prescribed by that statute. Held, that the enforcement of the statute interfered with no right conferred by the letters patent. Patterson *v.* Kentucky, 97 U. S. 501, 24 L. Ed. 1115.

**1. As to the assignment and transfer of patent rights.**—Allen *v.* Riley, 203 U. S.

347, 51 L. Ed. 216; Woods *v.* Carl, 203 U. S. 358, 51 L. Ed. 219.

Section 4898 of the Revised Statutes, providing that the assignment of any patent or interest therein shall be void as to subsequent purchasers and mortgagees for valuable consideration and without notice, unless such assignment be recorded in the patent office within three months from the date thereof, is not such legislation as takes away the rights of the state to legislate on the subject themselves in a manner neither inconsistent with nor opposed to the federal statute. Allen *v.* Riley, 203 U. S. 347, 51 L. Ed. 216; Woods *v.* Carl, 203 U. S. 358, 51 L. Ed. 219.

The Kansas act, Laws of 1889, 182, Gen. Statutes of Kansas, 1901, §§ 4356, 4357, 4358, which makes it unlawful for any person to sell or barter any patent right, or alleged patent right, in any county in that state, without first filing with the clerk of the district court of such county duly authenticated copies of the letters patent and at the same time making an affidavit that such letters are genuine, is a reasonable and valid regulation and one not repugnant to or forbidden by § 4898 of the Revised Statutes, above mentioned. Allen *v.* Riley, 203 U. S. 347, 51 L. Ed. 216.

The Arkansas act of April 23, 1891, Kirby's Dig., § 513, substantially the same as the Kansas act mentioned in the preceding paragraph, but with an additional provision making void a note given for a patent right unless it shows on its face the consideration for which it was given, was upheld in Woods *v.* Carl, 203 U. S. 358, 51 L. Ed. 219.

istration of a federal institution within the state, while such officers are acting within the limitations imposed and approved by congress.<sup>2</sup>

(dd) *Federal Encroachment upon the States*—(aaa) *Federal Government Bound to Respect Differences between Domestic Institutions of States*.—All the political sovereignty of the United States, within the states, must be exercised according to the subject matter upon which it may be brought to bear, and according to what was the actual condition of the states in their domestic institutions when the constitution was formed, until a state shall please to alter them.<sup>3</sup>

(bbb) *Federal Government Not to Control the Power nor Review the Discretion of State Legislatures*.—To exercise unlimited legislative powers within their own limits, except so far as restrained by the constitution of the United States, is one of the essential attributes of the sovereignty of the states. The federal government, through its supreme court, has no jurisdiction, therefore, to control the powers nor to review the discretion, of the state legislatures, unless they have exercised their powers in such manner as to conflict with the federal constitution. That a state legislature has abused its powers, that it has enacted laws which are unjust and oppressive, or impolitic, unwise or inexpedient, or that it has acted from unworthy motives, are questions with which the federal government, acting through any of its departments, has nothing to do. So long as the legislature has not transcended the limits imposed by the federal constitution, the federal supreme court is not the harbor in which the citizens of a state may find refuge from the ill-advised, unjust and oppressive action of their state legislature.<sup>4</sup>

**2. Federal institutions within the states; soldiers' homes.**—*Ohio v. Thomas*, 173 U. S. 276, 282, 43 L. Ed. 699.

The legislature of the state of Ohio has no constitutional power to interfere with the board of managers or the governor of the soldiers' home in Montgomery County, Ohio, while they are engaged in the administration of its affairs, acting therein in pursuance to acts of congress providing therefor. It is a federal institution, and neither by virtue of the fact of jurisdiction of the ground whereon the home is located nor by the police power of the state are the authorities enabled to prohibit the furnishing of any rations approved by congress or by the board of managers of the home. *Ohio v. Thomas*, 173 U. S. 276, 282, 43 L. Ed. 699.

The governor of the soldiers' home at Dayton, Ohio, in supplying food and rations to the inmates of that institution, is not subject to the Ohio statute regulating the use of oleomargarine and requiring, among other things, that placards, printed in letters of a prescribed size, and giving notice of its use, shall be posted in places where it served as an article of food. *Ohio v. Thomas*, 173 U. S. 276, 43 L. Ed. 699.

**3. Federal government to recognize differences between domestic institutions of the states.**—*Passenger Cases* (opinion of Wayne, J.), 7 How. 283, 428, 12 L. Ed. 702; *Scott v. Sandford*, 19 How. 393, 394, 15 L. Ed. 691.

"The constitution was formed by states in which slavery existed, and was not likely to be relinquished, and states in which slavery had been, but was abolished, or for the prospective abolition of which provision had been made by law.

The undisturbed continuance of that difference between the states at that time, unless as it might be changed by a state itself, was the recognized condition in the constitution for the national Union. It has that, and can have no other, foundation." (Opinion of Wayne, J.) *Passenger Cases*, 7 How. 283, 428, 12 L. Ed. 702. See, also, ante, "Construction in the Light of Contemporaneous History and Existing Conditions," III, B, 3.

**4. State legislative power and discretion not subject to federal control.**—*Fletcher v. Peck*, 6 Cranch 87, 3 L. Ed. 162; *Houston v. Moore*, 5 Wheat. 1, 45, 5 L. Ed. 19; *Green v. Biddle*, 8 Wheat. 1, 98, 5 L. Ed. 547; *Providence Bank v. Bilhings*, 4 Pet. 514, 563, 7 L. Ed. 939; *Passenger Cases* (opinion of McLean, J.), 7 How. 283, 399, 12 L. Ed. 702; *Ohio Life Ins., etc., Co. v. Debolt*, 16 How. 415, 14 L. Ed. 997; *New York v. Commissioners of Taxes*, 2 Black 620, 17 L. Ed. 451; *Cummings v. Missouri*, 4 Wall. 277, 318, 18 L. Ed. 356; *Witherspoon v. Duncan*, 4 Wall. 210, 217, 18 L. Ed. 339; *License Tax Cases*, 5 Wall. 462, 469, 18 L. Ed. 497; *Lane County v. Oregon*, 7 Wall. 71, 19 L. Ed. 101; *St. Louis v. Ferry Co.*, 11 Wall. 423, 20 L. Ed. 192; *State Tax on Foreign-Held Bonds*, 91 U. S. 300, 21 L. Ed. 179; *Munn v. Illinois*, 94 U. S. 113, 132, 24 L. Ed. 77; *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155, 164, 24 L. Ed. 94; *Davidson v. New Orleans*, 96 U. S. 97, 104, 24 L. Ed. 616; *Kirtland v. Hotchkiss*, 100 U. S. 491, 498, 25 L. Ed. 558; *Livingston County v. Darlington*, 101 U. S. 407, 416, 25 L. Ed. 1015; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. Ed. 238; *Bridge Co. v. United States*, 105 U. S. 470, 482, 26 L. Ed. 1143; *Antoni v. Greenhow*, 107 U. S. 769, 775, 27



**Exception.**—There is one apparent exception to the statement that the federal government cannot, through any of its departments, control the powers or review the discretion of a state legislature acting within the limits of its con-

L. Ed. 468; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 670, 29 L. Ed. 516; *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 520, 29 L. Ed. 463; *Wabash, etc., R. Co. v. Illinois*, 118 U. S. 557, 577, 30 L. Ed. 244; *Yick Wo v. Hopkins*, 118 U. S. 356, 370, 30 L. Ed. 220; *Ouachita Packet Co. v. Aiken*, 121 U. S. 444, 448, 449, 450, 30 L. Ed. 976; *Maynard v. Hill*, 125 U. S. 190, 209, 31 L. Ed. 654; *Powell v. Pennsylvania*, 127 U. S. 678, 684, 32 L. Ed. 253; *Walston v. Nevin*, 128 U. S. 578, 582, 32 L. Ed. 544; *Charlotte, etc., R. Co. v. Gibbs*, 142 U. S. 386, 35 L. Ed. 1051; *Horn Silver Min. Co. v. New York State*, 143 U. S. 305, 36 L. Ed. 164; *New York v. Squire*, 145 U. S. 175, 36 L. Ed. 666; *Bryan v. Board of Education*, 151 U. S. 639, 653, 38 L. Ed. 297; *New York, etc., R. Co. v. Bristol*, 151 U. S. 556, 570, 38 L. Ed. 269; *Connecticut v. Woodruff*, 153 U. S. 689, 38 L. Ed. 869; *Postal Tel. Cable Co. v. Charleston*, 153 U. S. 692, 699, 38 L. Ed. 871; *New York, etc., R. Co. v. Pennsylvania*, 153 U. S. 628, 641, 38 L. Ed. 846; *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 561, 39 L. Ed. 759; *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 155, 41 L. Ed. 369; *Castillo v. McConico*, 168 U. S. 674, 682, 42 L. Ed. 622; *Chicago, etc., R. Co. v. Nebraska*, 170 U. S. 57, 77, 42 L. Ed. 948; *L'Hote v. New Orleans*, 177 U. S. 587, 44 L. Ed. 899; *Yazoo, etc., R. Co. v. Adams*, 180 U. S. 1, 25, 45 L. Ed. 395; *Orr v. Gilman*, 183 U. S. 278, 283, 46 L. Ed. 196; *Louisville, etc., R. Co. v. Kentucky*, 183 U. S. 503, 512, 46 L. Ed. 298; *Jacobson v. Massachusetts*, 197 U. S. 11, 22, 49 L. Ed. 643; *Keher v. Stewart*, 197 U. S. 60, 70, 49 L. Ed. 663; *Cunnius v. Reading School District*, 198 U. S. 458, 469, 49 L. Ed. 1125; *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, 50 L. Ed. 204; *St. Mary's, etc., Petroleum Co. v. West Virginia*, 203 U. S. 183, 192, 51 L. Ed. 144; *Northwestern Nat. Life Ins. Co. v. Riggs*, 203 U. S. 243, 51 L. Ed. 168; *Whitfield v. Aetna Life Ins. Co.*, 205 U. S. 489, 495, 51 L. Ed. 895. See, also, post, "Judicial Control of Legislative Discretion," VI, D, 3, d, (4), (b), (bb), et seq.

State powers are at all times and under all circumstances exercised independently of the general government, and are never declared void or inoperative except when they transcend state jurisdiction. *Passenger Cases* (opinion of McLean, J.), 7 How. 283, 399, 12 L. Ed. 702.

"The extent to which it shall be exercised, the subjects upon which it shall be exercised, and the mode in which it shall be exercised, are all equally within the discretion of the legislatures to which the states commit the exercise of the power.

That discretion is restrained only by the will of the people expressed in the state constitutions or through elections, and by the condition that it must not be so used as to burden or embarrass the operations of the national government. There is nothing in the constitution which contemplates or authorizes any direct abridgment of this power by national legislation." *Lane County v. Oregon*, 7 Wall. 71, 19 L. Ed. 101; *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 561, 39 L. Ed. 759.

The hardship, impolicy, or injustice of state laws is not necessarily an objection to their constitutional validity; the remedy for evils of that character is to be sought from state legislatures. Our jurisdiction cannot be invoked unless some right claimed under the constitution, laws, or treaties of the United States is invaded. This court is not a harbor where refuge can be found from every act of ill-advised and oppressive state legislation. *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 520, 29 L. Ed. 463.

"The remedy for abuse is in the state courts, for, in the language of Mr. Justice Field, in *Mobile County v. Kimball*, 102 U. S. 691, 26 L. Ed. 238, 'this court is not the harbor in which the people of a city or county can find a refuge from ill-advised, unequal and oppressive state legislation.'" *Walston v. Nevin*, 128 U. S. 578, 582, 32 L. Ed. 544.

In the case of *Cummings v. Missouri*, 4 Wall. 277, 318, 18 L. Ed. 356, Mr. Justice Field delivering the majority opinion of the court upon the constitutionality of the "test oath" provision of the constitution of that state, said: "This court cannot decide the case upon the justice or hardship of these provisions; its duty is to determine whether they are in conflict with the constitution of the United States."

The federal courts cannot review the wisdom, propriety or policy of legislation repudiating public contracts under a plea of a technical incapacity to contract. *Yazoo, etc., R. Co. v. Adams*, 180 U. S. 1, 25, 45 L. Ed. 395.

**State discretion in the enactment of police regulations.**—The power of the federal courts to review the action of a state legislature in the enactment of police regulations does not exist until there has been some invasion of congressional power or of private rights secured by the constitution of the United States. *L'Hote v. New Orleans*, 177 U. S. 587, 44 L. Ed. 899.

The duty to safeguard the public health rests primarily with the states, and the mode or manner in which that result is to be accomplished is within the discre-



stitutional authority. This exception arises in that class of cases in which the states have concurrent jurisdiction with the federal government to legislate concerning a particular subject matter until congress shall see fit to enact legislation superseding that of the states. As to those subjects, congress, whenever it deems the regulations enacted by the states to be inexpedient, unwise, op-

tion of the state, subject to federal review only in the event that the state enacts some statute or regulation upon the subject in contravention of the constitution of the United States. *Jacobson v. Massachusetts*, 197 U. S. 11, 22, 49 L. Ed. 643. See, also, the title **POLICE POWER**.

**Uncontrollable power of state to tax.—**

"The taxing power, so far as it is reserved to the states, and used within constitutional limits, cannot be controlled or restrained by this court, the prudence of its exercise not being a judicial question." *New York v. Commissioners of Taxes*, 2 Black 620, 17 L. Ed. 451; *Delaware Railroad Tax*, 18 Wall. 206, 231, 21 L. Ed. 888; *Horn Silver Min. Co. v. New York State*, 143 U. S. 305, 313, 36 L. Ed. 164; *New York, etc., R. Co. v. Pennsylvania*, 153 U. S. 628, 641, 38 L. Ed. 846; *Postal Tel. Cable Co. v. Charleston*, 153 U. S. 692, 699, 38 L. Ed. 871.

It is not the province of the United States supreme court to interfere with the policy of the revenue laws of the states, nor with the interpretation given to them by their courts. Each state has the right to determine the manner of levying and collecting taxes. *Witherspoon v. Duncan*, 4 Wall. 210, 217, 18 L. Ed. 339; *Castillo v. McConico*, 168 U. S. 674, 682, 42 L. Ed. 622. See, also, ante, "The Taxing Power," VI. D. 3, c. (5), (b), (bb), (bbb).

What the necessity is for a license tax, and upon what occupations it shall be imposed, as well as the amount of the imposition, are exclusively within the control of the state legislature. So long as there is no discrimination against citizens of other states, the amount and necessity of the tax are not open to criticism here. *Kehrer v. Stewart*, 197 U. S. 60, 70, 49 L. Ed. 663.

"The contrary has not been held in this court by the case of *Loan Ass'n v. Topeka*, 20 Wall. 655, 22 L. Ed. 455. In that case a statute of Kansas was held invalid because by its provisions the property of the citizen under the guise of taxation would be taken in aid of a private enterprise, which was a perversion of the power of taxation. The case was brought in the United States circuit court for the district of Kansas, and was decided by that court in favor of the city. There had been no decision of the highest state court upon the question whether the act violated the constitution of Kansas, and consequently there was none to be followed by the federal court upon that question. This court held that a law tax-

ing the citizen for the use of a private enterprise conducted by other citizens was an unauthorized invasion of private rights. Mr. Justice Miller said that there were such rights in every free government which were beyond the control of the state. The ground of the decision was as stated, that the act took the property of the citizen for a private purpose, although under the forms of taxation. In thus holding, there was no overruling or refusing to follow the decisions of the highest court of the state respecting the constitution of its own state." *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 155, 41 L. Ed. 369.

**Regulation of carriers; long and short haul.**—Of the justice or propriety of the principle which lies at the foundation of the Illinois statute prohibiting carriers of goods from charging more for a short than for a long haul it is not within the province of the United States supreme court to speak. As restricted to a transportation which begins and ends within the limits of the state it may be very just and equitable, and it certainly is the province of the state legislature to determine that question. *Wabash, etc., R. Co. v. Illinois*, 118 U. S. 557, 577, 30 L. Ed. 244.

**Legislative discretion in granting franchises.**—It is not our province to declare that the legislature unwisely exercised the discretion with which it was invested in granting an exclusive franchise to a gas company or an exemption from taxation, etc. "Whether such contracts should be made or not is exclusively for the consideration of the state. It is the exercise of an undoubted power of sovereignty which has not been surrendered by the adoption of the constitution of the United States, and over which this court has no control. For it can never be maintained in any tribunal in this country that the people of a state, in the exercise of the powers of sovereignty, can be restrained within narrower limits than that fixed by the constitution of the United States, upon the ground that they make contracts ruinous or injurious to themselves." *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 670, 29 L. Ed. 516; *Horn Silver Min. Co. v. New York State*, 143 U. S. 305, 313, 36 L. Ed. 164.

Neither can a franchise granted by a municipal corporation be declared void upon grounds of public policy merely because, in the opinion of the court, it was granted for an unreasonable length of time. *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, 50 L. Ed. 204.

pressive or unjust, may supersede them by legislation of its own.<sup>5</sup>

(ccc) *Power of Federal Government to Control or Revise the Proceedings of State Courts.*—The federal government has no jurisdiction to interfere with the constitution, jurisdiction or procedure of state courts, or to review their decisions, except where the federal constitution and laws are involved.<sup>6</sup>

**Enjoining Criminal Proceedings in State Courts.**—"The existence of the power in the courts of the United States to discharge upon *habeas corpus* by no means implies that they may, in the exercise of their equity powers, interrupt or enjoin proceedings of a criminal character in a state court."<sup>7</sup>

**As to Habeas Corpus Where Persons Are in Custody of State Courts.**—The reluctance with which the federal supreme court will sanction federal interference with a state in the administration of its domestic law for the prosecution of crime has been frequently affirmed. It is only where fundamental rights, specially secured by the federal constitution, are invaded that such interference is warranted.<sup>8</sup>

(ddd) *Federal Encroachment upon the States through the Exercise of the Taxing Power*—(aaaa) *Generally.*—There are certain virtual limitations upon the taxing power of congress arising from the principles of the constitution itself. One of these limitations is that it cannot be so exercised as to destroy the state governments, or embarrass their lawful operation.<sup>9</sup> The right of the

5. *Houston v. Moore*, 5 Wheat. 1, 22, 45, 5 L. Ed. 19; *Ouachita Packet Co. v. Aiken*, 121 U. S. 444, 448, 449, 450, 30 L. Ed. 976. See, also, ante, "General Principles," VI. D. 3, c. (5), (b), (aa); "Illustrations," VI. D. 3, c. (5), (b), (bb).

Thus wharfage, in the absence of congressional regulation, is governed by state laws. By the state laws it is generally required to be reasonable; and by those laws its reasonableness must be judged. If it does not violate them, and they do not violate the constitution of the United States, relief against alleged unreasonable charges cannot be had in the federal courts when the jurisdiction is based upon the alleged unconstitutionality of the charges, and not on the citizenship of the parties. With the federal congress, however, it is different; for if it deems the state regulations to be unreasonable or oppressive, it may supersede them by regulations of its own. *Ouachita Packet Co. v. Aiken*, 121 U. S. 444, 448, 449, 450, 30 L. Ed. 976.

6. **Power to control or revise proceedings in state courts.**—*Clafin v. Houseman*, 93 U. S. 130, 137, 23 L. Ed. 833. See, also, the title APPEAL AND ERROR vol. 1, p. 333; COURTS; HABEAS CORPUS; INJUNCTIONS; JURISDICTION; MANDAMUS; etc. And see ante, "State Courts: Their Constitution, Jurisdiction and Procedure," VI. D. 3, c. (4), (c).

7. **Enjoining criminal proceedings in state courts.**—*Fitts v. McGhee*, 172 U. S. 516, 532, 43 L. Ed. 535.

Let the defendants appear to the indictment and defend themselves upon the ground that the state statute is repugnant to the constitution of the United States. The state court is competent to determine

the question thus raised, and is under a duty to enforce the mandates of the supreme law of the land. *Rebb v. Connolly*, 111 U. S. 624, 28 L. Ed. 542. And if the question is determined adversely to the defendants in the highest court of the state in which a decision can be had, the judgment may be re-examined by the federal supreme court upon writ of error. That the defendants may be frequently indicted constitutes no reason why a federal court of equity should assume to interfere with the ordinary course of criminal procedure in a state court. *Fitts v. McGhee*, 172 U. S. 516, 532, 43 L. Ed. 535.

In this case, it was held that the federal circuit court could not enjoin the institution or prosecution of a criminal proceeding against the toll gatherers of a railroad company for exacting from the public a road of toll, for crossing a bridge owned by the railroad company, in excess of the toll prescribed by a state law alleged to be unconstitutional. *Fitts v. McGhee*, 172 U. S. 516, 532, 43 L. Ed. 535. See, also, the titles COURTS; INJUNCTIONS.

8. **As to habeas corpus where person is in custody of state courts.**—*Ex parte Reggel*, 114 U. S. 642, 29 L. Ed. 250; *In re Converse*, 137 U. S. 624, 34 L. Ed. 793; *In re Frederick*, 149 U. S. 70, 37 L. Ed. 653; *Allen v. Georgia*, 166 U. S. 138, 41 L. Ed. 949; *Hodgson v. Vermont*, 158 U. S. 262, 42 L. Ed. 461; *Brown v. New Jersey*, 175 U. S. 172, 44 L. Ed. 119; *Rogers v. Peck*, 199 U. S. 425, 434, 50 L. Ed. 256. See, generally, the title HABEAS CORPUS.

9. **Federal encroachment through exercise of the taxing power.**—*Veazie Bank v. Fenno*, 8 Wall. 533, 541, 19 L. Ed. 482; *Railroad Co. v. Peniston*, 18 Wall. 530, 21 L. Ed. 787.



states to administer their own affairs through their legislative, executive and judicial departments, in their own manner through their own agencies, carries with it an exemption of those agencies and instruments from the taxing power of the federal government. If they may be taxed lightly, they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed, if any interference is permitted. Hence, the beginning of such tax is not allowed on the one side, is not claimed on the other.<sup>10</sup>

(bbbb) *Federal Taxation of State and Municipal Property and Revenues.*—In the light of the foregoing principles, it is scarcely necessary to say that state revenues are not subject to taxation by the United States government.<sup>12</sup>

**Municipal Revenues.**—A municipal corporation is a portion of the sovereign power of the state, and is not subject to taxation by congress upon its municipal revenue.<sup>13</sup>

**Property of States and of Municipal Corporations.**—Likewise, it is well settled that the property of a state or of a municipal corporation, owned and used for governmental purposes, is not subject to taxation by the national government.<sup>14</sup>

**Constitution Construed in Light of Existing Conditions; Property, Business or Revenue Must Be of a Governmental Character.**—In order to determine to what extent the property, revenues, etc., of a state are exempt

**10. Same.**—*Collector v. Day*, 11 Wall. 113, 128, 20 L. Ed. 122; *United States v. Railroad Co.*, 17 Wall. 322, 327, 21 L. Ed. 597; *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 584, 39 L. Ed. 759; *Ambrosini v. United States*, 187 U. S. 1, 47 L. Ed. 49; *Snyder v. Bettman*, 190 U. S. 249, 47 L. Ed. 1035; *South Carolina v. United States*, 199 U. S. 437, 459, 50 L. Ed. 261.

The means and instrumentalities employed by the states for carrying on the operations of their governments, for preserving their existence, and fulfilling the duties and responsibilities assigned to them by the constitution cannot be taxed by the federal government. *Collector v. Day*, 11 Wall. 113, 125, 20 L. Ed. 122.

This is especially true as to those means and instrumentalities which are the creations of the states by virtue of their sovereign and reserved rights; as, for example, the establishment and maintenance of their judicial departments, and the appointment of officers to administer their laws. *Collector v. Day*, 11 Wall. 113, 126, 20 L. Ed. 122.

**12. Federal taxation of state and municipal property and revenues.**—*Manhattan Co. v. Blake*, 148 U. S. 412, 37 L. Ed. 504.

The act of congress of June 30, 1864, c. 173, § 110, 13 Stat. 277, afterwards embodied in § 3408 of the Revised Statutes, imposed a tax of "one twenty-fourth of one per centum each month upon the average amount of the deposits of money, subject to payment by check or draft, or represented by certificates of deposit or otherwise, whether payable on demand or at some future day, with any person, bank, association, company, or corporation, engaged in the business of banking." As applied to moneys deposited with a banking company in the city of New York

to the credit of the treasurer of the state of New York, to be used for the purpose of paying the principal and interest of the public stock of that state, said moneys being subject to the draft of the treasurer, payable to the cashier of the bank, for the purpose before stated, this statute was not unconstitutional as imposing a tax upon the revenues of the state. *Manhattan Co. v. Blake*, 148 U. S. 412, 37 L. Ed. 504.

Such money was not the revenue of the state in the hands of a disbursing agent, but was the money of the bank, just as any other money on deposit. Moreover, the bank paid the tax without charging any portion of it to the account of the state. *Manhattan Co. v. Blake*, 148 U. S. 412, 37 L. Ed. 504.

**13. Municipal revenues.**—*Collector v. Day*, 11 Wall. 113, 124, 20 L. Ed. 122; *United States v. Railroad Co.*, 17 Wall. 322, 332, 21 L. Ed. 597; *Pollock v. Farmers' Loan Trust Co.*, 157 U. S. 429, 584, 39 L. Ed. 759.

**14. Property of states and of municipal corporations.**—*Collector v. Day*, 11 Wall. 113, 124, 20 L. Ed. 122; *United States v. Railroad Co.*, 17 Wall. 322, 21 L. Ed. 597; *Pollock v. Farmers' Loan and Trust Co.*, 157 U. S. 429, 585, 39 L. Ed. 759.

**Federal succession tax as applied to bequest to state or municipality.**—In *Snyder v. Bettman*, 190 U. S. 249, 47 L. Ed. 1035, the succession tax required by the laws of congress was sustained, although the bequest was to the city of Springfield, Ohio, upon the ground that the tax imposed was not upon the property, but upon the right to succeed to property. See, also, *United States v. Perkins*, 163 U. S. 625, 41 L. Ed. 287, in which a succession tax imposed by state law was upheld even as to property bequeathed by will to the United States.



from federal taxation, the constitution must be examined in the light of conditions as they existed at the time it was framed.<sup>15</sup> Looking at the constitution in the light of conditions existing at the time of its adoption, it is obvious that the framers, in granting full power over license taxes to the national government, meant that that power should be complete, and never thought that the states by extending their functions, could practically destroy it.<sup>16</sup> Construing the constitution in the manner indicated, it is evident that the exemption of the state agencies and instrumentalities from national taxation is limited to those which are of a strictly governmental character and does not extend to those which are used by the state in carrying on an ordinary private business in which the state is engaged.<sup>17</sup> Likewise, revenue must be municipal in its nature to entitle it to the exemption claimed. If the corporation should depart from its municipal character, and assume the position of a private trustee, it would, as to the revenues handled in such capacity, enjoy no greater privilege than would an individual under like circumstances. It would not in that case be an auxiliary or servant of the state, but of the individual creating the trust.<sup>18</sup>

(cccc) *Salaries of State Officers*.—So it is not competent for congress, under the constitution of the United States, to impose a tax upon the salary of a judicial officer of a state.<sup>19</sup>

(dddd) *Ten Per Cent Tax upon State Banks of Circulation*.—Congress, having undertaken to provide a currency for the whole country, may, to secure the benefit of it to the people, restrain, by suitable enactments, the circulation as

**15. Constitution construed in light of conditions existing at time of adoption.**—

See, ante, "Construction in Light of Contemporaneous History and Existing Conditions," III, B, 3. And see *South Carolina v. United States*, 199 U. S. 437, 453, 50 L. Ed. 261.

**16. Same.**—*South Carolina v. United States*, 199 U. S. 437, 457, 50 L. Ed. 261.

**17. Property or revenue must be of a governmental character.**—*United States v. Railroad Co.*, 17 Wall. 322, 332, 21 L. Ed. 597; *Ambrosini v. United States*, 187 U. S. 1, 47 L. Ed. 49; *South Carolina v. United States*, 199 U. S. 437, 461, 50 L. Ed. 261.

The carrying on of a private business is not a governmental function, and the state cannot by engaging therein exempt such business from the operation of the taxing power of the national government. *South Carolina v. United States*, 199 U. S. 437, 461, 50 L. Ed. 261.

Thus it is held that while the regulation and control of the traffic in intoxicating liquors is a matter clearly within the police powers of the state, nevertheless, the state cannot, by engaging in the traffic itself, exempt such business and the individuals employed to carry it on from the operation of the internal revenue laws of the United States. *South Carolina v. United States*, 199 U. S. 437, 457, 458, 50 L. Ed. 261.

The internal revenue tax upon the traffic in intoxicating liquors, as applied to the dispensary system of South Carolina, was not a tax upon any property of the state nor upon the profits derived from the business, but was merely a license tax

upon the business itself, irrespective of profits or of the property used therein. *South Carolina v. United States*, 199 U. S. 437, 458, 50 L. Ed. 261.

**18. Revenue must be of a municipal character.**—*United States v. Railroad Co.*, 17 Wall. 322, 332, 21 L. Ed. 597.

Where a municipal corporation, acting under legislative authority, and with a view to the advancement of the commercial and business interests of the city, makes a loan of funds to aid the construction of a railroad leading into the city, taking the interest bearing bonds of the company as evidence of the indebtedness, the interest derived from such loan is to be deemed a municipal revenue, and a federal statute taxing the same while it is yet in the hands of the railroad company, and ordering the company to pay the same to the proper federal official, is to that extent unconstitutional and void. *United States v. Railroad Co.*, 17 Wall. 322, 333, 21 L. Ed. 597.

**Stamp tax on bonds required of municipal licensees.**—In *Ambrosini v. United States*, 187 U. S. 1, 47 L. Ed. 49, in which the federal war revenue tax act, providing for stamp taxes on bonds, was held inapplicable to bonds required from licensees under the dram shop act of Illinois, the court declared (p. 8): "The question is whether the bonds were taken in the exercise of a function strictly belonging to the state and city in their ordinary governmental capacity, and we are of the opinion that they were, and that they were exempt, and no more taxable than the license."

**19. Salaries of state officers.**—*Collector v. Day*, 11 Wall. 113, 125, 20 L. Ed. 122.

money of any notes not issued under its authority: "The tax thus laid is not on the obligation, but on its use in a particular way."<sup>20</sup>

(eeee) *Municipal, State and County Securities*.—"It is settled law that bonds issued by a state, or under its authority by its public municipal bodies, are not taxable by the United States."<sup>21</sup>

**Income from Municipal Securities.**—This principle extends to the exemption from federal taxation of income derived from the interest on municipal bonds.<sup>22</sup>

**But Congress May Tax Use as Money.**—But as against the United States, a state municipality has no right to put its notes or other obligations in circulation as money. It may execute its obligations, but cannot, against the will of congress, make them money. Such a use is against the policy of the United States, and it is wholly within the competency of congress to destroy such use by means of a prohibitive tax. A tax thus laid is not on the obligation, but upon its use in a particular way.<sup>22a</sup>

(ffff) *Stamp Act Not an Interference with Right of State to Regulate Form of Contracts*.—The act of congress approved June 13, 1898, ch. 448, commonly known as the war revenue act, and which required, in certain cases that there should be a written memorandum of sales of personal property, upon which a tax was imposed, was not unconstitutional as an attempt upon the part of congress to require a written notice or memorandum of contracts made within the states. The statute did not render void a sale made without the memorandum or statement, nor did it assume to enact anything in opposition to the law of any state upon the subject of sales. It prescribed a written memorandum contain-

**20. Ten per cent tax upon state banks of circulation.**—*Veazie Bank v. Fenno*, 8 Wall. 533, 19 L. Ed. 482; *National Bank v. United States*, 101 U. S. 1, 25 L. Ed. 979; *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 577, 39 L. Ed. 759.

**21. Municipal, state and county securities.**—*Plummer v. Coler*, 178 U. S. 115, 117, 44 L. Ed. 998; *Mercantile Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895; *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 583, 39 L. Ed. 759.

"Bonds issued by the state of New York, or under its authority by its public municipal bodies, are means for carrying on the work of the government, and are not taxable even by the United States." *Mercantile Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895.

**22. Income from municipal securities.**—*Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 586, 39 L. Ed. 759

The provisions of the Income Tax Act of August 28, 1894 (28 Stats. 509, ch. 349) imposing a tax upon income derived from the interest on municipal bonds are unconstitutional and void as a tax upon the power of the states and their instrumentalities to borrow money. *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 586, 39 L. Ed. 759.

"The law under consideration provides 'that nothing herein contained shall apply to states, counties or municipalities.' It is contended that although the property or revenues of the states of their instrumentalities cannot be taxed, nevertheless the income derived from state, county, and

municipal securities can be taxed. But we think the same want of power to tax the property or revenues of the states or their instrumentalities exists in relation to a tax on the income from their securities, and for the same reason, and that reason is given by Chief Justice Marshall in *Weston v. Charleston*, 2 Pet. 449, 468, 7 L. Ed. 481, where he said: 'The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burthen on the operations of government. It may be carried to an extent which shall arrest them entirely. \* \* \* The tax on government stock is thought by this court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the constitution.' *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 586, 39 L. Ed. 759.

**22a. But congress may tax use as money.**—*National Bank v. United States*, 101 U. S. 1, 6, 25 L. Ed. 979.

Section 3413 of the Revised Statutes, providing that "Every national banking association, state bank or banker or association shall pay a tax of ten per centum on the amount of notes of any town, city or municipal corporation paid out by them," is constitutional and valid. *National Bank v. United States*, 101 U. S. 1, 25 L. Ed. 979; *Veazie Bank v. Fenno*, 8 Wall. 533, 19 L. Ed. 482.

ing the matters mentioned simply as a means of identifying the sale and for collecting the tax by means of the required stamps.<sup>23</sup>

(eee) *Sale of Lottery Tickets in Violation of State Law*.—In *Cohens v. Virginia*, 6 Wheat. 264, 441, 5 L. Ed. 257, it was held that where an act of congress empowered the corporation of the city of Washington to authorize the drawing of lotteries for certain purposes it could not force the sale of the tickets in Virginia, where such sale was prohibited by law. That case is a strong authority in favor of the view that, although lottery tickets are authorized by one government, such validity cannot authorize their sale within the territory of another government which forbids such sale.<sup>24</sup>

(fff) *Suppressing Crime or Immorality within the States through the Enactment of Postal Regulations*.—See ante, "To Define and Punish Crime," VI, D, 3, c, (4), (f).

(ggg) *Power of Federal Courts to Restrain State Officers Acting under Unconstitutional Laws*.—See the titles COURTS; INJUNCTIONS; JURISDICTION; STATES.

(hhh) *Federal Encroachment upon the Police Power of the States*.—See the title POLICE POWER.

(ee) *Prohibition against Encroachment or Intrusion Not Founded on Any Express Provision of the Constitution*.—The doctrine which exempts the agencies and instrumentalities of one government from the influence of unfriendly legislation by the other, is not founded on any express provision of the constitution, but rests upon necessary implication, resulting from the principle that no government, whose means employed in conducting its operations are subject to the control of another and distinct government, can exist except at the mercy of that government.<sup>25</sup>

**23. Form of contracts; stamp act.**—*Nicol v. Ames*, 173 U. S. 509, 523, 43 L. Ed. 786.

**24. Sale of lottery tickets in violation of state law.**—*Horner v. United States*, 147 U. S. 449, 462, 37 L. Ed. 237. See, also, ante, "To Define and Punish Crime," VI, D, 3, c, (4), (f).

**25. Prohibition against encroachment and interference not founded upon any express provision of the constitution.**—*Osborn v. United States Bank*, 9 Wheat. 738, 865, 866, 6 L. Ed. 204; *National Bank v. Commonwealth*, 9 Wall. 353, 19 L. Ed. 701; *Collector v. Day*, 11 Wall. 113, 127, 20 L. Ed. 122; *South Carolina v. United States*, 199 U. S. 437, 451, 50 L. Ed. 261.

The doctrine which exempts the instrumentalities of the federal government from the influence of state legislation, is not founded on any express provision of the constitution, but in the implied necessity for the use of such instruments by the federal government. *National Bank v. Commonwealth*, 9 Wall. 353, 19 L. Ed. 701.

There is no express provision in the constitution that prohibits the general government from taxing the means and instrumentalities of the states, nor is there any prohibiting the states from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, is subject to the control of another and distinct government, can exist only at the

mercy of that government. *Collector v. Day*, 11 Wall. 113, 127, 20 L. Ed. 122; *South Carolina v. United States*, 199 U. S. 437, 453, 50 L. Ed. 261. See, also, *United States v. Railroad Co.*, 17 Wall. 322, 332, 21 L. Ed. 597; *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 584, 39 L. Ed. 759.

"Among those matters which are implied, though not expressed, is that the nation may not, in the exercise of its powers, prevent a state from discharging the ordinary function of government, just as it follows from the second clause of article 6 of the constitution, that no state can interfere with the free and unembarrassed exercise by the national government of all the powers conferred upon it." *South Carolina v. United States*, 199 U. S. 437, 451, 50 L. Ed. 261.

"The exemption of the state's property and its functions from federal taxation is implied from the dual character of our federal system and the necessity of preserving the state in all its efficiency." *South Carolina v. United States*, 199 U. S. 437, 456, 50 L. Ed. 261.

Speaking upon this point Chief Justice Marshall says: "It is contended, that, admitting congress to possess the power, this exemption ought to have been expressly asserted in the act of incorporation; and not being expressed ought not to be implied by the court. It is not unusual, for a legislative act to involve consequences which are not expressed. An officer, for example, is ordered to arrest an individual. It is not necessary, nor is



(ff) *Limitations of Doctrine*.—See ante, "Salary of Federal Official; Right or Title to Office," VI, D, 3, c, (6), (b), (cc), (fff), (ffff); "Limitation of Doctrine," VI, D, 3, c, (6), (b), (cc), (fff), (mmmm).

(gg) *Neither Government Can Authorize the Other to Pass the Limits Fixed by the Constitution*.—The constitution of the United States being the supreme law of the land, it is incompetent for either government to enlarge or restrict the powers of the other as defined by that instrument.<sup>26</sup>

(hh) *Supremacy in Case of Conflict between State and Federal Powers*.—As we have already seen, each government is supreme within the scope of its authority,<sup>27</sup> and that neither government can intrude upon the jurisdiction, interfere with the operations, nor burden the instrumentalities of the other.<sup>28</sup> The powers remaining with the states may be, however, and it frequently happens that they are, so exercised as to come in conflict with those vested in the national government or in congress. In other words, it frequently happens that statutes enacted by state legislatures and acts done under the authority thereof, although touching matters within the undisputed sphere of state powers, come in conflict with the laws of the United States enacted pursuant to the constitution or with some treaty made under the authority of the United States, or with some authority exercised pursuant to a valid law or treaty of the United States. It has been contended that in such cases, the state law or authority,

it usual, to say that he shall not be punished for obeying this order. His security is implied in the order itself. It is no unusual thing, for an act of congress to imply, without expressing, this very exemption from state control, which is said to be so objectionable in this instance. The collectors of the revenue, the carriers of the mail, the mint establishment, and all those institutions which are public in their nature, are examples in point. It has never been doubted that all who are employed in them, are protected, while in the line of duty; and yet this protection is not expressed in any act of congress. It is incidental to, and is implied in the several acts by which these institutions are created, and is secured to the individuals employed in them, by the judicial power alone; that is, the judicial power is the instrument employed by the government in administering this security." *Osborn v. United States Bank*, 9 Wheat. 738, 865, 866, 6 L. Ed. 204.

26. *Neither government to authorize the other to transcend the limits fixed by the constitution*.—*Wayman v. Southard*, 10 Wheat. 1, 48, 6 L. Ed. 253; *Martin v. Waddell*, 16 Pet. 367, 410, 10 L. Ed. 997; *Pollard v. Hagan*, 3 How. 212, 229, 11 L. Ed. 565; *Passenger Cases* (opinion of McLean, J.), 7 How. 283, 399, 12 L. Ed. 702; *Cooley v. Board of Wardens*, 12 How. 299, 318, 13 L. Ed. 996; *Kentucky v. Dennison*, 24 How. 66, 108, 16 L. Ed. 717; *Van Allen v. The Assessors*, 3 Wall. 573, 18 L. Ed. 229; *Gilman v. Philadelphia*, 3 Wall. 713, 726, 18 L. Ed. 96; *United States v. Dewitt*, 9 Wall. 41, 19 L. Ed. 593; *Gunn v. Barry*, 15 Wall. 610, 623, 21 L. Ed. 212; *United States v. Jones*, 109 U. S. 513, 518, 27 L. Ed. 1015; *The Chinese Exclusion Case*, 130 U. S. 581, 609, 32 L. Ed. 1068; *In re Rahrer*, 140 U. S. 545, 560, 35 L. Ed. 572.

Congress can in no respect restrict or enlarge the state powers, though they may adopt a state law. State powers are at all times and under all circumstances exercised independently of the general government, and are never declared void or inoperative except when they transcend state jurisdiction. And on the same principle, the federal authority is void when exercised beyond its constitutional limits. (Opinion of McLean, J.) *Passenger Cases*, 7 How. 283, 399, 12 L. Ed. 702.

The state assemblies do not constitute a legislative body for the Union. They possess no portion of that legislative power which the constitution vests in congress, and cannot receive it by delegation. *Wayman v. Southard*, 10 Wheat. 1, 48, 6 L. Ed. 253.

When the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government; and by no compact between a state and the United States can the right of the states be either diminished or enlarged with respect to these matters. *Martin v. Waddell*, 16 Pet. 367, 410, 10 L. Ed. 997; *Gilman v. Philadelphia*, 3 Wall. 713, 726, 18 L. Ed. 96; *Pollard v. Hagan*, 3 How. 212, 229, 11 L. Ed. 565.

27. *Each government supreme within its own sphere*.—See ante, "Generally," VI, D. 3, c, (6), (a).

28. *Neither government to intrude upon the jurisdiction of the other*.—See ante, "Neither Government to Intrude upon the Jurisdiction, Interfere with the Operation, nor Burden the Instrumentalities of the Other," VI, D, 3, (6), (b), et seq.

on the one hand and the federal law or authority on the other, affect the subject matter and each other like equal opposing forces, but the federal supreme court has uniformly held that the framers of the constitution foresaw this state of things and provided for it by declaring the supremacy, not only of the constitution itself, but of the laws made in pursuance thereof and of the treaties made under the authority of the United States. Consequently, it is the established doctrine that in every such case the acts of congress, made pursuant to the constitution, and the treaties made under the authority of the United States, are the supreme law, and that state constitutions and laws, and authority exercised thereunder, although touching matters within the reserved powers of the states, must yield thereto. This principle has been frequently affirmed by the federal supreme court, and is founded as well on the nature of the government as on the words of the constitution.<sup>29</sup>

29. *Wilson v. Black-Bird Creek Marsh Co.*, 2 Pet. 245, 251, 252, 7 L. Ed. 412; *Harris v. Dennie*, 3 Pet. 292, 305, 7 L. Ed. 283; *Worcester v. Georgia*, 6 Pet. 515, 571, 8 L. Ed. 483; *New York City v. Miln*, 11 Pet. 102, 9 L. Ed. 648; *License Cases*, 5 How. 504, 573, 574, 579, 12 L. Ed. 256; *Cooley v. Board of Wardens*, 12 How. 299, 13 L. Ed. 996; *Pennsylvania v. Wheeling, etc.*, *Bridge Co.*, 13 How. 518, 560, 14 L. Ed. 249; *Ableman v. Booth*, 21 How. 506, 16 L. Ed. 169; *Sinnot v. Davenport*, 22 How. 227, 243, 16 L. Ed. 243; *New York v. Commissioners of Taxes*, 2 Black 620, 632, 17 L. Ed. 451.

**Supremacy in case of conflict between state and federal powers.**—*Ware v. Hylton*, 3 Dall. 199, 284, 1 L. Ed. 568; *Respublica v. Cobbett*, 3 Dall. 467, 473, 1 L. Ed. 683; *Martin v. Hunter*, 1 Wheat. 304, 343, 363, 4 L. Ed. 97; *McCulloch v. Maryland*, 4 Wheat. 316, 405, 406, 436, 4 L. Ed. 579; *Houston v. Moore*, 5 Wheat. 1, 49, 5 L. Ed. 19; *Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257; *Gibbons v. Ogden*, 9 Wheat. 1, 201, 211, 6 L. Ed. 23; *Brown v. Maryland*, 12 Wheat. 419, 448, 449, 6 L. Ed. 678; *Society for Savings v. Coite*, 6 Wall. 594, 605, 18 L. Ed. 897; *Ex parte McNeil*, 13 Wall. 236, 240, 20 L. Ed. 624; *Tarble's Case*, 13 Wall. 397, 20 L. Ed. 597; *White v. Hart*, 13 Wall. 646, 650, 20 L. Ed. 685; *United States v. Cruikshank*, 92 U. S. 542, 550, 23 L. Ed. 588; *Henderson v. New York City*, 92 U. S. 259, 272, 23 L. Ed. 543; *Clafin v. Houseman*, 93 U. S. 130, 136, 23 L. Ed. 833; *Pound v. Turck*, 95 U. S. 459, 462, 24 L. Ed. 525; *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 9, 24 L. Ed. 708; *Tennessee v. Davis*, 100 U. S. 257, 262, 25 L. Ed. 648; *Ex parte Virginia*, 100 U. S. 339, 346, 25 L. Ed. 676; *Ex parte Siebold*, 100 U. S. 371, 392, 399, 25 L. Ed. 717; *Ex parte Clarke*, 100 U. S. 399, 404, 25 L. Ed. 715; *Transportation Co. v. Parkersburg*, 107 U. S. 691, 700, 27 L. Ed. 584; *Legal Tender Case*, 110 U. S. 421, 438, 28 L. Ed. 204; *Robb v. Connolly*, 111 U. S. 624, 631, 28 L. Ed. 542; *Van Brocklin v. Tennessee*, 117 U. S. 151, 155, 29 L. Ed. 845; *Kidd v. Pearson*, 128 U. S. 1, 18, 32 L. Ed. 346; *In re Neagle*, 135 U. S. 1, 60, 34 L. Ed. 55; *Manchester*

*v. Massachusetts*, 139 U. S. 240, 262, 35 L. Ed. 159; *United States v. Knight Co.*, 156 U. S. 1, 11, 39 L. Ed. 325; *Gulf, etc., R. Co. v. Hefley*, 158 U. S. 98, 102, 39 L. Ed. 910; *In re Debs*, 158 U. S. 564, 39 L. Ed. 1092; *Missouri, etc., R. Co. v. Haber*, 169 U. S. 613, 626, 627, 42 L. Ed. 878; *L'Hote v. New Orleans*, 177 U. S. 587, 596, 44 L. Ed. 899; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 558, 46 L. Ed. 679; *Northern Securities Co. v. United States*, 193 U. S. 197, 347, 48 L. Ed. 679; *Jacobson v. Massachusetts*, 197 U. S. 11, 25, 49 L. Ed. 643. See, also, the title **POLICE POWER**.

"The nullity of any act, inconsistent with the constitution, is produced by the declaration, that the constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the state legislatures as do not transcend their powers, but though enacted in the execution of acknowledged state powers, interfere with, or are contrary to, the laws of congress, made in pursuance of the constitution, or some treaty made under the authority of the United States. In every such case, the act of congress, or the treaty is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it." (Opinion of Marshall, C. J.) *Gibbons v. Ogden*, 9 Wheat. 1, 211, 6 L. Ed. 23.

It has been observed that the powers remaining with the states may be so exercised as to come in conflict with those vested in congress. When this happens that which is not supreme must yield to that which is supreme. This great and universal truth is inseparable from the nature of things, and the constitution has applied it to the often interfering powers of the general and state governments, as a vital principle of perpetual operation. Marshall, C. J., delivering the majority opinion in *Brown v. Maryland*, 12 Wheat. 419, 448, 6 L. Ed. 678.

"The supremacy of the laws of congress, in cases of collision with state laws, is secured in the article which declares that the laws of congress, passed in pur-



### Immaterial to What Class the Conflicting State Power May Belong.

—And it is wholly immaterial under which class of powers the conflicting statute or authority falls. Whether state laws be passed in virtue of a concurrent power of the state with congress to legislate upon the subject to which such laws apply, or whether in virtue of the power of the states, to regulate their domestic trade

suance of the powers granted, shall be the supreme law; and it is only where both governments may legislate on the same subject that this article can operate. For if the mere grant of power to the general government was in itself a prohibition to the states, there would seem to be no necessity for providing for the supremacy of the laws of congress, as all state laws upon the subject would be ipso facto void, and there could therefore be no such thing as conflicting laws, nor any question about the supremacy of conflicting legislation. It is only where both may legislate on the subject, that the question can arise." (Opinion of Taney, C. J.) *License Cases*, 5 How. 504, 579, 12 L. Ed. 256.

"It has been contended that if the law passed by a state in the exercise of its acknowledged sovereignty, comes in conflict with the law passed by congress in pursuance of the constitution, they affect the subject and each other, like equal opposing powers." (Gibbons v. Ogden, 9 Wheat. 1, 210, 6 L. Ed. 23.) But the framers of the constitution foresaw this state of things and provided for it, by declaring the supremacy not only of the constitution itself, but of the laws made in pursuance of it. The nullity of any act inconsistent with the constitution is produced by the declaration that the constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the state legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged state powers, interfere with or are contrary to the laws of congress, made in pursuance of the constitution or some treaty made under the authority of the United States. In every such case, the act of congress or treaty is supreme, and the law of the state, though enacted in the exercise of powers not controverted, must yield to it. *McCulloch v. Maryland*, 4 Wheat. 316, 405, 406, 436, 4 L. Ed. 579; *Brown v. Maryland*, 12 Wheat. 419, 448, 6 L. Ed. 678; *Willson v. Black-Bird Creek Marsh Co.*, 2 Pet. 245, 251, 252, 7 L. Ed. 412; *License Cases*, 5 How. 504, 573, 574, 579, 12 L. Ed. 256; *Sinnot v. Davenport*, 22 How. 227, 242, 16 L. Ed. 243.

No law can be an infringement of state sovereignty, or state rights, which congress, by the constitution, is authorized to enact. The constitution and laws enacted pursuant thereto being supreme, the states, in exercising their rights, cannot disregard the limitations which have been placed upon them by the federal

constitution. Every addition of power to the national government involves a corresponding diminution of the governmental powers of the states. The national government is carved out of them. The states cannot, therefore, deny to the national government the right to exercise all the granted powers, though such exercise may interfere with the full enjoyment of rights which the states would possess if those powers had not been granted. *Ex parte Virginia*, 100 U. S. 339, 346, 25 L. Ed. 676.

The constitution of the United States is paramount and controlling to all state laws, and even state constitution, where-soever they interfere or disagree. (Opinion of Cushing, J.) *Ware v. Hylton*, 3 Dall. 199, 284, 1 L. Ed. 568.

The federal constitution together with the laws of congress enacted under the authority thereof are the supreme law of the land, any state law or any right of a state set up in opposition thereof, to the contrary notwithstanding. *Brown v. Walker*, 161 U. S. 591, 606, 40 L. Ed. 819.

Thus it was competent for congress, in the enactment of a statute granting immunity from prosecution of persons testifying to matters which would otherwise tend to incriminate them and subject them to criminal prosecutions, to extend its provisions so as to include exemption from prosecution in the state courts for offenses against the state. *Brown v. Walker*, 161 U. S. 591, 606, 40 L. Ed. 819.

"The boundary of Kentucky extends only to low-water mark on the western and northwestern banks of the Ohio River. *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 609, 613, 43 L. Ed. 823, and authorities there cited. In that case it was said that although the jurisdiction of that commonwealth for all the purposes for which any state possesses jurisdiction within its territorial limits was co-extensive with its established boundaries, that jurisdiction was attended by the fundamental condition that it must not be exerted so as to entrench upon the authority of the national government or to impair any rights secured or protected by the national constitution." *Louisville, etc., Ferry Co. v. Kentucky*, 188 U. S. 385, 393, 47 L. Ed. 513.

No state law can hinder or obstruct the free use of a license granted under an act of congress. *Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. 518, 566, 14 L. Ed. 249.

The United States having a lien on imported goods for the payment of the duties accruing thereon, and being entitled



and police, they must yield to the constitutional enactments of congress relating to the same subjects, for neither the police powers of the states extensive as they are, nor any other power can be so exercised as to encroach upon or hinder the full and free operation of the constitutionally enacted acts of congress and treaties under the authority of the United States.<sup>30</sup>

to a virtual custody of them, from the time of their arrival in port, until the duties are paid or secured, any attachment by a state officer is an interference with such lien and right of custody; and, being repugnant to the laws of the United States is void. *Harris v. Dennie*, 3 Pet. 292, 305, 7 L. Ed. 283.

**Supremacy of treaties in case of conflict with reserved powers.**—The protection which should be afforded to the citizens of one country owning property in another, and the manner in which that property may be transferred, devised or inherited, are fitting subjects for such negotiation, and of regulation by mutual stipulations between two countries under the treaty power. *Geofroy v. Riggs*, 133 U. S. 258, 266, 33 L. Ed. 642.

Thus it is held that a state law, whereby it is provided that the lands of an alien, dying intestate and without issue, shall escheat to the state, must yield to a treaty provision confirming to the alien next of kin of such intestate the right to recover the lands and withdraw the proceeds thereof from this country. *Hauenstein v. Lynham*, 100 U. S. 483, 25 L. Ed. 628.

The fourth article of the treaty of peace concluded between Great Britain and the United States on the 3d day of September, 1783, and providing that British creditors should be entitled to recover debts owing them by citizens of the United States, nullified the Virginia statute passed on the 20th of October, 1777, providing for the payment of such debts to the state of Virginia, destroyed all papers made thereunder, revived the debt, and gave a right of recovery thereto against the original debtor. This treaty being, under the constitution, the supreme law of the land, is not invalid as impairing vested rights of those debtors who have previously made payments to the state of Virginia under the aforesaid statute. (*Opinion of Chase, J.*) *Ware v. Hylton*, 3 Dall. 199, 235, 1 L. Ed. 568.

If the federal government should make the burdens and restrictions imposed upon foreign commerce by the states in the exercise of their police power over the importation of paupers, lunatics, and criminals the subject of a treaty, such treaty would fall within the power conferred on the president and the senate by the constitution and would be enforceable as the supreme law. *Henderson v. New York City*, 92 U. S. 259, 273, 23 L. Ed. 543.

**30. Immaterial to what class conflicting state power may belong.**—*Gibbons v. Ogden*, 9 Wheat. 1, 210, 6 L. Ed. 23; *Sin-*

*not v. Davenport*, 22 How. 227, 16 L. Ed. 243; *Henderson v. New York City*, 92 U. S. 259, 23 L. Ed. 543; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 661, 29 L. Ed. 516; *Walling v. Michigan*, 116 U. S. 446, 460, 29 L. Ed. 691; *L'Hote v. New Orleans*, 177 U. S. 587, 596, 44 L. Ed. 899; *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455, 464, 30 L. Ed. 237; *Kidd v. Pearson*, 128 U. S. 1, 18, 32 L. Ed. 346; *United States v. Knight Co.*, 156 U. S. 1, 11, 39 L. Ed. 325; *In re Debs*, 158 U. S. 546, 39 L. Ed. 1092; *Gulf, etc., R. Co. v. Hefley*, 158 U. S. 98, 104, 39 L. Ed. 910; *Western Union Tel. Co. v. James*, 162 U. S. 650, 654, 40 L. Ed. 1105; *Hennington v. Georgia*, 163 U. S. 299, 309, 41 L. Ed. 166; *Lake Shore, etc., R. Co. v. Ohio*, 165 U. S. 365, 366, 368, 41 L. Ed. 747; *Missouri, etc., R. Co. v. Haber*, 169 U. S. 613, 626, 42 L. Ed. 878; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 558, 46 L. Ed. 679; *Cummings v. Chicago*, 188 U. S. 410, 428, 47 L. Ed. 525; *Northern Securities Co. v. United States*, 193 U. S. 197, 347, 48 L. Ed. 679; *Dobbins v. Los Angeles*, 195 U. S. 223, 236, 237, 49 L. Ed. 169; *Jacobson v. Massachusetts*, 197 U. S. 11, 25, 49 L. Ed. 643. See, also, ante, "Generally," VI, D, 3, c, (6), (b), (cc), (aaa).

"If the inspection, quarantine or health laws of a state, passed under its reserved power to provide for the health, comfort and safety of its people, come into conflict with an act of congress, passed under its power to regulate interstate and foreign commerce, such local regulations, to the extent of the conflict, must give way in order that the supreme law of the land—an act of congress passed in pursuance of the constitution—may have unobstructed operation." *Hennington v. Georgia*, 163 U. S. 299, 309, 41 L. Ed. 166.

"Whenever these reserved powers, or any of them, are so exercised as to come in conflict with the free course of the powers vested in congress, the law of the state must yield to the supremacy of the federal authority; though such law may have been enacted in the exercise of a power undelegated and indisputably reserved to the states." *Kidd v. Pearson*, 128 U. S. 1, 18, 32 L. Ed. 346.

Generally it may be said in respect to state laws regulating the charges of carriers for the transportation of freight that, though resting upon the police power of the state, they must yield whenever congress, in the exercise of the powers granted to it, legislates upon the precise subject matter, for that power, like all

**Federal Legislation or Treaty Must Have Been Within the Scope of Its Authority.**—In the event of conflict between state and federal legislation the latter, to be supreme, must, of course, have been enacted with reference to a subject within the scope of federal authority, and be otherwise constitutional.<sup>31</sup>

**Temporary Supremacy.**—But whenever any conflict arises between the enactments of the two sovereignties, or in the enforcement of their asserted authorities, those of the national government have supremacy until the validity of the different enactments and authorities are determined by the tribunals of the United States.<sup>32</sup>

**Construction; State Law Not to Be Held Invalid Unless Conflict Is Clear.**—In the application of this principle of the supremacy of the acts of congress over conflicting state laws, it is the settled rule that a statute enacted in execution of a reserved power of the state is not to be regarded as inconsistent with an act of congress passed in the execution of a clear power under the constitution, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together.<sup>33</sup> Where the state statute does

other reserved powers of the states, is subordinate to those in terms conferred by the constitution upon the nation. "No urgency for its use can authorize a state to exercise it in regard to a subject matter which has been confided exclusively to the discretion of congress by the constitution." *Henderson v. New York City*, 92 U. S. 259, 271, 23 L. Ed. 543." *Gulf, etc., R. Co. v. Hefley*, 158 U. S. 98, 104, 39 L. Ed. 910.

**Regulation of federal elections.**—The exercise by congress of its power to supervise the election of its members can properly cause no collision of regulations or jurisdictions between the state and national governments, because the authority of congress over the subject is paramount and any regulations it may make necessarily supersede inconsistent regulations of the state. This is involved in the power to make or alter. *Ex parte Siebold*, 100 U. S. 371, 25 L. Ed. 717.

**Commerce and navigation.**—The constitution of the United States declares that the constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land. It follows that a law of congress regulating commerce with foreign nations, or among the several states, is the supreme law; and if the law of a state is in conflict with it, the law of congress must prevail, and the state law cease to operate so far as it is repugnant to the law of the United States. (*Opinion of Taney, C. J.*) *License Cases*, 5 How. 504, 574, 12 L. Ed. 256; *Manchester v. Massachusetts*, 139 U. S. 240, 262, 35 L. Ed. 159.

**31. Federal legislation or treaty must have been within the scope of its authority.**—*New York City v. Miln*, 11 Pet. 102; 9 L. Ed. 648. See, also, ante, "Limitations upon the Supremacy of the Federal Constitution, Treaties, and Laws," IV, B, 2, d, et seq.

**32. Temporary supremacy.**—*Tarble's Case*, 13 Wall. 397, 20 L. Ed. 597; *Ableman v. Booth*, 21 How. 506, 16 L. Ed. 169.

"There are within the territorial limits of each state two governments, restricted in their spheres of action, but independent of each other, and supreme within their respective spheres. Each has its separate departments; each has its distinct laws, and each has its own tribunals for their enforcement. Neither government can intrude within the jurisdiction, or authorize any interference therein by its judicial officers with the action of the other. The two governments in each state stand in their respective spheres of action in the same independent relation to each other, except in one particular, that they would if their authority embraced distinct territories. That particular consists in the supremacy of the authority of the United States when any conflict arises between the two governments. The constitution and the laws passed in pursuance of it are declared by the constitution itself to be the supreme law of the land, and the judges of every state are bound thereby, 'anything in the constitution or laws of any state to the contrary notwithstanding.' Whenever, therefore, any conflict arises between the enactments of the two sovereignties, or in the enforcement of their asserted authorities, those of the national government must have supremacy until the validity of the different enactments and authorities can be finally determined by the tribunals of the United States. This temporary supremacy until judicial decision by the national tribunals, and the ultimate determination of the conflict by such decision, are essential to the preservation of order and peace, and the avoidance of forcible collision between the two governments." *Tarble's Case*, 13 Wall. 397, 406, 20 L. Ed. 597; *Ableman v. Booth*, 21 How. 506, 16 L. Ed. 169.

**33. State law not to be held invalid unless conflict is clear.**—*Sinnot v. Davenport*, 22 How. 227, 243, 16 L. Ed. 243;



not cover the same ground as the act of congress and therefore is not inconsistent with such act, its constitutionality is not to be questioned unless it be in violation of the constitution of the United States, independently of any legislation by congress.<sup>34</sup> The question, however, is not whether, in any particular case, operation may be given to both statutes, but whether their enforcement may expose a party to a conflict of duties. It is enough that the two statutes operating upon the same subject matter prescribe different rules. In such case one must yield and that one is the state law.<sup>35</sup>

d. *Separation of Departments and Distribution of Powers*.—(1) *Power of Body Politic with Respect to Distribution of Powers*.—The power existing in every body politic is an absolute despotism. In constituting a government, the body politic distributes that power as it pleases, and in the quantity it pleases, and imposes what checks it pleases upon its public functionaries. The natural distribution and the necessary distribution to individual security, is into legislative, executive and judicial; but it is obvious that every community may make a perfect or imperfect separation and distribution of these powers at its will.<sup>36</sup>

**In the Several States.**—What exact partition of powers, legislative, executive or judicial, the people of the several states may or should apportion to the different departments of their respective governments, is a question rather for the state government to determine, than for the federal supreme court, and that court will enter into such an inquiry with very great reluctance.<sup>37</sup>

**Separation Not a Requisite to Due Process of Law.**—"Whether the legislative, executive and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the state; and its determination one way or the other cannot be an element in the inquiry whether the due process of law prescribed by the fourteenth amendment has been respected by the state or its representatives when dealing with matters involving life or liberty."<sup>38</sup>

(2) *Powers Distributed among Three Great Departments*.—The object of the federal constitution was to establish three great departments of government; the legislative, the executive and the judicial departments. The first was to pass laws, the second, to approve and execute them, and the third, to expound and enforce them.<sup>39</sup> All the powers intrusted to government, whether state or national, are thus distributed among three departments.<sup>40</sup>

Missouri, etc., *R. Co. v. Haber*, 169 U. S. 613, 624, 42 L. Ed. 878; *Reid v. Colorado*, 187 U. S. 137, 150, 47 L. Ed. 108. See, also, the title **STATUTES**.

**34. Where state law does not cover the same ground.**—*Reid v. Colorado*, 187 U. S. 137, 150, 47 L. Ed. 108.

**35. Same.**—*Gulf, etc., R. Co. v. Hefley*, 158 U. S. 98, 103, 39 L. Ed. 910.

**36. Power of body politic with respect to distribution of powers.**—*Johnson, J.*, delivering the opinion in *Livingston v. Moore*, 7 Pet. 469, 546, 8 L. Ed. 751.

**37. Same; powers of the several states.**—*Satterlee v. Mathewson*, 2 Pet. 380, 413, 7 L. Ed. 458; *Livingston v. Moore*, 7 Pet. 469, 546, 8 L. Ed. 751; *Baltimore, etc., R. Co. v. Nesbit*, 10 How. 395, 400, 13 L. Ed. 469; *Randall v. Kreiger*, 23 Wall. 137, 147, 23 L. Ed. 124; *Dreyer v. Illinois*, 187 U. S. 71, 83, 47 L. Ed. 79; *Reetz v. Michigan*, 188 U. S. 505, 507, 47 L. Ed. 563. See, also, post, "Power to Impose Judicial Functions upon Nonjudicial Tribunals," VI, D, 3, d, (3), (e).

**38. Separation of departments not a requisite of due process.**—*Dreyer v. Illinois*, 187 U. S. 71, 84, 47 L. Ed. 79. See, also, *Michigan Cent. R. Co. v. Powers*, 201 U. S. 245, 294, 50 L. Ed. 744.

"A local statute investing a collection of persons not of the judicial department, with powers that are judicial, and authorizing them to exercise the pardoning power which alone belongs to the governor of the state, presents no question under the constitution of the United States." *Dreyer v. Illinois*, 187 U. S. 71, 83, 47 L. Ed. 79.

**39. Powers distributed among three departments.**—*Chisholm v. Georgia*, 2 Dall. 419, 465; *Martin v. Hunter*, 1 Wheat. 304, 329, 4 L. Ed. 97; *Wayman v. Southard*, 10 Wheat. 1, 46, 6 L. Ed. 253; *Dodge v. Woolsev*, 18 How. 331, 347, 15 L. Ed. 401; *Legal Tender Case*, 110 U. S. 421, 438, 28 L. Ed. 204.

**40. Same.**—*Kilbourn v. Thompson*, 103 U. S. 168, 176, 190, 26 L. Ed. 377; *Kansas*



(3) *The Departments Separate: None to Encroach upon or Exercise the Powers of Another*—(a) *Generally*.—The functions appropriate to each of these branches of government are vested in a separate body of public servants, and the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is a fundamental principle, therefore, that the powers confided by the constitution to one of these departments shall not be exercised by another; that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that they shall confine themselves to the exercise of those powers appropriate to their own department.<sup>41</sup>

(b) *Legislative Exercise of Judicial Powers*—(aa) *Generally*.—The constitution declares that the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish. This is equivalent to a declaration that no judicial power is vested in the congress or either branch of it, save in the case of impeachment, etc.<sup>42</sup> But wherever the legislative power of a government is un-

*v. Colorado*, 206 U. S. 46, 81, 51 L. Ed. 956.

**Not always true as to state governments.**—This has not always been true as to the state governments, however. The legislature, or general court of Connecticut, originally possessed and exercised all legislative, executive and judicial authority; and from time to time they distributed the two latter powers in such manner as they thought proper; but without parting with the general superintending power or the right of exercising the same whenever they should judge it expedient. And it has been held that an act of the Connecticut legislature, setting aside a final judgment or decree in a civil cause and awarding a new trial, was constitutional and valid. *Calder v. Bull*, 3 Dall. 386, 395, 1 L. Ed. 648. See, also, *Olney v. Arnold*, 3 Dall. 308, 318, 1 L. Ed. 614; *Cooper v. Telfair*, 4 Dall. 14, 19, 1 L. Ed. 721.

"It has pleased Pennsylvania, in her constitution, to make what most jurists would pronounce an imperfect separation of those powers; she has not thought it necessary to make any imperative provision for incorporating the equity jurisdiction, in its full latitude, into her jurisprudence; and the consequence is, as it ever will be, that so far as her common-law courts are incapable of assuming and exercising that branch of the jurisdiction, her legislature must often be called upon to pass laws which bear a close affinity to decrees in equity." *Johnson, J.*, delivering the opinion in *Livingston v. Moore* 7 Pet. 469, 546, 8 L. Ed. 751.

**41 Departments separate; none to encroach upon another.**—*Meriwether v. Garrett*, 102 U. S. 472, 515, 26 L. Ed. 197; *Kilbourn v. Thompson*, 103 U. S. 168, 191, 26 L. Ed. 377; *Mugler v. Kansas*, 123 U. S. 623, 662, 31 L. Ed. 205; *McCray v. United States* 195 U. S. 27, 55, 49 L. Ed. 78.

"A strict confinement of each department within its own proper sphere was designed by the founders of our govern-

ment, and is essential to its successful administration." *Meriwether v. Garrett*, 102 U. S. 472, 515, 26 L. Ed. 197.

It is a fundamental principle in our institutions, indispensable to the preservation of public liberty, that one of the separate departments of government shall not usurp powers committed by the constitution to another department. *Mugler v. Kansas*, 123 U. S. 623, 662, 31 L. Ed. 205.

"As aptly said by the court, speaking through Mr. Justice Miller, in *Kilbourn v. Thompson*, 103 U. S. 168, 190, 26 L. Ed. 377: 'It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to the government, whether state or national, are divided into the three grand departments, the executive, the legislative, and the judicial; that the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.'" *McCray v. United States*, 195 U. S. 27, 55, 49 L. Ed. 78.

**42. Legislative exercise of judicial powers.**—*Fletcher v. Peck*, 6 Cranch 87, 136, 3 L. Ed. 162; *Kilbourn v. Thompson*, 103 U. S. 168, 193, 26 L. Ed. 377; *Gordon v. United States*, 117 U. S., appx., 697, 705.

The constitution of the United States delegates no judicial power to congress. Its powers are confined to legislative duties, and restricted within certain prescribed limits. *Gordon v. United States*, 117 U. S., appx., 697, 705.

It is the peculiar province of the legislature to prescribe general rules for the

defined, it includes the judicial and executive attributes.<sup>43</sup>

**Federal Constitution Not Prohibitive to State Legislatures.**—There is nothing in the constitution of the United States which forbids the legislature of a state or territory to exercise judicial functions.<sup>44</sup>

(bb) *What Constitutes*—(aaa) *Legislation Affecting Pending Suits or Judgments Rendered*—(aaaa) *Statute Authorizing Congressional Investigation of Matter Pending in Courts.*—If the United States is a creditor of any citizen, or of any one else, on whom process can be served, the usual, the only legal mode of enforcing payment of the debt, is by a resort to a court of justice. And where the claim of the United States against such person is being duly and regularly prosecuted in a court of justice, it is not competent for the house of representatives to institute a separate investigation, conducted by a house committee, for the purpose of reaching and subjecting to the satisfaction of such claim property or funds which are being proceeded against in the pending suit.<sup>45</sup>

(bbbb) *Statute Dictating Judgment to Be Rendered upon Evidence in Pending Suit.*—An act of congress which, without attempting to create any new circumstances affecting pending litigation, undertakes to declare what shall be the effect of certain evidence (in this case an executive pardon) in a pending case, and to compel the court to render a certain decision thereon, passes the limit which separates the legislative from the judicial power and is unconstitutional and void.<sup>46</sup>

(cccc) *Withdrawing Land Claim from Further Consideration of the Courts.*—In the execution of its treaty obligations with respect to property claimed under Mexican Laws, the government may, if it please, act by legislation directly upon a claim preferred, withdrawing it from further consideration of the courts under the provisions of a general act.<sup>47</sup>

government of society; the application of those rules to individuals in society would seem to be the duty of other departments. *Fletcher v. Peck*, 6 Cranch 87, 136, 3 L. Ed. 162.

**43. Where legislative power is undefined.**—*Cooper v. Telfair*, 4 Dall. 14, 19, 1 L. Ed. 721.

**44. Federal constitution not prohibitive to state legislatures.**—*Satterlee v. Mathewson*, 2 Pet. 380, 413, 7 L. Ed. 458; *Baltimore, etc., v. Nesbit*, 10 How. 395, 13 L. Ed. 469; *Randall v. Kreiger*, 23 Wall. 137, 147, 23 L. Ed. 124.

Thus in a case arising in Pennsylvania a lessee, who had brought in an outstanding title founded on a Pennsylvania patent, affirmed that he was not estopped to deny his landlord's title, because his landlord's title, being founded on a Connecticut grant, was not sufficient to create the relation of landlord and tenant between them. This contention was upheld by the Pennsylvania supreme court, and, pending a new trial, the legislature enacted a measure declaring that titles founded on Connecticut grants should be deemed sufficient to create the relation of landlord and tenant, and made said statute applicable to pending suits. Held, that there was nothing in the federal constitution to prohibit the exercise of the judicial functions by state legislatures, and that the statute was not unconstitutional on that ground. *Satterlee v. Mathewson*, 2 Pet. 380, 413, 7 L. Ed. 458, distinguishing *Ogden v. Blackledge*, 2 Cranch 272, 276, 2 L. Ed. 276.

**45. Congressional investigation of matter pending in courts.**—*Kilbourn v. Thompson*, 103 U. S. 168, 193, 26 L. Ed. 377.

Thus where a debtor of the United States was supposed to have an interest in the property and assets of a certain corporation, and the question of his interest in such corporation was at that time the subject of investigation in a suit instituted by the government in a court of competent jurisdiction, with a view to subject such interest, if any, to the demands of the government, the house of representatives had no jurisdiction to institute a separate investigation, conducted by a house committee, for the same purpose. Such investigation was an unwarranted encroachment upon the functions of the judicial department; and imprisonment of persons summoned as witnesses in such investigation, for an alleged contempt, was wholly without warrant of law. *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. Ed. 377.

**46. Statute dictating judgment to be rendered in pending suit.**—*United States v. Klein*, 13 Wall. 128, 129, 147, 20 L. Ed. 519, distinguishing *Pennsylvania v. Wheeling, etc., Bridge Co.*, 18 How. 421, 429, 15 L. Ed. 435.

**47. Withdrawing land claim from consideration of courts.**—*Grisar v. McDowell*, 6 Wall. 363, 364, 18 L. Ed. 863.

Accordingly, an act by which all the right and title of the United States to the land within the corporate limits of San Francisco, confirmed to the city by a de-



(dddd) *Statute Destroying Right of Appeal in Pending Suit.*—The repeal of an act authorizing appeals to the federal supreme court in certain classes of cases, pending appeals provided for by such act, is not an exercise of judicial power by the legislature, no matter whether the repeal takes effect before or after argument on the pending appeals.<sup>48</sup>

(eeee) *Statute Amending, Overruling or Setting Aside Judgment or Decree.*—As a legal proposition it is true that an act of congress cannot amend a judgment of the supreme court of the United States, or impair the rights determined thereby, especially as respects adjudications upon the private rights of parties, which, when they have passed into judgment, become absolute; and it is the duty of the court to enforce its judgment without regard to the act.<sup>49</sup> But such a position is wholly inapplicable to measures of public policy falling appropriately within the legislative competency; as, for example, where the private rights claimed depend upon the obstruction of the enjoyment of a public right, as in the case of one claiming special damages for the obstruction of navigation upon a public navigable river.<sup>50</sup>

**Colonial Practice.**—Under their colonial charters the general assemblies of Rhode Island and Connecticut had the power to set aside the decisions of the courts of those states.<sup>51</sup>

**Statutes Awarding New Trials, Right of Appeal, etc.**—A statute which enacts that, in cases where a motion for a new trial is not ruled upon during the term at which presented, it shall be deemed to have been denied and an appeal allowed with a review of the questions raised in said motion in like manner as if it had been overruled and exceptions reserved, is not unconstitutional as a legislative assumption of judicial functions.<sup>52</sup>

cree of the circuit court, were relinquished and granted to that city, and by which the claim of the city was confirmed, subject, however, to the reservations and exceptions designated in the decree, and upon certain specified trusts, disposed of the city's claim, and determined the conditions upon which it should be recognized and finally confirmed. *Grisar v. McDowell*, 6 Wall. 363, 364, 18 L. Ed. 863.

**48. Destroying right of appeal in pending suit.**—*Ex parte McCardle*, 7 Wall. 506, 19 L. Ed. 264; *Baltimore, etc., R. Co. v. Grant*, 98 U. S. 398, 25 L. Ed. 231.

**49. Amending, overruling or setting aside judgment.**—*Pennsylvania v. Wheeling, etc., Bridge Co.*, 18 How. 421, 431, 457, 15 L. Ed. 435.

The legislature has no power to invalidate or set aside a judgment rendered before the passage of the act. *United States v. Klein*, 13 Wall. 128, 20 L. Ed. 519.

**50. Same.**—*Pennsylvania v. Wheeling, etc., Bridge Co.*, 18 How. 421, 431, 15 L. Ed. 435. (Four justices dissenting.)

Thus the provisions of the act of congress passed August 31, 1852 (10 Stat. at Large 112), declaring the bridges over the Ohio River at Wheeling and Bridgeport, at their then height and position, to be lawful structures, and declaring said bridges to be post roads of the United States, thereby annulling that portion of the decree of the supreme court of the United States in the case of *Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. 518, 14 L. Ed. 249, which enjoined further obstruction of commerce by the continued maintenance of said bridges, were not un-

constitutional as an unwarranted coercion of the judiciary, or as an encroachment upon its constitutional prerogatives, or as impairing the rights of the private parties to that controversy as determined by the decree rendered therein. *Pennsylvania v. Wheeling, etc., Bridge Co.*, 18 How. 421, 431, 15 L. Ed. 435. Accord: *The Clinton Bridge*, 10 Wall. 454, 19 L. Ed. 969; *Stockdale v. Insurance Companies*, 20 Wall. 323, 332, 22 L. Ed. 348.

The ground of the decree was the unlawful interference with any obstruction of commerce. The act of congress merely changed the law regulating commerce so as to render such obstruction and interference no longer unlawful. The decree of the court was no longer enforceable, therefore, since there was no longer any unlawful obstruction or interference with the enjoyment of the public rights of navigation and commerce. *Pennsylvania v. Wheeling, etc., Bridge Co.*, 18 How. 421, 431, 15 L. Ed. 435. (Four justices dissenting.)

But that portion of the decree relating to the costs adjudged to the complainant was a matter affecting the private rights of the parties, which became vested and absolute upon the rendition of the decree. Therefore, the decree, in so far as it related to such costs, was not affected by the subsequent act of congress. *Pennsylvania v. Wheeling, etc., Bridge Co.*, 18 How. 421, 431, 15 L. Ed. 435.

**51. Colonial practice.**—*Olney v. Arnold*, 3 Dall. 308, 318, 1 L. Ed. 614; *Calder v. Bull*, 3 Dall. 386, 1 L. Ed. 648.

**52. Statutes awarding new trial, right of**



(bbb) *Legislative Judgments and Decrees*—(aaaa) *Generally*.—The distribution of the powers of government among the three departments forbids the legislature sitting as a court for the trial of causes in law and equity, and any statute which undertakes to determine a question of right or obligation, or of property, as the foundation upon which it proceeds, is to that extent a judicial act, and an improper exercise of legislative power.<sup>53</sup>

**State Legislative Decrees.**—As previously stated, there is nothing in the federal constitution which prohibits a state legislature from exercising judicial functions.<sup>54</sup> But the exercise of judicial functions by the legislature of a state may operate to deprive individuals of their property or vested rights without due process of law, and be unconstitutional for that reason.<sup>55</sup>

(bbbbb) *What Constitutes Legislative Judgment or Decree*—(aaaaa) *Legislative Transfer of Property*.—"To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms."<sup>56</sup> "A statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A, shall be and is hereby vested in B, would, if effectual, deprive A of his property without due process of law, within the meaning of the constitutional provision."<sup>57</sup> Such an enactment would not receive judicial sanction in any country having a written constitution distributing the powers of government among three co-ordinate departments, and committing to the judiciary, expressly or by implication, authority to enforce the provisions of such constitution. It would be treated, not as an exertion of legislative power, but as a sentence—an act of spoliation.<sup>58</sup>

**appeal, etc.**—*James v. Appel*, 192 U. S. 129, 135, 48 L. Ed. 377.

The Revised Statutes of Arizona, requiring that motions for new trials "shall be determined at the term of the court at which the motion shall be made," R. S. 1887, par. 837, and that "in case there shall be no ruling on said motion for a new trial during the term at which it is filed then said motion shall be denied and the questions that may have been raised thereby shall be subject to review by the supreme court as if said motion had been overruled and exceptions thereto reserved and entered on the minutes of the court," Acts of 1891, No. 49, p. 69, are not an unconstitutional assumption of judicial functions either in form or substance. Not in form because the legislature does not direct a judgment, but merely removes an obstacle to a judgment already entered; and not in substance, because the power of the legislature to enact a statute of limitations for motions for a new trial can not be doubted. *James v. Appel*, 192 U. S. 129, 135, 48 L. Ed. 377. See, also, post, "Statute Awarding New Trial Right of Appeal, etc." VIII, C. 13, h.

**53. Legislative judgments and decrees.**—*Vanhorne v. Dorrance*, 2 Dall. 304, 312, 1 L. Ed. 391; *Sinking-Fund Cases*, 99 U. S. 700, 761, 25 L. Ed. 496.

**54. State legislative decrees.**—*Satterlee v. Matthewson*, 2 Pet. 380, 413, 7 L. Ed. 458; *Baltimore, etc., R. Co. v. Nesbit*, 10 How. 395, 13 L. Ed. 469; *Randall v. Krei-*

*ger*, 23 Wall. 137, 23 L. Ed. 134.

The general assembly of Rhode Island under its colonial charter had power to set aside the decisions of the courts of that state; but it had no power to render a decision. *Olney v. Arnold*, 3 Dall. 308, 318, 1 L. Ed. 614. Accord, as to the first point, as to the legislature of Connecticut, *Calder v. Bull*, 3 Dall. 386, 1 L. Ed. 648.

**55. Same; vested rights; due process.**—*Vanhorne v. Dorrance*, 2 Dall. 304, 312, 1 L. Ed. 391; *Loan Ass'n v. Topeka*, 20 Wall. 655, 664, 22 L. Ed. 455; *Davidson v. New Orleans*, 96 U. S. 97, 102, 24 L. Ed. 616.

**56. Legislative transfer of property.**—*Loan Ass'n v. Topeka*, 20 Wall. 655, 664, 22 L. Ed. 455.

"Nor is it taxation. A 'tax,' says Webster's Dictionary, 'is a rate or sum of money assessed on the person or property of a citizen by government for the use of the nation or state.' 'Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes.'" *Loan Ass'n v. Topeka*, 20 Wall. 655, 22 L. Ed. 455.

**57. Same.**—*Vanhorne v. Dorrance*, 2 Dall. 304, 312, 1 L. Ed. 391; *Davidson v. New Orleans*, 96 U. S. 97, 102, 24 L. Ed. 616; *Missouri Pac. R. Co. v. Nebraska*, 164 U. S. 403, 417, 41 L. Ed. 489; *Chicago, etc., R. Co. v. Chicago*, 166 U. S. 226, 235, 41 L. Ed. 979; *Loan Ass'n v. Topeka*, 20 Wall. 655, 22 L. Ed. 455.

**58. Same.**—*Chicago, etc., R. Co. v. Chicago*, 166 U. S. 226, 235, 41 L. Ed. 979.

(bbbbb) *Compensation for Property Taken for Public Use.*—While the legislature may judge the necessity for taking private property, it cannot fix the amount of compensation to be given therefor. This can be done only in three ways. 1. By the parties, that is, by stipulation between the legislature and the owner of the land. 2. By commissioners, mutually elected by the parties. 3. By the intervention of a jury.<sup>59</sup>

(ccccc) *Legislative Divorces.*—The division of government into three departments, and the implied inhibition through that cause upon the legislative department to exercise judicial functions, was neither intended nor understood to exclude legislative control over the marriage relation.<sup>60</sup> The fact that no cause existed for the divorce, and that it was obtained without the knowledge of the wife, cannot affect the validity of an act granting a legislative divorce. Knowledge or ignorance of parties of intended legislation cannot effect its validity, if within the legislative competency.<sup>61</sup> Nor can the loose morals and shameless conduct of the husband in deserting his wife and children have any bearing upon the question of the existence or absence of power in the legislature to pass such an act.<sup>62</sup>

(ddddd) *Statute Forbidding the Setting Up of Titles under Grant from Another State.*—The controversy between Pennsylvania and Connecticut as to the territorial jurisdiction of certain lands in North Hampton and other counties having been finally decided in favor of Pennsylvania, the Pennsylvania statute of April 11, 1795, making it a criminal offense to take possession of said land, or to conspire to convey, possess or settle them, under any title not derived from Pennsylvania, was not unconstitutional as violating the federal constitutional provision, that the judicial power of the United States shall extend to controversies between citizens of the same state claiming lands under grants of different states.<sup>63</sup> Nor was it a violation of the state constitution as being an exercise of judicial power by the legislature.<sup>64</sup>

(eeee) *Statute Deciding Authorship of Invention.*—Whether congress can, constitutionally, decide the fact, that a particular individual is the author or inventor of a certain writing or invention, so as to preclude judicial inquiry into the originality of the authorship or invention, was raised but not decided in *Evans v. Eaton*, 3 Wheat. 454, 4 L. Ed. 433.

(fffff) *Legislature Not to Decide Whether a Right Has Vested.*—The question whether a right has vested or not is, in its nature, judicial, and must be tried by the judicial authority.<sup>65</sup>

(ggggg) *Statute Declaring Certain Place or Business to Be a Nuisance.*—An act of the legislature which declares all places where intoxicating liquors are manufactured, sold, bartered, or given away in violation of any of its provisions, or where intoxicating liquors are kept for sale, barter or, delivery, to be a common nuisance, is not unconstitutional as being a legislative decree encroaching upon the functions of the judiciary and depriving owners of such property of the same without due process of law.<sup>66</sup>

(hhhhh) *Bills of Attainder and Confiscation.*—The right to confiscate and banish was not within the judicial power of the state of Georgia as created and regulated by the constitution of February 5th, 1777, but, naturally and tacitly,

59. *Compensation for property taken for public use.*—*Vanhorne v. Dorrance*, 2 Dall. 304, 312, 1 L. Ed. 391. See, generally, the titles DUE PROCESS OF LAW; EMINENT DOMAIN. And see post, "Application of Principles," VI, D, 3, d, (4), (b), (bb), (ccc).

60. *Legislative divorces.*—*Maynard v. Hill*, 125 U. S. 190, 208, 31 L. Ed. 654.

61. *Same.*—*Maynard v. Hill*, 125 U. S. 190, 209, 31 L. Ed. 654.

62. *Same.*—*Maynard v. Hill*, 125 U. S. 190, 209, 31 L. Ed. 654.

63. *Statute forbidding the setting up of titles under grant from another state.*—*Commonwealth v. Franklin*, 4 Dall. 255, 1 L. Ed. 823.

64. *Same.*—*Commonwealth v. Franklin*, 4 Dall. 255, 1 L. Ed. 823.

65. *As to whether a right has become vested.*—*Marbury v. Madison*, 1 Cranch 137, 167, 2 L. Ed. 60.

66. *Declaring place or business a nuisance.*—*Mugler v. Kansas*, 123 U. S. 623, 672, 31 L. Ed. 205.

belonged to the legislature; therefore the act of May 4th, 1782, confiscating the estates and banishing the persons of the individuals therein declared guilty of treason, was not in violation of the state constitutional provision declaring that the legislative, executive and judicial departments should be kept separate and distinct and neither exercise the powers of the others.<sup>67</sup> Under the federal constitution, however, congress has no power to define the offense, declare the fact of guilt, and adjudge the punishment by one of its own agents.<sup>68</sup>

(iiii) *Statutes Admitting or Excluding Attorneys at Law.*—By the rules and practice of common-law courts, it rests exclusively with the court to determine who is qualified to become or continue one of its officers, as an attorney and counsellor of the court, and for what cause he ought to be removed. Their admission or their exclusion is the exercise of judicial power.<sup>69</sup> But the legislature may prescribe qualifications for the office to which such attorneys and counsellors must conform.<sup>70</sup>

(ccc) *Legislative Construction of Statutes.*—In our system of government the lawmaking power is vested in congress and the power to construe laws in the course of their administration between citizens, in the courts. Whatever weight may attach to a legislative declaration of what the law has been or is, it can have no decisive authority, the power of legislature being limited to declarations of what the law shall be, and it being the function of the judiciary to declare what it is.<sup>71</sup> Congress cannot, under cover of giving a construction to an existing or expired statute, invade private rights with which it could not inter-

**67. Bills of attainder and confiscation.**—Cooper v. Telfair, 4 Dall. 14, 1 L. Ed. 721.

**68. Same.**—Wong Wing v. United States, 163 U. S. 228, 237, 41 L. Ed. 140; Li Sing v. United States, 180 U. S. 486, 495, 45 L. Ed. 634. See, also, post, "Protection to Persons Accused of Crime." XVIII, et seq.; "Ex Post Facto Laws and Bills of Attainder," XIX, et seq.

"To declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial. It is not consistent with the theory of our government that the legislature should, after having defined an offense as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents." Wong Wing v. United States, 163 U. S. 228, 237, 41 L. Ed. 140; Li Sing v. United States, 180 U. S. 486, 495, 45 L. Ed. 634.

**69. Admission and exclusion of attorneys at law.**—Ex parte Secombe, 19 How. 9, 13, 15 L. Ed. 565; Ex parte Garland, 4 Wall. 333, 379, 18 L. Ed. 366.

The act of congress of January 24, 1865, forbidding any person to practice as an attorney and counsellor in the courts of the United States until he should have taken and subscribed the oath prescribed by the act of July 20, 1862, said oath being to the effect that the affiant had taken no part against the United States in the rebellion nor borne arms against the same, operated, as to persons previously admitted to practice in said courts, as a legislative decree, excluding from the practice of the law in the courts of the United

States all parties who had offended in any of the particulars enumerated in said oath, and was unconstitutional and void. Ex parte Garland, 4 Wall. 333, 18 L. Ed. 366.

**70. Same; legislature may prescribe qualifications.**—Ex parte Garland, 4 Wall. 333, 379, 18 L. Ed. 366.

**71. Legislative construction of statutes.**—Terrett v. Taylor, 9 Cranch 43, 51, 3 L. Ed. 650; Postmaster-General v. Early, 12 Wheat. 136, 148, 6 L. Ed. 577; Stockdale v. Insurance Companies, 20 Wall. 323, 332, 22 L. Ed. 348; Koshkonong v. Burton, 194 U. S. 668, 679, 26 L. Ed. 886.

**Whether one statute repealed by another.**—So the question whether one statute was or was not repealed by a later is one for judicial determination, and a legislative declaration or recital in regard thereto is not binding upon the courts. United States v. Claflin, 97 U. S. 546, 24 L. Ed. 1028.

In the case of Ogden v. Blackledge, 2 Cranch 272, 277, 2 L. Ed. 276, one of the counsel was urging upon the court an argument to the effect that one of the fundamental principles of all our governments is, that the legislative power shall be separated from the judicial, and that it is the province of the legislature to declare what the law shall be, and the province of the judiciary to declare what the law is or has been, and that therefore a statute which undertook to declare that a certain statute had not been repealed by one subsequently enacted, was void as an assumption of judicial power. The court stopped the counsel observing that it was unnecessary to argue that point. See, in accord, Koshkonong v. Burton, 104 U. S. 668, 678, 26 L. Ed. 886, citing the above case.



fere by new and affirmative statutes.<sup>72</sup> But where it can exercise a power by passing a new statute which may be retroactive in its effect, the form of words it may use to put this power in operation cannot be material, if the purpose is clear, and that purpose is within its power.<sup>73</sup>

**Legislature May Establish Rule for Future Construction.**—Both in principle and authority it may be taken to be established that a legislative body may by statute declare the construction of previous statutes so as to bind the courts in reference to all transactions occurring after the passage of the law, and may in many cases thus furnish the rule to govern the courts in transactions which are past, provided no constitutional right of the parties concerned is violated.<sup>74</sup>

(ddd) *Special, Curative, and Remedial Legislation*—(aaaa) *Generally*.—The question of the power of a legislature, when not restrained by a specific constitutional provision, to pass special laws, has been much mooted in the courts of this country. Laws of this character, for the purpose of healing defects, giving relief, aid, and authority in cases beyond the force of existing law, have been frequently passed in almost every state in the Union, and have received the sanction not only of the federal supreme court, but of other courts of high authority.<sup>75</sup> "The exercise of this power has been most conspicuous in that class of cases in which the legislature has been called upon to act as *parens patriæ* on behalf of lunatics, minors, and other incapacitated persons. Laws authorizing the sale of the estates of such persons have frequently been passed, and have been upheld as fairly within the legislative power."<sup>76</sup> "The passage of such laws is not the exercise of judicial power, although by general laws the discretion to pass upon such cases might be confided to the courts. But when it is not confided to the courts, the power exercised is of a legislative character, the legislature making a law for the particular case."<sup>77</sup>

(bbbb) *Statute Authorizing Sale of Decedent's Realty*.—A state legislature may, constitutionally, pass a private act authorizing a court to decree, on the petition of an administrator, a private sale of the real estate of an intestate to pay his debts, even though the act should not require notice to heirs or to any one, and although the same general subject is regulated by general statute much more full and provident in its provisions.<sup>78</sup> In those states where the real estate of

**72. Same; invasion of private right.**—*Stockdale v. Insurance Companies*, 20 Wall. 323, 332, 22 L. Ed. 348.

See, however, *Stockdale v. Insurance Companies*, 20 Wall. 323, 331, 22 L. Ed. 348, where it is said that a legislative body may in many cases thus furnish the rule to govern the courts in transactions that are passed, provided no constitutional right of the party concerned is violated.

**73. Same.**—*Stockdale v. Insurance Companies*, 20 Wall. 323, 332, 22 L. Ed. 348.

Thus where it was a mooted question whether certain sections of the internal revenue law of 1864 expired and became inoperative *ex vi termini*, in the year 1869, or in the year 1870, congress having the power to revive or renew the tax by a new statute operating retrospectively for the year 1870, it was held that § 17 of the act of July 14, 1870, which provided that the sections in question "shall be construed to impose the taxes therein mentioned to the first day of August, 1870," etc., was valid, because it was not an attempt to exercise judicial power by construing a statute for the court, but was a mode of continuing or reviving the tax, which might have

been supposed to have expired. *Stockdale v. Insurance Companies*, 20 Wall. 323, 332, 22 L. Ed. 348.

**74. Same; rule for future construction.**—*Stockdale v. Insurance Companies*, 20 Wall. 323, 331, 22 L. Ed. 348; *Koshkonong v. Burton*, 104 U. S. 668, 679, 26 L. Ed. 886.

**75. Special, curative and remedial legislation.**—*Hoyt v. Sprague*, 103 U. S. 613, 634, 26 L. Ed. 585.

**76. Same.**—*Hoyt v. Sprague*, 103 U. S. 613, 634, 26 L. Ed. 585.

**77. Same.**—*Hoyt v. Sprague*, 103 U. S. 613, 634, 26 L. Ed. 585.

Where not prohibited, and where it has never been authoritatively condemned in the jurisprudence of the state, the legislature has the right to enact special laws in those cases in which it has been accustomed so to do. Such laws are not judgments upon any person's rights, but they confer powers upon the exercise of which judgment may afterwards be given. *Hoyt v. Sprague*, 103 U. S. 613, 634, 26 L. Ed. 585. Same principle, *Watkins v. Holman*, 16 Pet. 25, 10 L. Ed. 873.

**78. Special act authorizing sale of decedent's realty.**—*Florentine v. Barton*, 2 Wall. 210, 17 L. Ed. 783.

decedents is liable for their debts, the heirs cannot alien the land to the prejudice of creditors. In such state a special statute authorizing a particular nonresident administratrix to sell the realty of her decedent within the jurisdiction for the payment of his debts is not unconstitutional as a legislative adjudication, or as depriving the heirs of their property without due process, or as impairing their vested rights; such statute is purely remedial in its nature; and the legislature has entire control of the whole range of remedies by which property may be subjected for the debts of the decedent.<sup>79</sup>

**Trustee's Sale.**—So the legislature may authorize a trustee to sell the realty of which he holds the title, and may otherwise legislate with respect to carrying out the trust.<sup>80</sup>

(cccc) *Statute Validating Void Judicial Sale.*—A special act of the legislature confirming and validating a void sale of the real estate of a deceased person, said sale having been made for, and the proceeds thereof having been applied to, the payment of the debts of such decedent, is not unconstitutional as a legislative assumption of judicial functions. Such an act, when it purports to be a legislative resolution, is an exercise of legislation and not a decree.<sup>81</sup>

(dddd) *Statute Providing for Substitution of Trustees.*—A statute authorizing a chancellor to discharge trustees named in a will and to appoint new ones is valid if passed at the request of the trustees discharged. The cestuis que trustent cannot complain, since the discharge of one trustee and the substitution of another does not defeat the trust nor deprive them of any vested right.<sup>82</sup>

(eeee) *Statute Providing for Foreclosure of Liens.*—So where there is no method pointed out by law whereby existing liens of a certain character can be foreclosed, the legislature may lawfully provide a method of foreclosure without being guilty of an encroachment upon the powers of the judiciary.<sup>83</sup>

(eee) *Presumption as to Legislative Intention.*—As the courts will not interfere with the action of the legislature, so it may rightfully be presumed that the legislature never intends to interfere with the action of the courts, or to assume judicial functions to itself.<sup>84</sup> Thus the redress of private wrongs being a judicial function, it is to be presumed, in the absence of a manifest intention to the contrary, that the legislature, in the enactment of statutes operating upon the rights of particular individuals, its action having been induced by the fraudulent representations of interested persons, intended that the wronged parties should seek their redress at the hands of the judicial department.<sup>85</sup>

**79. Same.**—*Watkins v. Holman*, 16 Pet. 25, 63, 10 L. Ed. 873.

**80. Special act authorizing trustee to sell.**—*Suydam v. Williamson*, 24 How. 427, 16 L. Ed. 742; *Williamson v. Suydam*, 6 Wall. 723, 18 L. Ed. 967.

**81. Act validating judicial sale.**—*Wilkinson v. Leland*, 2 Pet. 627, 660, 7 L. Ed. 542.

**82. Substitution of trustees.**—*Williamson v. Suydam*, 6 Wall. 723, 18 L. Ed. 967.

**83. Special act authorizing foreclosure of lien.**—*Livingston v. Moore*, 7 Pet. 469, 546, 8 L. Ed. 751.

J. N., sometimes comptroller-general of the state of Pennsylvania, having been found, upon settlement of his accounts, to be largely in arrears to the state, and such indebtedness having been declared by statute to be a lien upon the lands of J. N. within the state, but with no provision made for enforcing or foreclosing such lien, except upon an appeal from the account stated, and no such appeal having been taken, it was held that an act of the legislature, creating a commission and

vesting it with power to foreclose this lien by a sale of the lands after the manner therein prescribed, was not unconstitutional as a legislative assumption of judicial functions in contravention of the provisions of the Pennsylvania constitution separating the departments of government into legislative, executive and judicial. *Livingston v. Moore*, 7 Pet. 469, 546, 549, 8 L. Ed. 751.

**84. Legislative intention; presumption.**—*Angle v. Chicago, etc.*, R. Co., 151 U. S. 1, 20, 38 L. Ed. 55.

**85. Same.**—*Angle v. Chicago, etc.*, R. Co., 151 U. S. 1, 25, 38 L. Ed. 55.

Thus where one public service corporation, by means of bribery, fraudulent representations, and other corrupt practices, procured the enactment of a law revoking a grant made to another public service company engaged in the construction of a railroad, to the great and undeniable injury of the latter company, it was held, the property having been regranted to the wrongdoer, that it was not to be presumed that the legislature intended that it should



(c) *Exercise of Legislative or Political Functions by the Judiciary*—(aa) *Generally as to Judicial Legislation*.—It is the province of the courts to pass upon the validity of the laws, not to make them, and when their validity is established to declare their meaning and apply their provisions to cases between parties as they arise for judgment, and enforce by proper process the law thus declared. When they go beyond this and declare that the law as it exists is wrong, and attempt by judgment or decree to make it conform to their opinions of what it should be, they encroach upon the functions of the legislative department.<sup>86</sup>

**No Power to Make Exceptions or Additions.**—Courts of justice have no jurisdiction to make exceptions to a statute, nor to add to the exceptions which the legislature has made, as this would be legislating.<sup>87</sup> Where the language of an act is explicit, it is not for the courts to change it by construction based upon some supposed legislative policy. It is not for the court to say that it shall be so construed as to embrace other cases because no good reason can be assigned why they were excluded from its provisions. If the meaning of the legislature is plain, it must be obeyed.<sup>88</sup>

(bb) *Generally as to Political Questions*.—Upon political questions the action

hold it free from the right of the wronged company to subject it to the satisfaction of its just demands for the wrong done. *Angle v. Chicago, etc., R. Co.*, 151 U. S. 1, 25, 38 L. Ed. 55.

**86. Generally as to judicial legislation.**

—*Bank v. Dalton*, 9 How. 522, 529, 13 L. Ed. 242; *Hadden v. Collector*, 5 Wall. 107, 111, 18 L. Ed. 518; *Hepburn v. Griswold*, 8 Wall. 603, 611, 19 L. Ed. 513; *Broderick v. Magraw*, 8 Wall. 639, 19 L. Ed. 531; *Minor v. Happersteet*, 21 Wall. 162, 178, 22 L. Ed. 627; *The Lottawanna*, 21 Wall. 558, 22 L. Ed. 654; *United States v. Reese*, 92 U. S. 214, 221, 23 L. Ed. 563; *Meriwether v. Garrett*, 102 U. S. 472, 515, 26 L. Ed. 197; *The Chinese Exclusion Case*, 130 U. S. 581, 603, 32 L. Ed. 1068; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 37, 39 L. Ed. 601; *New Jersey v. Anderson*, 203 U. S. 483, 490, 51 L. Ed. 284.

"It is the province of the courts to decide causes between parties, and, in so doing, to construe the constitution and the statutes of the United States, and of the several states, and to declare the law, and, when their judgments are rendered, to enforce them by such remedies as legislation has prescribed, or as are allowed by the established practice. When they go beyond this, they go outside of their legitimate domain, and encroach upon the other departments of the government." *Meriwether v. Garrett*, 102 U. S. 472, 515, 26 L. Ed. 197.

"The province of the courts is to pass upon the validity of laws, not to make them, and, when their validity is established, to declare their meaning and apply their provisions. All else lies beyond their domain." *The Chinese Exclusion Case*, 130 U. S. 581, 603, 32 L. Ed. 1068.

It is the province of the courts to decide what the law is; not to declare what it should be. If the law is wrong and ought to be changed, the courts cannot change

it; that is the function of the legislative department of the government. *Decatur v. Paulding*, 14 Pet. 497, 518d, 10 L. Ed. 559; *The Lottawanna*, 21 Wall. 558, 22 L. Ed. 654; *Minor v. Happersteet*, 21 Wall. 162, 178, 22 L. Ed. 627.

It does not belong to the courts to interpolate constitutional restrictions. Their duty is to apply the law, not to make it. *Veazie Bank v. Fenno*, 8 Wall. 533, 548, 19 L. Ed. 482; *Township of Pine Grove v. Talcott*, 19 Wall. 666, 677, 22 L. Ed. 227; *Munn v. Illinois*, 94 U. S. 113, 132, 134, 24 L. Ed. 77; *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155, 164, 24 L. Ed. 94; *Spencer v. Merchant*, 125 U. S. 345, 355, 31 L. Ed. 763.

**Nature of judicial discretion.**—"Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law." *Osborn v. United States Bank*, 9 Wheat. 738, 866, 6 L. Ed. 204.

**87. No power to make exceptions or additions.**—*McIver v. Ragan*, 2 Wheat. 25, 29, 4 L. Ed. 175; *Bank v. Dalton*, 9 How. 522, 529, 13 L. Ed. 242.

**88. Same.**—*United States v. Fisher*, 2 Cranch 358, 385, 2 L. Ed. 304; *McIver v. Ragan*, 2 Wheat. 25, 29, 4 L. Ed. 175; *Scott v. Reid*, 10 Pet. 524, 9 L. Ed. 519; *Decatur v. Paulding*, 14 Pet. 497, 518d, 10 L. Ed. 559; *Hadden v. Collector*, 5 Wall. 107, 111, 18 L. Ed. 518; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 37, 39 L. Ed. 601.



of the political branches of the government is conclusive and will be followed by the courts.<sup>89</sup> The truth is, that, generally speaking, the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the constitution when establishing the judicial power of the United States.<sup>90</sup> Undoubtedly, however, some things were, by the constitution, made justiciable which were not so at common law.<sup>91</sup> For example, it is provided by art. 3, § 2, that the judicial power of the United States shall extend to controversies between two or more states; and as such controversies may, and often do, relate to boundaries and other matters which, as between independent nations, would constitute political rather than judicial controversies, it is well settled that the judicial power covers a wide range of matters susceptible of adjustment, and not purely political in their nature; that the diplomatic powers of the individual states, and the right to make war, having been surrendered to the general government, it devolved upon that government to provide a remedy in lieu thereof; and that remedy is found in the constitutional provision to which reference has just been made.<sup>92</sup> The cases cited show that such jurisdiction has been exercised in cases involving boundaries and jurisdiction over lands and their inhabitants, and in cases directly affecting the property rights and interests of a state. But such cases manifestly do not cover the entire field in which such controversies may arise, and for which the constitution has provided a remedy; and it would be objectionable, and, indeed, impossible, for the court to anticipate, by definition, what controversies can and what cannot be brought within the original jurisdiction of the federal supreme court.<sup>93</sup>

**Matters Dependent upon Principles of International Law.**—Nor is the

**89. Generally as to political questions.**—

*Rose v. Himely*, 4 Cranch 241, 268, 2 L. Ed. 608; *The Schooner Exchange v. McFadden*, 7 Cranch 116, 3 L. Ed. 287; *United States v. Yorba*, 1 Wheat. 412, 423, 17 L. Ed. 635; *Gelston v. Hoyt*, 3 Wheat. 246, 4 L. Ed. 381; *United States v. Palmer*, 3 Wheat. 610, 634, 4 L. Ed. 471; *The Divina Pastora*, 4 Wheat. 52, 4 L. Ed. 512; *Foster v. Neilson*, 2 Pet. 253, 307, 7 L. Ed. 415; *Cherokee Nation v. Georgia*, 5 Pet. 1, 20, 50, 8 L. Ed. 25; *Keene v. McDonough*, 8 Pet. 308, 8 L. Ed. 955; *Legal Tender Cases* (opinion of Bradley, J.), 12 Wall. 457, 562, 20 L. Ed. 287; *Garcia v. Lee*, 12 Pet. 511, 9 L. Ed. 1176; *Rhode Island v. Massachusetts*, 12 Pet. 657, 736, 738, 9 L. Ed. 1233; *Williams v. Suffolk Ins. Co.*, 13 Pet. 415, 420, 10 L. Ed. 226; *Scott v. Jones*, 5 How. 343, 375, 12 L. Ed. 181; *Luther v. Borden*, 7 How. 1, 56, 12 L. Ed. 581; *United States v. Lynde*, 11 Wall. 632, 638, 20 L. Ed. 230; *Georgia v. Stanton*, 16 Wall. 50, 75, 76, 18 L. Ed. 721; *United States v. Lee*, 106 U. S. 196, 209, 27 L. Ed. 171; *Head Money Cases*, 112 U. S. 580, 28 L. Ed. 798; *The Chinese Exclusion Case*, 130 U. S. 581, 32 L. Ed. 1068; *Jones v. United States*, 137 U. S. 202, 212, 34 L. Ed. 691; *Ekiu v. United States*, 142 U. S. 651, 659, 35 L. Ed. 1146; *In re Cooper*, 143 U. S. 472, 503, 36 L. Ed. 232; *Fong Yue Ting v. United States*, 149 U. S. 698, 712, 37 L. Ed. 905; *Wilson v. Shaw*, 204 U. S. 24, 32, 51 L. Ed. 351.

"In exercising the great power which the people of the United States, by establishing a written constitution as the supreme and paramount law, have vested in this court, of determining, whenever the

question is properly brought before it, whether the acts of the legislature or of the executive are consistent with the constitution, it behooves the court to be careful that it does not undertake to pass upon political questions, the final decision of which has been committed by the constitution to the other departments of the government." *Fong Yue Ting v. United States*, 149 U. S. 698, 712, 37 L. Ed. 905.

Questions of political expediency belong to the legislative halls, and not to the judicial forum. *Legal Tender Cases* (concurring opinion of Bradley, J.), 12 Wall. 457, 562, 20 L. Ed. 287.

**90. Same.**—*Hans v. Louisiana*, 134 U. S. 1, 33 L. Ed. 842.

**91. Some matters made justiciable which were not so at common law.**—*Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 288, 289, 32 L. Ed. 239; *Hans v. Louisiana*, 134 U. S. 1, 15, 33 L. Ed. 842; *Louisiana v. Texas*, 176 U. S. 1, 44 L. Ed. 347; *Missouri v. Illinois*, 180 U. S. 208, 240, 45 L. Ed. 497; *Kansas v. Colorado*, 185 U. S. 125, 140, 46 L. Ed. 838; *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 237, 51 L. Ed. 1038.

**92. Same.**—*Hans v. Louisiana*, 134 U. S. 1, 15, 33 L. Ed. 842; *Louisiana v. Texas*, 176 U. S. 1, 44 L. Ed. 347; *Missouri v. Illinois*, 180 U. S. 208, 240, 45 L. Ed. 497; *Kansas v. Colorado*, 185 U. S. 125, 140, 46 L. Ed. 838; *Kansas v. Colorado*, 206 U. S. 46, 97, 51 L. Ed. 956; *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 237, 51 L. Ed. 1038.

**93. Same.**—*Missouri v. Illinois*, 180 U. S. 208, 240, 45 L. Ed. 497; *Kansas v. Colorado*, 206 U. S. 46, 97, 51 L. Ed. 956.

jurisdiction of the court ousted even if, because the states are sovereign and independent in local matters, the relations between them depend in any respect upon the principles of international law. International law is no alien in the federal supreme court. In *The Paquete Habana*, 175 U. S. 677, 700, 44 L. Ed. 320, Mr. Justice Gray declared: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."<sup>94</sup> "The states, by entering the Union, did not sink to the position of private owners subject to one system of private law."<sup>95</sup>

**Controversy Must Be Susceptible of Judicial Determination.**—But the controversy must be one which is susceptible of judicial determination; otherwise, the court will decline to take jurisdiction.<sup>96</sup>

**Political and Judicial Questions Distinguished.**—Political power is that which a sovereign or state exerts by his or its own authority, as reprisal and confiscation. Judicial power is that which is given to a court or judicial tribunal. Those controversies between states and nations are in their nature political when the sovereign or state reserves to itself the right of deciding it, and makes it the subject of a treaty, or the foundation of representations from one state to another. This is political equity, to be adjudged by the parties themselves, as contradistinguished from judicial equity administered by courts of justice, decreeing the equity and good conscience of the case, regardless of who or what may be the parties before them.<sup>97</sup>

**94. Matters dependent upon principles of international law.**—*Kansas v. Colorado*, 206 U. S. 46, 97, 51 L. Ed. 956.

**95. Same.**—*Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 237, 51 L. Ed. 1038.

"When the states by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi sovereign interests; and the alternative to force is a suit in this court." *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 237, 51 L. Ed. 1038. Accord: *Missouri v. Illinois*, 180 U. S. 208, 241, 45 L. Ed. 497; *Kansas v. Colorado*, 206 U. S. 46, 97, 51 L. Ed. 956.

**96. Controversy must be one susceptible of judicial determination.**—*Hans v. Louisiana*, 134 U. S. 1, 33 L. Ed. 842.

"And yet the case of *Penn v. Lord Baltimore*, 1 Vesey, Sen. 444, shows that some of these unusual subjects of litigation were not unknown to the courts even in colonial times; and several cases of the same general character arose under the articles of confederation, and were brought before the tribunal provided for that purpose by those articles. 131 U. S. App. 1. The establishment of this new branch of jurisdiction seemed to be necessary from the extinguishment of diplomatic relations between the states. Of other controversies between a state and another state or its citizens, which, on the settled principles of public law, are not subjects of judicial cognizance, this court has often declined to take jurisdiction. See *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 288, 289, 32 L. Ed. 239, and cases there cited."

*Hans v. Louisiana*, 134 U. S. 1, 33 L. Ed. 842. See, also, post "Boundary Questions," VI, D, 3, d, (3), (c), (ff); "Constitutional Status of Seceding States," VI, D, 3, d, (3), (c), (dd). See, generally, the titles COURTS; STATES.

**Jurisdiction over controversies "between a state and citizens of another state" does not embrace the determination of political questions**, and, where no controversy exists between states, it is not for the federal supreme court to restrain the governor of a state in the discharge of his executive functions in a matter lawfully confided to his discretion and judgment. *Louisiana v. Texas*, 176 U. S. 1, 44 L. Ed. 347.

By the second section of the third article of the constitution, "the judicial power extends to all cases, in law and equity, arising under the constitution, the laws of the United States," etc., and "to controversies between a state and citizens of another state,"—which controversies, under the judiciary act, may be brought in the first instance before the federal supreme court in the exercise of its original jurisdiction. In order to maintain an original bill in the federal supreme court for an injunction, under the authority of this constitutional provision, a case presented must be appropriate for the exercise of judicial power; the rights endangered must be rights of persons or property, not merely political rights, which do not belong to the jurisdiction of a court, either in law or in equity. *Georgia v. Stanton*, 6 Wall. 50, 75, 76, 18 L. Ed. 721.

**97. Political and judicial questions distinguished.**—*Rhode Island v. Massachusetts*, 12 Pet. 657, 738, 9 L. Ed. 1233.



(cc) *Generally as to International Relations; Determination of Rightful Sovereign or Government.*—The control of international relations, both in peace and in war, belongs to the political department of the government, and may be exercised either through treaties made by the president and senate or through statutes enacted by congress.<sup>98</sup> The courts will not entertain an application to review the action of the political department of the government upon a question pending between it and a foreign power, pending diplomatic negotiations between the two countries respecting the same matters.<sup>99</sup>

**Redress of Wrongs Inflicted upon Citizen of United States by a Foreign Government.**—The courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.<sup>1</sup>

**Extradition Proceedings—Judicial Interference.**—"The decisions of the executive department in matters of extradition, within its own sphere, and in accordance with the constitution, are not open to judicial revision, and it results that where proceedings for extradition, regularly and constitutionally taken under the acts of congress, are pending, they cannot be ended to by writs of habeas corpus."<sup>2</sup>

**Admission or Exclusion of Aliens.**—If the political department of the government considers the presence of foreigners of a different race in this country to be dangerous to its peace and security, and determines upon their exclusion or deportation, its determination is conclusive upon the judiciary.<sup>3</sup>

**Determination of Rightful Sovereign or Government.**—Who is the sovereign, de jure or de facto, of a territory, is not a judicial, but a political question, the determination of which by the legislative and executive departments

98. As to international relations.—Head Money Cases, 112 U. S. 580, 28 L. Ed. 798; The Chinese Exclusion Case, 130 U. S. 581, 604, 609, 32 L. Ed. 1068; In re Cooper, 143 U. S. 472, 36 L. Ed. 232; Ekiu v. United States, 142 U. S. 651, 659, 35 L. Ed. 1146; Fong Yue Ting v. United States, 149 U. S. 698, 705, 37 L. Ed. 905; Lem Moon Sing v. United States, 158 U. S. 538, 543, 39 L. Ed. 1082.

"It is not competent for the judiciary to make any declaration upon the question of the length of time during which Cuba may be rightfully occupied and controlled by the United States in order to effect its pacification—it being the function of the political branch of the government to determine when such occupation and control shall cease, and therefore when the troops of the United States shall be withdrawn from Cuba." Neely v. Henkel (No. 1), 180 U. S. 109, 124, 48 L. Ed. 448.

Accordingly, it was held that there was no merit in an objection that the occupancy and control of the island of Cuba under the military authority of the United States was an unauthorized interference with the internal affairs of a friendly power, and that the defendant could not, constitutionally, be extradited for trial in the courts established under the orders issued by the military governor of the island. Neely v. Henkel (No. 1), 180 U. S. 109, 124, 48 L. Ed. 448.

99. Same.—In re Cooper, 143 U. S. 472, 36 L. Ed. 232.

1. As to wrongs inflicted upon American citizens by foreign countries.—Underhill v. Hernandez, 168 U. S. 250, 252, 42 L. Ed. 456.

2. Extradition proceedings; judicial interference.—Terlinden v. Ames, 184 U. S. 270, 290, 46 L. Ed. 534. See, also, United States v. Rauscher, 119 U. S. 407, 424, 30 L. Ed. 425.

3. Admission and exclusion of aliens.—The Chinese Exclusion Case, 130 U. S. 581, 606, 32 L. Ed. 1068; Fong Yue Ting v. United States, 149 U. S. 698, 706, 37 L. Ed. 905.

The supervision of the admission of aliens into the United States may be entrusted by congress either to the department of state or to the department of the treasury, charged with the enforcement of laws regulating interstate commerce. The final determination of the facts may be entrusted by congress to the officers of either of these departments with or without the right of a review of their decision by the judicial department as congress may see fit. United States v. Jung Ah Lung, 124 U. S. 621, 31 L. Ed. 591; The Chinese Exclusion Case, 130 U. S. 581, 32 L. Ed. 1068; Ekiu v. United States, 142 U. S. 651, 653, 659, 35 L. Ed. 1146; Fong Yue Ting v. United States, 149 U. S. 698, 713, 714, 37 L. Ed. 905; Lem Moon Sing v. United States, 158 U. S. 538, 543, 39 L. Ed. 1082. See, also, the title ALIENS, vol. 1, pp. 210, 245, 250, 255.



of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government. This principle has always been upheld by the United States supreme court, and has been affirmed under a great variety of circumstances.<sup>4</sup>

**Same—Facts Assumed by Political Departments.**—When the executive branch of the government, which is charged with the foreign relations of the United States, shall, in its correspondence with a foreign nation, assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department.<sup>5</sup>

**Same—Rightful Government of States of the United States.**—Whether the people of a state in adopting a new constitution or in revising an old one, have, in abolishing the old government, and establishing a new one in its place, changed their form of government, is a question to be settled by the political power, and when that power has decided, the courts are bound to take notice of its decision and to follow it.<sup>6</sup>

**4. Determination of rightful sovereign or government.**—*Gelston v. Hoyt*, 3 Wheat. 246, 324, 4 L. Ed. 381; *United States v. Palmer*, 3 Wheat. 610, 4 L. Ed. 471; *The Divina Pastora*, 4 Wheat. 52, 4 L. Ed. 512; *Foster v. Neilson*, 2 Pet. 253, 307, 309, 7 L. Ed. 415; *Keene v. McDonough*, 8 Pet. 308, 8 L. Ed. 955; *Garcia v. Lee*, 12 Pet. 511, 520, 9 L. Ed. 1176; *Williams v. Suffolk Ins. Co.*, 13 Pet. 415, 10 L. Ed. 226; *United States v. Yorba*, 1 Wall. 412, 423, 17 L. Ed. 635; *United States v. Lynde*, 11 Wall. 632, 638, 20 L. Ed. 230; *Jones v. United States*, 137 U. S. 202, 212, 34 L. Ed. 691; *Underhill v. Hernandez*, 168 U. S. 250, 42 L. Ed. 456; *Pearcy v. Stranahan*, 205 U. S. 257, 265, 51 L. Ed. 793.

**5. Same; facts assumed by political department.**—*Williams v. Suffolk Ins. Co.*, 13 Pet. 415, 10 L. Ed. 226.

The government of the United States having insisted, and continuing to insist, through its regular executive authority, that the Falkland islands do not constitute any part of the dominions within the sovereignty of Buenos Ayres, and that the seal fishery at those islands is a trade free and lawful to the citizens of the United States, and beyond the competency of the Buenos Ayres government to regulate, prohibit or punish, it is not competent for a circuit court of the United States to inquire into, and ascertain by other evidence, the title of the government of Buenos Ayres to the sovereignty of the Falkland islands. *Williams v. Suffolk Ins. Co.*, 13 Pet. 415, 10 L. Ed. 226.

**6. Same; rightful government of one of the United States.**—*Luther v. Borden*, 7 How. 1, 47, 12 L. Ed. 581. See, also, post, "Political Department Charged with Duty of Enforcing Guaranty," VI, D, 5, d. (2).

At the period of the American revolution Rhode Island did not, like other states, adopt a new constitution, but continued the form of government established by the charter of Charles the Second, making only such alterations, by acts of

the legislature, as were necessary to adapt it to their condition and rights as an independent state. But no mode of proceeding was pointed out by which amendments might be made. In 1841 a portion of the people held meetings and formed associations, which resulted in the election of a convention to form a new constitution, to be submitted to the people for their adoption or rejection. This convention framed a constitution, directed a vote to be taken upon it, declared afterwards that it had been adopted and ratified by a majority of the people of the state, and that it was the paramount law and constitution of Rhode Island. Under it, elections were held for governor, members of the legislature, and other officers, who assembled together in May, 1842, and proceeded to organize the new government. But the charter government did not acquiesce in these proceedings. On the contrary, it passed stringent laws, and finally passed an act declaring the state under martial law. In May, 1843, a new constitution, which had been framed by a convention called together by the charter government, went into operation, and has continued ever since. The house of the plaintiff in error having been entered by the military acting under the alleged authority of the charter government, and plaintiff in error having been arrested by the military under the alleged authority of the charter government, and the plaintiff in error having sued the defendants for the alleged trespass, the defendants justified upon the ground that they were acting under the alleged authority of the lawful government of the state. Plaintiff in error replied, denying the authority of the charter government as the lawful government of the state. It was held that the question as to which of the two opposing governments was the legitimate one, viz, the charter government, or the government established by the voluntary convention, was not a judicial, but a political question; that it was for the political department to determine whether a

**Same—Same—Federal Courts Will Follow State Decisions.**—The power of determining that a state government has been lawfully established, which the courts of that state disown and repudiate, is not one of the powers of the federal courts. Upon such a question the courts of the United States are bound to follow the decisions of the state tribunals.<sup>7</sup>

**Same—Same—Adoption of State Constitution—Requisite Majority.**—The question whether or not a majority of those persons entitled to suffrage voted to adopt a constitution cannot be settled in a judicial proceeding.<sup>8</sup>

**Same—Same—De Jure Legislature.**—Nor can the courts be required, in a case not involving the private interests of parties, to determine whether particular bodies assuming to exercise legislative functions constitute a lawful legislative assembly.<sup>9</sup>

**State Gubernatorial Contest.**—See post, "Nature and Extent," VI, D, 3, h, (1), (a), (bb), note.

**Indian Tribes.**—Whether any particular class of Indians are still to be regarded as a tribe, or have ceased to hold the tribal relation, is primarily a question for the political departments of the government, and if they have decided it, the courts will follow their lead.<sup>10</sup>

**Recognition of New Governments.**—It belongs exclusively to the political department of the government to recognize or to refuse to recognize a new government in a foreign country, claiming to have displaced the old and established a new one. Until such recognition, either by our own government or the government to which the new state belongs, courts of justice are bound to consider the ancient state of things as remaining unaltered.<sup>11</sup>

proposed constitution or amendment had been ratified by the people of the state, and that such determination was binding upon the courts. *Luther v. Borden*, 7 How. 1, 12 L. Ed. 581.

**7. Same; force and effect of state decisions.**—*Luther v. Borden*, 7 How. 1, 40, 12 L. Ed. 581.

The courts of Rhode Island having decided the conflict of 1841-1843, between the opposing governments of that state, in favor of the charter government and against the government organized under the constitution framed by the voluntary convention of 1842, such decision will be followed by courts of the United States, the question being one which concerned the constitution and laws of the state. *Luther v. Borden*, 7 How. 1, 12 L. Ed. 581.

Speaking upon this point, however, Chief Justice Taney, says: "Indeed, we do not see how the question could be tried and judicially decided in a state court. Judicial power presupposes an established government capable of enacting laws and enforcing their execution, and of appointing judges to expound and administer them. The acceptance of the judicial office is a recognition of the authority of the government from which it is derived. And if the authority of that government is annulled and overthrown, the power of its courts and other officers is annulled with it. And if a state court should enter upon the inquiry proposed in this case, and should come to the conclusion that the government under which it acted had been put aside and displaced by an opposing government, it would cease to be a court,

and be incapable of pronouncing a judicial decision upon the question it undertook to try. If it decides at all as a court, it necessarily affirms the existence and authority of the government under which it is exercising judicial power." *Luther v. Borden*, 7 How. 1, 40, 12 L. Ed. 581.

**8. Adoption of state constitution.**—*Luther v. Borden*, 7 How. 1, 12 L. Ed. 581.

**9. De jure legislature.**—*Clough v. Curtis*, 134 U. S. 361, 371, 33 L. Ed. 945. Accord: *Lyons v. Woods*, 153 U. S. 649, 669, 38 L. Ed. 854. See, also, post, "Records of Legislative Bodies," VI, D, 3, d, (3), (c), (ii).

**10. Indian tribes.**—*United States v. Holliday*, 3 Wall. 407, 18 L. Ed. 182.

The question whether or not the Tonawanda Band of Indians, residing within the state of New York, were bound by a treaty concluded between the federal government and the Seneca nation, or tribe of Indians, was one to be decided, not by the courts, but by the political power which acted for and with the Indians. *New York v. Dibble*, 21 How. 366, 371, 16 L. Ed. 149.

The judicial department of the government was bound by the acts of the political branch which recognized the Cherokee nation of Indians as a state. *Cherokee Nation v. Georgia*, 5 Pet. 1, 16, 8 L. Ed. 25.

**11. Recognition of new governments.**—*Rose v. Himely*, 4 Cranch 241, 272, 2 L. Ed. 608; *Gelston v. Hoyt*, 3 Wheat, 246, 324, 4 L. Ed. 381; *Kennett v. Chambers*, 14 How. 38, 50, 14 L. Ed. 316.

Until the political department of the



(dd) *Constitutional Status of Seceding States*.—The various acts passed by congress for the reconstruction and the rehabilitation of the seceding states show clearly that, in the judgment of congress, said states were never out of the Union, and that to bring them back into full communion with the loyal states nothing was necessary but to permit them to restore their representation in congress. This act upon the part of the political department of the government is conclusive upon the judiciary.<sup>12</sup>

(ee) *Enforcement and Construction of Treaties*.—**Power to Make or Unmake Treaties a Political Function**.—The power to make or unmake treaties is political and not judicial. Courts cannot declare treaties to be of no effect because of alleged fraud or duress, or misapprehension of the facts.<sup>13</sup>

**Enforcement of Rights of High Contracting Parties Not Confided to the Judiciary**.—A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress.<sup>14</sup> So far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as congress may pass for its enforcement, modification or repeal.<sup>15</sup> "If the country with which a treaty is made is dissatisfied with the action of the legislative department in disregarding its stipulations by enacting inconsistent laws, it may present its complaint to the executive head of the government, and take such other measures as it may deem essential for the protection of its interests. The courts can afford no redress. Whether the complaining nation has just cause of complaint, or our country

government acknowledged the independence of Texas, the judiciary were bound to consider the old order of things as having continued. *Kennett v. Chambers*, 14 How. 38, 14 L. Ed. 316.

Foreign states cannot be created by judicial construction. Until their sovereignty has been acknowledged by the legislative or executive power, the courts of the nation cannot judicially recognize them as sovereign. *United States v. Palmer*, 3 Wheat. 610, 634, 635, 4 L. Ed. 471; *The Divina Pastora*, 4 Wheat. 52, 63, 4 L. Ed. 512; *The Nueva Anna*, 6 Wheat. 193, 5 L. Ed. 239; *Cherokee Nation v. Georgia* (separate opinion of Baldwin, J.), 5 Pet. 1, 47, 8 L. Ed. 25.

**12. Status of seceding states**.—*White v. Hart*, 13 Wall. 646, 652, 20 L. Ed. 685. See, also, post, "Constitutional Status of Seceding States and Their Inhabitants," VI. D, 7, a, (3), et seq.

**13. Power to make or unmake treaties**.—*United States v. Old Settlers*, 148 U. S. 427, 37 L. Ed. 509; *Virginia v. Tennessee*, 148 U. S. 503, 527, 37 L. Ed. 537.

The decision in *United States v. Arredondo*, 6 Pet. 691, 710, 711, 8 L. Ed. 547, is not an authority for the proposition that a court may be clothed with power to annul a treaty on the ground of fraud or duress in its execution. Neither will it be presumed that congress has intended to submit the question of its own good faith or that of the government to judi-

cial determination. *United States v. Old Settlers*, 148 U. S. 427, 468, 37 L. Ed. 509.

**14. Enforcement of rights of high contracting parties not confided to the judiciary**.—*United States v. Rauscher*, 119 U. S. 407, 418, 30 L. Ed. 425. Accord: *Foster v. Neilson*, 2 Pet. 253, 314, 7 L. Ed. 415; *Head Money Cases*, 112 U. S. 580, 598, 28 L. Ed. 798.

**15. Treaty subject to modification by act of congress**.—*Head Money Cases*, 112 U. S. 580, 599, 28 L. Ed. 798; *Whitney v. Robertson*, 124 U. S. 190, 195, 31 L. Ed. 386. See, also, ante, "Supremacy over Acts of Congress," IV. B, 2, d, (2), (b).

"It is 'well settled that an act of congress may supersede a prior treaty and that any questions that may arise are beyond the sphere of judicial cognizance, and must be met by the political department of the government.' *Thomas v. Gay*, 169 U. S. 264, 271, 42 L. Ed. 740." *Stephens v. Cherokee Nation*, 174 U. S. 445, 483, 484, 43 L. Ed. 1041.

"It follows, therefore, that when a law is clear in its provisions, its validity cannot be assailed before the courts for want of conformity to stipulations of a previous treaty not already executed. Considerations of that character belong to another department of the government. The duty of the courts is to construe and give effect to the latest expression of the sovereign will. *Head Money Cases*, 112 U. S. 580, 28 L. Ed. 798." *Whitney v. Robertson*, 124 U. S. 190, 195, 31 L. Ed. 386.



was justified in its legislation, are not matters for judicial cognizance."<sup>16</sup>

**Capacity of Foreign State to Make or Carry Out Treaty Obligations.**—The question whether power remains in a foreign state to carry out its treaty obligations is in its nature political and not judicial, and the courts ought not to interfere with the conclusions of the political department in that regard.<sup>17</sup>

**Rights of Private Persons.**—But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found in treaties which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens. The constitution of the United States places such provisions as these in the same category as other laws of congress, by its declaration that

**16. Remedy of dissatisfied party.**—*Whitney v. Robertson*, 124 U. S. 190, 194, 31 L. Ed. 386.

Breaches of treaties by one of the sovereign parties, thereof are not breaches of contract cognizable in courts of justice; since the questions and rights devolved are in their nature political, and for their political acts sovereign states are not amenable to tribunals of justice. (Separate opinion of Johnson, J., citing *Nabob of Arcot's Case*, 3 Bro. C. C. 292.) *Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L. Ed. 25.

If the treaty between the United States and Mexico is violated by a general statute enacted for the purpose of ascertaining the validity of claims derived from the Mexican government, it is a matter of international concern, which the two states must determine by treaty, or by such other means as enables one state to enforce upon another the obligations of a treaty. The federal supreme court, in a class of cases like this, has no power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the government of the United States, as a sovereign power, chooses to disregard. *The Cherokee Tobacco*, 11 Wall. 616, 20 L. Ed. 227; *Head Money Cases*, 112 U. S. 580, 598, 28 L. Ed. 798; *Whitney v. Robertson*, 124 U. S. 190, 31 L. Ed. 386; *Botiller v. Dominguez*, 130 U. S. 238, 247, 32 L. Ed. 926.

Whether a proper consideration by our government of its previous laws, or a proper respect for the nation whose subjects are affected by its action, should influence congress, in legislating for the exclusion of the Chinese, to limit the effect of such exclusion act only to persons departing from the country after the passage of the act, are not questions for judicial determination. If there be any just ground of complaint on the part of a Chinese subject who departed from the country previous to the enactment of such act, and who is prevented thereby from returning to this country, it must be made the subject of representations by his government to the political department of

our government, which is alone competent to act upon the subject. *The Chinese Exclusion Case*, 130 U. S. 581, 609, 32 L. Ed. 1068.

**17. Capacity of foreign state to make or carry out treaty.**—*Terlinden v. Ames*, 184 U. S. 270, 288, 46 L. Ed. 534.

The Kingdom of Prussia having become merged in the German Empire, the question whether a treaty previously entered into between that kingdom and the United States, and providing among other things for the extradition of fugitives from that country, is still operative, is a political question upon which the action and practice of the political departments of the two countries is conclusive upon the courts. *Terlinden v. Ames*, 184 U. S. 270, 46 L. Ed. 534.

In *Doe v. Braden*, 16 How. 635, 656, 14 L. Ed. 1090, it was contended that so much of the treaty of February 22, 1819, ceding Florida to the United States, as annulled a certain land grant, was void for want of power in the King of Spain to ratify such a provision. It was held that whether or not the King of Spain had power, according to the constitution of Spain, to annul the grant, was a political and not a judicial question, and was decided when the treaty was made and ratified. Mr. Chief Justice Taney said: "The treaty is therefore a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the constitution of the United States. It is their duty to interpret it and administer it according to its terms. And it would be impossible for the executive department of the government to conduct our foreign relations with any advantage to the country, and fulfill the duties which the constitution has imposed upon it, if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power, by its constitution and laws, to make the engagements into which he entered"

"this constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land." A treaty, then, is a law of the land, as an act of congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined.<sup>18</sup> But a treaty being in its nature a contract between two nations, is not generally self-executing even as to those stipulations respecting the rights of private individuals. In such case the legislature must execute the contract stipulated therein before it can become a rule for the court.<sup>19</sup> But where the treaty is considered, not as a contract between two nations, but as a rule to which the courts must have due regard in defining the rights and titles of individuals to the possession of property in the ceded territory, its construction becomes a judicial question, and may be considered as a part of the law and evidence of the case.<sup>20</sup>

**18. Rights of private persons.**—*American Ins. Co. v. Canter*, 1 Pet. 511, 7 L. Ed. 243; *Foster v. Neilson*, 2 Pet. 253, 314, 7 L. Ed. 415; *Head Money Cases*, 112 U. S. 580, 598, 28 L. Ed. 798; *United States v. Rauscher*, 119 U. S. 407, 418, 30 L. Ed. 425.

Where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights, and is as much to be regarded by the court, as an act of congress. *The Peggy*, 1 Cranch 103, 110, 2 L. Ed. 49; *DeLima v. Bidwell*, 182 U. S. 1, 195, 45 L. Ed. 1041.

"Under the doctrine that the treaty is the supreme law of the land, and is to be observed by all the courts, state and national, 'anything in the laws of the states to the contrary notwithstanding,' if the state court should fail to give due effect to the rights of the party under the treaty, a remedy is found in the judicial branch of the federal government, which has been fully recognized. This remedy is by a writ of error from the supreme court of the United States to the state court which may have committed such an error. The case being thus removed into that court, the just effect and operation of the treaty upon the rights asserted by the prisoner would be there decided." *United States v. Rauscher*, 119 U. S. 407, 431, 30 L. Ed. 425.

**19. Same; where treaty not self-executing.**—*United States v. Arredondo*, 6 Pet. 691, 735, 8 L. Ed. 547.

**20. Where treaty supplies the rule to determine private right.**—*United States v. Arredondo*, 6 Pet. 691, 735, 8 L. Ed. 547; *Mitchel v. United States*, 9 Pet. 711, 9 L. Ed. 283.

Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. *Foster v. Neilson*, 2 Pet. 253, 314, 7 L. Ed. 415; *The Cherokee Tobacco*, 11 Wall. 616, 20 L. Ed. 227; *Head Money Cases*, 112 U. S. 580, 28 L. Ed. 798; *Whitney v. Robertson*, 124 U. S. 190, 31 L. Ed. 386; *De Lima*

*v. Bidwell*, 182 U. S. 1, 195, 45 L. Ed. 1041.

A title in fee may pass by a treaty without the aid of an act of congress, as where, in a treaty with an Indian tribe, and as part of the consideration for the cession by the tribe of the tract of country to the United States, a reservation is made to a chief or other member of the tribe of a specified number of sections of land. In such case, the treaty itself converts the reserved section into individual property, which property is to be protected by the courts the same as property derived from any other source. *Buttz v. Northern Pac. R. Co.*, 119 U. S. 55, 67, 30 L. Ed. 330; *Jones v. Meehan*, 175 U. S. 1, 8, 21, 44 L. Ed. 49; *Francis v. Francis*, 203 U. S. 233, 238, 241, 51 L. Ed. 165. See, also, *Johnson v. McIntosh*, 8 Wheat. 543, 5 L. Ed. 681; *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L. Ed. 25; *Worcester v. Georgia*, 6 Pet. 515, 544, 8 L. Ed. 483; *Doe v. Wilson*, 23 How. 457, 463, 16 L. Ed. 584; *Wilson v. Wall*, 6 Wall. 83, 89, 18 L. Ed. 727; *Reichart v. Felps*, 6 Wall. 160, 166, 18 L. Ed. 849; *Smith v. Stevens*, 10 Wall. 321, 327, 19 L. Ed. 933; *Holden v. Joy*, 17 Wall. 211, 247, 21 L. Ed. 523; *United States v. Cook*, 19 Wall. 591, 22 L. Ed. 210; *United States v. Kagama*, 118 U. S. 375, 381, 20 L. Ed. 228.

**Enforcement of treaty obligations with respect to public land claims.**—In the execution of its treaty obligations with respect to property claimed under Mexican laws, the government may adopt such modes of procedure as it may deem expedient. It may act by legislation directly upon the claims preferred, or it may provide a special board for their determination, or it may require their submission to the ordinary tribunals. It is the sole judge of the propriety of the mode; and having the plenary power of confirmation, it may annex any conditions to the confirmation of a claim resting upon an imperfect right, which it may choose. It may declare the action of the special board final; it may make it subject to appeal; it may require the appeal to go through one or more courts, and it may arrest the action of board or courts at any

**Construction of Treaties; Courts Follow the Political Departments.—**

It is for the political departments of the government to determine the proper construction of treaties entered into with foreign powers; and in determining individual rights growing out of such treaties, the courts will follow the construction placed upon the treaties by the political departments of the government.<sup>21</sup>

Where there has been no construction by the political departments of the government, and the rights are of such a nature that they may be enforced in a court of justice, the court resorts to the treaty for a rule of decision of the case before it as it would to a statute.<sup>22</sup>

**As to Questions of Private Right.**—In fact, the doctrine that the courts follow the political departments of the government in the construction of treaties is true, only in so far as political questions are concerned. As regards questions of private right arising under treaties, their construction is the peculiar province of the judiciary, and congress has no constitutional power to settle such rights, or to affect titles already granted by the treaty itself.<sup>23</sup>

(ff) *Boundary Questions.*—In a controversy between two nations concerning the national boundary and involving the construction of a treaty fixing such boundary, the question is one for the legislative or political branch of the government; the judiciary not being the department of the government to which the

stage. *Grisar v. McDowell*, 6 Wall. 363, 379, 18 L. Ed. 863, reaffirmed in *Bowden v. San Francisco*, 199 U. S. 600, 50 L. Ed. 328.

**21. Construction of treaties; as to political questions.**—*American Ins. Co. v. Canter*, 1 Pet. 511, 7 L. Ed. 243; *Patterson v. Jenks*, 2 Pet. 216, 7 L. Ed. 402; *Foster v. Neilson*, 2 Pet. 253, 307, 7 L. Ed. 415; *Cherokee Nation v. Georgia*, 5 Pet. 1, 46, 8 L. Ed. 25; *United States v. Arredondo*, 6 Pet. 691, 710, 712, 8 L. Ed. 547; *Poole v. Fleeger*, 11 Pet. 185, 2121, 9 L. Ed. 680; *Garcia v. Lee*, 12 Pet. 511, 516, 517, 9 L. Ed. 1176; *Rhode Island v. Massachusetts*, 12 Pet. 657, 745, 9 L. Ed. 1233; *Williams v. Suffolk Ins. Co.*, 13 Pet. 415, 420, 10 L. Ed. 226; *Pollard v. Hagan*, 3 How. 212, 228, 11 L. Ed. 565; *United States v. Reynes*, 9 How. 127, 13 L. Ed. 74; *Davis v. Police Jury*, 9 How. 280, 13 L. Ed. 138; *United States v. Rauscher*, 119 U. S. 407, 424, 30 L. Ed. 425.

"The judiciary is not that department of the government to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established." *Marshall, C. J.*, delivering the opinion in *Foster v. Neilson*, 2 Pet. 253, 307, 7 L. Ed. 415.

It is the province of courts to conform its decisions to the will of the legislature, if that will has been clearly expressed, and to decide according to the principles established by the political departments of the government. (Separate opinion of Baldwin, J.) *Cherokee Nation v. Georgia*, 5 Pet. 1, 46, 8 L. Ed. 25, following *Foster v. Neilson*, 2 Pet. 253, 307, 7 L. Ed. 415.

A congressional construction of the pur-

pose and meaning of extradition treaties is conclusive upon the judiciary of the right conferred upon persons brought from a foreign country into this under such proceedings. *United States v. Rauscher*, 119 U. S. 407, 424, 30 L. Ed. 425.

The construction of a treaty made and acted upon by the political departments of the governments which were parties thereto becomes the supreme law of the land, binding upon all parties entering the judicial department of government. *Rhode Island v. Massachusetts*, 12 Pet. 657, 745, 746, 9 L. Ed. 1233.

If the state of Georgia has construed its treaty with the Cherokee Indians by any subsequent acts, manifesting an understanding of it, the federal supreme court would not hesitate to adopt that construction. *Patterson v. Jenks*, 2 Pet. 216, 7 L. Ed. 402.

**22. Same; where there has been no construction by the political departments.**—*Head Money Cases*, 112 U. S. 580, 598, 28 L. Ed. 798.

**23. As to questions of private right.**—*American Ins. Co. v. Canter*, 1 Pet. 511, 542, 7 L. Ed. 243; *Foster v. Neilson*, 2 Pet. 253, 254, 7 L. Ed. 415; *Worcester v. Georgia*, 6 Pet. 515, 562, 8 L. Ed. 483; *Mitchel v. United States*, 9 Pet. 711, 749, 9 L. Ed. 283; *United States v. Brooks*, 10 How. 442, 460, 13 L. Ed. 489; *Doe v. Wilson*, 232 How. 457, 461, 16 L. Ed. 584; *Crews v. Burcham*, 1 Black 352, 356, 17 L. Ed. 91; *Wilson v. Wall*, 6 Wall. 83, 89, 18 L. Ed. 727; *Reichart v. Felps*, 6 Wall. 160, 18 L. Ed. 849; *Smith v. Stevens*, 10 Wall. 321, 327, 19 L. Ed. 933; *The Kansas Indians*, 5 Wall. 737, 18 L. Ed. 667; *Holden v. Joy*, 17 Wall. 211, 247, 21 L. Ed. 523; *Jones v. Meehan*, 175 U. S. 1, 32, 44 L. Ed. 49.



assertion of the nation's interest against foreign powers is confided. If the legislative construction of such treaty has been clear and consistent, it is the duty of the court, whatever may be the individual opinions of the judges, to follow that construction.<sup>24</sup> And even where the territory on both sides of the disputed boundary has passed under the dominion of one of the powers, or to a third power, the courts, in passing upon the rights of individuals based upon conflicting grants from the original nations which were parties to the treaty, will follow the construction which the legislature has placed upon such treaty and decide the case upon the theory that the legislative determination as to the location is the correct one.<sup>25</sup>

**Controversies between the Colonies Respecting Boundaries.**—In the colonies there was no judicial tribunal which could settle boundaries between them; for the court of one could not adjudicate on the rights of another, unless as a plaintiff. The only power to do it remained in the king, where there was no agreement, and in chancery, where there was one, and the parties appeared; so that the question was partly political and partly judicial, and so remained until the declaration of independence.<sup>26</sup>

**Controversies Respecting Boundaries between the States.**—When the prerogative of the king and the transcendent powers of parliament devolved on the several states by the revolution, there could be no paramount authority to prescribe the boundaries of the states, which were sovereign by inherent right, until they should appoint some common arbiter, to whose decree they would submit. Under the federal constitution this matter is referred to the federal supreme court to decide in the case of "controversies" open and existing and which

**24. Boundary questions.**—*American Ins. Co. v. Canter*, 1 Pet. 511, 7 L. Ed. 243; *Foster v. Neilson*, 2 Pet. 253, 7 L. Ed. 415; *Poole v. Fleeger*, 11 Pet. 185, 212l, 9 L. Ed. 680; *Lattimer v. Poteet*, 14 Pet. 4, 15, 10 L. Ed. 328; *Pollard v. Kibbe*, 14 Pet. 353, 416, 10 L. Ed. 490; *United States v. Reynes*, 9 How. 127, 13 L. Ed. 74; *Davis v. Policy Jury*, 9 How. 280, 13 L. Ed. 138.

Controversies between nations or independent states respecting boundaries are in their nature political and not judicial, and none but the political or sovereign power of the state can settle them, unless the states or nations interested mutually agree to refer the question to some tribunal of their selection. *Rhode Island v. Massachusetts*, 12 Pet. 657, 737, 9 L. Ed. 1233.

If those departments of the government which are intrusted with the foreign intercourse of the nation, and which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over any country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in the courts of the nation that this construction is to be denied. *American Ins. Co. v. Canter*, 1 Pet. 511, 7 L. Ed. 243; *Foster v. Neilson*, 2 Pet. 253, 309, 7 L. Ed. 415; *Garcia v. Lee*, 12 Pet. 511, 9 L. Ed. 1176; *Rhode Island v. Massachusetts*, 12 Pet. 657, 745, 9 L. Ed. 1233; *Pollard v. Hagan*, 3 How. 212, 228, 11 L. Ed. 565.

The question of boundary between the

United States and Spain was one for the political departments of the government; and the legislative and executive branches of the government having decided the question, the courts of the United States are bound to regard the boundary determined by them as the true one. *Garcia v. Lee*, 12 Pet. 511, 9 L. Ed. 1176; *Foster v. Neilson*, 2 Pet. 253, 254, 7 L. Ed. 415; *United States v. Arredondo*, 6 Pet. 691, 711, 8 L. Ed. 547.

The decisions in *Foster v. Neilson*, and *Garcia v. Lee*, sustaining the construction of the political department of the government upon the question of the limits of Louisiana, reviewed and confirmed. *United States v. Reynes*, 9 How. 127, 13 L. Ed. 74; *Davis v. Police Jury*, 9 How. 280, 13 L. Ed. 138.

**25. Where disputed territory has passed to one nation.**—*Foster v. Neilson*, 2 Pet. 253, 7 L. Ed. 415.

**26. Controversies between the colonies respecting boundaries.**—*Rhode Island v. Massachusetts*, 12 Pet. 657, 743, 9 L. Ed. 1233.

In the case of *Poole v. Fleeger*, 11 Pet. 185, 212k, 212l, 9 L. Ed. 680, Mr. Justice Baldwin, citing the case of *Penn v. Baltimore*, 1 Ves. Sr. 447, 454, holds that it was the agreement or compact alone which gave jurisdiction to a court of equity to decree on the boundaries of provinces owned by proprietaries subordinate to the king, and that where there had been no agreement or compact, a dispute as to a boundary was a political question to be determined by the king in council, and not a judicial one for any court.

the states cannot settle amicably.<sup>27</sup> It is the established doctrine therefore, that a question involving a disputed boundary between two of the states of the Union or between a state and a territory is one susceptible of judicial determination by a court having jurisdiction of such controversies, and that the supreme court of the United States has jurisdiction in such case of a bill filed by one state against another.<sup>28</sup> In this respect the judicial department of our government is distinguished from the judicial department of any other country, drawing to itself by the ordinary modes of peaceful procedure the settlement of questions as to boundaries and consequent rights of soil and jurisdiction between states, possessed, for purposes of internal government, of the powers of independent communities.<sup>29</sup>

**Where States Are Agreed upon Boundary.**—But where questions of boundary have been determined by compacts between the states, concerning which compacts there is no controversy between the parties thereto, the question of boundary is a political one, and the court has no jurisdiction to establish a boundary different from what both states have made, or from that which resulted from their antecedent rights and relation to each other, when they could not adjust them amicably. In other words, in a case arising between individuals involving, for example, individual rights dependent upon questions of boundary, the compact, if one exists, and its construction by the states parties thereto, is binding upon the courts.<sup>30</sup> The courts are not bound, however, by the *ex parte* con-

**27. Controversies over state boundaries.**

—*Poole v. Fleeger*, 11 Pet. 185, 212i, 212t, 9 L. Ed. 680; *Rhode Island v. Massachusetts*, 12 Pet. 657, 737, 743, 9 L. Ed. 1233; *United States v. Texas*, 143 U. S. 621, 638, 639, 36 L. Ed. 285.

**28. Same.**—*New Jersey v. New York*, 5 Pet. 284, 8 L. Ed. 127; *Missouri v. Iowa*, 7 How. 660, 12 L. Ed. 861; *Florida v. Georgia*, 17 How. 478, 15 L. Ed. 181; *Virginia v. West Virginia*, 11 Wall. 39, 20 L. Ed. 67; *Missouri v. Kentucky*, 11 Wall. 395, 20 L. Ed. 116; *Indiana v. Kentucky*, 136 U. S. 479, 34 L. Ed. 329; *Nebraska v. Iowa*, 143 U. S. 359, 36 L. Ed. 186; *United States v. Texas*, 143 U. S. 621, 640, 36 L. Ed. 285.

**29. Same.**—*Virginia v. Tennessee*, 148 U. S. 503, 37 L. Ed. 537.

The construction of the compact entered into between two or more states and assented to by congress, fixing the boundaries between those states, is a judicial question, and was so treated by the federal supreme court in *Sims v. Irvine*, 3 Dall. 425, 454, 1 L. Ed. 665; *Marlett v. Silk*, 11 Pet. 1, 2, 18, 9 L. Ed. 609; *Burton v. Williams*, 3 Wheat. 529, 533, 4 L. Ed. 452; *Baldwin, J.*, delivering the majority opinion in *Rhode Island v. Massachusetts*, 12 Pet. 657, 725, 9 L. Ed. 1233.

In the case of *Virginia v. West Virginia*, 11 Wall. 39, 53, 20 L. Ed. 67, it was objected that the federal supreme court had no jurisdiction of the case because it involved the consideration of questions purely political; that is to say, the main question to be decided being one of boundary, the controversy related to the right of the state to exercise political jurisdiction and sovereignty over the territory in dispute, and was therefore political and not judicial in its nature. It was

held, that under the constitution, the supreme court of the United States had original jurisdiction of the controversy.

It was further held that this jurisdiction was not defeated because in deciding the question of boundary it was necessary to consider and construe contracts and agreements between the states, nor because the judgment or decree of the court might affect the territorial limits of the jurisdiction of the states which were parties to the suit. *Virginia v. West Virginia*, 11 Wall. 39, 53, 20 L. Ed. 67.

**30. Where states are agreed upon boundary.**—*Poole v. Fleeger* (opinion of Baldwin, J.), 11 Pet. 185, 212i, 212k, 9 L. Ed. 680.

After the declaration of independence, the states then being independent, reserved to themselves the power of settling their own boundaries, which was necessarily a purely political matter, and so continued till 1781. Then the states delegated the whole power over controverted boundaries to congress, to appoint and its court to decide, as judges, and give a final sentence and judgment upon it, as a judicial question, settled by a specially appointed judicial power, as the substitute for the king in council, and the court of chancery, in a proper case; before the one as a political, and the other, as a judicial question. Then came the constitution, which divided the power between the political and judicial departments, after incapacitating the states from settling their controversies upon any subject, by treaty, compact or agreement; and completely reversed the long established course of the laws of England. Compacts and agreements were referred to the political, controversies to the judicial power. *Baldwin, J.*, delivering the majority opinion in



struction of either state, or of its tribunals.<sup>31</sup>

(gg) *Questions Growing Out of Cession of Territory*.—Where land has been ceded by a state to the general government, questions concerning the object for which it was ceded, or the nature and purpose of its occupation by the federal government, are of a political character, and in their determination the courts will follow the action of the political departments of the government.<sup>32</sup> Likewise, questions arising out of a retrocession of territory from the United States to a state are political.<sup>33</sup>

(hh) *Attempts to Subject Property of Foreign Nations*.—Questions arising out of attempts to subject the public ships and other property belonging to foreign and independent nations to the jurisdiction of domestic laws, being of such a nature that their decision may involve war and peace, must be primarily dealt with by those departments of the government which have the power to adjust them by negotiation, or to enforce the national power by war.<sup>34</sup>

(ii) *Records of Legislative Bodies*.—It is not one of the functions of a court to make up the records of the proceedings of legislative bodies.<sup>35</sup>

*Rhode Island v. Massachusetts*, 12 Pet. 657, 743, 9 L. Ed. 1233.

"If the state of Georgia has practically settled the limits of Franklin county, such settlement ought to have been conclusive on the circuit court." *Patterson v. Jenks*, 2 Pet. 216, 7 L. Ed. 402.

**31. Courts not bound by ex parte construction.**—*Marlett v. Silk*, 11 Pet. 1, 9 L. Ed. 609.

**32. Questions growing out of cession of territory.**—*Benson v. United States*, 146 U. S. 325, 331, 36 L. Ed. 991.

Thus in the case of a crime committed upon the Ft. Leavenworth military reservation, it was contended by the appellant's counsel that, within the scope of previous decisions of the supreme court, jurisdiction passed to the general government only over such portions of the reserve as were actually used for military purposes, and that the particular part of the reserve on which the crime charged was committed was used solely for farming purposes. Answering the contention, the court said: "But in matters of that kind the courts follow the action of the political department of the government. The entire tract had been legally reserved for military purposes. *United States v. Stone*, 2 Wall. 525, 537, 17 L. Ed. 765. The character and purposes of its occupation having been officially and legally established by that branch of the government which has control over such matters, it is not open to the courts, on a question of jurisdiction, to inquire what may be the actual uses to which any portion of the reserve is temporarily put." *Benson v. United States*, 146 U. S. 325, 331, 36 L. Ed. 991.

**33. Same; retrocession.**—*Phillips v. Payne*, 92 U. S. 130, 132, 23 L. Ed. 649.

Questions arising out of the retrocession of a portion of District of Columbia are political. *Phillips v. Payne*, 92 U. S. 130, 132, 23 L. Ed. 649.

**34. Attempts to subject property of foreign nations.**—*United States v. Lee*, 106 U. S. 196, 209, 27 L. Ed. 171.

**35. Records of legislative bodies.**—*Clough v. Curtis*, 134 U. S. 361, 371, 33 L. Ed. 945; *Lyons v. Woods*, 153 U. S. 649, 669, 38 L. Ed. 854.

In *Clough v. Curtis*, 134 U. S. 361, 371, 33 L. Ed. 945, petitions for mandamus to compel the secretary of the territory of Idaho to record certain proceedings as part of the proceedings of a session of the legislature of the territory, and to compel the clerk of the territorial house to bring his minutes and journals into court to be there corrected, came under review, and the court said: "It is not one of the functions of a court to make up the records of the proceedings of legislative bodies. Nor can it be required, in a case not involving the private interests of parties, to determine whether particular bodies assuming to exercise legislative functions, constitute a lawful legislative assembly. Such a question might indeed arise in a suit depending upon an enactment passed by such an assembly. And it might be that, in a case of that character, and under some circumstances, the court would be compelled to decide whether such an enactment was passed by a legislature having legal authority to enact laws. How far in the decision of such a question the judiciary would be concluded by the record of the proceedings of those bodies, deposited by the person whose duty it was to keep it, with the officer designated by law as its custodian, are questions we have no occasion at this time to consider." In a later case, the court, after quoting the foregoing language with approval, said: "Without undertaking to consider under what circumstances which of two legislative bodies may be judicially determined to be the lawful and true body, or when or how the lawful organization of a legislative body may be judicially drawn in question, we are of opinion that the allegations of this bill made no such case for interposition as would have justified the courts in going behind the enrolled bills as deposited with the secretary of the territory, and



**Whether Journal May Be Appealed to for Purpose of Invalidating Statutes.**—See the title **STATUTES**.

(jj) *Limits of Admiralty and Maritime Jurisdiction.*—The question as to the true limits of maritime law and admiralty jurisdiction is exclusively a judicial question and no state law or act of congress can make it broader or narrower than the judicial power may determine those limits to be. But what the law is within those limits, assuming the general maritime law to be the basis of the system, depends on what has been received as law in the maritime usages of this country, and on such legislation as may have been competent to affect it.<sup>36</sup>

**Changes in Maritime Law.**—Whilst it cannot be supposed that the framers of the constitution contemplated that the maritime law should remain unchanged, the courts cannot change it; they can only declare it. If within its proper scope, any change is desired in its rules, other than those of procedure, it must be made by the legislative department.<sup>37</sup>

(kk) *The Power of Taxation Not Judicial.*—In the distribution of the powers of government in this country into three departments, the power of taxation falls to the legislative. It belongs to that department to determine what measures shall be taken for the public welfare, and to provide the revenues for the support and due administration of the government throughout the state and in all its subdivisions. Having the sole power to authorize the tax, it must equally possess the sole power to prescribe the means by which the tax shall be collected, and to designate the officers through whom its will shall be enforced.<sup>38</sup>

declaring them invalid because some of the members of the council were seated without certificates of election." *Lyons v. Woods*, 153 U. S. 649, 669, 38 L. Ed. 854. See, also, *Field v. Clark*, 143 U. S. 649, 36 L. Ed. 294; *United States v. Ballin*, 144 U. S. 1, 36 L. Ed. 321; *Harwood v. Wentworth*, 162 U. S. 547, 560, 40 L. Ed. 1069; *Twin City Bank v. Nebeker*, 167 U. S. 196, 203, 42 L. Ed. 134.

**36. Limits of admiralty and maritime jurisdiction.**—*The Lottawanna*, 21 Wall. 558, 22 L. Ed. 654.

**37. Changes in maritime law.**—*The Lottawanna*, 21 Wall. 558, 22 L. Ed. 654.

**38. Power of taxation not judicial.**—*McCullock v. Maryland*, 4 Wheat. 316, 428, 4 L. Ed. 579; *Rees v. Watertown*, 19 Wall. 107, 116, 22 L. Ed. 72; *Heine v. Board of Levee Comm'rs*, 19 Wall. 655, 22 L. Ed. 223; *Kennard v. Louisiana*, 92 U. S. 480, 23 L. Ed. 478; *State Railroad Tax Cases*, 92 U. S. 575, 23 L. Ed. 663; *McMillen v. Anderson*, 95 U. S. 37, 24 L. Ed. 335; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *United States v. New Orleans*, 98 U. S. 381, 25 L. Ed. 225; *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. Ed. 558; *Missouri v. Lewis*, 101 U. S. 22, 25 L. Ed. 989; *Meriwether v. Garrett*, 102 U. S. 472, 515, 26 L. Ed. 197; *National Bank v. Kimball*, 103 U. S. 732, 26 L. Ed. 469; *Kelly v. Pittsburgh*, 104 U. S. 78, 80, 26 L. Ed. 658; *Williams v. Supervisors*, 122 U. S. 154, 164, 30 L. Ed. 1088; *Spencer v. Merchant*, 125 U. S. 345, 31 L. Ed. 763; *Walston v. Nevin*, 128 U. S. 578, 32 L. Ed. 544; *Palmer v. McMahon*, 133 U. S. 660, 669, 33 L. Ed. 772; *Pollock v. Farmers' Loan & Trust Co.* (rehearing), 158 U. S. 601, 621, 39 L. Ed. 1108; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283,

298, 42 L. Ed. 1037; *Nicol v. Ames*, 173 U. S. 509, 524, 43 L. Ed. 786.

Where congress has the power to impose a tax, the means to be adopted for its collection, within reasonable and rational limits, must be a question for congress alone. *Nicol v. Ames*, 173 U. S. 509, 524, 43 L. Ed. 786.

The power of taxation vested in the legislature is, with some exceptions, limited only by constitutional provisions designed to secure equality and uniformity in the assessment. The mode in which the property shall be appraised, by whom its appraisal shall be made, the time within which it shall be done, what certificate of their actions shall be furnished, and when parties shall be heard for the correction of errors, are matters resting in the discretion of the legislature. *Williams v. Supervisors*, 122 U. S. 154, 164, 30 L. Ed. 1088.

It is the lawmaking power which is to determine all questions of discretion or policy in ordering and apportioning taxes; which must make all the necessary rules and regulations, and decide upon the agencies by means of which the taxes shall be collected, unless as may sometimes happen, the legislature transcends its functions and enacts, in the guise of a tax law, a law whereby the property of the citizen is confiscated or taken for private purposes in which case it is the right and duty of the judiciary to interpose. *Thomas v. Gay*, 169 U. S. 264, 283, 42 L. Ed. 740.

Whether the written memorandum of sales of personal property required by the war revenue act of June 13, 1898, and the collecting of the tax by means of the required stamps, were the best means suit-

**Abuse of Power—Unjust and Oppressive Taxation.**—The power to tax may be exercised oppressively upon persons; but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected.<sup>39</sup> That the estimated value of the land for taxation is greatly in excess of its

able to the purpose was a question for the judgment of congress, and its decision was conclusive in that respect. *Nicol v. Ames*, 173 U. S. 509, 524, 43 L. Ed. 786.

The court can neither make nor cause to be made a new assessment if the one complained of be erroneous. *State Railroad Tax Cases*, 92 U. S. 575, 23 L. Ed. 663. See, also, the title TAXATION.

But in reducing the amount of a special assessment after a trial upon a full hearing, the assessment having been made under color at least of legislative authority, the court does not exercise the legislative function of making an assessment. *Security Trust, etc., Co. v. Lexington*, 203 U. S. 323, 334, 51 L. Ed. 204.

**39. Same; unjust and oppressive taxation.**—*McCulloch v. Maryland*, 4 Wheat. 316, 428, 4 L. Ed. 579; *Providence Bank v. Billings*, 4 Pet. 514, 563, 7 L. Ed. 939; *Veazie Bank v. Fenno*, 8 Wall. 533, 548, 19 L. Ed. 482; *United States v. New Orleans*, 98 U. S. 381, 392, 25 L. Ed. 225; *Kirtland v. Hotchkiss*, 100 U. S. 491, 498, 25 L. Ed. 558; *Meriwether v. Garrett*, 102 U. S. 472, 26 L. Ed. 197; *Spencer v. Merchant*, 125 U. S. 345, 355, 31 L. Ed. 763; *New York, etc., R. Co. v. Pennsylvania*, 153 U. S. 628, 641, 38 L. Ed. 846; *Postal Tel. Cable Co. v. Charleston*, 153 U. S. 692, 699, 38 L. Ed. 871; *McCray v. United States*, 195 U. S. 27, 58, 49 L. Ed. 78.

Questions of this character belong to the controversies of political parties and cannot be determined by judicial decisions. *Pollock v. Farmers' Loan & Trust Co.* (rehearing), 158 U. S. 601, 634, 39 L. Ed. 1108.

In the *Income Tax Cases* the court said that it was not concerned with the question whether an income tax be or be not desirable, nor whether such a tax would enable the government to diminish the taxes on consumption and duties upon imports, and to enter upon a reform of its fiscal and commercial system; that its province was to determine whether the tax imposed by the act under consideration was or was not a direct tax within the meaning of the constitution. *Pollock v. Farmers' Loan & Trust Co.* (rehearing), 158 U. S. 601, 634, 39 L. Ed. 1108.

In the absence of constitutional limitation, the question whether a progressive tax is more just and equal than a proportional one, is legislative and not judicial. *Knowlton v. Moore*, 178 U. S. 41, 109, 44 L. Ed. 969.

So if a particular tax bears heavily upon a corporation, or a class of corporations, it cannot, for that reason only, be pronounced contrary to the constitution. *Veazie Bank v. Fenno*, 8 Wall. 533, 548, 19 L. Ed. 482; *New York, etc., R. Co. v.*

*Pennsylvania*, 153 U. S. 628, 641, 38 L. Ed. 846; *Postal Tel. Cable Co. v. Charleston*, 153 U. S. 692, 38 L. Ed. 871; *McCray v. United States*, 195 U. S. 27, 57, 49 L. Ed. 78.

In *Knowlton v. Moore*, 178 U. S. 41, 44 L. Ed. 969, this doctrine was restated. In *Treat v. White*, 181 U. S. 264, 45 L. Ed. 853, referring to a stamp duty levied by congress, it was observed (p. 269): "The power of congress in this direction is unlimited. It does not come within the province of this court to consider why agreements to sell shall be subject to the stamp duty, and agreements to buy, not. It is enough that congress in this legislation has imposed a stamp duty upon the one and not upon the other."

In *Patton v. Brady*, 184 U. S. 608, 46 L. Ed. 713, considering a stamp duty levied by congress, it was again said (p. 623): "That it is no part of the function of a court to inquire into the reasonableness of the excise, either as respects the amount, or the property upon which it is imposed."

In *Austin v. The Aldermen*, 7 Wall. 694, 19 L. Ed. 224, it was again declared (p. 699) that "the right of taxation, where it exists, is necessarily unlimited in its nature. It carries with it inherently the power to embarrass and destroy."

In *Pacific Ins. Co. v. Soule*, 7 Wall. 433, 19 L. Ed. 95, referring to the unlimited nature of the power of taxation conferred upon congress, it was observed (p. 443): "Congress may prescribe the basis, fix the rates, and require payment as it may deem proper. Within the limits of the constitution it is supreme in its action. No power of supervision or control is lodged in either of the other departments of the government." And after referring to the express limitations as to uniformity and articles exported from any state, it was remarked (p. 446): "With these exceptions, the exercise of the power is, in all respects, unfettered."

And the same doctrine has been again and again expounded. In the *License Tax Cases*, 5 Wall. 462, 18 L. Ed. 497, referring to the extensive power of taxation possessed by congress, and the express limitations found in the constitution, it was said (p. 471): "It is true that the power of congress to tax is a very extensive power. It is given in the constitution, with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion."



true value, or that the benefits received are small in proportion to the tax imposed, are all matters within the discretion of the legislature, and cannot be made the grounds for assailing the validity of the tax in the courts.<sup>40</sup>

**Amount of Penalty for Failure to Pay Taxes.**—It is within the power of the legislature to determine in its discretion the amount of the penalty in case of failure to pay taxes.<sup>41</sup>

**Whether Tax Levied for a Public Use.**—Whether or not the purpose for which a tax is authorized is a public purpose is a question for the judicial department, and where a tax is imposed for a purely private purpose, as, for example, in aid of a manufacturing enterprise, the courts will declare it unconstitutional and void.<sup>42</sup>

(ll) *Assessments for Local Improvements.*—Whenever a local improvement is authorized, it is for the legislature to prescribe the manner in which the means to meet its cost shall be raised, whether by general taxation, or by laying the burden either wholly or in part upon the district benefited by the improvement.<sup>43</sup>

**Property Benefited or Deemed Benefited.**—The determination of the territorial district which is benefited or deemed to be benefited by a local improvement, and which should be taxed therefor, is within the province of legislative discretion. That a portion of the property within the defined district was not actually benefited does not affect the validity of the assessment.<sup>44</sup>

**Burden Not Proportioned to Benefits.**—Nor can the fact that the assessment is oppressive, unjust and out of all proportion to the benefits received be successfully urged as a ground for invalidating the same.<sup>45</sup>

(mm) *Conspiracy by State to Exclude Voters from Registry Lists.*—The ex-

**40. Excessive valuation; unequal benefits.**

—Willard *v.* Presbury, 14 Wall. 676, 20 L. Ed. 719; Kennard *v.* Louisiana, 92 U. S. 480, 23 L. Ed. 478; State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663; McMillen *v.* Anderson, 95 U. S. 37, 24 L. Ed. 335; Davidson *v.* New Orleans, 96 U. S. 97, 24 L. Ed. 616; United States *v.* Memphis, 97 U. S. 284, 24 L. Ed. 937; Kirtland *v.* Hotchkiss, 100 U. S. 491, 25 L. Ed. 558; Missouri *v.* Lewis, 101 U. S. 22, 25 L. Ed. 989; Mobile County *v.* Kimball, 102 U. S. 691, 704, 26 L. Ed. 238; National Bank *v.* Kimball, 103 U. S. 732, 26 L. Ed. 469; Kelly *v.* Pittsburgh, 104 U. S. 78, 80, 26 L. Ed. 658; Hagar *v.* Reclamation District, No. 108, 111 U. S. 701, 28 L. Ed. 569; Stanley *v.* Supervisors, 121 U. S. 535, 550, 30 L. Ed. 1000; Walston *v.* Nevin, 128 U. S. 578, 582, 32 L. Ed. 544.

**41. Amount of penalty for failure to pay taxes.**—Western Union Tel. Co. *v.* Indiana, 165 U. S. 304, 310, 41 L. Ed. 725.

**42. Whether tax levied for a public purpose.**—Loan Ass'n *v.* Topeka, 20 Wall. 655, 22 L. Ed. 455. Accord: Hepburn *v.* Griswold, 8 Wall. 603, 623, 19 L. Ed. 513; Olcott *v.* Supervisors, 16 Wall. 678, 689, 21 L. Ed. 382; Township of Pine Grove *v.* Talcott, 19 Wall. 666, 676, 22 L. Ed. 227; Board of Commissioners *v.* Lucas, 93 U. S. 108, 114, 23 L. Ed. 822; Parkersburg *v.* Brown, 106 U. S. 487, 27 L. Ed. 238; Cole *v.* La Grange, 113 U. S. 1, 7, 28 L. Ed. 896; Head *v.* Amoskeag Mfg. Co., 113 U. S. 9, 21, 25, 28 L. Ed. 889; Thomas *v.* Gay, 169 U. S. 264, 283, 42 L. Ed. 740. See, generally, the title TAXATION.

**43. Assessments for local improve-**

**ments.**—Willard *v.* Presbury, 14 Wall. 676, 20 L. Ed. 719; Davidson *v.* New Orleans, 96 U. S. 97, 24 L. Ed. 616; Mattingly *v.* District of Columbia, 97 U. S. 687, 24 L. Ed. 1098; Mobile County *v.* Kimball, 102 U. S. 691, 704, 26 L. Ed. 238; Hagar *v.* Reclamation District, No. 108, 111 U. S. 701, 705, 28 L. Ed. 569; Spencer *v.* Merchant, 125 U. S. 345, 355, 31 L. Ed. 763; Walston *v.* Nevin, 128 U. S. 578, 582, 32 L. Ed. 544; Lent *v.* Tillson, 140 U. S. 316, 328, 35 L. Ed. 419; Illinois Cent. R. Co. *v.* Decatur, 147 U. S. 190, 198, 199, 37 L. Ed. 132; Shoemaker *v.* United States, 147 U. S. 282, 37 L. Ed. 170; Paulsen *v.* Portland, 149 U. S. 30, 37 L. Ed. 637; Bauman *v.* Ross, 167 U. S. 548, 589, 42 L. Ed. 270.

**44. Property benefited or deemed benefited.**—Willard *v.* Presbury, 14 Wall. 676, 20 L. Ed. 719; Commissioners *v.* Commissioners, 92 U. S. 307, 23 L. Ed. 552; Davidson *v.* New Orleans, 96 U. S. 97, 24 L. Ed. 616; United States *v.* Memphis, 97 U. S. 284, 24 L. Ed. 937; Mobile County *v.* Kimball, 102 U. S. 691, 704, 26 L. Ed. 238; Hagar *v.* Reclamation District, No. 108, 111 U. S. 701, 28 L. Ed. 569; Stanley *v.* Supervisors, 121 U. S. 535, 550, 30 L. Ed. 1000; Spencer *v.* Merchant, 125 U. S. 345, 356, 31 L. Ed. 763; Walston *v.* Nevin, 128 U. S. 578, 582, 32 L. Ed. 544. See, generally, the title SPECIAL ASSESSMENTS.

**45. That burden is not proportioned to benefits.**—See ante, "The Power of Taxation Not Judicial," VI, D, 3, d, (3), (c), (kk). See, also, the titles SPECIAL ASSESSMENTS; TAXATION.



clusion of colored citizens from the lists of registered voters by means of a conspiracy upon the part of the state and the people of the state, and by reason of state constitutional requirements which contravene the fourteenth amendment of the federal constitution is a political wrong, relief from which must be given by the people of the state or by the legislative and political departments of the government of the United States. The federal circuit court has no jurisdiction in such case of a bill filed by a colored citizen in behalf of himself and all others in like situation to compel county registrars to add their names to the lists of registered voters.<sup>46</sup>

(nn) *Validity of State Law Providing for the Appointment of Presidential Electors*.—The question of the validity of a state law providing for the appointment of presidential electors is a judicial question, and the United States supreme court cannot decline to exercise jurisdiction upon the inadmissible suggestion that action might be taken by political agencies in disregard of the judgment of the highest tribunal of the state as revised by its own.<sup>47</sup>

(oo) *Title or Possession of Property*.—Whether the one or the other of two persons laying claim to property is entitled to the possession thereof is a judicial, and not an executive or legislative question.<sup>48</sup> Nor does such question cease to be judicial because the defendant claims that the right of possession is in the government of which he is the officer or agent.<sup>49</sup>

(pp) *Power of Courts to Enjoin the Commission of Crime; Whether an Encroachment upon the Function of the Executive to Enforce the Laws*.—See the title INJUNCTIONS.

(d) *Power of Congress to Impose Legislative or Executive Duties upon the Judiciary*.—(aa) *Generally*.—Congress cannot bring under the judicial power a matter which from its nature is not a subject for judicial determination, nor assign, to the judiciary any but judicial duties.<sup>50</sup>

**46. Conspiracy to exclude voters from registry lists.**—*Giles v. Harris*, 189 U. S. 475, 488, 47 L. Ed. 909.

**47. Manner of choosing presidential electors.**—*McPherson v. Blacker*, 146 U. S. 1, 24, 36 L. Ed. 869.

The judicial power of the United States extends to all cases in law and equity arising under the constitution and laws of the United States, and there is a case so arising when the validity of such a law has been drawn in question as being repugnant to such constitution and laws, and its validity sustained. *McPherson v. Blacker*, 146 U. S. 1, 23, 24, 36 L. Ed. 869. See, also, *Boyd v. Nebraska*, 143 U. S. 135, 36 L. Ed. 103.

**48. Title or possession of property.**—*United States v. Peters*, 5 Cranch 115, 139, 3 L. Ed. 53; *United States v. Lee*, 106 U. S. 196, 222, 27 L. Ed. 171; *Tindal v. Wesley*, 167 U. S. 204, 221, 42 L. Ed. 137.

**49. Same; where government claims title.**—*United States v. Peters*, 5 Cranch 115, 139, 3 L. Ed. 53; *United States v. Lee*, 106 U. S. 196, 222, 27 L. Ed. 171; *Tindal v. Wesley*, 167 U. S. 204, 221, 42 L. Ed. 137; *Minnesota v. Hitchcock*, 185 U. S. 373, 46 L. Ed. 954.

"We may repeat here what was said by Chief Justice Marshall, delivering the unanimous judgment of this court in *United States v. Peters*, 5 Cranch 115, 139, 3 L. Ed. 53: 'It certainly can never be alleged that a mere suggestion of title in a state to property, in possession of an individ-

ual, must arrest the proceedings of the court, and prevent their looking into the suggestion, and examining the validity of the title.' Whether the one or the other party is entitled in law to possession is a judicial, not an executive or legislative, question. It does not cease to be a judicial question because the defendant claims that the right of possession is in the government of which he is an officer or agent." *Tindal v. Wesley*, 167 U. S. 204, 221, 42 L. Ed. 137. Accord: *United States v. Lee*, 106 U. S. 196, 222, 27 L. Ed. 171.

**50. Power of congress to impose legislative or executive functions upon the judiciary.**—*Hayburn's Case*, 2 Dall. 409, 410, 1 L. Ed. 436; *Marbury v. Madison*, 1 Cranch 137, 171, 2 L. Ed. 60; *Hunt v. Palao*, 4 How. 589, 11 L. Ed. 1115; *McNulty v. Batty*, 10 How. 72, 79, 13 L. Ed. 303; *United States v. Todd*, note, 13 How. 52, 14 L. Ed. 42; *United States v. Ferreira*, 13 How. 40, 14 L. Ed. 42; *Murray v. Hoboken Land, etc., Co.*, 18 How. 272, 284, 15 L. Ed. 372; *Gordon v. United States*, 117 U. S., appx., 697, 703; *Fong Yue Ting v. United States*, 149 U. S. 698, 715, 37 L. Ed. 905; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 485, 38 L. Ed. 1047.

In regulating the judicial department the cases in which the courts of the United States shall have jurisdiction are particularly and specifically enumerated and defined; and they are not authorized

**Exceptions; Duties Imposed upon Court Not as a Court.**—It is otherwise where the nonjudicial duty is imposed, not upon the court as a court, but upon the judge personally; as where the claims of Spanish subjects, for injuries suffered at the hands of the American troops in Florida and for the satisfaction of which provision was made in the treaty of 1819 between Spain and the

to take cognizance of any case which does not come within the description therein specified. (*Opinion of Taney, C. J.*) *Scott v. Sandford*, 19 How. 393, 401, 15 L. Ed. 691.

**Requiring judges to act as commissioners of pensions.**—In 1792, an act was passed directing the secretary of war to place on the pension list such disabled officers and soldiers as should be reported to him by the circuit courts. This act was held unconstitutional in the circuit courts upon the grounds, "that by the constitution of the United States, the government thereof is divided into three distinct and independent branches, and it is the duty of each to abstain from and to oppose, encroachments on either; that neither the legislative nor the executive branches can constitutionally assign to the judicial any duties, but such as are properly judicial, and to be performed in a judicial manner;" and that the duties assigned to the circuit court by this act were not of a judicial character. See *Havburn's Case*, 2 Dall. 409, 410, 1 L. Ed. 436; *Marbury v. Madison*, 1 Cranch 137, 171, 2 L. Ed. 60; *United States v. Todd*, note, 13 How. 52, 14 L. Ed. 42.

**Duties assigned to the circuit courts by the 12th section of the interstate commerce act.**—The 12th section of the interstate commerce act, authorizing the interstate commerce commission to invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses, and the production of documents, books and papers, and authorizing the circuit courts of the United States to use their process in aid of inquiries before the interstate commerce commission, by punishing, as for contempt, any persons refusing to obey subpoenas lawfully issued by the commission, or who may be guilty of contumacy in refusing to give testimony or produce books and papers, etc., is not unconstitutional as imposing on the judicial tribunals of the United States duties that are not judicial in their nature. *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 38 L. Ed. 1047, reaffirmed in *Ex parte Lochren*, Commissioner of Pensions, 163 U. S. 692, 41 L. Ed. 319.

A case arising out of the presentation to a circuit court of a petition by the interstate commerce commission, praying that such court may order certain witnesses summoned before the interstate commerce commission to answer questions which have been propounded to them and which they have refused to answer, and to require them to produce cer-

tain books and papers before the commission, said petition being filed pursuant to the provisions of § 12 of the interstate commerce act, is a case or controversy within the meaning of the constitutional provision extending the judicial power of the United States to all cases in law and in equity arising under that instrument, or under the laws of the United States, and to all controversies which the United States shall be a party. *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 38 L. Ed. 1047, reaffirmed in *Ex parte Lochren*, Commissioner of Pensions, 163 U. S. 692, 41 L. Ed. 319.

"Whether the commission is entitled to the evidence it seeks, and whether the refusal of the witness to testify or to produce books, papers, etc., in his possession, is or is not in violation of his duty or in derogation of the rights of the United States, seeking to execute a power expressly granted to congress, are the distinct issues between that body and the witness. They are issues between the United States and those who dispute the validity of an act of congress and seek to obstruct its enforcement. And these issues, made in the form prescribed by the act of congress, are so presented that the judicial power is capable of acting on them." *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 476, 38 L. Ed. 1047, reaffirmed in *Ex parte Lochren*, Commissioner of Pensions, 163 U. S. 692, 41 L. Ed. 319.

**Right of alien to land upon soil of United States.**—Congress may, if it sees fit, authorize the courts to investigate and ascertain the facts as to the right of an alien to land upon the soil of the United States, though the entire question of international relation is a political one and the entire control thereof is vested by the constitution in the political departments of the government. *Ekiu v. United States*, 142 U. S. 651, 660, 35 L. Ed. 1146.

The act of May 5, 1892, ch. 60, prohibiting the coming of Chinese persons into the United States, and providing for the arrest and removal from the United States of any person of Chinese descent unlawfully within this country, unless such person shall establish by affirmative proof to the satisfaction of a justice, judge or commissioner of the United States, before whom he may be brought and tried, his lawful right to remain in the United States, and also authorizing the arrest of such person by any custom official, collector of internal revenue, or United States marshal, the person arrested then to be taken before a United States judge, does



United States, were directed, by act of congress, to be presented to and passed upon by a judge of a United States district court.<sup>51</sup>

**Judicial Appointments to Office.**—And so congress has power by the constitution to vest in the circuit courts the appointment of federal supervisors of elections. It is expressly declared that congress may by law vest the appointment of such inferior officers, as they think proper, in the president alone, in the courts of law, or in the heads of departments; and whilst, as a question of propriety, the appointment of officers whose duties appertain to one department ought not to be lodged in another, the matter is, nevertheless, left to the discretion of congress.<sup>52</sup>

**Judicial Control over Rules of Procedure, etc.**—Likewise, congress having provided by general laws for the regulation of the practice and mode of procedure in the federal courts, may constitutionally delegate to those courts the power to prescribe and enforce rules relating to the details of practice and procedure therein.<sup>53</sup>

**May Authorize Courts to Grant Franchises.**—In the absence of constitutional restriction, a state legislature may delegate its authority to grant franchises to the courts of law.<sup>54</sup>

(bb) *Jurisdiction of the Federal Supreme Court*—The supreme court of the United States does not owe its existence or its powers to the legislative department of the government. It is created by the constitution, and represents one of the three great divisions of power in the government of the United States,

not impose a nonjudicial function upon the judiciary. *Fong Yue Ting v. United States*, 149 U. S. 698, 738, 37 L. Ed. 905.

"When, in the form prescribed by law, the executive officer, acting in behalf of the United States, brings the Chinese laborer before the judge, in order that he may be heard, and the facts upon which depends his right to remain in the country be decided, a case is duly submitted to the judicial power; for here are all the elements of a civil case—a complainant, defendant, and a judge—actor, reus et judex. 3 Bl. Com. 25; *Osborn v. United States Bank*, 9 Wheat. 738, 819, 6 L. Ed. 204. No formal complainant or pleadings are required, and the want of them does not affect the authority of the judge or the validity of the statute." *Fong Yue Ting v. United States*, 149 U. S. 698, 37 L. Ed. 905.

**Statute authorizing attorney general to bring suit to set aside award against the Republic of Mexico in favor of mining company.**—The act of congress of December 28, 1892, directing that the attorney general should bring suit in the court of claims in the name of the United States for the purpose of ascertaining whether the award against the Republic of Mexico in favor of La Abra Silver Mining Company was obtained by means of false swearing or other false or fraudulent practice was not open to the objection that it subjected to judicial determination a matter committed by the constitution to the exclusive control of the president. The subject was one in which congress had an interest, and in respect to which it could give directions by means of legislative enactment; and the question whether fraud had or had not

been committed in obtaining the award was one peculiarly judicial in its nature. *La Abra Silver Min. Co. v. United States*, 175 U. S. 423, 459, 44 L. Ed. 223.

**51. Where duty not imposed upon court as a court.**—*United States v. Ferreira*, 13 How. 40, 50, 14 L. Ed. 42.

**52. Appointments to office.**—*Ex parte Siebold*, 100 U. S. 371, 25 L. Ed. 717.

"Congress having provided for commissioners, who are not judges in the constitutional sense, had a perfect right under article 2, § 2, paragraph 2, of the constitution to invest the district or circuit courts with the power of appointment." *Rice v. Ames*, 180 U. S. 371, 378, 45 L. Ed. 577.

**53. As to rules of procedure.**—*Wayman v. Southard*, 10 Wheat. 1, 42, 47, 6 L. Ed. 253. Accord: *United States Bank v. Halstead*, 10 Wheat. 51, 6 L. Ed. 264.

The act of 1792, ch. 36, which permanently continued the forms of writs, executions and other process, and the forms and modes of proceeding in suits at common law, then in use in the courts of the United States, under the process act of 1789, subject to such alterations and additions as the said courts respectively should, in their discretion, deem expedient, or to such regulations as the supreme court of the United States should think proper, from time to time, by rule, to prescribe to any circuit or district court concerning the same, is not an unconstitutional devolution of legislative power and discretion upon the judiciary. *Beers v. Haughton*, 9 Pet. 260, 329, 9 L. Ed. 145.

**54. As to granting franchises.**—*Wright v. Nagle*, 101 U. S. 791, 794, 25 L. Ed. 921.



to each of which the constitution has assigned its appropriate duties and powers, made each independent of the other in performing its appropriate functions. The power conferred on this court is exclusively judicial, and it can neither be diminished nor enlarged by legislative authority. Neither can it be required or authorized to exercise any other.<sup>55</sup>

**Appeals from Nonjudicial Tribunals.**—Congress may establish special tribunals with special powers to examine testimony and decide, in the first instance, upon the validity and justice of any claim for money against the United States, subject to the supervision and control of congress, or a head of any of the executive departments. Congress cannot, however, authorize an appeal from such a tribunal to the supreme court of the United States, for the reason that the appellate power of the supreme court, as defined by the constitution, is limited to those cases arising in courts exercising the judicial powers of the United States, whereas the powers vested in these special tribunals are not judicial in their nature.<sup>56</sup> But objections urged against the jurisdiction of the court of claims and of the United States supreme court cannot be maintained if the proceeding authorized by act of congress involves a right which in its nature is susceptible of judicial determination, and if the determination of it by the court of claims and by the supreme court is not simply ancillary or advisory, but is the final and indisputable basis of action by the parties.<sup>57</sup>

(e) *Power to Impose Judicial Functions upon Nonjudicial Tribunals.*—**Judicial Power of the United States.**—By the first section of the third article of the constitution, it is required that the judicial power of the United States shall be vested in one supreme court and in such inferior courts as congress may from time to time establish, the judges of said courts to hold their offices during good behavior. If the subject matter of a proceeding necessarily involves an

**55. Jurisdiction of federal supreme court.**—*Gordon v. United States*, 2 Wall. 561, 17 L. Ed. 921; *Railway Co. v. Whitton*, 13 Wall. 270, 20 L. Ed. 571; *United States v. Union Pac. R. Co.*, 98 U. S. 569, 602, 25 L. Ed. 143; *Gordon v. United States*, 117 U. S., appx., 697, 699, 700; *In re Sanborn*, 148 U. S. 222, 37 L. Ed. 429, *United States v. Old Settlers*, 148 U. S. 427, 466, 37 L. Ed. 509.

"The supreme court alone possesses jurisdiction derived immediately from the constitution, and of which the legislative power cannot deprive it. *United States v. Hudson*, 7 Cranch 32, 3 L. Ed. 259; *Ex parte Wisner*, 203 U. S. 449, 455, 51 L. Ed. 264.

**56. Appeals from nonjudicial tribunals.**—*American Ins. Co. v. Canter*, 1 Pet. 511, 534, 7 L. Ed. 243; *Benner v. Porter*, 9 How. 235, 13 L. Ed. 119; *United States v. Ritchie*, 17 How. 525, 534, 15 L. Ed. 236; *United States v. Ferreira*, 13 How. 40, 14 L. Ed. 42; *Murray v. Hoboken Land, etc., Co.*, 18 How. 272, 284, 15 L. Ed. 372; *Clinton v. Englebrecht*, 13 Wall. 434, 20 L. Ed. 659; *Reynolds v. United States*, 98 U. S. 145, 154, 25 L. Ed. 244; *Gordon v. United States*, 117 U. S., appx., 697; *La Abra Silver Min. Co. v. United States*, 175 U. S. 423, 425, 457, 44 L. Ed. 223.

**57. Same.**—*La Abra Silver Min. Co. v. United States*, 175 U. S. 423, 457, 44 L. Ed. 223.

The proceeding authorized by the act of congress of December 28, 1892, to be

brought in the court of claims by the attorney general in the name of the United States against the *La Abra Silver Mining Company*, to determine whether the award in favor of that company against the Republic of Mexico was obtained by false swearing or other false and fraudulent means, was a proceeding of this character, since the rights involved were of such a nature as to be susceptible of judicial determination, and since the decision of the court of claims and of the supreme court were to be not merely ancillary or advisory, but conclusive upon both the United States and the defendants. *La Abra Silver Mining Co. v. United States*, 175 U. S. 423, 44 L. Ed. 223.

Where an act of congress has provided that controverted questions of fact or law arising upon the pendency of any claim or matter before the head of an executive department may be referred to the court of claims, to be there decided and reported back to the department by which it was transmitted, but fails to make such decision obligatory upon the department to which it was reported, the function of the court of claims in such case is ancillary and advisory only, and an appeal therefrom will not lie to the supreme court of the United States. *In re Sanborn*, 148 U. S. 222, 37 L. Ed. 429, cited in *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 484, 38 L. Ed. 1047. See, also, the title APPEAL AND ERROR, vol. 1, p. 511, et seq.

exercise of the judicial power of the United States, jurisdiction of such proceeding can only be conferred upon the courts duly organized and constituted under this provision of the constitution, and it is not competent for congress to vest it in the officers of the executive department nor in any other board or tribunal which does not constitute a court of the United States constituted and organized in accordance with the terms of this section of the constitution; as, for example, territorial courts in which the judges hold not for life, or during good behavior, but for a prescribed term of years.<sup>58</sup> Except in the particular instances enumerated in the constitution, of the exercise by either house of congress of its right to punish disorderly behavior upon the part of its members, and to compel the attendance of witnesses and the production of papers in election and impeachment cases, and in cases that may involve the existence of those bodies,<sup>59</sup> the power to impose fine or imprisonment in order to compel the performance of a legal duty imposed by the United States can only be exerted, under the law of the land, by a competent judicial tribunal having jurisdiction in the premises.<sup>60</sup>

**But Some Matters May or May Not Be Brought under Judicial Cognizance.**—At the same time, there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States as it may deem proper. In fact, it is no new thing for the lawmaking power, acting either through treaties made by the president and senate, or by the more common method of acts of congress, to submit the decision of questions, not necessarily of judicial cognizance, either to the final determination of executive officers, or to the decision of such officers in the first instance, with such opportunity for judicial review of their action as congress may see fit to authorize or permit.<sup>61</sup> The question is, whether the subject matter is necessarily, and

**58. Imposing judicial functions upon nonjudicial bodies; judicial power of the United States.**—*American Ins. Co. v. Canter*, 1 Pet. 511, 7 L. Ed. 243; *Benner v. Porter*, 9 How. 235, 13 L. Ed. 119; *United States v. Ferreira*, 13 How. 40, 14 L. Ed. 42; *United States v. Ritchie*, 17 How. 525, 534, 15 L. Ed. 236; *Murray v. Hoboken Land, etc., Co.*, 18 How. 272, 275, 15 L. Ed. 372; *Ex parte Milligan*, 4 Wall. 2, 121, 18 L. Ed. 281; *Clinton v. Englebrecht*, 13 Wall. 434, 20 L. Ed. 659; *Reynolds v. United States*, 98 U. S. 145, 154, 25 L. Ed. 244; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 480, 38 L. Ed. 1047, reaffirmed in *Ex parte Lochren*, *Commissioner of Pensions*, 163 U. S. 692, 41 L. Ed. 319.

The constitution vests the whole judicial power of the United States in a supreme court, and such inferior courts as congress shall from time to time ordain and establish. *Marbury v. Madison*, 1 Cranch 137, 173, 2 L. Ed. 60.

**59.** See *Anderson v. Dunn*, 6 Wheat. 204, 5 L. Ed. 242; *Kilbourn v. Thompson*, 103 U. S. 168, 190, 26 L. Ed. 377.

**60. Legal duties enforceable only by judicial tribunals.**—*Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 485, 38 L. Ed. 1047, reaffirmed in *Ex parte Lochren*, *Commissioner of Pensions*, 163 U. S. 692, 41 L. Ed. 319; *Wong Wing v. United States*, 163 U. S. 228, 237, 41 L. Ed. 140; *Li Sing v. United States*, 180 U. S. 486, 495, 45 L. Ed. 634.

**Contumacy of witnesses in proceedings before interstate commerce commission.**—The inquiry whether a witness before the interstate commerce commission is bound to answer a particular question propounded to him, or to produce books, papers, etc., in his possession and called for by that body, is one that cannot be committed to a subordinate administrative tribunal for final determination. Such a body could not, under any system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment. *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 485, 38 L. Ed. 1047, reaffirmed in *Ex parte Lochren*, *Commissioner of Pensions*, 163 U. S. 692, 41 L. Ed. 319.

**Trial by military commission.**—Under these provisions congress had no power to vest any part of the judicial power of the United States in a military commission created for the purposes of trying persons who were not connected with the military or naval service, but who were citizens of states in which no state of war existed and in which the civil courts were open for the trial of offenders at the time the alleged offences were committed. *Ex parte Milligan*, 4 Wall. 2, 121, 18 L. Ed. 281.

**61. Matters which may or may not be brought under judicial cognizance.**—*Murray v. Hoboken Land, etc., Co.*, 18



without regard to the consent of congress, a judicial controversy.<sup>62</sup>

**Where Duty Merely Ministerial.**—In many cases the power conferred is merely ministerial and the statute is therefore constitutional.<sup>63</sup>

**Judicial Powers of the States.**—There is nothing in the federal constitution respecting the separation and distribution of state governmental powers; on the other hand, each state may make such distribution of its legislative, executive and judicial powers as it may see fit.<sup>64</sup>

How. 272, 284, 15 L. Ed. 372. Accord: *American Ins. Co. v. Canter*, 1 Pet. 511, 534, 7 L. Ed. 243; *Benner v. Porter*, 9 How. 235, 13 L. Ed. 119; *United States v. Ferreira*, 13 How. 40, 14 L. Ed. 42; *United States v. Ritchie*, 17 How. 525, 534, 15 L. Ed. 236; *Fong Yue Ting v. United States*, 149 U. S. 698, 715, 37 L. Ed. 905; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 475, 38 L. Ed. 1047; *United States v. Coe*, 155 U. S. 76, 39 L. Ed. 76. See, also, *Cary v. Curtis*, 3 How. 236, 11 L. Ed. 576; *In the Matter of Metzger*, 5 How. 176, 12 L. Ed. 104; *Curtis v. Fiedler*, 2 Black 461, 478, 479, 17 L. Ed. 273; *Arnson v. Murphy*, 109 U. S. 238, 240, 27 L. Ed. 920; *Benson v. McMahon*, 127 U. S. 457, 32 L. Ed. 234; *In re Oteiza*, 136 U. S. 330, 34 L. Ed. 464; *In re Fassett*, 142 U. S. 479, 486, 487, 35 L. Ed. 1086; *Pas-savant v. United States*, 148 U. S. 214, 37 L. Ed. 426.

The auditing of the account of a collector of the customs, the ascertainment of the balance due from such collector to the government, and the issuing of a distress warrant therefor by the solicitor of the treasury, under the act of congress passed on the 15th of May, 1820 (3 Stats. at Large 592), is an exercise of the executive and not of the judicial power of the United States. By the common law of England and the laws of many of the colonies prior to the revolution, and of the states prior to the formation of the federal government, a summary process existed for the collection of the revenue due the government, and it does not alter the case that the revenue has reached the hands of a collector on its way to the treasury; nor does it necessarily follow that the adjustment of these balances is a controversy to which the United States is a party. *Murray v. Hoboken Land, etc., Co.*, 18 How. 272, 280, 281, 15 L. Ed. 372.

The privilege allowed to the collector to bring the question of his indebtedness before the courts of the United States was merely the consent of congress to the suit, which is given in other classes of cases. *Murray v. Hoboken Land, etc., Co.*, 18 How. 272, 281, 15 L. Ed. 372.

Under the national banking law the comptroller of the currency has power to appoint a receiver for a defaulting or insolvent national bank, and to call for a ratable assessment upon the stockholders of such bank, without a previous judicial ascertainment of the necessity for the appointment of the receiver and of the existence of the liabilities of the bank; and

the lodgment of authority in the comptroller, empowering him either to appoint a receiver or to make a ratable call upon the stockholders, is not unconstitutional as vesting that officer with judicial power in violation of the constitution. *Casey v. Galli*, 94 U. S. 673, 24 L. Ed. 168; *Bushnell v. Leland*, 164 U. S. 684, 685, 41 L. Ed. 598. See, also, *Kennedy v. Gibson*, 8 Wall. 498, 19 L. Ed. 476; *United States v. Knox*, 102 U. S. 422, 26 L. Ed. 216.

**Admission or exclusion of aliens.**—See ante, "Generally as to International Relations; Determination of Rightful Sovereign or Government," VI, D, 3, d, (3), (c), (cc). See, also, the title ALIENS, vol. 1, p. 250, et seq.

**62. Same.**—*Murray v. Hoboken Land, etc., Co.*, 18 How. 272, 281, 15 L. Ed. 372.

**63. Where duty imposed is merely ministerial.**—*Hoff v. Jasper County*, 110 U. S. 53, 28 L. Ed. 68; *Shoemaker v. United States*, 147 U. S. 282, 37 L. Ed. 170.

**64. Judicial powers of the states.**—*Satterlee v. Matthewson*, 2 Pet. 380, 413, 7 L. Ed. 458; *Livingston v. Moore*, 7 Pet. 469, 546, 8 L. Ed. 751; *Baltimore, etc., R. Co. v. Nesbit*, 10 How. 395, 400, 13 L. Ed. 469; *Reetz v. Michigan*, 188 U. S. 505, 507, 47 L. Ed. 563. See, also, *Calder v. Bull*, 3 Dall. 386, 395, 1 L. Ed. 648; *Cooper v. Telfair*, 4 Dall. 14, 19, 1 L. Ed. 721. See, also, ante, "Powers of Body Politic with Respect to Distribution of Powers," VI, D, 3, d, (1).

There is no provision in the federal constitution which forbids a state from granting to a tribunal, whether called a court or a board of registration, the final determination of a legal question. *Reetz v. Michigan*, 188 U. S. 505, 507, 47 L. Ed. 563.

"Many executive officers, even those who are spoken of as purely ministerial officers, act judicially in the determination of facts in the performance of their official duties; and in so doing they do not exercise 'judicial power,' as that phrase is commonly used, and as it is used in the organic act, in conferring judicial power upon specified courts. The powers conferred on the board of medical examiners are nowise different in character in this respect from those exercised by the examiners of candidates to teach in our public schools, or by tax assessors or boards of equalization in determining, for purposes of taxation, the value of property. The ascertainment and determination of qualifications to practice medicine by a board of competent experts, appointed for that purpose, is not the exercise of a



(4) *The Departments Independent and Co-Ordinate; None to Coerce or Control Another*—(a) *Generally*.—Under the constitution, each of the three great departments of the government is, within its sphere, co-ordinate with and independent of the others. Neither may coerce nor control the others within the sphere of action assigned to them by the constitution; but all, rightfully done by either, is binding upon the others.<sup>65</sup>

**Unlimited Power Not Found in Any Department.**—There is no such thing, however, in the theory of our governments, state and national, as unlimited power in any of their branches. The executive, the legislative, and the judicial departments are all of limited and defined powers. There are limitations of such powers which arise out of the essential nature of all free governments; implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name.<sup>66</sup>

(b) *Independence of the Legislative Branch*—(aa) *Power of Judiciary to Declare Statutes Unconstitutional*.—Thus while an unconstitutional act of the legislature is not a law, but is absolutely void and binding upon no one,<sup>67</sup> and while

power which appropriately belongs to the judicial department of the government.” *Reetz v. Michigan*, 188 U. S. 505, 507, 47 L. Ed. 563.

The Pennsylvania constitution (article 4, § 1), provides that “the supreme court and the several courts of common pleas, shall, besides the powers heretofore usually exercised by them have the powers of a court of chancery, so far as relates to the perpetuating of testimony, the obtaining of evidence from places not within the state, and the care of the persons and estates of those who are non compos mentis; and the legislature shall vest in the said courts such other powers to grant relief in equity as shall be necessary, and may, from time to time, enlarge or diminish those powers, or vest them in such other courts as may judge proper for the due administration of justice.” Held, that under this section the legislature had authority to create a board of commissioners and vest it with the specific equitable power of selling the lands owned by a former state officer for the purpose of foreclosing a lien held by the state upon such lands for the satisfaction of a claim in favor of the state arising out of the defalcation of such officer, and for the foreclosure of which lien no previous provision or remedy existed. *Livingston v. Moore*, 7 Pet. 469, 549, 8 L. Ed. 751.

**65. Departments independent and co-ordinate.**—*Calder v. Bull*, 3 Dall. 386, 1 L. Ed. 648; *Worcester v. Georgia*, 6 Pet. 515, 570, 8 L. Ed. 483; *Dodge v. Woolsey*, 18 How. 331, 347, 15 L. Ed. 401; *Mississippi v. Johnson*, 4 Wall. 475, 18 L. Ed. 437; *United States v. Klein*, 13 Wall. 128, 129, 147, 20 L. Ed. 519; *United States v. Reese*, 92 U. S. 214, 221, 23 L. Ed. 563; *In re Tyler*, 149 U. S. 164, 182, 37 L. Ed. 689; *In re Swan*, 150 U. S. 637, 652, 37 L. Ed. 1207; *Burton v. United States*, 202 U. S. 344, 369, 50 L. Ed. 1057; *Hodges v. United States*, 203 U. S. 1, 19, 51 L. Ed. 65.

“Three co-ordinate branches of the government were established; the executive,

legislative and judicial. These branches are essential to the existence of any free government, and they should possess powers, in their respective spheres, co-extensive with each other. If the executive have not powers which will enable him to execute the functions of his office, the system is essentially defective; as those duties must, in such case, be discharged by one of the other branches. This would destroy that balance which is admitted to be essential to the existence of free government, by the wisest and most enlightened statesmen of the present day. It is not less important that the legislative power should be exercised by the appropriate branch of the government, than that the executive duties should devolve upon the proper functionary. And if the judicial power shall fall short of giving effect to the laws of the Union, the existence of the federal government is at an end.” (Opinion of McLean, J.) *Worcester v. Georgia*, 6 Pet. 515, 570, 8 L. Ed. 483.

“The congress is the legislative department of the government; the president is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance.” *Mississippi v. Johnson*, 4 Wall. 475, 500, 18 L. Ed. 437.

**66. Unlimited power not vested in any department.**—*Loan Ass'n v. Topeka*, 20 Wall. 655, 22 L. Ed. 455.

**67. Unconstitutional act not a law.**—*Vanhorne v. Dorrance*, 2 Dall. 304, 308, 1 L. Ed. 391; *Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 60; *Cohens v. Virginia*, 6 Wheat. 264, 414, 5 L. Ed. 257; *Craig v. Missouri*, 4 Pet. 410, 7 L. Ed. 903; *Worcester v. Georgia*, 6 Pet. 515, 571, 8 L. Ed. 483; *Ex parte Siebold*, 100 U. S. 371, 376, 25 L. Ed. 717; *Ex parte Yarbrough*, 110 U. S. 651, 654, 28 L. Ed. 274; *Virginia Coupon Cases*, 114 U. S. 269, 340, 29 L. Ed. 185; *Ex parte Royall*, 117 U. S. 241, 248, 29 L. Ed. 868; *Norton v. Selby*

the judicial department has the power, and it is its duty, when such an act comes before it for construction, to declare it so,<sup>68</sup> yet the duty is one of great delicacy and only to be performed where the repugnancy between the statute and the con-

County, 118 U. S. 425, 442, 30 L. Ed. 178; *Huntington v. Worthen*, 120 U. S. 97, 101, 30 L. Ed. 588; *The Chinese Exclusion Case*, 130 U. S. 581, 605, 32 L. Ed. 1068.

**68. Power and duty of court to declare it so.**—*Calder v. Bull*, 3 Dall. 386, 399, 1 L. Ed. 648; *Cooper v. Telfair*, 4 Dall. 14, 19, 1 L. Ed. 721; *Marbury v. Madison*, 1 Cranch 137, 177, 2 L. Ed. 60; *McCulloch v. Maryland*, 4 Wheat. 316, 423, 4 L. Ed. 579; *Cohens v. Virginia*, 6 Wheat. 264, 404, 5 L. Ed. 257; *Green v. Biddle*, 8 Wheat. 1, 5 L. Ed. 547; *Bank v. Dudley*, 2 Pet. 492, 7 L. Ed. 496; *Worcester v. Georgia*, 6 Pet. 515, 571, 8 L. Ed. 483; *Ableman v. Booth*, 21 How. 506, 520, 16 L. Ed. 169; *Mayor v. Cooper*, 6 Wall. 247, 251, 18 L. Ed. 851; *Hepburn v. Griswold*, 8 Wall. 603, 19 L. Ed. 513; *Broderick v. Magraw*, 8 Wall. 639, 19 L. Ed. 531; *United States v. Reese*, 92 U. S. 214, 221, 23 L. Ed. 563; *Board of Liquidation v. McComb*, 92 U. S. 531, 536, 23 L. Ed. 623; *Gordon v. United States*, 117 U. S., appx., 697, 705; *Chicago, etc., Ry. Co. v. Wellman*, 143 U. S. 339, 345, 36 L. Ed. 176; *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 554, 39 L. Ed. 759; *San Diego Land, etc., Co. v. National City*, 174 U. S. 739, 754, 43 L. Ed. 1154; *Fairbank v. United States*, 181 U. S. 283, 285, 45 L. Ed. 862; *Lottery Case*, 188 U. S. 321, 372, 47 L. Ed. 492; *Northern Securities Co. v. United States*, 193 U. S. 197, 350, 48 L. Ed. 679.

"Since the opinion in *Marbury v. Madison*, 1 Cranch 137, 177, 2 L. Ed. 60, was delivered, it has not been doubted that it is within judicial competency, by express provisions of the constitution or by necessary inference and implication, to determine whether a given law of the United States is or is not made in pursuance of the constitution, and to hold it valid or void accordingly." *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 554, 39 L. Ed. 759.

The judicial department of every government is the rightful expositor of its laws, and emphatically of its constitution, or supreme law. If in a case depending before any court, whether a court of last resort or not, a legislative act shall conflict with the constitution, it is admitted that the court must exercise its judgment on both, and that the constitution must control the act; the court must determine whether a repugnancy does or does not exist, and in making this determination must construe both instruments; that its construction of the one is authority, while its construction of the other is to be disregarded, is a proposition not to be admitted. *Bank v. Dudley*, 2 Pet. 492, 7 L. Ed. 496.

Whether a prosecution be under a federal or state law, the defendant has a right

to question the constitutionality of the law. *Worcester v. Georgia*, 6 Pet. 515, 569, 8 L. Ed. 483; *Ex parte Siebold*, 100 U. S. 371, 376, 25 L. Ed. 717; *Ex parte Royall*, 117 U. S. 241, 248, 29 L. Ed. 868.

"Within its legitimate sphere, congress is supreme, and beyond the control of the courts; but if it steps outside of its constitutional limitations, and attempts that which is beyond its reach, the courts are authorized to, and when called upon in due course of legal proceedings must, annul its encroachments upon the reserved power of the states and the people." *United States v. Reese*, 92 U. S. 214, 221, 23 L. Ed. 563.

Whether an act of congress is within the limits of its delegated power or not is a judicial question, to be decided by the courts, the constitution having, in express terms, declared that the judicial power shall extend to all cases arising under the constitution. *Gordon v. United States*, 117 U. S., appx., 697, 705.

"The house of representatives is not the final judge of its own power and privileges in cases in which the rights and liberties of the subject are concerned, but the legality of its action may be examined and determined by this court. That house is not the legislature, but only a part of it, and is therefore subject in its action to the laws, in common with all other bodies, officers, and tribunals within the commonwealth. Especially is it competent and proper for this court to consider whether its proceedings are in conformity with the constitution and laws, because, living under a written constitution, no branch or department of the government is supreme; and it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the constitution; and if they have not, to treat their acts as null and void." Opinion of Hoar, J., in *Burnham v. Morrissey*, 14 Gray 226, approved in *Kilbourn v. Thompson*, 103 U. S. 168, 199, 26 L. Ed. 377.

"The idea that any legislature, state or federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions." *Smyth v. Ames*, 169 U. S. 466, 527, 43 L. Ed. 819.

"Should congress," said the same great magistrate (Chief Justice Marshall), in *McCulloch v. Maryland*, 4 Wheat. 316, 423, 4 L. Ed. 579, 'under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to



stitution is clear and the conflict irreconcilable; the burden is upon those affirming the invalidity of the statute, and every doubt is to be resolved in favor of its constitutionality.<sup>69</sup>

the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.' And so Chief Justice Taney, referring to the extent and limits of the powers of congress: 'As the constitution itself does not draw the line, the question is necessarily one for judicial decision and depending altogether upon the words of the constitution.'" *Lottery Case*, 188 U. S. 321, 372, 47 L. Ed. 492.

The supreme court of a state, when required to give effect to a statute of the state, will examine its constitution, which they are sworn to maintain, to see if the legislative act be repugnant to it; and if repugnancy exist the statute must yield to the paramount law. The same principle governs the supreme tribunal of the Union. (*Opinion of McLean, J.*) *Worcester v. Georgia*, 6 Pet. 515, 571, 8 L. Ed. 483.

Even the judge of a county court, in fidelity to the constitution as the supreme law of the land, is bound to refuse to give effect to any statute that is repugnant to that law; therefore such a court has power to declare a statute unconstitutional. *Lent v. Tillson*, 140 U. S. 316, 330, 35 L. Ed. 419.

Some doubt was at first entertained as to the constitutional authority of the federal supreme court to declare an act of congress unconstitutional (see *Cooper v. Telfair*, 4 Dall. 14, 19, 1 L. Ed. 721), but as said by Mr. Justice Washington, in *Green v. Biddle*, 8 Wheat. 1, 91, 92; 5 L. Ed. 547, the doctrine is now too firmly established to be shaken.

"The power to declare a law unconstitutional is always exercised with reluctance; but the duty to do so, in a proper case, cannot be declined, and must be discharged in accordance with the deliberate judgment of the tribunal in which the validity of the enactment is directly drawn in question." *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 554, 39 L. Ed. 759.

**69. Statute to be invalidated only in clear cases.**—*Calder v. Bull*, 3 Dall. 386, 399, 1 L. Ed. 648; *Cooper v. Telfair*, 4 Dall. 14, 18, 1 L. Ed. 721; *Fletcher v. Peck*, 6 Cranch 87, 128, 3 L. Ed. 162; *Dartmouth College v. Woodward*, 4 Wheat. 518, 625, 4 L. Ed. 629; *Ogden v. Saunders*, 12 Wheat. 213, 270, 294, 6 L. Ed. 606; *Brown v. Maryland*, 12 Wheat. 419, 436, 6 L. Ed. 678; *Parsons v. Bedford*, 3 Pet. 433, 7 L. Ed. 732; *Briscoe v. Commonwealth Bank*, 8 Pet. 118, 8 L. Ed. 887; *New York v. Miln*, 9 Pet. 85, 9 L. Ed. 60; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 553, 9 L. Ed. 773; *United States v. Coombs*, 12 Pet. 72, 9 L. Ed. 1004; *Brewer v. Blougher*,

14 Pet. 178, 10 L. Ed. 408; *License Cases*, 5 How. 504, 619, 12 L. Ed. 256; *Butler v. Pennsylvania*, 10 How. 402, 13 L. Ed. 472; *Mayor v. Cooper*, 6 Wall. 247, 251, 18 L. Ed. 851; *Hepburn v. Griswold*, 8 Wall. 603, 609, 19 L. Ed. 513; *Broderick v. Magraw*, 8 Wall. 639, 19 L. Ed. 531, *Miller v. United States*, 11 Wall. 268, 309, 20 L. Ed. 135; *Legal Tender Cases*, 12 Wall. 457, 531, 20 L. Ed. 287; *Township of Pine Grove v. Talcott*, 19 Wall. 666, 673, 22 L. Ed. 227; *Munn v. Illinois*, 94 U. S. 113, 123, 24 L. Ed. 77; *Sinking-Fund Cases*, 99 U. S. 700, 718, 25 L. Ed. 496; *Livingston County v. Darlington*, 101 U. S. 407, 410, 25 L. Ed. 1015; *United States v. Harris*, 106 U. S. 629, 635, 27 L. Ed. 290; *Montclair v. Ramsdell*, 107 U. S. 147, 155, 27 L. Ed. 431; *Antoni v. Greenhow*, 107 U. S. 769, 775, 27 L. Ed. 468; *Grenada County Supervisors v. Brogden*, 112 U. S. 261, 268, 28 L. Ed. 704; *Presser v. Illinois*, 116 U. S. 252, 269, 29 L. Ed. 615; *Powell v. Pennsylvania*, 127 U. S. 678, 686, 32 L. Ed. 253; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 475, 478, 38 L. Ed. 1047; *Plumley v. Massachusetts*, 155 U. S. 461, 479, 39 L. Ed. 223; *Hooper v. California*, 155 U. S. 648, 657, 39 L. Ed. 297; *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 554, 39 L. Ed. 759; *Pollock v. Farmers' Loan & Trust Co.*, 158 U. S. 601, 617, 39 L. Ed. 1108; *Sweet v. Rechel*, 159 U. S. 380, 392, 40 L. Ed. 188; *United States v. Gettysburg Electric R. Co.*, 160 U. S. 668, 680, 40 L. Ed. 576; *Brown v. Walker*, 161 U. S. 591, 596, 40 L. Ed. 819; *Nichol v. Ames*, 173 U. S. 509, 43 L. Ed. 786; *Henderson Bridge Co. v. Henderson*, 173 U. S. 592, 615, 43 L. Ed. 823; *San Diego Land, etc., Co. v. National City*, 174 U. S. 739, 754, 43 L. Ed. 1154; *Houston, etc., R. Co. v. Texas*, 177 U. S. 66, 90, 44 L. Ed. 673; *Chesapeake, etc., R. Co. v. Kentucky*, 179 U. S. 388, 394, 45 L. Ed. 244; *Fairbank v. United States*, 181 U. S. 283, 285, 45 L. Ed. 862; *Booth v. Illinois*, 184 U. S. 425, 431, 46 L. Ed. 623; *Reid v. Colorado*, 187 U. S. 137, 153, 47 L. Ed. 108; *The Japanese Immigrant Case*, 189 U. S. 86, 101, 47 L. Ed. 721; *Northern Securities Co. v. United States*, 193 U. S. 197, 350, 48 L. Ed. 679; *Martin v. District of Columbia*, 205 U. S. 135, 139, 51 L. Ed. 743.

"The constitutionality of an act of congress is a matter always requiring the most careful consideration. The presumptions are in favor of constitutionality, and before a court is justified in holding that the legislative power has been exercised beyond the limits granted, or in conflict with restrictions imposed by the fundamental law, the excess or conflict should be clear. And yet, when clear, if written constitutions are to be regarded as of value, the duty of the court is plain



**Court Will Not Volunteer an Opinion as to Constitutionality.**—The court will avoid volunteering an opinion on any question involving the construc-

to uphold the constitution, although in so doing the legislative enactment falls." *Fairbank v. United States*, 181 U. S. 283, 285, 45 L. Ed. 862.

"The principle is universal that legislation, whether by congress or by a state, must be taken to be valid, unless the contrary is made clearly to appear." *Reid v. Colorado*, 187 U. S. 137, 153, 47 L. Ed. 108.

It is incumbent upon those who deny the constitutionality of an act of congress to show clearly that it is in violation of the provisions of the constitution. It is not sufficient for them that they succeed in raising a doubt. *Legal Tender Cases*, 12 Wall. 457, 531, 20 L. Ed. 287.

Every reasonable presumption must be indulged in favor of the validity of such enactment. It must be regarded as valid, unless it can be clearly shown to be in conflict with the constitution. *Sweet v. Rechel*, 159 U. S. 380, 392, 40 L. Ed. 188.

"Every intendment is in favor of its constitutionality. Such act is presumed to be valid unless its invalidity is plain and apparent; no presumption of invalidity can be indulged in; it must be shown clearly and unmistakably. This rule has been stated and followed by this court from the foundation of the government." *United States v. Gettysburg Electric R. Co.*, 160 U. S. 668, 680, 40 L. Ed. 576.

"In the case of all acts of congress, such interpretation ought to be adopted as, without doing violence to the import of the words used, will bring them into harmony with the constitution. An act of congress must be taken to be constitutional unless the contrary plainly and palpably appears." *The Japanese Immigrant Case*, 189 U. S. 86, 101, 47 L. Ed. 721.

Where a statute has stood for a long time unchallenged it should not be declared unconstitutional if, by a reasonable construction of its meaning, it can be avoided. *Martin v. District of Columbia*, 205 U. S. 135, 139, 51 L. Ed. 743.

"Instead of seeking for excuses for holding acts of the legislative power to be void by reason of their conflict with the constitution, or with certain supposed fundamental principles of civil liberty, the effort should be to reconcile them if possible, and not to hold the law invalid, unless, as was observed by Mr. Chief Justice Marshall, in *Fletcher v. Peck*, 6 Cranch 87, 128, 3 L. Ed. 162, 'the opposition between the constitution and the law be such that the judge feels a clear and strong conviction of their incompatibility with each other.'" *Brown v. Walker*, 161 U. S. 591, 596, 40 L. Ed. 819.

**Particular clause violated must be specified.**—The particular clause of the constitution must be specified and the act admit of no reasonable construction in

harmony with its meaning. *Township of Pine Grove v. Talcott*, 19 Wall. 666, 673, 22 L. Ed. 227.

**Where statute will bear two constructions.**—If the statute will bear two constructions, one of which would be within the constitutional power of congress, or the legislature, to enforce, and the other a transgression of the power, that must be adopted which is consistent with the constitution. It is always a presumption that the legislature acts within the scope of its authority. *Miller v. United States*, 11 Wall. 268, 309, 20 L. Ed. 135; *United States v. Coombs*, 12 Pet. 72, 9 L. Ed. 1004; *Grenada County Supervisors v. Brogden*, 112 U. S. 261, 268, 28 L. Ed. 704.

Thus it is said, that even if it were well settled that a separate coach law was unconstitutional as applied to interstate commerce, a law applying on its face to all passengers should be limited by construction so as to make it apply to such as the legislature were competent to deal with—that is, to intrastate passengers. *Chesapeake, etc., R. Co. v. Kentucky*, 179 U. S. 388, 394, 45 L. Ed. 244.

**Where statute may or may not be within legislative authority according to circumstances.**—It is a well-settled rule of constitutional exposition, that if a statute may or may not be, according to circumstances, within the limits of legislative authority, the existence of the circumstances necessary to support it must be presumed. *Fletcher v. Peck*, 6 Cranch 87, 3 L. Ed. 162; *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Sinking-Fund Cases*, 99 U. S. 700, 718, 25 L. Ed. 496; *Antoni v. Greenhow*, 107 U. S. 769, 775, 27 L. Ed. 468; *Sweet v. Rechel*, 159 U. S. 380, 392, 40 L. Ed. 188.

**State enactments.**—When it is alleged that a state enactment invades or destroys rights secured by the constitution of the United States, a judicial question arises, and the courts, federal and state, must meet the issue, taking care always not to entrench upon the authority belonging to a different department, nor to disregard a statute unless it be unmistakably repugnant to the fundamental law. *San Diego Land, etc., Co. v. National City*, 174 U. S. 739, 754, 43 L. Ed. 1154.

"A deliberate intention on the part of a legislative body to violate the organic law of the state under which it exists and to which the members have sworn obedience, is not to be lightly indulged. The existence of such intention should be proved beyond doubt or cavil from the very acts themselves which are under discussion, and if it be reasonably possible to so construe them as to render them valid, a proper respect for the legislative department calls for such construction rather than one which invalidates them,

tion of the constitution, where the case itself does not bring the question directly before them, and make it their duty to decide upon it.<sup>70</sup>

**Must Be an Actual Adversary Proceeding.**—The theory that parties have an appeal from the legislature to the courts, and that the latter are given an immediate and general supervision of the constitutionality of the acts of the former, is not true.<sup>71</sup> Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, state or federal,

because they were enacted with a direct purpose to violate the state constitution." *Houston, etc., R. Co. v. Texas*, 177 U. S. 66, 90, 44 L. Ed. 673.

To pronounce a law of one of the sovereign states of this Union to be a violation of the constitution is a solemn function, demanding the gravest and most deliberate consideration; and a law of one of the states should never be so denominated by the federal supreme court, if it can upon any other principle be correctly explained. *Butler v. Pennsylvania*, 10 How. 402, 13 L. Ed. 472; *Plumley v. Massachusetts*, 155 U. S. 461, 479, 39 L. Ed. 223.

If it be doubtful whether the power is granted, prohibited or reserved, then, by the settled rules and course of this court, its decision must be in favor of the validity of the state law. *Fletcher v. Peck*, 6 Cranch 87, 128, 3 L. Ed. 162; *Brown v. Maryland*, 12 Wheat. 419, 436, 6 L. Ed. 678; *New York v. Miln* (opinion of Baldwin, J.), 11 Pet. 102, 153, 9 L. Ed. 648.

"If a plain collision arises, the subordinate law must yield to that which is paramount; but this collision must not be sought by the exercise of ingenuity or refinement of reasoning; it ought to be avoided, whenever reason or authority will authorize such a construction of a law, 'ut magis valeat quam pereat.'" (Opinion of Baldwin, J.) *New York v. Miln*, 11 Pet. 102, 153o, 9 L. Ed. 648.

It is not enough to fancy some remote or indirect repugnance to acts of congress—a "potential inconvenience"—in order to annul the laws of sovereign states, and overturn the deliberate decisions of state tribunals. There must be an actual collision, a direct inconsistency, and that depreciated case of "clashing sovereignties," in order to demand the judicial interference of the supreme court to reconcile them. (Opinion of Woodbury, J.) *License Cases*, 5 How. 504, 619, 12 L. Ed. 256. *Accord, Antoni v. Greenhow*, 107 U. S. 769, 775, 27 L. Ed. 468.

"If a state of facts could exist that would justify the change in a remedy which has been made, we must presume it did exist, and that the law was passed on that account." *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Antoni v. Greenhow*, 107 U. S. 769, 775, 27 L. Ed. 468.

The presumption is in favor of every legislative act, and the whole burden of proof lies on the one who denies its con-

stitutionality. *Fletcher v. Peck*, 6 Cranch 87, 128, 3 L. Ed. 162; *Dartmouth College v. Woodward*, 4 Wheat. 518, 625, 4 L. Ed. 629; *Brown v. Maryland*, 12 Wheat. 419, 436, 6 L. Ed. 678; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 583m, 9 L. Ed. 773.

In considering the constitutionality of a state statute, the supreme court cannot wholly neglect the long-settled law and common understanding of a particular state in considering the plaintiff's rights. It is bound to be very cautious in coming to the conclusion that the fourteenth amendment has upset what thus has been established and accepted for a long time. Even the incidents of ownership may be cut down by the peculiar laws and usages of a state. *Eldridge v. Trezevant*, 160 U. S. 452, 466, 40 L. Ed. 490; *Otis Co. v. Ludlow Mfg. Co.*, 201 U. S. 140, 154, 50 L. Ed. 696.

**70. Court will not volunteer an opinion as to constitutionality.**—*Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 553, 9 L. Ed. 773; *Chicago, etc., R. Co. v. Wellman*, 143 U. S. 339, 445, 36 L. Ed. 176; *Baker v. Grice*, 169 U. S. 284, 292, 42 L. Ed. 748.

In cases where constitutional questions were involved, unless four judges of the court concurred, in opinion, thus making the decision that of a majority of the whole court, (the court then being composed of seven members) it was not the practice of the court, to deliver any judgment, except in cases of absolute necessity. Four judges not having concurred in opinion as to the constitutional questions argued in certain cases, the court directed that the cases should be reargued at the next term. *Briscoe v. Commonwealth Bank*, 8 Pet. 118, 8 L. Ed. 887.

**Should be heard by a full court.**—Again, the court has refused to take up cases involving constitutional questions, when the court was not full. *New York v. Miln*, 9 Pet. 85, 9 L. Ed. 60.

"It is almost the undeviating rule of the courts, both state and federal, not to decide constitutional questions until the necessity for such decision arises in the record before the court." *Baker v. Grice*, 169 U. S. 284, 292, 42 L. Ed. 748.

**71. Courts not possessed of general power of revision.**—*Chicago, etc., R. Co. v. Wellman*, 143 U. S. 339, 344, 36 L. Ed. 176.



and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not.<sup>72</sup> But such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.<sup>73</sup>

**Cannot Avoid Decision in Proper Case.**—But where the case demands a decision upon the constitutionality of a statute, the court cannot pass it by, but is bound to decide either that it is or is not a constitutional measure.<sup>74</sup>

**Statute Void in Part and Valid in Part.**—See the title STATUTES.

(bb) *Judicial Control of Legislative Discretion*—(aaa) *Generally*.—The judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers. That power has been or may be abused, or that it has not been wisely exercised, or that the measures adopted are untimely and inexpedient and not the wisest, best, or most appropriate means to a desired end, is no ground for declaring them void, so long as the legislature had the power to do what it actually did. Within the limits of its powers, its discretion is absolute and subject to no review by the courts. Courts do not sit in judgment on the wisdom of legislative or constitutional enactments. This is a general principle; but it is especially true of federal courts when they are asked to interpose in a controversy between a state and its citizens. Likewise, the wisdom and the discretion of congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from the abuse of the powers which have been granted to that body. They are the restraints on which the people must often rely solely in all representative governments.<sup>75</sup>

**72. Court must decide where constitutionality actually involved.**—Chicago, etc., R. Co. v. Wellman, 143 U. S. 339, 345, 36 L. Ed. 176.

**73. But controversy must be actual.**—Chicago, etc., R. Co. v. Wellman, 143 U. S. 339, 345, 36 L. Ed. 176.

Courts may be easily misled into doing grievous wrong to the public, and should be careful not to declare legislative acts unconstitutional upon agreed and general statements, and without the fullest disclosure of all material facts. Chicago, etc., R. Co. v. Wellman, 143 U. S. 339, 346, 36 L. Ed. 176.

**74. Cannot avoid decision in proper case.**—McCulloch v. Maryland, 4 Wheat. 316, 423, 4 L. Ed. 579; Cohens v. Virginia, 6 Wheat. 264, 404, 5 L. Ed. 257; Bank v. Dudley, 2 Pet. 492, 7 L. Ed. 496; Worcester v. Georgia, 6 Pet. 515, 572, 8 L. Ed. 483; Board of Liquidation v. McComb, 92 U. S. 531, 536, 23 L. Ed. 623; Sinking-Fund Cases, 99 U. S. 700, 718, 25 L. Ed. 496; Robb v. Connolly, 111 U. S. 624, 637, 28 L. Ed. 542; Ex parte Royall, 117 U. S. 241, 248, 29 L. Ed. 868; Powell v. Pennsylvania, 127 U. S. 678, 686, 688, 32 L. Ed. 253; Chicago, etc., R. Co. v. Wellman, 143 U. S. 339, 345, 36 L. Ed. 176.

"It is most true, that this court will not take jurisdiction if it should not; but it

is equally true, that it must take jurisdiction, if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur, which we would gladly avoid; but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously to perform our duty." Marshall, C. J., delivering the opinion in Cohens v. Virginia, 6 Wheat. 264, 404, 5 L. Ed. 257.

As to the duty of the courts, state and federal, to sustain the supremacy of the federal constitution, see ante, "Duty of Courts to Uphold and Maintain the Supremacy of the Federal Constitution, Treaties and Laws," IV, B, 2, e.

**75. Judicial control of legislative discretion.**—Houston v. Moore, 5 Wheat. 1, 45, 5 L. Ed. 19; Ex parte Kearney, 7 Wheat. 38, 45, 5 L. Ed. 391; Gibbons v. Ogden, 9 Wheat. 1, 6 L. Ed. 23; Providence Bank v. Billings, 4 Pet. 514, 563, 7 L. Ed. 939; Briscoe v. Bank, 11 Pet. 257, 328a, 9 L.



(bbb) *Legislative Discretion as to Occasion or Necessity, Choice of Means, etc.*—The government, possessing the powers which are to be exercised for

Ed. 709; *Scott v. Sandford*, 19 How. 393, 405, 15 L. Ed. 691; *Witherspoon v. Duncan*, 4 Wall. 210, 217, 18 L. Ed. 339; *Lane County v. Oregon*, 7 Wall. 71, 19 L. Ed. 101; *Veazie Bank v. Fenno*, 8 Wall. 533, 548, 19 L. Ed. 482; *St. Louis v. Ferry Co.*, 11 Wall. 423, 20 L. Ed. 192; *Legal Tender Cases*, 12 Wall. 457, 551, 562, 20 L. Ed. 287; *State Tax on Foreign-Held Bonds*, 15 Wall. 300, 21 L. Ed. 179; *Township of Pine Grove v. Talcott*, 19 Wall. 666, 677, 22 L. Ed. 227; *Railroad Co. v. Maryland*, 21 Wall. 456, 457, 471, 22 L. Ed. 678; *United States v. Reese*, 92 U. S. 214, 221, 23 L. Ed. 563; *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155, 164, 24 L. Ed. 94; *Munn v. Illinois*, 94 U. S. 113, 132, 134, 24 L. Ed. 77; *Davidson v. New Orleans*, 96 U. S. 97, 104, 24 L. Ed. 616; *Kirtland v. Hotchkiss*, 100 U. S. 491, 498, 25 L. Ed. 558; *Bridge Co. v. United States*, 105 U. S. 470, 482, 26 L. Ed. 1143; *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 520, 29 L. Ed. 463; *Spencer v. Merchant*, 125 U. S. 345, 355, 31 L. Ed. 763; *Powell v. Pennsylvania*, 127 U. S. 678, 686, 32 L. Ed. 253; *Ex parte Terry*, 128 U. S. 289, 309, 32 L. Ed. 405; *Charlotte, etc., R. v. Gibbes*, 142 U. S. 386, 35 L. Ed. 1051; *United States v. Des Moines Nav., etc., Co.*, 142 U. S. 510, 544, 35 L. Ed. 1099; *In re Rapiet*, 143 U. S. 110, 135, 36 L. Ed. 93; *Chicago, etc., R. Co. v. Wellman*, 143 U. S. 339, 344, 36 L. Ed. 176; *People v. Squire*, 145 U. S. 175, 36 L. Ed. 666; *Fong Yue Ting v. United States*, 149 U. S. 698, 731, 37 L. Ed. 905; *Angle v. Chicago, etc., R. Co.*, 151 U. S. 1, 98, 38 L. Ed. 55; *New York, etc., R. Co. v. Bristol*, 151 U. S. 556, 57, 38 L. Ed. 269; *Bryan v. Board of Education*, 151 U. S. 639, 653, 38 L. Ed. 297; *New York, etc., R. Co. v. Pennsylvania*, 153 U. S. 628, 641, 38 L. Ed. 846; *Connecticut v. Woodruff*, 153 U. S. 689, 38 L. Ed. 869; *Postal Tel. Cable Co. v. Charleston*, 153 U. S. 692, 699, 38 L. Ed. 871; *United States v. Union Pac. R. Co.*, 160 U. S. 1, 35, 38, 40 L. Ed. 319; *Hennington v. Georgia*, 163 U. S. 299, 304, 41 L. Ed. 166; *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112, 155, 41 L. Ed. 369; *Castillo v. McConico*, 168 U. S. 674, 682, 42 L. Ed. 622; *Chicago, etc., R. Co. v. Nebraska*, 170 U. S. 57, 77, 42 L. Ed. 948; *Atchison, etc., R. Co. v. Matthews*, 174 U. S. 96, 102, 43 L. Ed. 909; *Chicago, etc., R. Co. v. Thompkins*, 176 U. S. 167, 173, 44 L. Ed. 417; *Knowlton v. Moore*, 178 U. S. 41, 44 L. Ed. 969; *Yazoo, etc., R. Co. v. Adams*, 180 U. S. 1, 25, 45 L. Ed. 395; *Treat v. White*, 181 U. S. 264, 45 L. Ed. 853; *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 110, 46 L. Ed. 92; *Orr v. Gilman*, 183 U. S. 278, 283, 46 L. Ed. 196; *Louisville, etc., R. Co. v. Kentucky*, 183 U. S. 503, 512, 46 L. Ed. 298; *Patton v. Brady*, 184 U. S.

608, 46 L. Ed. 713; *Lottery Cases*, 188 U. S. 321, 363, 47 L. Ed. 492; *Otis v. Parker*, 187 U. S. 606, 608, 47 L. Ed. 323; *Lottery Case*, 188 U. S. 321, 363, 47 L. Ed. 492; *Atkins v. Kansas*, 191 U. S. 207, 223, 48 L. Ed. 148; *Northern Securities Co. v. United States*, 193 U. S. 197, 380, 48 L. Ed. 679; *McCray v. United States*, 195 U. S. 27, 54, 49 L. Ed. 78; *Jacobson v. Massachusetts*, 197 U. S. 11, 22, 49 L. Ed. 643; *Kehrer v. Stewart*, 197 U. S. 60, 70, 49 L. Ed. 663; *Cunnius v. Reading School Dist.* 198 U. S. 458, 469, 49 L. Ed. 1125; *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, 50 L. Ed. 204; *Hodges v. United States*, 203 U. S. 1, 19, 51 L. Ed. 65; *St. Mary's Petroleum Co. v. West Virginia*, 203 U. S. 183, 192, 51 L. Ed. 144; *Northwestern Nat. Life Ins. Co. v. Riggs*, 203 U. S. 243, 51 L. Ed. 168; *Whitfield v. Aetna Life Ins. Co.*, 205 U. S. 489, 495, 51 L. Ed. 895.

"The supremacy of the law is the foundation rock upon which our institutions rest. The law, this court said in *United States v. Lee*, 106 U. S. 196, 220, 27 L. Ed. 171, is the only supreme power in our system of government. And no higher duty rests upon this court than to enforce, by its decrees, the will of the legislative department of the government, as expressed in a statute, unless such statute be plainly and unmistakably in violation of the constitution. If the statute is beyond the constitutional power of congress, the court would fail in the performance of a solemn duty if it did not so declare. But if nothing more can be said than that congress has erred—and the court must not be understood as saying that it has or has not erred—the remedy for the error and the attendant mischief is the selection of new senators and representatives, who, by legislation, will make such changes in existing statutes, or adopt such new statutes, as may be demanded by their constituents and be consistent with law." *Northern Securities Co. v. United States*, 193 U. S. 197, 350, 48 L. Ed. 679.

**Wisdom, policy or expediency of the laws.**—*Marbury v. Madison*, 1 Cranch 137, 170, 171, 2 L. Ed. 60; *McCulloch v. Maryland*, 4 Wheat. 316, 413, 423, 4 L. Ed. 579; *Satterlee v. Matthewson*, 2 Pet. 380, 412, 7 L. Ed. 458; *Providence Bank v. Billings*, 4 Pet. 514, 563, 7 L. Ed. 939; *United States v. Arredondo*, 6 Pet. 691, 729, 8 L. Ed. 547; *Briscoe v. Bank*, 11 Pet. 257, 328a, 9 L. Ed. 709; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 583dd, 9 L. Ed. 773; *Brewer v. Blougher*, 14 Pet. 178, 198, 10 L. Ed. 408; *Scott v. Sandford*, 19 How. 393, 405, 15 L. Ed. 691; *License Tax Cases*, 5 Wall. 462, 469, 18 L. Ed. 497; *Livingston County v. Darlington*, 101 U. S. 407, 416, 25 L. Ed. 1015; *Head Money Cases*, 112 U. S. 580, 599, 28 L. Ed. 798;

protection and security, is clothed with authority to determine the occasion

*Yick Wo v. Hopkins*, 118 U. S. 356, 370, 30 L. Ed. 220; *Mugler v. Kansas*, 123 U. S. 623, 662, 31 L. Ed. 205; *Spencer v. Merchant*, 125 U. S. 345, 355, 31 L. Ed. 763; *Powell v. Pennsylvania*, 127 U. S. 678, 685, 32 L. Ed. 253; *Cope v. Cope*, 137 U. S. 682, 685, 34 L. Ed. 832; *United States v. Union Pac. R. Co.*, 160 U. S. 1, 35, 38, 40 L. Ed. 319; *Hennington v. Georgia*, 163 U. S. 299, 304, 41 L. Ed. 166; *Atchison, etc., R. Co. v. Matthews*, 174 U. S. 96, 102, 43 L. Ed. 909; *Chicago, etc., R. Co. v. Tompkins*, 176 U. S. 167, 173, 44 L. Ed. 417; *Knowlton v. Moore*, 178 U. S. 41, 44 L. Ed. 969; *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 110, 46 L. Ed. 92; *Orr v. Gilman*, 183 U. S. 278, 283, 46 L. Ed. 196; *Louisville, etc., R. Co. v. Kentucky*, 183 U. S. 503, 512, 46 L. Ed. 298; *Booth v. Illinois*, 184 U. S. 425, 431, 46 L. Ed. 623; *Atkin v. Kansas*, 191 U. S. 207, 223, 48 L. Ed. 148; *McCray v. United States*, 195 U. S. 27, 53, 49 L. Ed. 78; *Cunnius v. Reading School District*, 198 U. S. 458, 469, 49 L. Ed. 1125; *Northwestern Nat. Life Ins. Co. v. Riggs*, 203 U. S. 243, 51 L. Ed. 168; *Hodges v. United States*, 203 U. S. 1, 19, 51 L. Ed. 65; *Whitfield v. Aetna Life Ins. Co.*, 205 U. S. 489, 495, 51 L. Ed. 895.

"As a court we may not interpose our personal views as to the wisdom or policy of forms of legislation. It cannot be too often said that forms are matters of legislative consideration; results and power only are to be considered by the courts." *Atchison, etc., R. Co. v. Matthews*, 174 U. S. 96, 103, 43 L. Ed. 909.

In deciding on prerogative or legislative grants the court can look only to the power and right by which they are made; questions of policy, expediency or discretion, are not judicial ones; if necessity or public good brings a power into action, the court cannot judge of its degree or extent. To do so would be to pass the line which circumscribes the judicial department and to tread on legislative ground. (Opinion of Baldwin, J.) *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 583dd, 9 L. Ed. 773; *McCulloch v. Maryland*, 4 Wheat. 316, 413, 423, 4 L. Ed. 579.

The same rule applies to all officers or tribunals in whom a discretionary power is invested by law, without any appeal or supervisory power in any other tribunal being provided; their acts done in the exercise of an honest and sound discretion, can be invalidated only by fraud in the party who claims under it, or an abuse or an excess of authority in the depository of the power. *Marbury v. Madison*, 1 Cranch 137, 170, 171, 2 L. Ed. 60; *Satterlee v. Matthewson*, 2 Pet. 380, 412, 7 L. Ed. 458; *Providence Bank v. Billings*, 4 Pet. 514, 563, 7 L. Ed. 939; *United States v.*

*Arredondo*, 6 Pet. 691, 729, 8 L. Ed. 547; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 583dd, 9 L. Ed. 773.

It is not the province of the court to decide upon the justice or injustice, the policy or impolicy of the laws. The decision of that question belongs to the political or law making power; to those who formed the sovereignty and framed the constitution. The duty of the court is to interpret the instrument they have framed, with the best lights obtainable, and to administer it according to its true intent and meaning when it was adopted. (Opinion of Taney, C. J.) *Scott v. Sandford*, 19 How. 393, 405, 15 L. Ed. 691.

The expediency and moral tendency of a law is a question for legislative cognizance. Legislatures are as competent as the courts to deal with such subjects, and in fixing a standard of their own, are beyond judicial control. *Brewer v. Blougher*, 14 Pet. 178, 198, 10 L. Ed. 408; *Cope v. Cope*, 137 U. S. 682, 685, 34 L. Ed. 832.

If a statute is mischievous in its tendencies the responsibility therefor rests upon legislators, not upon the courts. *Atkin v. Kansas*, 191 U. S. 207, 223, 48 L. Ed. 148.

It is not a part of the functions of the courts to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove its determination of such questions. The power which the legislature has to promote the general welfare is very great, and the discretion which that department of the government has, in the employment of means to that end, is very large. While both its power and its discretion must be so exercised as not to impair the fundamental rights of life, liberty, and property; and while, according to the principles upon which our institutions rest, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself; yet, "in many cases of mere administration, the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of public opinion or by means of the suffrage." *Yick Wo v. Hopkins*, 118 U. S. 356, 370, 30 L. Ed. 220; *Powell v. Pennsylvania*, 127 U. S. 678, 685, 32 L. Ed. 253.

Speaking upon this point Chief Justice Chase says: "This court can know nothing of public policy except from the constitution and the laws, and the course of administration and decision. It has no



on which the powers shall be called forth; and its determination, so far as the

legislative powers. It cannot amend or modify any legislative acts. It cannot examine questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort must, in general be addressed to the legislature. Questions of policy determined there are concluded here." License Tax Cases, 5 Wall. 462, 469, 18 L. Ed. 497. Accord: *Whitfield v. Etna Life Ins. Co.*, 205 U. S. 489, 495, 51 L. Ed. 895.

It is no part of the judicial function to determine the wisdom or folly of a regulation by the legislative body in respect to matters of a police nature. *L'Hote v. New Orleans*, 177 U. S. 587, 597, 44 L. Ed. 899.

When the legislature has prescribed that all persons shall cease from all labor, works of necessity and charity excepted, one day in seven, it is not for the judiciary to say that the legislature should have prescribed one day rather than another, whether the day fixed be the Sabbath day or some other. *Hennington v. Georgia*, 163 U. S. 299, 304, 41 L. Ed. 166.

Where a municipal corporation is invested with authority to grant exclusive privileges or franchises, the length of time for which they shall be granted, in the absence of constitutional or statutory provisions regulating the same, is a matter within the discretion of the municipal authority; and such a privilege or franchise cannot be declared void by the courts upon grounds of public policy merely because in the opinion of the court it was granted for an unreasonable length of time. *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, 50 L. Ed. 204.

**Abuse of power.**—*Houston v. Moore*, 5 Wheat. 1, 45, 5 L. Ed. 19; *Ex parte Kearney*, 7 Wheat. 38, 45, 5 L. Ed. 391; *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23; *Providence Bank v. Billings*, 4 Pet. 514, 563, 7 L. Ed. 939; *Briscoe v. Bank*, 11 Pet. 257, 328a, 9 L. Ed. 709; *Witherspoon v. Duncan*, 4 Wall. 210, 217, 18 L. Ed. 339; *Lane County v. Oregon*, 7 Wall. 71, 19 L. Ed. 101; *St. Louis v. Ferry Co.*, 11 Wall. 423, 20 L. Ed. 192; *Legal Tender Cases*, 12 Wall. 457, 562, 20 L. Ed. 287; *State Tax on Foreign-Held Bonds*, 15 Wall. 300, 21 L. Ed. 179; *Township of Pine Grove v. Talcott*, 19 Wall. 666, 677, 22 L. Ed. 227; *Railroad Co. v. Maryland*, 21 Wall. 456, 457, 471, 22 L. Ed. 678; *Munn v. Illinois*, 94 U. S. 113, 134, 24 L. Ed. 77; *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155, 164, 24 L. Ed. 94; *Davidson v. New Orleans*, 96 U. S. 97, 104, 24 L. Ed. 616; *Kirtland v. Hotchkiss*, 100 U. S. 491, 497, 25 L. Ed. 558; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. Ed. 238; *Powell v. Pennsylvania*, 127 U. S. 678, 686, 32 L. Ed. 253; *Ex parte Terry*, 128 U. S. 289, 309, 32 L. Ed. 405; *In re Rapiet*, 143 U. S. 110, 135, 36 L. Ed. 93; *Chicago, etc., R. Co. v. Well-*

*man*, 143 U. S. 339, 344, 36 L. Ed. 176; *New York, etc., R. Co. v. Bristol*, 151 U. S. 556, 570, 38 L. Ed. 269; *Bryan v. Board of Education*, 151 U. S. 639, 653, 38 L. Ed. 297; *New York, etc., R. Co. v. Pennsylvania*, 153 U. S. 628, 641, 38 L. Ed. 846; *Connecticut v. Woodruff*, 153 U. S. 689, 38 L. Ed. 869; *Postal Tel. Cable Co. v. Charleston*, 153 U. S. 692, 699, 38 L. Ed. 871; *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 561, 39 L. Ed. 759; *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112, 155, 157, 41 L. Ed. 369; *Castillo v. McConico*, 168 U. S. 674, 682, 42 L. Ed. 622; *L'Hote v. New Orleans*, 177 U. S. 587, 44 L. Ed. 899; *Stearns v. Minnesota*, 179 U. S. 223, 243, 45 L. Ed. 162; *Yazoo, etc., R. Co. v. Adams*, 180 U. S. 1, 25, 45 L. Ed. 395; *Downes v. Bidwell*, 182 U. S. 244, 283, 45 L. Ed. 1088; *Lottery Case*, 188 U. S. 321, 47 L. Ed. 492; *Campagne Francaise, etc. v. Board of Health*, 186 U. S. 380, 389, 392, 46 L. Ed. 1209; *Billings v. Illinois*, 188 U. S. 97, 102, 47 L. Ed. 400; *McCray v. United States*, 195 U. S. 27, 54, 56, 49 L. Ed. 78; *Jacobson v. Massachusetts*, 197 U. S. 11, 22, 49 L. Ed. 643; *Kehr v. Stewart*, 197 U. S. 60, 70, 49 L. Ed. 663; *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, 50 L. Ed. 204; *Michigan Cent. R. Co. v. Powers*, 201 U. S. 245, 296, 50 L. Ed. 744.

That power may be injuriously exercised is no reason for a misconstruction of the scope and extent of that power, and affords no basis for an argument that the power does not exist. *Stearns v. Minnesota*, 179 U. S. 223, 243, 45 L. Ed. 162.

The proposition that, under our constitutional system, the abuse by one department of the government of its lawful powers is to be corrected by the abuse of its powers by another department, if sustained, would destroy all distinction between the powers of the respective departments of the government, would put an end to that confidence and respect for each other which it was the purpose of the constitution to uphold, and would thus be full of danger to the permanence of our institutions. *McCray v. United States*, 195 U. S. 27, 54, 49 L. Ed. 78.

The courts cannot declare statutes unconstitutional upon the ground that to admit their validity would recognize the existence of a power in the legislature which might be the subject of abuse. The abuse of a power, if proven, is no argument against its existence, and the courts are not responsible therefor. *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23; *Legal Tender Cases*, 12 Wall. 457, 562, 20 L. Ed. 289 (concurring opinion of Bradley, J.); *Lottery Case*, 188 U. S. 321, 363, 47 L. Ed. 492; *McCray v. United States*, 195 U. S. 27, 56, 49 L. Ed. 78.

The liability of legislative power to abuse is no ground for declaring that it



subjects affected are concerned, is necessarily conclusive upon all its depart-

does not exist. Where the exercise of a particular power is not constitutionally restrained, the security against abuse rests in the responsibility to the public of those who, for the time being, are officially intrusted with the power; the courts cannot presume that it will be exercised detrimentally. *Township of Pine Grove v. Talcott*, 19 Wall. 666, 677, 22 L. Ed. 227; *Railroad Co. v. Maryland*, 21 Wall. 456, 457, 471, 22 L. Ed. 678.

"Wherever power is lodged it may be abused. But this forms no solid objection against its exercise. Confidence must be reposed somewhere; and if there should be an abuse, it will be a public grievance, for which a remedy may be applied by the legislature, and is not to be devised by courts of justice." *Ex parte Terry*, 128 U. S. 289, 309, 32 L. Ed. 405; *Ex parte Kearney*, 7 Wheat. 38, 45, 5 L. Ed. 391.

Possible abuse of legislative powers is never a valid argument against their existence, since human wisdom never devised a form of government so perfect that it may not be perverted to bad purposes. *Downes v. Bidwell*, 182 U. S. 244, 283, 45 L. Ed. 1088.

**Or that statute is unjust, oppressive, or unreasonable.**—*Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23; *Providence Bank v. Billings*, 4 Pet. 514, 563, 7 L. Ed. 939; *Scott v. Sandford*, 19 How. 393, 405, 15 L. Ed. 691; *Veazie Bank v. Fenno*, 8 Wall. 533, 548, 19 L. Ed. 482; *Legal Tender Cases*, 12 Wall. 457, 551, 20 L. Ed. 287; *Davidson v. New Orleans*, 96 U. S. 97, 104, 24 L. Ed. 616; *Kirtland v. Hotchkiss*, 100 U. S. 491, 498, 25 L. Ed. 558; *Bridge Co. v. United States*, 105 U. S. 470, 482, 26 L. Ed. 1143; *Wabash, etc., R. Co. v. Illinois*, 118 U. S. 557, 577, 30 L. Ed. 244; *Head Money Cases*, 112 U. S. 580, 590, 28 L. Ed. 798; *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 520, 29 L. Ed. 463; *Ouachita Packet Co. v. Aiken*, 121 U. S. 444, 448, 449, 450, 30 L. Ed. 976; *Charlotte, etc., R. Co. v. Gibbs*, 142 U. S. 386, 35 L. Ed. 1051; *Chicago, etc., R. Co. v. Wellman*, 143 U. S. 339, 344, 36 L. Ed. 176; *People v. Squire*, 145 U. S. 175, 36 L. Ed. 666; *New York, etc., R. Co. v. Bristol*, 151 U. S. 556, 570, 38 L. Ed. 269; *Bryan v. Board of Education*, 151 U. S. 639, 653, 38 L. Ed. 297; *New York, etc., R. Co. v. Pennsylvania*, 153 U. S. 628, 641, 38 L. Ed. 846; *Connecticut v. Woodruff*, 153 U. S. 689, 38 L. Ed. 869; *Postal Tel. Cable Co. v. Charleston*, 153 U. S. 692, 699, 38 L. Ed. 871; *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112, 157, 41 L. Ed. 369; *Chicago, etc., R. Co. v. Nebraska*, 170 U. S. 57, 77, 42 L. Ed. 948; *Campagne Francaise, etc., v. Board of Health*, 186 U. S. 380, 392, 46 L. Ed. 1209; *Otis v. Parker*, 187 U. S. 606, 608, 47 L. Ed. 323; *Billings v. Illinois*, 188 U. S. 97, 102, 47 L. Ed. 400; *Lottery Case*, 188 U. S. 321, 363, 47 L.

Ed. 492; *Atkin v. Kansas*, 191 U. S. 207, 223, 48 L. Ed. 148; *McCray v. United States*, 195 U. S. 27, 53, 49 L. Ed. 78; *Michigan Cent. R. Co. v. Powers*, 201 U. S. 245, 296, 50 L. Ed. 744; *St. Mary's, etc., Petroleum Co. v. West Virginia*, 203 U. S. 183, 192, 51 L. Ed. 144; *New Jersey v. Anderson*, 203 U. S. 483, 490, 51 L. Ed. 284.

Of the expediency or justice of measures congress and not the courts, are the sole judges. *Head Money Cases*, 112 U. S. 580, 599, 28 L. Ed. 798; *Scott v. Sandford*, 19 How. 393, 405, 15 L. Ed. 691.

If a statute is otherwise valid, the courts have no power to declare that it is unconstitutional merely because they may think its provisions harsh or unjust. *Legal Tender Cases*, 12 Wall. 457, 551, 20 L. Ed. 287.

For protection against unjust or unwise legislation, within the limits of recognized legislative power, the people must look to the polls and not to the courts. It would be an abuse of judicial power for the courts to attempt to interfere with the constitutional discretion of the legislature. *Bridge Co. v. United States*, 105 U. S. 470, 482, 26 L. Ed. 1143.

"While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semper ubique et ab omnibus*." *Otis v. Parker*, 187 U. S. 606, 608, 47 L. Ed. 323.

The constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the state governments. *Providence Bank v. Billings*, 4 Pet. 514, 563, 7 L. Ed. 939; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. Ed. 238; *Michigan Cent. R. Co. v. Powers*, 201 U. S. 245, 296, 50 L. Ed. 744.

"If the act violate any provision, expressed or properly implied, of the federal constitution, it is our duty to so declare it but; if it do not, there is no justification for the federal courts to run counter to the decisions of the highest state court upon questions involving the construction of state statutes or constitutions, on any alleged ground that such de-

ments and officers.<sup>78</sup> Likewise, in both the state and federal governments, it rests with the legislative departments to determine what measures shall be taken for the public welfare.<sup>79</sup> They have an undoubted right to take a comprehensive view in determining the necessity of a law, and the character of the purpose to be accomplished by it.<sup>80</sup>

**Discretion of Congress with Respect to Measures for Carrying Express Powers into Effect.**—As regards the discretionary powers of congress under the federal constitution, as to the necessity or occasion for a law and the means to be employed in carrying its powers into execution, it has been said that the constitution, by apt words of designation or general description, marks the outlines of the powers granted to the national legislature, but that it does not undertake, with the precision and detail of a code of laws, to enumerate the subdivisions of those powers, or to specify all the means by which they may be carried into execution, and that we must never forget that it is a constitution we are expounding.<sup>81</sup> Nevertheless, the constitution has not left the right of congress to employ the necessary means for the execution of the powers conferred upon the government to general reasoning, but to its enumeration of express powers has added the power of making "all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department thereof."<sup>82</sup> The words "necessary and

cisions are in conflict with sound principles of general constitutional law." *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112, 155, 41 L. Ed. 369.

"It was stated by Mr. Justice Miller, in *Davidson v. New Orleans*, 96 U. S. 97, 104, 24 L. Ed. 616, that there was 'abundant evidence that there exists some strange misconception of the scope of this provision as found in the fourteenth amendment. In fact it would seem from the character of many of the cases before us and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a state court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded.' Of course, no such jurisdiction exists or is claimed to exist by the parties here. It is at the same time most difficult to set certain and clear bounds to the right of this court and consequently to its duty to review questions arising under state legislation with reference to this amendment as to due process of law." *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112, 157, 41 L. Ed. 369.

"If the purpose is within the legal powers of the legislature, and the classification made has relation to that purpose (excludes no persons or objects that are affected by the purpose, includes all that are), logically speaking, it will be appropriate; legally speaking, a law based upon it will have equality of operation. And, excluding our right to consider policies or assume legislation, we have many times said that a state in its purposes and in the execution of them, must be allowed a wide range of discretion, and that this

court will not make itself 'a harbor in which can be found a refuge from ill-advised, unequal and oppressive legislation.'" *Billings v. Illinois*, 188 U. S. 97, 102, 47 L. Ed. 400. See, also, *Mobile County v. Kimball*, 102 U. S. 691, 704, 26 L. Ed. 238.

**78. Legislative discretion as to occasion, necessity, choice of means, etc.**—*McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *The Chinese Exclusion Case*, 130 U. S. 581, 606, 32 L. Ed. 1068; *Fong Yue Ting v. United States*, 149 U. S. 698, 706, 37 L. Ed. 905; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 472, 38 L. Ed. 1047.

**79. Same.**—*Meriwether v. Garrett*, 102 U. S. 472, 515, 26 L. Ed. 197; *Livingston County v. Darlington*, 101 U. S. 407, 416, 25 L. Ed. 1015.

**80. Same.**—*Livingston County v. Darlington*, 101 U. S. 407, 416, 25 L. Ed. 1015.

**81. Discretion of congress as to necessity of measures enacted in aid of express powers.**—*Martin v. Hunter*, 1 Wheat. 304, 326, 4 L. Ed. 97; *McCulloch v. Maryland*, 4 Wheat. 316, 407, 4 L. Ed. 579; *Legal Tender Cases*, 12 Wall. 457, 20 L. Ed. 287; *New York v. Miln*, 11 Pet. 102, 153k, 9 L. Ed. 648; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 583c, 9 L. Ed. 773; *Rhode Island v. Massachusetts*, 12 Pet. 657, 721, 9 L. Ed. 1233; *Passenger Cases*, 7 How. 283, 459, 12 L. Ed. 702; *Legal Tender Case*, 110 U. S. 421, 439, 28 L. Ed. 204. Accord: *Fairbank v. United States*, 181 U. S. 283, 287, 45 L. Ed. 862; *Lottery Case*, 188 U. S. 321, 354, 47 L. Ed. 492.

**82. Same; not left to general reasoning.**—*McCulloch v. Maryland*, 4 Wheat. 316, 411, 4 L. Ed. 579.



proper," as here used, were intended to have a sense at once admonitory and directory, and require that the means used in the execution of an express power shall be bona fide appropriate to the end.<sup>83</sup> No power can be derived by implication from any express power to enact laws as means for carrying it into execution, unless such laws come within this description.<sup>84</sup> There must be some relation between the means and end; some adaptedness or appropriateness of the laws to carry into execution the powers by the constitution,<sup>85</sup> and the power to decide whether the means adopted by congress for the purpose of carrying into effect the powers expressly given are necessary or appropriate to the end, or whether they have any relation to the powers granted by the constitution, must finally rest with the judiciary and not with congress.<sup>86</sup>

**As to the Tenth Amendment.**—And so it has been said that article ten of the amendments was intended to have a like admonitory and directory sense, and to restrain the limited government established under the constitution from the exercise of powers not clearly delegated, or derived by just inference from powers so delegated.<sup>87</sup>

**"Necessary and Proper" Not Limited to Such Measures as Are Absolutely Necessary.**—But by the settled construction, the words "necessary and proper" are not limited to such measures as are absolutely and indispensably necessary, and without which the powers granted must fail of execution; on the other hand, they include all appropriate means not inconsistent with this constitution, which are conducive or adapted to the end to be accomplished, and which, in the judgment of congress, will most advantageously effect it. In short, congress has a large discretion as to the means to be employed in the execution of a power conferred upon it, and is not restricted to "those alone without which the power would be nugatory." As said by Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 421, 4 L. Ed. 579. "The sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."<sup>88</sup> Within the limits of this definition, congress is the exclusive judge as to the means best adapted to the end proposed, and its measures are not to be set aside as unconstitutional because, in the opinion of the court, some other means more appropriate or better designed to accomplish the desired purpose might have been adopted.<sup>89</sup>

**83. Must be bona fide and appropriate.**—*Hepburn v. Griswold*, 8 Wall. 603, 614, 19 L. Ed. 513; *Broderick v. Magraw*, 8 Wall. 639, 19 L. Ed. 531; *In re Rapier*, 143 U. S. 110, 133, 36 L. Ed. 93.

**84. Same.**—*Hepburn v. Griswold*, 8 Wall. 603, 19 L. Ed. 513; *Broderick v. Magraw*, 8 Wall. 639, 19 L. Ed. 531; *Kansas v. Colorado*, 206 U. S. 46, 87, 51 L. Ed. 956.

**85. Must be some relation between means and end.**—*Legal Tender Cases*, 12 Wall. 457, 543, 20 L. Ed. 287; *In re Rapier*, 143 U. S. 110, 133, 36 L. Ed. 93.

**86. Ultimate decision rests with the judiciary.**—*Hepburn v. Griswold*, 8 Wall. 603, 618, 19 L. Ed. 513; *Broderick v. Magraw*, 8 Wall. 639, 19 L. Ed. 531; *Thomson v. Pacific Railroad*, 9 Wall. 579, 588, 19 L. Ed. 792; *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641, 657, 34 L. Ed. 295.

**87. As to tenth amendment.**—*Hepburn v. Griswold*, 8 Wall. 603, 614, 19 L. Ed. 513, followed in *Broderick v. Magraw*, 8 Wall. 639, 19 L. Ed. 531.

**88. Congress permitted a wide discretion.**—*McCulloch v. Maryland*, 4 Wheat. 316, 415, 4 L. Ed. 579; *Logan v. United States*, 144 U. S. 263, 283, 293, 36 L. Ed. 429; *United States v. Union Pac. R. Co.*, 160 U. S. 1, 35, 40 L. Ed. 319; *United States v. Gettysburg Electric R. Co.*, 160 U. S. 668, 681, 40 L. Ed. 576; *Boske v. Comingore*, 177 U. S. 459, 468, 44 L. Ed. 846; *Fairbank v. United States*, 181 U. S. 283, 287, 45 L. Ed. 862; *Lottery Case*, 188 U. S. 321, 354, 47 L. Ed. 492; *Burton v. United States*, 202 U. S. 344, 367, 50 L. Ed. 1057; *Kansas v. Colorado*, 206 U. S. 46, 87, 51 L. Ed. 956.

**89. Congress the exclusive judge within limits of definition.**—*United States v. Fisher*, 2 Cranch 358, 2 L. Ed. 304; *Mc-*



**Congress May Employ One or Several Modes.**—"In accomplishing the objects of a power granted to it, congress may employ any one or all the modes that are appropriate to the end in view, taking care only that no mode employed is inconsistent with the limitations of the constitution."<sup>90</sup>

*Culloch v. Maryland*, 4 Wheat. 316, 421, 4 L. Ed. 579; *Anderson v. Dunn*, 6 Wheat. 204, 5 L. Ed. 242; *Hepburn v. Griswold*, 8 Wall. 603, 19 L. Ed. 513; *Broderick v. Magraw*, 8 Wall. 639, 659, 19 L. Ed. 531; *Thomson v. Pacific Railroad*, 9 Wall. 579, 588, 19 L. Ed. 792; *Legal Tender Cases*, 12 Wall. 457, 542, 20 L. Ed. 287; *United States v. Reese*, 92 U. S. 214, 23 L. Ed. 563; *Strauder v. West Virginia*, 100 U. S. 303, 311, 25 L. Ed. 664; *Livingston County v. Darlington*, 101 U. S. 407, 416, 25 L. Ed. 1015; *Ex parte Curtis*, 106 U. S. 371, 373, 27 L. Ed. 232; *Legal Tender Cases*, 110 U. S. 421, 441, 450, 28 L. Ed. 204; *Ex parte Yarbrough*, 110 U. S. 651, 658, 28 L. Ed. 274; *Ouachita Packet Co. v. Aiken*, 121 U. S. 444, 450, 30 L. Ed. 976; *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641, 657, 34 L. Ed. 295; *In re Rapier*, 143 U. S. 110, 134, 36 L. Ed. 93; *Logan v. United States*, 144 U. S. 263, 283, 36 L. Ed. 429; *Fong Yue Ting v. United States*, 149 U. S. 698, 712, 713, 37 L. Ed. 905; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 472, 38 L. Ed. 1047; *Lottery Case*, 188 U. S. 321, 354, 47 L. Ed. 492; *Burton v. United States*, 202 U. S. 344, 367, 50 L. Ed. 1057.

The words "all laws necessary and proper for carrying into execution" powers expressly granted or vested have, in the constitution, a sense equivalent to that of the words; laws, not absolutely necessary indeed, but appropriate, plainly adapted to constitutional and legitimate ends, which are not prohibited, but consistent with the letter and spirit of the constitution; laws really calculated to effect objects intrusted to the government. *Hepburn v. Griswold*, 8 Wall. 603, 19 L. Ed. 513; *Broderick v. Magraw*, 8 Wall. 639, 19 L. Ed. 531.

It is essential to a just construction, that many words which import something excessive should be understood in a more mitigated sense—that is, in that sense which common usage justifies. The word "necessary" as used in that section of the federal constitution which provides that congress shall have power to make all laws which shall be necessary and proper for carrying into execution its enumerated powers, is of this description. *McCulloch v. Maryland*, 4 Wheat. 316, 414, 4 L. Ed. 579.

Where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. *United States v. Fisher*, 2 Cranch 358, 2 L. Ed. 304; *McCulloch v. Maryland*, 4

Wheat. 316, 423, 4 L. Ed. 579; *Legal Tender Cases*, 12 Wall. 457, 542, 20 L. Ed. 287; *Sinking-Fund Cases*, 99 U. S. 700, 718, 25 L. Ed. 496; *Livingston County v. Darlington*, 101 U. S. 407, 416, 25 L. Ed. 1015; *Legal Tender Case*, 110 U. S. 421, 450, 28 L. Ed. 204; *Ex parte Yarbrough*, 110 U. S. 651, 658, 28 L. Ed. 274; *The Chinese Exclusion Case*, 130 U. S. 581, 606, 32 L. Ed. 1068; *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641, 657, 34 L. Ed. 295; *In re Rapier*, 143 U. S. 110, 134, 36 L. Ed. 93; *Logan v. United States*, 144 U. S. 263, 283, 36 L. Ed. 429; *Fong Yue Ting v. United States*, 149 U. S. 698, 712, 713, 37 L. Ed. 905; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 473, 38 L. Ed. 1047.

**90. May employ one or several modes.**—*Logan v. United States*, 144 U. S. 263, 283, 36 L. Ed. 429; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 478, 38 L. Ed. 1047; *Boske v. Comingore*, 177 U. S. 459, 468, 44 L. Ed. 846.

"We cannot assent to any view of the constitution that concedes the power of congress to accomplish a named result, indirectly, by particular forms of judicial procedure, but denies its power to accomplish the same result, directly, and by a different proceeding judicial in form. We could not do so without denying to congress the broad discretion with which it is invested by the constitution of employing all or any of the means that are appropriate or plainly adapted to an end which it has unquestioned, namely, the protection of interstate commerce against improper burdens and discriminations." *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 486, 38 L. Ed. 1047.

The courts have nothing to do with the wisdom or policy of legislation. The discretion of congress cannot be controlled by the judiciary, nor can the courts declare an act of legislation invalid because, in their judgment, the public interests would have been best subserved by some different policy or measure. *United States v. Union Pac. R. Co.*, 160 U. S. 1, 35, 38, 40 L. Ed. 319.

"In order to promote the efficiency of the public service and enforce integrity in the conduct of such public affairs as are committed to the several departments, congress, having a choice of means, may prescribe such regulations to those ends as its wisdom may suggest, if they be not forbidden by the fundamental law. It possesses the entire legislative authority of the United States. By the provision in the constitution that 'all legislative powers herein granted shall be vested in a congress of the United States,' it is meant

**Burden of Proof as to Invalidity of Means Employed.**—Those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.<sup>91</sup> When the statute has proved effective in the execution of powers confessedly existing, it is not too much to say that it must have had some appropriateness to the execution of those powers. The rules of construction do not demand that the relationship between the means and the end shall be direct and immediate.<sup>92</sup>

(ccc) *Application of Principles.*—The doctrine that the courts have no authority to control or coerce legislative discretion exercised within the constitutional limits of legislative authority, finds illustration in numberless ways. It has been applied to grants of jurisdiction to the inferior federal courts,<sup>93</sup> to statutes abolishing charges for export stamps,<sup>94</sup> statutes confirming private land claims,<sup>95</sup> to legislative discretion as to the kind or degree of punishment,<sup>96</sup> to the manner of enforcing fines and penalties,<sup>97</sup> to statutes fixing the place of im-

that congress—keeping within the limits of its powers and observing the restrictions imposed by the constitution—may, in its discretion, enact any statute appropriate to accomplish the objects for which the national government was established.” *Burton v. United States*, 202 U. S. 344, 367, 50 L. Ed. 1057.

**91. Burden of proof as to invalidity of means employed.**—*McCulloch v. Maryland*, 4 Wheat. 316, 409, 4 L. Ed. 579; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 473, 38 L. Ed. 1047.

**92. Same; where statute has proven effectual.**—*Legal Tender Cases*, 12 Wall. 457, 543, 20 L. Ed. 287.

**93. Jurisdiction of the inferior federal courts.**—*Rhode Island v. Massachusetts*, 12 Pet. 657, 721, 9 L. Ed. 1233; *Railway Co. v. Whitton*, 13 Wall. 270, 20 L. Ed. 571; *United States v. Union Pac. R. Co.*, 98 U. S. 569, 602, 25 L. Ed. 143; *Ames v. Kansas*, 111 U. S. 449, 469, 28 L. Ed. 482.

It rests with the legislative department of the government to say to what extent grants of jurisdiction shall be made to the inferior federal courts. *Rhode Island v. Massachusetts*, 12 Pet. 657, 721, 9 L. Ed. 1233; *Railway Co. v. Whitton*, 13 Wall. 270, 20 L. Ed. 571; *United States v. Union Pac. R. Co.*, 98 U. S. 569, 602, 25 L. Ed. 143; *Ames v. Kansas*, 111 U. S. 449, 469, 28 L. Ed. 482.

**94. Statutes abolishing charges for export stamps.**—*Turpin v. Burgess*, 117 U. S. 504, 506, 29 L. Ed. 988.

The action of congress in abolishing the charge for export stamps was a mere matter of legislative discretion and was not subject to judicial review. *Turpin v. Burgess*, 117 U. S. 504, 506, 29 L. Ed. 988.

**95. Statutes confirming private land claims.**—*Tameling v. United States Freehold, etc., Co.*, 93 U. S. 644, 23 L. Ed. 998; *Maxwell Land-Grant Case*, 121 U. S. 325, 366, 382, 30 L. Ed. 949.

Where congress has passed upon and confirmed a private land claim, all of the lands included in the claim and survey, as confirmed, being at the time of confirmation the property of either the gov-

ernment or the claimant, the courts have no jurisdiction, even upon a bill filed by the United States, to review the action of congress and limit the quantity of land granted to a less area than that contained in the grant as confirmed by congress. The reason is that the power of disposing of the public domain having been vested in congress by the constitution, its confirmation of the claim is a disposition of all the lands contained therein as confirmed, and the courts have no jurisdiction to review the discretion of congress in the premises. *Maxwell Land-Grant Case*, 121 U. S. 325, 366, 382, 30 L. Ed. 949; *Tameling v. United States Freehold, etc., Co.*, 93 U. S. 644, 23 L. Ed. 998.

In such a case the courts can go no further than to make a construction of what congress intended to do by the act of confirmation. *Maxwell Land-Grant Case*, 121 U. S. 325, 382, 30 L. Ed. 949. See, also, the title PUBLIC LANDS.

**96. Kind or degree of punishment.**—*Ex parte Curtis*, 106 U. S. 371, 374, 27 L. Ed. 232; *Clune v. United States*, 159 U. S. 590, 595, 40 L. Ed. 269.

If it is constitutional to prohibit the act, the kind or degree of punishment to be inflicted for disregarding the prohibition is clearly within the discretion of congress, provided it be not cruel or unusual. *Ex parte Curtis*, 106 U. S. 371, 374, 27 L. Ed. 232; *Clune v. United States*, 159 U. S. 590, 595, 40 L. Ed. 269.

Whatever may be thought of the wisdom or propriety of a statute making a conspiracy to do an act punishable more severely than the doing of the act itself, it is a matter to be considered solely by the legislative body. *Clune v. United States*, 159 U. S. 590, 595, 40 L. Ed. 269.

**97. Enforcement of fines and penalties.**—*Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 523, 29 L. Ed. 463.

The power of the state to impose fines and penalties for a violation of its statutory requirements is coeval with government; and the mode in which they shall be enforced, whether at the suit of a private party, or at the suit of the public, and



prisonment,<sup>98</sup> statutes providing for the recovery of exemplary or punitive damages in certain cases,<sup>99</sup> statutes enacted in the exercise of the taxing power;<sup>1</sup> the regulation of common carriers, warehousemen, etc.;<sup>2</sup> the reasonableness of wharfage and pilotage regulations,<sup>3</sup> the wisdom or propriety of liquor legisla-

what disposition shall be made of the amounts collected, are merely matters of legislative discretion. *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 523, 29 L. Ed. 463.

**98. Statutes fixing place of imprisonment.**—*Ex parte Karstendick*, 93 U. S. 396, 400, 23 L. Ed. 889.

The place where persons convicted of crimes against the United States shall be imprisoned is left to the discretion of the legislative department of the government, and is beyond the control of the courts. Congress may provide for the erection of a prison at any place within the jurisdiction of the United States and direct that all persons convicted under the laws of the United States shall be imprisoned there; it may provide that persons convicted of crimes against the United States in one state shall be imprisoned in another, or it may arrange with a single state for the use of its prisons and require the courts of the United States to execute their sentences of imprisonment in them. *Ex parte Karstendick*, 93 U. S. 396, 400, 23 L. Ed. 889.

**99. Recovery of exemplary damages.**—*Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 522, 29 L. Ed. 463; *Minneapolis, etc., R. Co. v. Emmons*, 149 U. S. 364, 367, 37 L. Ed. 769.

There is no inhibition upon a state to impose such penalties for disregard of its police regulations as will insure prompt obedience to their requirements. For what injures the party violating their requirements shall be liable, whether immediate or remote, is a matter of legislative discretion. *Minneapolis, etc., R. Co. v. Emmons*, 149 U. S. 364, 367, 37 L. Ed. 769.

**Same; damages caused by the operation of railroads.**—The operating of railroads without fences and cattle guards undoubtedly increases the danger which attends the operation of all railroads. It is only by such fences and guards that the straying cattle, running at large upon the tracks, can be prevented and security had against accidents from that source; and the extent of the penalties which should be imposed by the state for any disregard of its legislation in that respect is a matter entirely within its control. *Minneapolis, etc., R. Co. v. Emmons*, 149 U. S. 364, 367, 37 L. Ed. 769.

It is not essential that the penalty should be confined to damages for the actual loss to the owner of cattle injured by the want of fences and guards; it is entirely competent for the legislature to subject the company to any incidental or consequential damages, such as the loss of rent, the expenses of keeping watch to

guard cattle from straying upon the tracks, or any other expenditure to which the adjoining owner is subjected in consequence of failure of the company to construct the required fences and cattle guards. *Minneapolis, etc., R. Co. v. Emmons*, 149 U. S. 364, 367, 37 L. Ed. 769.

Likewise it is within the legislative discretion to fix limits as to the amount of damages, over and above compensatory damages, which a jury may award in cases of gross negligence resulting from the failure of railroad companies to fence their tracks as required by law. *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 522, 29 L. Ed. 463; *Minneapolis, etc., R. Co. v. Emmons*, 149 U. S. 364, 37 L. Ed. 769.

**1. Legislative discretion in the matter of taxation.**—See ante, "The Power of Taxation Not Judicial," VI, D, 3, d, (3), (c), (kk); "Assessments for Local Improvements," VI, D, 3, d, (3), (c), (11).

**2. Regulation of carriers, warehousemen, etc.**—*Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155, 164, 24 L. Ed. 94; *Munn v. Illinois*, 94 U. S. 113, 132, 24 L. Ed. 77; *Wabash, etc., R. Co. v. Illinois*, 118 U. S. 557, 577, 30 L. Ed. 244.

Whether a system of classification of the railroads in a state, for the purpose of regulating freight and passenger rates, is the best that could have been adopted, is a question over which the courts have no control, provided the legislature had the power to make such classification under any circumstances. If the power existed, the manner of its exercise was a question for the legislature, to decide for itself, subject to no review by the courts. *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155, 164, 24 L. Ed. 94; *Munn v. Illinois*, 94 U. S. 113, 132, 24 L. Ed. 77.

Of the justice or propriety of the principle which lies at the foundation of the Illinois statute prohibiting carriers of goods from charging more for a short than for a long haul it is not within the province of the United States supreme court to speak. As restricted to a transportation which begins and ends within the limits of the state, it may be very just and equitable, and it is the province of the state legislature to determine that question. *Wabash, etc., R. Co. v. Illinois*, 118 U. S. 557, 577, 30 L. Ed. 244.

**3. Reasonableness of wharfage and pilotage regulations.**—*Ouachita Packet Co. v. Aiken*, 121 U. S. 444, 448, 450, 30 L. Ed. 976; *Olsen v. Smith*, 195 U. S. 332, 49 L. Ed. 224; *Thompson v. Darden*, 198 U. S. 310, 316, 49 L. Ed. 1064.

Wharfage, until congress shall pass some law to regulate it, is governed by local state laws. By those laws it is



tion,<sup>4</sup> statutes defining the inheritable capacity of bastards,<sup>5</sup> statutes appropriating private property to public purposes,<sup>6</sup> to the wisdom or expediency of regu-

generally required to be reasonable, and by those laws its reasonableness must be judged. If it does not violate them, the courts of the United States cannot interfere to prevent its exaction. If the charges are unreasonable, remedy must be sought by invoking the laws of the state, which cannot be done in the federal courts when the jurisdiction of the court is rested upon the supposed unconstitutionality of the charges for wharfrage and not on the citizenship of the parties. If the state laws furnish no remedy, in other words, if the charges are sanctioned by them, then it is for congress, and not for the federal courts, to regulate the matter and provide a proper remedy. What measures congress may adopt for the purpose of preventing abuses in this and like matters, it is not for the courts to determine. *Ouachita Packet Co. v. Aiken*, 121 U. S. 444, 448, 450, 30 L. Ed. 976. See, also, the title WHARVES.

The courts are not vested with authority to avoid the pilotage regulations adopted by the states, which do not discriminate as to commerce to which they apply, simply because it is deemed they are unwise or unjust. An objection based on the assumed injustice of a pilotage regulation does not involve the power to make the regulation. Objections of this character, therefore, if they be meritorious, merely concern the power of congress to exercise the ultimate authority vested in it on the subject of pilotage. *Thompson v. Darden*, 198 U. S. 310, 316, 49 L. Ed. 1064; *Olsen v. Smith*, 195 U. S. 332, 49 L. Ed. 224.

**4. Wisdom or propriety of liquor legislation.**—*Mugler v. Kansas*, 123 U. S. 623, 662, 31 L. Ed. 205.

If a state deems the absolute prohibition of the manufacture and sale, within her limits, of intoxicating liquors for other than medical, scientific and manufacturing purposes, to be necessary to the peace and security of society, the courts cannot, without usurping legislative functions, override the will of the people, as thus expressed by their chosen representatives. *Mugler v. Kansas*, 123 U. S. 623, 662, 31 L. Ed. 205.

And so, if, in the judgment of the legislature, the manufacture of intoxicating liquors for the maker's own use, as a beverage, would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question. *Mugler v. Kansas*, 123 U. S. 623, 662, 31 L. Ed. 205. See, also, the titles INTOXICATING LIQUORS; POLICE POWER.

**5. Statutes defining the inheritable capacity of bastards.**—*Brewer v. Blougher*, 14 Pet. 178, 198, 10 L. Ed. 408; *Cope v. Cope*, 137 U. S. 682, 685, 34 L. Ed. 832.

A statute fixing the inheritable capacity of illegitimate children, and providing that where the paternity is clearly proved they shall inherit as if legitimate, cannot be declared void by reason of its failure to conform to any judicial standard of social and moral obligations. *Cope v. Cope*, 137 U. S. 682, 685, 34 L. Ed. 832; *Brewer v. Blougher*, 14 Pet. 178, 198, 10 L. Ed. 408.

**6. Statutes appropriating private property to public use.**—*Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 571, 9 L. Ed. 773; *Gilman v. Sheboygan*, 2 Black 510, 17 L. Ed. 305; *Rogers v. Burlington*, 3 Wall. 654, 18 L. Ed. 79; *Hepburn v. Griswold*, 8 Wall. 603, 623, 19 L. Ed. 513; *Railroad Co. v. Otoe County*, 16 Wall. 667, 21 L. Ed. 375; *Olcott v. Supervisors*, 16 Wall. 678, 689, 21 L. Ed. 382; *Queensbury v. Culver*, 19 Wall. 83, 22 L. Ed. 100; *Township of Pine Grove v. Talcott*, 19 Wall. 666, 676, 22 L. Ed. 227; *Loan Ass'n v. Topeka*, 20 Wall. 655, 22 L. Ed. 455; *Secombe v. Railroad Co.*, 23 Wall. 108, 23 L. Ed. 67; *Board of Commissioners v. Lucas*, 93 U. S. 108, 114, 23 L. Ed. 822; *Township of Burlington v. Beasley*, 94 U. S. 310, 24 L. Ed. 161; *New Orleans v. Clark*, 95 U. S. 644, 24 L. Ed. 521; *County Commissioners v. Chandler*, 96 U. S. 205, 24 L. Ed. 625; *Boom Co. v. Patterson*, 98 U. S. 403, 406, 25 L. Ed. 206; *Taylor v. Ypsilanti*, 105 U. S. 60, 26 L. Ed. 1008; *Osborne v. Adams County*, 106 U. S. 181, 27 L. Ed. 129; *S. C.*, 109 U. S. 1, 27 L. Ed. 835; *Parkersburg v. Brown*, 106 U. S. 487, 27 L. Ed. 238; *United States v. Jones*, 109 U. S. 513, 519, 27 L. Ed. 1015; *United States v. Dodge County Comm'rs*, 110 U. S. 156, 28 L. Ed. 103; *Blair v. Cuming County*, 111 U. S. 363, 372, 28 L. Ed. 457; *Middleton v. Mullica Township*, 112 U. S. 433, 28 L. Ed. 785; *Cole v. LaGrange*, 113 U. S. 1, 28 L. Ed. 896; *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9, 21, 25, 28 L. Ed. 889; *Wurts v. Hoagland*, 114 U. S. 606, 614, 29 L. Ed. 229; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 659, 29 L. Ed. 516; *Young v. Clarendon Township*, 132 U. S. 340, 356, 33 L. Ed. 356; *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641, 34 L. Ed. 295; *Kaukauna Water Power Co. v. Green Bay, etc., Canal Co.*, 142 U. S. 254, 273, 35 L. Ed. 1004; *Shoemaker v. United States*, 147 U. S. 282, 298, 37 L. Ed. 170; *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 327, 37 L. Ed. 463; *United States v. Gettysburg Electric R. Co.*, 160 U. S. 668, 685, 40 L. Ed. 576; *Fallbrook Irrigation Dist. v. Bradley*,

lations with respect to congressional elections;<sup>7</sup> the policy of Indian legislation;<sup>8</sup>

164 U. S. 112, 166, 41 L. Ed. 369; *Backus v. Fort Street Union Depot Co.*, 169 U. S. 557, 568, 42 L. Ed. 853; *Adirondack R. Co. v. New York State*, 176 U. S. 335, 349, 44 L. Ed. 492.

The adjudicated cases established the proposition that the courts have the power to determine whether the use for which private property is authorized by the legislature to be taken is, in fact, a public use. *Gilman v. Sheboygan*, 2 Black 510, 17 L. Ed. 305; *Rogers v. Burlington*, 3 Wall. 654, 18 L. Ed. 79; *Hepburn v. Griswold*, 8 Wall. 603, 623, 19 L. Ed. 513; *Railroad Co. v. Otoe County*, 16 Wall. 667, 21 L. Ed. 375; *Olcott v. Supervisors*, 16 Wall. 678, 689, 21 L. Ed. 382; *Queensbury v. Culver*, 19 Wall. 83, 22 L. Ed. 100; *Township of Pine Grove v. Talcott*, 19 Wall. 666, 676, 22 L. Ed. 227; *Loan Ass'n v. Topeka*, 20 Wall. 655, 22 L. Ed. 455; *Secombe v. Railroad Co.*, 23 Wall. 108, 23 L. Ed. 67; *Board of Commissioners v. Lucas*, 93 U. S. 108, 114, 23 L. Ed. 822; *Township of Burlington v. Beasley*, 94 U. S. 310, 24 L. Ed. 161; *New Orleans v. Clark*, 95 U. S. 644, 24 L. Ed. 521; *County Commissioners v. Chandler*, 96 U. S. 205, 24 L. Ed. 625; *Taylor v. Ypsilanti*, 105 U. S. 60, 26 L. Ed. 1008; *Osborn v. County of Adams*, 106 U. S. 181, 27 L. Ed. 129; *S. C.*, 109 U. S. 1, 27 L. Ed. 835; *Parkersburg v. Brown*, 106 U. S. 487, 27 L. Ed. 238; *United States v. Dodge County Comm'rs*, 110 U. S. 156, 28 L. Ed. 103; *Blair v. Cuming County*, 111 U. S. 363, 372, 28 L. Ed. 457; *Middleton v. Mullica Township*, 112 U. S. 433, 28 L. Ed. 785; *Cole v. LaGrange*, 113 U. S. 1, 7, 28 L. Ed. 896; *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9, 21, 25, 28 L. Ed. 889; *Wurts v. Hoagland*, 114 U. S. 606, 614, 29 L. Ed. 229; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 659, 29 L. Ed. 516; *Young v. Clarendon Township*, 132 U. S. 340, 356, 33 L. Ed. 356; *Kaukauna Water Power Co. v. Green Bay, etc., Canal Co.*, 142 U. S. 254, 273, 35 L. Ed. 1004; *Shoemaker v. United States*, 147 U. S. 282, 298, 37 L. Ed. 170; *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112, 166, 41 L. Ed. 369.

Likewise the question of compensation is judicial. It does not rest with the public, taking the property, through congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry. *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 650, 9 L. Ed. 773; *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 327, 37 L. Ed. 463.

With the determination of these questions, however, the judicial function is exhausted. The necessity or occasion for

the taking, the propriety or expediency of the appropriation of the property to be taken, are matters solely within the discretion of the legislature. *Boom Co. v. Patterson*, 98 U. S. 403, 406, 25 L. Ed. 206; *United States v. Jones*, 109 U. S. 513, 27 L. Ed. 1015; *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641, 34 L. Ed. 295; *Shoemaker v. United States*, 147 U. S. 282, 298, 37 L. Ed. 170; *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 327, 37 L. Ed. 463; *United States v. Gettysburg Electric R. Co.*, 160 U. S. 668, 685, 40 L. Ed. 576; *Backus v. Fort Street Union Depot Co.*, 169 U. S. 557, 568, 42 L. Ed. 853; *Adirondack R. Co. v. New York State*, 176 U. S. 335, 349, 44 L. Ed. 492.

The use for which land is to be taken having been determined to be a public use, the quantity which should be taken is a legislative and not a judicial question. *Shoemaker v. United States*, 147 U. S. 282, 298, 37 L. Ed. 170; *United States v. Gettysburg Electric R. Co.*, 160 U. S. 668, 635, 40 L. Ed. 576.

The question of necessity is not one of a judicial character, but rather one for determination by the lawmaking branch of the government. *Boom Co. v. Patterson*, 98 U. S. 403, 406, 25 L. Ed. 206; *United States v. Jones*, 109 U. S. 513, 27 L. Ed. 1015; *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641, 34 L. Ed. 295; *Backus v. Fort Street Union Depot Co.*, 169 U. S. 557, 568, 42 L. Ed. 853.

Where land has been set aside by the legislature for public use and in the name of the state, and the wisdom or desirability of such appropriation is questioned, it becomes a matter for determination by the legislature and not by the judicial arm of the government. *Adirondack R. Co. v. New York State*, 176 U. S. 335, 349, 44 L. Ed. 492.

**7. Regulation of congressional elections.**—*Ex parte Siebold*, 100 U. S. 371, 393, 25 L. Ed. 717.

As to the right of congress to make regulations concerning the conducting of elections of members of congress, the only question which concerns the courts is one of power. As to the wisdom, justice, or expediency of such regulations as congress may prescribe, the courts have no revisory power. *Ex parte Siebold*, 100 U. S. 371, 392, 25 L. Ed. 717.

**8. Policy of Indian legislation.**—*United States v. Rogers*, 4 How. 567, 11 L. Ed. 1105; *Lone Wolf v. Hitchcock*, 187 U. S. 553, 565, 47 L. Ed. 299; *Matter of Heff*, 197 U. S. 488, 498, 49 L. Ed. 848.

"Plenary authority over the tribal relations of the Indians has been exercised by congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the

the protection of civil rights,<sup>9</sup> the policy of the government with respect to the emancipated slaves,<sup>10</sup> the admission and exclusion of aliens,<sup>11</sup> policy of the bankruptcy laws,<sup>12</sup> legislation repudiating public contracts,<sup>13</sup> the time of imposing inheritance taxes,<sup>14</sup> the amount of inspection fees,<sup>15</sup> ordinances dis-

judicial department of the government." *United States v. Rogers*, 4 How. 567, 11 L. Ed. 1105; *Lone Wolf v. Hitchcock*, 187 U. S. 553, 565, 47 L. Ed. 299; *Matter of Heff*, 197 U. S. 488, 498, 49 L. Ed. 848.

"And it is for congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of congress. It is true there may be a presumption that no radical departure is intended, and courts may wisely insist that the purpose of congress be made clear by its legislation; but when that purpose is made clear the question is at an end." *Matter of Heff*, 197 U. S. 488, 499, 49 L. Ed. 848.

If the policy of the United States, following the example of the European nations, in treating the Indian Territory as vacant and unoccupied lands, and dividing and parcelling them out accordingly, were any longer an open question, it would be one for the political and lawmaking departments of the government, and not the judicial. *United States v. Rogers*, 4 How. 567, 11 L. Ed. 1105. See, also, the titles INDIANS; PUBLIC LANDS.

**9. Protection of civil rights.**—See the title CIVIL RIGHTS, vol. 3, pp. 818, 834.

**10. Policy with reference to emancipated slaves.**—*Hodges v. United States*, 203 U. S. 1, 19, 51 L. Ed. 65.

Whether in fixing the status of the emancipated slaves at the close of the war, it would have been wiser to have left them in a state of pupillage and as wards of the nation, or, as was actually done, to have made them citizens with all the rights, including the right of suffrage, possessed by the superior race, is a question with which the courts are in no wise concerned. They are bound by the act of the nation in what it actually did, regardless of its wisdom, policy or expediency. *Hodges v. United States*, 203 U. S. 1, 19, 51 L. Ed. 65.

**11. Admission and exclusion of aliens.**—*The Chinese Exclusion Case*, 130 U. S. 581, 606, 32 L. Ed. 1068; *Fong Yue Ting v. United States*, 149 U. S. 698, 731, 37 L. Ed. 905; *Li Sing v. United States*, 180 U. S. 486, 495, 45 L. Ed. 634.

The question whether, and upon what conditions, aliens shall be permitted to remain within the United States being one to be determined by the political departments of the government, the judicial department cannot properly express an opinion upon the wisdom, the policy or the justice of the measures enacted by congress in the exercise of the powers conferred to it by the constitution over this subject. *The Chinese Exclusion Case*, 130 U. S. 581, 606, 32 L. Ed. 1068; *Fong Yue Ting*

*v. United States*, 149 U. S. 698, 731, 37 L. Ed. 905; *Li Sing v. United States*, 180 U. S. 486, 495, 45 L. Ed. 634.

**12. Policy of bankruptcy law.**—*Nelson v. Carland*, 1 How. 265, 277, 11 L. Ed. 126; *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 186, 46 L. Ed. 1113.

"With the policy of a law, letting in all classes—others as well as traders; and permitting the bankrupt to come in voluntarily, and be discharged without the consent of his creditors, the courts have no concern; it belongs to the lawmakers." *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 186, 46 L. Ed. 1113; *Nelson v. Carland*, 1 How. 265, 277, 11 L. Ed. 126.

**13. Legislation repudiating contracts on technical grounds.**—*Yazoo, etc., R. Co. v. Adams*, 180 U. S. 1, 25, 45 L. Ed. 395.

The wisdom, propriety, or policy of legislation repudiating railroad aid contracts, upon the ground of a technical incapacity upon the part of the state to enter into such contracts, are considerations which address themselves to the legislative, and not to the judicial departments of the government. In such a case, the legislature, and not the courts, is the proper guardian of the public faith and the keeper of the state's conscience. *Yazoo, etc., R. Co. v. Adams*, 180 U. S. 1, 25, 45 L. Ed. 395.

The federal courts cannot review the wisdom, propriety or policy of legislation repudiating public contracts under a plea of a technical incapacity to contract. *Yazoo, etc., R. Co. v. Adams*, 180 U. S. 1, 25, 45 L. Ed. 395.

**14. Time of imposing inheritance tax.**—*Cahen v. Brewster*, 203 U. S. 543, 551, 51 L. Ed. 310.

The time at which an inheritance tax shall be imposed is a legislative and not a judicial question, and the supreme court of the United States will not hold an inheritance tax law void because the statute imposing the tax is made to apply to estates already in the course of administration at the time of its enactment. *Cahen v. Brewster*, 203 U. S. 543, 551, 51 L. Ed. 310.

**15. Amount of inspection fees.**—*Patapsco Guano Co. v. North Carolina Board of Agriculture*, 171 U. S. 345, 43 L. Ed. 191; *McLean v. Denver, etc., R. Co.*, 203 U. S. 38, 55, 51 L. Ed. 78.

An inspection law being otherwise valid, the amount of the inspection fee is not a judicial question; it rests with the legislature to fix the amount, and it can only present a valid objection when it is shown that it is so unreasonable and disproportionate to the services rendered as to attack the good faith of the law. *Patapsco Guano Co. v. North Carolina Board of*



posing of garbage,<sup>16</sup> ordinances restricting lewd and abandoned women to prescribed limits,<sup>17</sup> statutes prohibiting options to buy or sell grain,<sup>18</sup> the wisdom of requiring railroads receiving government aid to construct and operate their own telegraph lines,<sup>19</sup> statutes awarding compensation for injuries incidental to the exercise of constitutional powers,<sup>20</sup> the necessity of public vaccination as a safeguard to the public health,<sup>21</sup> and generally as to all statutes enacted under the authority of the reserved police powers of the states.<sup>22</sup>

Agriculture, 171 U. S. 345, 43 L. Ed. 191; *McLean v. Denver*, etc., R. Co., 203 U. S. 38, 55, 51 L. Ed. 78.

**16. Ordinances disposing of garbage.**—*California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, 321, 50 L. Ed. 204; *Gardner v. Michigan*, 199 U. S. 325, 50 L. Ed. 212.

Where the state has committed the subject of the best means of disposing of garbage in municipal corporations to the discretion of the board of supervisors or other municipal authorities, the courts must accept the solution adopted by such authorities, unless the ordinances relating thereto are, in some essential particular, repugnant to the fundamental law. So long as the method adopted is not open to constitutional objection, the courts cannot declare the ordinances invalid upon the theory that some different and better method should have been adopted. *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, 321, 50 L. Ed. 204; *Gardner v. Michigan*, 199 U. S. 325, 50 L. Ed. 212.

**17. Ordinances restricting lewd women to prescribed limits.**—*L'Hote v. New Orleans*, 177 U. S. 587, 597, 44 L. Ed. 899.

The reasonableness or propriety of the limits fixed by an ordinance defining that portion of the city within which lewd and abandoned women must live, and outside of which disorderly houses shall not be maintained, is a matter for legislative consideration, and cannot become the basis of judicial action. *L'Hote v. New Orleans*, 177 U. S. 587, 597, 44 L. Ed. 899.

**18. Options to buy or sell grain.**—*Booth v. Illinois*, 184 U. S. 425, 432, 46 L. Ed. 623; *Otis v. Parker*, 187 U. S. 606, 609, 47 L. Ed. 323.

It may be that the steady, vigorous enforcement of the Illinois statute prohibiting options to buy or sell grain at a future time will materially interfere with the handling or moving of vast amounts of grain in the west which are disposed of by contracts or arrangements made in the board of trade in Chicago. But those are suggestions for the consideration of the Illinois legislature. The courts have nothing to do with the mere policy of legislation. *Booth v. Illinois*, 184 U. S. 425, 432, 46 L. Ed. 623. Accord, as to similar statute of the state of California, *Otis v. Parker*, 187 U. S. 606, 609, 47 L. Ed. 323.

**19. Requiring railroads aided by government to construct and operate their own**

**lines.**—*United States v. Union Pac. R. Co.*, 160 U. S. 1, 35, 40 L. Ed. 319.

The validity of the act of 1888, 25 Stat. 382, requiring all railroads and telegraph companies which had received government aid to construct, operate and maintain by their own proper corporate agencies and employees the telegraph lines which they were authorized and required to construct, cannot be made to turn upon the inquiry by the courts whether the policy inaugurated by congress was best for the public interests. Neither can it be said that said act is not germane or related to the objects for the attainment of which the aid of the government was bestowed, as indicated by the act of 1862. *United States v. Union Pac. R. Co.*, 160 U. S. 1, 35, 40 L. Ed. 319.

**20. Compensation for incidental injuries.**—*Union Bridge Co. v. United States*, 204 U. S. 364, 403, 51 L. Ed. 523; *United States v. Realty Co.*, 163 U. S. 427, 444, 41 L. Ed. 215.

"It is for congress to determine whether, under the circumstances of a particular case, justice requires that compensation be made to a person or corporation suffering incidentally from the exercise by the national government of its constitutional powers." *Union Bridge Co. v. United States*, 204 U. S. 364, 403, 51 L. Ed. 523. See, also, post, "To Lay and Collect Taxes, Imposts and Excises, and to Pay the Debts of the United States," VI, D, 3, f, (1), (h), (dd), (aaa).

**21. Necessity of public vaccination.**—*Jacobson v. Massachusetts*, 197 U. S. 11, 30, 31, 49 L. Ed. 643.

The legislature is the judge in the first instance of the necessity of public vaccination as a safeguard of the public health against an epidemic of smallpox. It is also for the legislature to say whether or not a general vaccination of citizens is the best mode of combating the disease; and having chosen that means, it is not for the courts to declare such act unconstitutional upon the theory that it should have adopted some other method. *Jacobson v. Massachusetts*, 197 U. S. 11, 30, 31, 49 L. Ed. 643.

**22. Police regulations.**—*Mugler v. Kansas*, 123 U. S. 623, 661, 31 L. Ed. 205; *Minnesota v. Barber*, 136 U. S. 313, 320, 34 L. Ed. 455; *Atkin v. Kansas*, 191 U. S. 207, 223, 48 L. Ed. 148; *Jacobson v. Massachusetts*, 197 U. S. 11, 31, 49 L. Ed. 643. And see, generally, the title POLICE POWER.

"If there is any such power in the ju-

(cc) *Motives of Legislature Not Subject to Judicial Inquiry*.—The rule is general, with reference to the enactments of all legislative bodies, that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferable from their operation, considered with reference to the condition of the country and existing legislation. If what they do is within the scope of their powers under the constitution, the courts have nothing to do with the motives which prompt their action. In short, the knowledge and good faith of a legislature are not open to question. It is conclusively presumed that a legislature acts with full knowledge and in good faith.<sup>23</sup> "It is, of course, true, as suggested, that if there be no authority

diciary to review legislative action in respect of a matter affecting the general welfare, it can only be when that which the legislature has done comes within the rule that if a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution.' *Mugler v. Kansas*, 123 U. S. 623, 661, 31 L. Ed. 205; *Minnesota v. Barber*, 136 U. S. 313, 320, 34 L. Ed. 455; *Atkin v. Kansas*, 191 U. S. 207, 223, 48 L. Ed. 148." *Jacobson v. Massachusetts*, 197 U. S. 11, 31, 49 L. Ed. 643.

**23. Motives of legislature not subject to judicial inquiry.**—*Fletcher v. Peck*, 6 Cranch 87, 130, 3 L. Ed. 162; *Ex parte McCordle*, 7 Wall. 506, 514, 19 L. Ed. 264; *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 541, 24 L. Ed. 148; *Antoni v. Greenhow*, 107 U. S. 769, 775, 27 L. Ed. 468; *Soon Hing v. Crowley*, 113 U. S. 703, 710, 28 L. Ed. 1145; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. Ed. 253; *The Chinese Exclusive Case*, 130 U. S. 581, 602, 32 L. Ed. 1068; *Minnesota v. Barber*, 136 U. S. 313, 320, 34 L. Ed. 455; *United States v. Des Moines Nav., etc., Co.*, 142 U. S. 510, 543, 35 L. Ed. 1099; *United States v. Old Settlers*, 148 U. S. 427, 466, 37 L. Ed. 509; *Virginia v. Tennessee*, 148 U. S. 503, 527, 37 L. Ed. 537; *Angle v. Chicago, etc., R. Co.*, 151 U. S. 1, 18, 25, 38 L. Ed. 55; *Hennington v. Georgia*, 163 U. S. 299, 307, 41 L. Ed. 166; *Gulf, etc., R. Co. v. Ellis*, 165 U. S. 150, 154, 41 L. Ed. 66; *Atchison, etc., R. Co. v. Matthews*, 174 U. S. 96, 104, 43 L. Ed. 909; *New Orleans v. Warner*, 175 U. S. 120, 145, 44 L. Ed. 96; *Chicago, etc., R. Co. v. Thompson*, 176 U. S. 167, 173, 44 L. Ed. 417; *Florida, etc., R. Co. v. Reynolds*, 183 U. S. 471, 480, 46 L. Ed. 283; *McCray v. United States*, 195 U. S. 27, 59, 49 L. Ed. 78; *Ellis v. United States*, 206 U. S. 246, 256, 51 L. Ed. 1047. See, also, ante, "Presumption as to Legislative Intention," VI, D, 3, d. (3), (b), (bb), (eee).

It is a maxim of constitutional law that a legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts, and with the purpose of promoting the interests of the

people as a whole, and courts will not lightly hold that an act duly passed by the legislature was one in the enactment of which it has transcended its power. *Atchison, etc., R. Co. v. Matthews*, 174 U. S. 96, 104, 43 L. Ed. 909.

"If the power mentioned is vested in congress, any reflection upon its motives, or the motives of any of its members in exercising it, would be entirely uncalled for. This court is not a censor of the morals of other departments of the government; it is not invested with any authority to pass judgment upon the motives of their conduct. When once it is established that congress possesses the power to pass an act, our province ends with its construction, and its application to cases as they are presented for determination." *The Chinese Exclusion Case*, 130 U. S. 581, 602, 32 L. Ed. 1068.

In a contest between two individuals, claiming under an act of a legislature, the court cannot inquire into the motives which actuated the members of that legislature. If the legislature might constitutionally pass such an act; if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit between individuals, founded on the allegation that the act is a nullity, in consequence of the impure motives which influenced certain members of the legislature which passed the law. *Fletcher v. Peck*, 6 Cranch 87, 3 L. Ed. 162.

"The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments. Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body. The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile." *Soon Hing v. Crowley*, 113 U. S. 703, 710, 28 L. Ed. 1145; *Minnesota v. Barber*, 136 U. S. 313, 320, 34 L. Ed. 455.

"Courts are not concerned with the mere beliefs and sentiments of legislators, or with the motives which influence them in enacting laws which are within legis-

in the judiciary to restrain a lawful exercise of power by another department of the government, where a wrong motive or purpose has impelled to the exertion of the power, that abuses of a power conferred may be temporarily effectual. The remedy for this, however, lies, not in the abuse by the judicial authority of its functions, but in the people, upon whom, after all, under our

lative competency." *Hennington v. Georgia*, 163 U. S. 299, 307, 41 L. Ed. 166.

"We must assume that the legislature acts according to its judgment for the best interests of the state. A wrong intent cannot be imputed to it." *Florida, etc., R. Co. v. Reynolds*, 183 U. S. 471, 480, 46 L. Ed. 283.

**Fraudulent revocation of grant to public service corporation.**—Thus where one public service corporation, by means of fraudulent representations, bribery and other corrupt practices, and evil influence brought to bear upon the legislators, procures the enactment of a law revoking a grant made to another public service company engaged in the construction of a railroad, to the great and undeniable injury of the latter, the courts have no jurisdiction to declare the revoking act void because of the improper motives which prompted the legislature. Such principle does not, however, extend to the prevention of the courts granting redress to the wronged party against the company whose wrongful acts and practices caused the injury of which it complains. *Angle v. Chicago, etc., R. Co.*, 151 U. S. 1, 25, 38 L. Ed. 55.

**Treaty of 1846.**—The court of claims declined to go beyond the treaty of 1846 upon the ground that it was not within the province of a court, either of law or equity, to determine that a treaty or an act of congress had been procured by duress or fraud, and declare it inoperative for that reason. *United States v. Old Settlers*, 148 U. S. 427, 466, 37 L. Ed. 509; *Virginia v. Tennessee*, 148 U. S. 503, 527, 37 L. Ed. 537.

**Revocation of license of foreign insurance company.**—Thus the state of Wisconsin having the power to revoke the license of a foreign insurance company to do business within the state for any reason, or for no reason at all, as it may see fit, a statute which directs the secretary of state to revoke the license of any such company which attempts to move a case from the state to the federal courts, cannot be declared unconstitutional upon the ground that it was the intention of the legislature to accomplish an unconstitutional result, namely, the prevention of the company's exercising its constitutional right to resort to the federal courts. *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 541, 24 L. Ed. 148.

**Legislative divorces.**—Where it is within the competency of a territorial legislative assembly to pass an act granting a divorce, the courts cannot inquire into

its motives in so doing; its will is a sufficient reason for its action. *Maynard v. Hill*, 125 U. S. 190, 209, 31 L. Ed. 654.

**Ordinance regulating laundries.**—And, even should it be true, as alleged, that an ordinance regulating laundries and wash-houses, which is, on its face, a valid police regulation, was designed for the purpose of enforcing an unjust discrimination against Chinese residents engaged in that business, on account of their race and color, it is no ground for declaring it unconstitutional unless in its enforcement it is made to operate only against the class mentioned. *Soon Hing v. Crowley*, 113 U. S. 703, 711, 28 L. Ed. 1145.

**Motives prompting enactment of eight-hour law.**—An act of congress which limits the employment of all laborers and mechanics employed by the United States, by the District of Columbia or by any contractor or subcontractor upon any of the public works of the United States, or the district, to eight hours in one calendar day, cannot be declared invalid through any speculation or allegation as to improper motives prompting its enactment. *Ellis v. United States*, 206 U. S. 246, 256, 51 L. Ed. 1047.

"Congress, as incident to its power to authorize and enforce contracts for public works, may require that they shall be carried out only in a way consistent with its views of public policy, and may punish a departure from that way. It is true that it has not the general power of legislation possessed by the legislatures of the states, and it may be true that the object of this law is of a kind not subject to its general control. But the power that it has over the mode in which contracts with the United States shall be performed cannot be limited by a speculation as to motives. If the motive be conceded, however, the fact that congress has not general control over the conditions of labor does not make unconstitutional a law otherwise valid, because the purpose, of the law is to secure to it certain advantages, so far as the law goes." *Ellis v. United States*, 206 U. S. 246, 256, 51 L. Ed. 1047.

**Law prescribing day of rest; Sunday laws.**—And where the legislature has prescribed that all persons shall cease from their labors upon the Sabbath day, works of charity and necessity excepted, the courts cannot inquire into the motives which prompted the legislature in fixing upon that particular day and declare the statute void upon the ground that it is a legislative attempt to compel the perform-



institutions, reliance must be placed for the correction of abuses committed in the exercise of a lawful power."<sup>24</sup>

**Limitations of Doctrine.**—While it is undoubtedly true that the general doctrine is as above stated, and that the legislature is presumed to act with full knowledge of the facts upon which its legislation is based, it is not true that its judgment upon those facts is not subject to investigation.<sup>25</sup> And while good faith and a knowledge of existing conditions on the part of a legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the fourteenth amendment a mere rope of sand, in no manner restraining state action.<sup>26</sup>

(dd) *Implied Limitations upon Legislative Powers; Statutes Opposed to Natural Justice, etc.*—The question whether there are not implied limitations upon the powers of the state and national legislatures, arising out of the nature of free governments and fundamental principles supposed to pervade or underlie our constitutions, was the subject of early discussion and the occasion of much difference of opinion among the justices composing the federal supreme court. On the one hand it was insisted that if congress or the legislature of a state should pass a law within the general scope of their constitutional power, the court could not pronounce it void merely because, in their judgment, it was contrary to the principles of natural justice; the ideas of natural justice being regulated by no fixed standard, and the legislature, as a co-ordinate branch, being entitled to an equal right of opinion with the courts.<sup>27</sup> On the other hand, it

ance of a religious duty or the observance of the holy day. *Hennington v. Georgia*, 163 U. S. 299, 307, 41 L. Ed. 166.

**Fraudulent expenditure of public funds.**—The fact that the city of New Orleans chose to pay \$300,000 in 1876, for property which Van Norden bought in 1872 from the Ship Canal Company for \$50,000, is not one which can be considered here. *New Orleans v. Warner*, 175 U. S. 120, 145, 44 L. Ed. 96.

24. *McCray v. United States*, 195 U. S. 27, 55, 49 L. Ed. 78; *Knowlton v. Moore*, 178 U. S. 41, 60, 44 L. Ed. 969. Accord: *Lottery Case*, 188 U. S. 321, 47 L. Ed. 492.

25. **Limitations of doctrine.**—*Chicago, etc., R. Co. v. Thompson*, 176 U. S. 167, 173, 44 L. Ed. 417.

For example, the presumption that the legislature acted with full knowledge of the facts upon which its legislation is based cannot preclude a judicial inquiry when vested rights or property are disturbed by a legislative enactment in respect to rates. *Chicago, etc., R. Co. v. Thompson*, 176 U. S. 167, 173, 44 L. Ed. 417.

26. **Same; hostile and discriminating legislation.**—*Gulf, etc., R. Co. v. Ellis*, 165 U. S. 150, 154, 41 L. Ed. 66.

27. **Implied limitations; statutes opposed to natural justice, etc.**—*Calder v. Bull*, 3 Dall. 386, 399, 1 L. Ed. 648; *Jones v. Van Zandt*, 5 How. 215, 12 L. Ed. 122. See, also, *Vanhorne v. Dorrance*, 2 Dall. 304, 310, 1 L. Ed. 391; *Satterlee v. Matthewson*, 2 Pet. 380, 413, 7 L. Ed. 458.

**Constitutional provision relating to re-**

**turn of fugitive slaves.**—In the case of *Jones v. Van Zandt*, 5 How. 215, 12 L. Ed. 122, it was urged upon the court in argument that not only the fugitive slave act of 1793, but the constitutional provision providing for the delivery up and return of fugitive slaves, should be disregarded and declared unconstitutional upon the ground that there can be no valid law recognizing slavery or right of property in man. Replying to this argument, Mr. Justice Woodbury, delivering the opinion of the court, says: "Before concluding, it may be expected by the defendant that some notice should be taken of the argument, urging on us a disregard of the constitution and the act of congress in respect to this subject, on account of the supposed inexpediency and invalidity of all laws recognizing slavery or any right of property in man. But that is a political question, settled by each state for itself; and the federal power over it is limited and regulated by the people of the states in the constitution itself, as one of its sacred compromises, and which we possess no authority as a judicial body to modify or overrule. Whatever may be the theoretical opinions of any as to the expediency of some of those compromises, or of the right of property in persons which they recognize, this court has no alternative, while they exist, but to stand by the constitution and laws with fidelity to their duties and their oaths. Their path is a strait and narrow one, to go where that constitution and the laws lead, and not to break both, by traveling without or beyond them."

was insisted that there were implied limitations, upon the powers of the legislative departments, implied reservations of individual rights of property and person, arising out of the essential nature of society and free government, and based upon fundamental, though unexpressed, principles pervading our constitutions, beyond which the legislative branches could not go, and that should they attempt to do so, the judicial department would have the power, and that it would be its duty, upon its assistance being properly invoked, to interpose a restraining hand and declare such enactments unconstitutional and void.<sup>28</sup> This latter view seems to have finally triumphed in the case of *Loan Association v. Topeka*. The question there arose upon the constitutionality of a statute authorizing municipal councils to appropriate funds or issue bonds for the purpose of aiding in the establishment of manufacturing plants owned by private persons, and to levy taxes to pay the same when due. In delivering the opinion of the courts, holding such statute to be unconstitutional as an unauthorized invasion of private rights and beyond the power of the legislature, Mr. Justice Miller said in part: "It must be conceded that there are such rights in every free government beyond the control of the state. \* \* \* The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers. There are limitations on such power which grow out of the essential nature of all free governments; implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. \* \* \* Of all the powers conferred upon government, that of taxation is most liable to abuse. \* \* \* This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised. To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is

**28. Statutes violating fundamental rights and principles.**—*Calder v. Bull*, 3 Dall. 386, 388, 1 L. Ed. 648; *Anderson v. Dunn*, 6 Wheat. 204, 231, 5 L. Ed. 242; *Wilkinson v. Leland*, 2 Pet. 627, 7 L. Ed. 542.

"I cannot subscribe to the omnipotence of a state legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the constitution, or fundamental law of the state. \* \* \* An act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law, in governments established on express compact, and on republican principles, must be determined by the nature of the power upon which it was founded." (Opinion of Chase, J.) *Calder v. Bull*, 3 Dall. 386, 388, 1 L. Ed. 648.

"It may well be doubted, whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation? To the legislature, all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public, be in

the nature of legislative power, is well worthy of serious reflection." Marshall, C. J., delivering the opinion in *Fletcher v. Peck*, 6 Cranch 87, 135, 3 L. Ed. 162.

The American legislative bodies have never possessed, or pretended to, the omnipotence which constitutes the leading feature in the legislative assembly of Great Britain. *Anderson v. Dunn*, 6 Wheat. 204, 231, 5 L. Ed. 242.

"That government can scarcely be deemed to be free, where the rights of property are left solely dependent on the will of the legislative body without any restraint. A fundamental maxim of a free government seems to require, that the rights of personal liberty and private property should be held sacred; at least, no court of justice in this country would be justified in assuming that the power to violate or disregard them, a power so repugnant to the common principles of justice and civil liberty, lurked under any general grant of legislative authority, or ought to be implied from a general expression of the will of the people; the people ought not to be presumed to part with rights so vital to their security and well being, without very strong and direct expressions of such an intention." *Wilkinson v. Leland*, 2 Pet. 627, 7 L. Ed. 542.



none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms."<sup>29</sup>

**Same; Impairment of Vested Rights.**—See post, "Validity; Power to Divest Vested Rights," VIII, B, 2.

(ee) *Where Intent Good, but Operation and Effect Unconstitutional.*—The presumption that a statute was enacted, in good faith, for the purpose expressed in the title, cannot control the final determination of the question whether it is not repugnant to the constitution of the United States. There may be no purpose upon the part of a legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, by its necessary operation, be destructive of rights granted or secured by the constitution. In such cases the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void.<sup>30</sup>

**29. Doctrine of Loan Ass'n v. Topeka,** 20 Wall. 655, 22 L. Ed. 455.

**Same: appropriating private property to other than public purpose.**—See, in accord, as to the constitutionality of appropriating property or levying taxes for private purposes, *Hepburn v. Griswold*, 8 Wall. 603, 623, 19 L. Ed. 513; *Olcott v. Supervisors*, 16 Wall. 678, 689, 21 L. Ed. 382; *Township of Pine Grove v. Talcott*, 19 Wall. 666, 676, 22 L. Ed. 227; *Board of Commissioners v. Lucas*, 93 U. S. 108, 114, 23 L. Ed. 822; *Parkersburg v. Brown*, 106 U. S. 487, 27 L. Ed. 238; *Cole v. La Grange*, 113 U. S. 1, 7, 28 L. Ed. 896; *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9, 21, 25, 28 L. Ed. 889; *Kaukauna Water Power Co. v. Green Bay, etc., Canal Co.*, 142 U. S. 254, 273, 35 L. Ed. 1004. See, also, *Township of Burlington v. Beasley*, 94 U. S. 310, 24 L. Ed. 161; *New Orleans v. Clark*, 95 U. S. 644, 24 L. Ed. 521; *County Commissioners v. Chandler*, 96 U. S. 205, 24 L. Ed. 625; *Taylor v. Ypsilanti*, 105 U. S. 60, 26 L. Ed. 1008; *United States v. Dodge County Comm'rs*, 110 U. S. 156, 28 L. Ed. 103; *Osborne v. County of Adams*, 106 U. S. 181, 27 L. Ed. 129; *S. C.*, 109 U. S. 1, 27 L. Ed. 835; *Blair v. Cumming Co.*, 111 U. S. 363, 372, 28 L. Ed. 457; *Middleton v. Mullica Township*, 112 U. S. 433, 28 L. Ed. 785; *Wurts v. Hoagland*, 114 U. S. 606, 614, 29 L. Ed. 229; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 659, 29 L. Ed. 516; *Young v. Clarendon Township*, 132 U. S. 340, 356, 33 L. Ed. 356; *Gilman v. Sheboygan*, 2 Black 510, 17 L. Ed. 305; *Rogers v. Burlington*, 3 Wall. 654, 18 L. Ed. 79; *Railroad Co. v. Otoe County*, 16 Wall. 667, 21 L. Ed. 375; *Olcott v. Supervisors*, 16 Wall. 678, 21 L. Ed. 382; *Queensbury v. Culver*, 19 Wall. 83, 22 L. Ed. 100; *Secombe v. Railroad Co.*, 23 Wall. 108, 23 L. Ed. 67; all involving the question whether the purpose for which the property was taken or the tax levied was or was not public. See, also, the titles DUE PROCESS OF LAW; EMINENT DOMAIN; MUNICIPAL, COUNTY, STATE AND FEDERAL AID; TAXATION.

**Statute imposing excise upon arti-**

**cially colored oleomargarine.**—Whatever may be the doctrine as to the power of the courts to invalidate acts of congress upon the theory that they transcend the implied limitations upon the powers of that body, or that they are opposed to inherent and fundamental principles of government which underlie the constitution, it is not controlling and has no application to an act of congress which imposes an excise upon artificially colored oleomargarine but not upon artificially colored butter, and which is alleged to be so excessive as to destroy the former industry in favor of the persons engaged in the manufacture of the latter. This results from the nature of artificially colored oleomargarine and from the tendency of that article to deceive the public into buying it for butter. *McCray v. United States*, 195 U. S. 27, 49 L. Ed. 78.

**30. Where intent good, but operation and effect unconstitutional.**—*Henderson v. New York City*, 92 U. S. 259, 268, 23 L. Ed. 543; *People v. Compagnie Generale Transatlantique*, 107 U. S. 59, 63, 27 L. Ed. 383; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. Ed. 1145; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. Ed. 220; *Mugler v. Kansas*, 123 U. S. 623, 661, 31 L. Ed. 205; *Minnesota v. Barber*, 136 U. S. 313, 319, 34 L. Ed. 455; *Brimmer v. Rebman*, 138 U. S. 78, 34 L. Ed. 862; *McCray v. United States*, 195 U. S. 27, 60, 49 L. Ed. 78; *Lochner v. New York*, 198 U. S. 45, 64, 49 L. Ed. 937.

"The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose. *Minnesota v. Barber*, 136 U. S. 313, 34 L. Ed. 455; *Brimmer v. Rebman*, 138 U. S. 78, 34 L. Ed. 862. The court looks beyond the mere letter of the law in such cases. *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. Ed. 220." *Lochner v. New York*, 198 U. S. 45, 64, 49 L. Ed. 937.

"Of course, where a state law is assailed



(ff) *Where Statute Otherwise Unobjectionable Is Unfaithfully Administered*.—A law cannot be held unconstitutional because, while its just interpretation is consistent with the constitution, it is unfaithfully administered by those who are charged with its execution. Their doings may be unlawful while the statute is valid.<sup>31</sup> But where an ordinance or law vests an absolute and arbitrary discretion in a municipal board, without the right of appeal or review therefrom, to grant or refuse licenses for conducting a legitimate and proper business, without regard to the character or fitness of the applicant or the suitability of the place where it is proposed to be conducted, thereby putting it in the power of such board to make unjust and arbitrary discriminations founded upon race or color or other arbitrary distinction, and it is actually shown that such discriminations are made, such ordinance will be held unconstitutional as denying the equal protection of the laws in violation of the first section of the fourteenth amendment.<sup>32</sup> But a statute is not to be held unconstitutional by indulging in conjecture as to every conceivable harm which may arise or wrong which may be occasioned by the abuse of the lawful powers which it confers. That should be considered when the supposed abuse arises.<sup>33</sup>

(gg) *Power of the Judiciary to Enjoin the Enactment of Statutes or Ordinances*.—The courts would pass the line that separates judicial from legislative authority if by any order or in any mode they should assume to control the discretion with which municipal assemblies are invested when deliberating upon the adoption or rejection of ordinances proposed for their adoption. The passage of ordinances by such bodies are legislative acts which a court of equity will not enjoin.<sup>34</sup> If an ordinance be passed and be invalid, the jurisdiction of the courts may then be invoked for the protection of private rights that may be violated by its enforcement; but the power of the court cannot be exercised to restrain its enactment in the first instance.<sup>35</sup>

(c) *Independence of the Executive*—(aa) *Generally*.—The executive power is vested in a president; and so far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power.<sup>36</sup>

(bb) *Judicial Control of the Executive*—(aaa) *The Federal Executive and His Subordinates*.—By the constitution of the United States, the president is invested with certain important political powers, and is accountable only to his

as repugnant to the constitution of the United States, and on its face such act was seemingly within the power of the state to adopt, but its necessary effect and operation is to usurp a power granted by the constitution to the government of the United States, it must follow, from the paramount nature of the constitution of the United States, that the act is void. In such a case the result of the test of necessary operation and effect is to demonstrate the want of power, because of the controlling nature of the limitations imposed by the constitution of the United States on the states." *McCray v. United States*, 195 U. S. 27, 60, 49 L. Ed. 78.

31. *Where statute otherwise unobjectionable is unfaithfully administered*.—*Cummings v. National Bank*, 101 U. S. 153, 161, 25 L. Ed. 903; *Compagnie Francaise, etc., v. State Board of Health*, 186 U. S. 380, 392, 46 L. Ed. 1209; *Michigan Cent. R. Co. v. Powers*, 201 U. S. 245, 50 L. Ed. 744.

32. *Oppressive administration of law vesting absolute and arbitrary discretion*.—*Soon Hing v. Crowley*, 113 U. S. 703, 711, 28 L. Ed. 1145; *Yick Wo v. Hopkins*,

118 U. S. 356, 373, 374, 30 L. Ed. 220; *Crowley v. Christensen*, 137 U. S. 86, 92, 34 L. Ed. 620. See, also, *Henderson v. New York City*, 92 U. S. 259, 23 L. Ed. 543; *Chy Lung v. Freeman*, 92 U. S. 275, 28 L. Ed. 550. And see post, "Equality Rule Forbids That Individuals Shall Be Subjected to Arbitrary Exercise of Power," VII, B, 2, i, et seq.

33. *Same*.—*Compagnie Francaise, etc., v. State Board of Health*, 186 U. S. 380, 392, 46 L. Ed. 1209.

34. *Power of courts to enjoin the enactment of statutes and ordinances*.—*New Orleans Waterworks Co. v. New Orleans*, 164 U. S. 471, 481, 41 L. Ed. 518.

35. *Same*.—*New Orleans Waterworks Co. v. New Orleans*, 164 U. S. 471, 481, 41 L. Ed. 518. See, generally, on this subject, the titles INJUNCTIONS; ORDINANCES; STATUTES.

36. *Independence of the executive*.—*Marbury v. Madison*, 1 Cranch 137, 166, 2 L. Ed. 60; *Mississippi v. Johnson*, 4 Wall. 475, 18 L. Ed. 437; *Kendall v. United States*, 12 Pet. 524, 610, 9 L. Ed. 1181.

country in his political character, and to his own conscience. As to such powers the judiciary has no power to control or restrain his discretion.<sup>37</sup>

**Principle Extends to Heads of Departments—Mandamus.**—This principle extends to the heads of the executive departments. Where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the president, in cases in which the executive possesses a constitutional or legal discretion, their acts are his acts, and there exists no power in the judiciary to control or review their discretion; such powers being political, are only politically examinable.<sup>38</sup>

**Power of Judiciary to Review Construction Placed upon Statutes by Heads of Departments.**—The judiciary is not bound by the practical construction placed upon statutes by the heads of departments in exercising functions pertaining to their offices. The courts must look to the laws themselves and construe them for themselves, although the construction placed upon the laws by the heads of departments are entitled to respect and will be duly weighed by the courts.<sup>39</sup>

**Other Officers.**—The public functionaries must be left at liberty to exercise

**37. Judicial control of the federal executive.**—*Marbury v. Madison*, 1 Cranch 137, 166, 2 L. Ed. 60; *Anderson v. Dunn*, 6 Wheat. 204, 226, 5 L. Ed. 242; *Decatur v. Paulding*, 14 Pet. 497, 516, 10 L. Ed. 559; *United States v. Guthrie*, 17 How. 284, 15 L. Ed. 102; *United States v. The Commissioner*, 5 Wall. 563, 18 L. Ed. 692; *Litchfield v. Register and Receiver*, 9 Wall. 575, 577, 19 L. Ed. 681; *Carrick v. Lamar*, 116 U. S. 423, 426, 29 L. Ed. 677; *Noble v. Union River Logging R. Co.*, 147 U. S. 165, 171, 37 L. Ed. 123.

In the case of the *Cherokee Nation v. Georgia*, 5 Pet. 1, 30, 8 L. Ed. 25, the plaintiff applied to the supreme court of the United States to restrain the state of Georgia from the forcible exercise of legislative power and enforcement of its laws within the Cherokee territory in alleged violation of the national and treaty rights of the Cherokee nation. In his separate opinion in this case, Mr. Justice Johnson, says: "The United States, finding themselves involved in conflicting treaties, or, at least, in two treaties, respecting the same property, under which two parties assert conflicting claims; one of the parties, putting itself upon its sovereign right, passes laws which in effect declare the laws and treaties under which the other party claims, null and void. It proceeds to carry into effect those laws by means of physical force; and the other party appeals to the executive department for protection. Being disappointed there, the party appeals to this court, indirectly to compel the executive to pursue a course of policy, which his sense of duty, or ideas of the law, may indicate should not be pursued. That is to declare war against a state, or to use the public force to repel the force and resist the laws of a state, when his judgment tells him the evils to grow out of such a course may be incalculable. What these people may have a right to claim of the executive power is one thing; whether we are to be the instruments to

compel another branch of the government to make good the stipulations of treaties, is a very different question. Courts of justice are properly excluded from all considerations of policy, and therefore, are very unfit instruments to control the action of that branch of government, which may often be compelled, by the highest considerations of public policy, to withhold even the exercise of a positive duty."

**38. Same; heads of departments.**—*Marbury v. Madison*, 1 Cranch 137, 166, 171, 2 L. Ed. 60; *Decatur v. Paulding*, 14 Pet. 497, 516, 10 L. Ed. 559; *Brashear v. Mason*, 6 How. 92, 12 L. Ed. 357; *Reeside v. Walker*, 11 How. 272, 13 L. Ed. 693; *United States v. Seaman*, 17 How. 225, 15 L. Ed. 226; *United States v. Guthrie*, 17 How. 284, 15 L. Ed. 102; *Commissioner v. Whiteley*, 4 Wall. 522, 18 L. Ed. 335; *United States v. The Commissioner*, 5 Wall. 563, 18 L. Ed. 692; *Gaines v. Thompson*, 7 Wall. 347, 19 L. Ed. 62; *The Secretary v. McGarrahan*, 9 Wall. 298, 19 L. Ed. 579; *Litchfield v. Register and Receiver*, 9 Wall. 575, 577, 19 L. Ed. 681; *United States v. Schuz*, 102 U. S. 378, 26 L. Ed. 167; *Butterworth v. United States*, 112 U. S. 50, 28 L. Ed. 656; *Carrick v. Lamar*, 116 U. S. 423, 426, 29 L. Ed. 677; *United States v. Black*, 128 U. S. 40, 32 L. Ed. 354; *United States v. Windom*, 137 U. S. 636, 34 L. Ed. 811; *Noble v. Union River Logging R. Co.*, 147 U. S. 165, 171, 37 L. Ed. 123.

"The interference of the courts with the performance of the ordinary duties of the executive departments of the government would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them." Taney, C. J., delivering the opinion of the court in *Decatur v. Paulding*, 14 Pet. 497, 516, 10 L. Ed. 559. See, also, the title *MANDAMUS*.

**39. Judicial review of construction placed upon statutes by heads of departments.**—*United States v. Dickson*, 15 Pet.



the powers which the people have intrusted to them. The interests and dignity of those who created them require the exertion of the powers indispensable to the attainment of the ends of their creation.<sup>40</sup> Where a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, and he is made the sole and exclusive judge of the existence of those facts, no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or controvert the sufficiency of the evidence on which he acted.<sup>41</sup>

**Exception as to Absolute or Ministerial Duties.**—But where such head of department or other officer is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he does not act under the direction of the president, and the performance of which the president cannot lawfully forbid, a mandamus is the proper remedy to compel the performance of such duties; as, for example, to record the commission of any public officer, or a patent for land, which has received all the legal solemnities, or to give a copy of such record.<sup>42</sup> This distinction between judicial and ministerial acts has been taken and enforced in many cases.<sup>43</sup>

141, 162, 10 L. Ed. 689; *Greely v. Thompson*, 10 How. 225, 234, 13 L. Ed. 397.

Speaking upon this point the court says: "We think, however, that the removal of that appraiser must be deemed valid, or not, as to third persons, according as the collector possessed legal power to make it on the facts of the case. The orders as well as the opinions of the head of the treasury department, expressed in either letters or circulars, are entitled to much respect, and will always be duly weighed by this court; but it is the laws which are to govern, rather than their opinions of them, and importers, in cases of doubt, are entitled to have their right settled by the judicial exposition of those laws, rather than by the views of the department. (*Marriott v. Brune*, 9 How. 619, 634, 635, 13 L. Ed. 282.) And though, as between the custom house officers and the department, the latter must by law control the course of proceeding (5 Stat. at L. 566), yet, as between them and the importer, it is well settled, that the legality of all their doings may be revised in the judicial tribunals (*Tracy v. Swartwout*, 10 Pet. 80, 95, 9 L. Ed. 354; *United States v. Lyman*, 1 Mason, C. C. 504; *Opinions of Attorneys-General*, 1015.)" *Greely v. Thompson*, 10 How. 225, 234, 13 L. Ed. 397.

**40. Other officers.**—*Anderson v. Dunn*, 6 Wheat. 204, 226, 5 L. Ed. 242.

**41. Same; discretionary powers.**—*Martin v. Mott*, 12 Wheat. 19, 31, 6 L. Ed. 537; *Philadelphia, etc., R. Co. v. Stimpson*, 14 Pet. 448, 458, 10 L. Ed. 535; *United States v. Jung Ah Lung*, 124 U. S. 621, 31 L. Ed. 591; *Benson v. McMahon*, 127 U. S. 457, 32 L. Ed. 234; *In re Oteiza*, 136 U. S. 330, 34 L. Ed. 464; *Ekiu v. United States*, 142 U. S. 651, 659, 660, 35 L. Ed. 1146; *Lem Moon Sing v. United States*, 158 U. S. 538, 544, 39 L. Ed. 1082.

**42. As to absolute and ministerial duties.**—*Marbury v. Madison*, 1 Cranch 137, 171, 2 L. Ed. 60.

**43. Same.**—*Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 60; *Kendall v. United States*, 12 Pet. 524, 9 L. Ed. 1181; *Decatur v. Paulding*, 14 Pet. 497, 10 L. Ed. 559; *Kendall v. Stokes*, 3 How. 87, 11 L. Ed. 506; *Brashear v. Mason*, 6 How. 92, 12 L. Ed. 357; *Reeside v. Walker*, 11 How. 272, 13 L. Ed. 693; *United States v. Seaman*, 17 How. 225, 231, 15 L. Ed. 226; *United States v. Guthrie*, 17 How. 284, 15 L. Ed. 102; *Commissioner v. Whiteley*, 4 Wall. 522, 18 L. Ed. 335; *United States v. The Commissioner*, 5 Wall. 563, 18 L. Ed. 692; *Gaines v. Thompson*, 7 Wall. 347, 19 L. Ed. 62; *The Secretary v. McGarahan*, 9 Wall. 298, 19 L. Ed. 579; *United States v. Boutwell*, 17 Wall. 604, 21 L. Ed. 721; *Board of Liquidation v. McComb*, 92 U. S. 531, 541, 23 L. Ed. 623; *United States v. Schuz*, 102 U. S. 378, 26 L. Ed. 167; *Cunningham v. Macon, etc., R. Co.*, 109 U. S. 446, 452, 27 L. Ed. 992; *Butterworth v. United States*, 112 U. S. 50, 28 L. Ed. 656; *Carrick v. Lamar*, 116 U. S. 423, 426, 29 L. Ed. 677; *United States v. Black*, 128 U. S. 40, 32 L. Ed. 354; *Noble v. Union River Logging R. Co.*, 147 U. S. 165, 171, 37 L. Ed. 123; *New Orleans v. Paine*, 147 U. S. 261, 37 L. Ed. 162. See, generally, the title **MANDAMUS**.

"It is settled by many decisions of this court that in matters which require judgment and consideration to be exercised by an executive officer of the government, or which are dependent upon his discretion, no rule for a mandamus to control his action will issue. It is only for ministerial acts in the performance of which no exercise of judgment or discretion is required, that the rule will be granted. *Decatur v. Paulding*, 14 Pet. 497, 499, 10 L. Ed. 559; *United States v. Guthrie*, 17 How. 284, 15 L. Ed. 102; *United States v. The Commissioner*, 5 Wall. 563, 18 L. Ed. 692; *Litchfield v. Register and Receiver*, 9 Wall. 575, 577, 19 L. Ed. 681." *Carrick v. Lamar*, 116 U. S. 423, 426, 29 L. Ed. 677.



**Ministerial Duty Defined.**—A ministerial duty, the performance of which may, in proper cases, be required of the head of a department by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law.<sup>44</sup>

**Injunction against the President.**—The president of the United States cannot be restrained by injunction from carrying into effect an act of congress alleged to be unconstitutional, nor will a bill having such a purpose be allowed to be filed.<sup>45</sup> It makes no difference whether the incumbent of the presidential office be described in the bill as president or simply as a citizen of a state.<sup>46</sup>

**Injunction against Secretary of War.**—A bill in equity filed by one of the United States to enjoin the secretary of war and other officers who represent the executive authority of the United States, from carrying into execution certain acts of congress, on the ground that such execution would annul and totally abolish the existing state government of the state and establish another and different one in its place—in other words, would overthrow and destroy the corporate existence of the state by depriving it of all the means and instrumentalities whereby its existence might, and otherwise would be maintained—calls for a judgment upon a political question, and will therefore not be entertained by the United States supreme court.<sup>47</sup> The character of the bill is not changed by the fact that, in setting forth the political rights sought to be protected, the bill avers that the state has real and personal property (as for example, the public buildings, etc.), of the enjoyment of which, by the destruction of its corporate existence, the state will be deprived; such averment not being the substantive ground of the relief sought.<sup>48</sup>

**44. Ministerial duty defined.**—*Mississippi v. Johnson*, 4 Wall. 475, 498, 18 L. Ed. 437.

A controversy having arisen between the postmaster general and certain contractors engaged in carrying the mails for the government, as to the balance due them, a memorial was presented to congress by the contractors, whereupon congress referred the entire matter to the arbitration of the solicitor of the treasury, his award to be final and conclusive. The postmaster general having refused to order a credit for the amount found due by the arbiter, and a mandamus having been sued out to coerce that official to give credit for the amount so found due, it was urged that the postmaster general was amenable solely to the direction and control of the president; and that the president, under the power conferred upon him by the constitution to enforce the execution of the law, had also the power to suspend or refrain from the enforcement of the law. Held, that such a doctrine cannot receive the sanction of the court; that it has no countenance for its support in any part of the constitution; that to contend that the obligation imposed on the president to see that the laws are faithfully executed, implies a power to forbid the execution, is an entirely inadmissible construction of the constitution, since it would clothe the president with the power to control the legislation of congress and paralyze the administration of justice. (Three justices dissenting.) *Kendall v. United States*, 12

Pet. 524, 608, 9 L. Ed. 1181. See, also, *Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 60.

A person appointed to office by the president of the United States, who is not removable at the will of the president, who concedes, that, by virtue of his appointment, the appointee has a legal right either to the commission which has been made out to him or to a copy of that commission, which commission or copy is withheld by the head of the department whose duty it is to transfer or deliver the same, is entitled to have such right examined and passed upon by the courts. *Marbury v. Madison*, 1 Cranch 137, 167, 2 L. Ed. 60.

But whether an island in a navigable river shall be surveyed and put upon the market is a question calling for the exercise of executive discretion, and a mandamus will not lie to coerce the secretary of the interior in such cases. *Carrick v. Lamar*, 116 U. S. 423, 29 L. Ed. 677.

**45. Injunction against the president.**—*Mississippi v. Johnson*, 4 Wall. 475, 18 L. Ed. 437.

**46. Same.**—*Mississippi v. Johnson*, 4 Wall. 475, 18 L. Ed. 437. See, also, the title INJUNCTIONS.

**47. Injunction against secretary of war.**—*Georgia v. Stanton*, 6 Wall. 50, 18 L. Ed. 721. See, also, *Gaines v. Thompson*, 7 Wall. 347, 19 L. Ed. 62. And see the title INJUNCTIONS.

**48. Same; form of bill.**—*Georgia v. Stanton*, 6 Wall: 50, 18 L. Ed. 721.

(bbb) *State Executive Officers.—Motives of State Executive.*—The federal supreme court will not inquire as to the motive which guided the chief magistrate of a state when executing the functions of his office.<sup>49</sup>

**Discretion of Executive Officers.**—A state, without its consent, cannot be sued by an individual; and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter.<sup>50</sup> But it is well settled, that when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it.<sup>51</sup>

**Injunction to Prevent Enforcement of Unconstitutional Act.**—An injunction will lie at the suit of an individual to prevent state officers from enforcing the provisions of an unconstitutional act of the state legislature to his personal and private injury.<sup>52</sup> The right of an individual to maintain an action of detinue or trespass committed under the alleged authority of a void act, or to maintain a bill to enjoin the enforcement of a void act, exists not only where the statute is void on its face, but also where the statute is complained of only because its operation works a violation of a constitutional right. The suit is no more to be deemed a suit against the state in the one case than in the other.<sup>53</sup>

(cc) *Legislative Encroachment upon the Executive*—(aaa) *The Pardoning Power of the Executive.*—To the executive alone is intrusted the pardoning power, and it is granted without limit. Any attempt, therefore, by congress to restrain the exercise of this power, or to adjust a pardon after the same has

**49. State executive; motives.**—*Pettibone v. Nichols*, 203 U. S. 192, 51 L. Ed. 148, followed in *Moyer v. Nichols*, 203 U. S. 221, 51 L. Ed. 160.

Thus where the governor of a state has sent a requisition for the return of a fugitive from justice, to the governor of another state, the court will not enter into any investigation as to the motives which induced the action taken by the governor of either state. So held in the case of *Pettibone v. Nichols*, 203 U. S. 192, 217, 51 L. Ed. 148, in which the petitioner alleged that his removal from the one state to the other had been effected by fraud and connivance, arranged between the executive authorities of the two states with the purpose and intent to deprive him of any opportunity to make application for his discharge in the courts of the surrendering state before his removal. Followed in *Moyer v. Nichols*, 203 U. S. 221, 51 L. Ed. 160.

**50. Discretion of executive officers.**—*Board of Liquidation v. McComb*, 92 U. S. 531, 23 L. Ed. 623; *Louisiana v. Jumel*, 107 U. S. 711, 27 L. Ed. 448; *Hagood v. Southern*, 117 U. S. 52, 69, 29 L. Ed. 805; *In re Ayers*, 123 U. S. 443, 506, 31 L. Ed. 216.

**51. Ministerial duties.**—*Davis v. Gray*, 16 Wall. 203, 21 L. Ed. 447; *Board of Liquidation v. McComb*, 92 U. S. 531, 541, 23 L. Ed. 623; *Cunningham v. Macon*, etc., *R. Co.*, 109 U. S. 446, 453, 27 L. Ed. 992; *Hagood v. Southern*, 117 U. S. 52, 69, 29

L. Ed. 805; *Rolston v. Missouri Fund Comm'rs*, 120 U. S. 390, 411, 30 L. Ed. 721; *In re Ayers*, 123 U. S. 443, 506, 31 L. Ed. 216.

In the case of *Davis v. Gray*, 16 Wall. 203, 21 L. Ed. 447, the state of Texas having made a grant of the alternate sections of land along which a railroad should thereafter be located, and the railroad company having surveyed the land at its own expense, and located its road through it, the governor of the state and the commissioner of the state land office, were, in violation of the rights of the company, selling and delivering patents for the sections to which the company had an undoubted vested right. The circuit court of the United States enjoined them from so doing by a decree which was affirmed upon appeal to the United States supreme court. See the titles INJUNCTIONS; MANDAMUS.

As to suits against states and state officers, see the title STATES.

**52. Enjoining enforcement of unconstitutional law.**—*Osborn v. United States Bank*, 9 Wheat. 738, 859, 6 L. Ed. 204; *Board of Liquidation v. McComb*, 92 U. S. 531, 541, 23 L. Ed. 623; *Virginia Coupon Cases*, 114 U. S. 269, 295, 29 L. Ed. 185; *In re Ayers*, 123 U. S. 443, 506, 31 L. Ed. 216; *Pennoyer v. McConaughy*, 140 U. S. 1, 11, 35 L. Ed. 363. See the title INJUNCTIONS.

**53. Same.**—*Virginia Coupon Cases*, 114 U. S. 269, 340, 29 L. Ed. 185.



been given and accepted, or to impair the effect thereof, is unconstitutional as an encroachment upon the prerogatives of the executive.<sup>54</sup>

(bbb) *Legislative Control of the Heads of Executive Departments.*—While it is true that the president, so far as his powers are derived from the constitution, is beyond the control of any other department, except in the mode prescribed by the constitution through the power of impeachment conferred upon the senate and house of representatives, it by no means follows, that every officer in every branch of the executive department is under the exclusive direction of the president. There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the president; but congress may impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the president. And this is emphatically the case, where the duty enjoined is of a mere ministerial character.<sup>55</sup>

**54. Legislative encroachment upon the executive: pardoning power.**—Ex parte Garland, 4 Wall. 333, 18 L. Ed. 366; United States v. Klein, 13 Wall. 128, 129, 147, 20 L. Ed. 519.

The appropriation act of July 12, 1870 (16 Stat. at Large 235), provided in substance: "That no pardon or amnesty granted by the president shall be admissible in evidence on the part of any claimant in the court of claims as evidence in support of any claim against the United States, or to establish the standing of any claimant in said court, or his right to bring or maintain suit therein; and that no such pardon or amnesty heretofore put in evidence on behalf of any claimant in that court be considered by it, or by the appellate court on appeal from said court, in deciding upon the claim of such claimant, or any appeal therefrom, as any part of the proof to sustain the claim of the claimant, or to entitle him to maintain his action in the court of claims, or on appeal therefrom, \* \* \* but that proof of loyalty (such as the proviso goes on to mention), shall be made irrespective of the effect of any executive proclamation, pardon, amnesty, or other act of condonation or oblivion. And that in all cases where judgment shall have been heretofore rendered in the court of claims in favor of any claimant on any other proof of loyalty than such as the proviso requires, this court shall, on appeal, have no further jurisdiction of the cause, and shall dismiss the same, for want of jurisdiction: 'And further, that whenever any pardon shall have heretofore been granted by the president to any person bringing suit in the court of claims for the proceeds of abandoned or captured property under the act of March 12th, 1863; and such pardon shall recite, in substance, that such person took part in the late rebellion, or was guilty of any act of rebellion against, or disloyalty to, the United States, and such pardon shall have been accepted in writing, by the person to whom the same issued, without an express disclaimer of and protestation

against such fact of guilt contained in such acceptance, such pardon and acceptance shall be taken and deemed in such suit in the said court of claims, and on appeal therefrom, conclusive evidence that such person did take part in and give aid and comfort to the late rebellion, and did not maintain true allegiance or consistently adhere to the United States, and on proof of such pardon and acceptance the jurisdiction of the court in the case shall cease, and the court shall forthwith dismiss the suit of such claimant.'" This proviso was unconstitutional and void. Its substance being that an acceptance of a pardon without a disclaimer should be conclusive evidence of the acts pardoned, but should be null and void as evidence of rights conferred by it, both in the court of claims and in the supreme court; it invaded powers both of the judicial and of the executive departments of the government. United States v. Klein, 13 Wall. 128, 129, 147, 20 L. Ed. 519.

**55. Legislative control of heads of departments.**—Kendall v. United States, 12 Pet. 524, 610, 9 L. Ed. 1181.

Thus, by an act of congress, a controversy between the postmaster general and certain contractors engaged in carrying the mail for the government, as to the balance due them, was referred to the solicitor of the treasury for adjustment and settlement. The postmaster general was vested with no discretion or control over the decision of the solicitor; nor was any appeal or review of the solicitor's decision provided for by the act, he being made the sole arbiter. Held, that it did not rest with the postmaster general to control congress or the solicitor in the affair; and the postmaster general having refused to credit the contractors with the balance found due by the solicitor, it was also held that he was subject to coercion by writ of mandamus at the suit of the contractors. (Three justices dissenting.) Kendall v. United States, 12 Pet. 524, 608, 9 L. Ed. 1181.

**Heads of departments controlled by laws enacted by congress.**—The authority



(d) *The Judicial Department Independent and Co-Ordinate.*—The judicial department of the federal government is one of its three equal and co-ordinate branches.<sup>56</sup> Under the constitution, its powers are co-extensive with the powers of the executive and legislative departments, so far, at least, as they are to be enforced by judicial proceedings;<sup>57</sup> and it is capable of deciding every judicial question which may arise under the constitution, treaties and laws.<sup>58</sup>

**Interference with Property in Custodia Legis.**—"The possession of property by the judicial department, whether federal or state, cannot be arbitrarily encroached upon without violating the fundamental principle which requires co-ordinate departments to refrain from interference with the independence of each other."<sup>59</sup>

**Independence of the Federal Supreme Court.**—The federal supreme court was erected, and its jurisdiction conferred upon it, not by the federal government, but by the people of the states who formed and adopted that government and conferred upon it all the powers, legislative, executive and judicial, which it now possesses. And in order to secure its independence and enable it

of the secretary of the navy to issue orders, regulations and instructions, with the approval of the president, in reference to matters connected with the naval establishment, is subject to the condition, necessarily implied, that they must be consistent with the statutes which have been enacted by congress in reference to the navy. He may, with the approval of the president, establish regulations in execution of, or supplementary to, but not in conflict with, the statutes defining his powers or conferring rights upon others. *United States v. Symonds*, 120 U. S. 46, 49, 30 L. Ed. 557; *United States v. Bishop*, 120 U. S. 51, 30 L. Ed. 558.

**Legislation respecting appointment of naval cadets.**—In enacting the statute of 1882 respecting the appointment of naval cadets, congress did not assume the power of appointment which belongs to the executive. Congress did not thereby undertake to name the incumbent of any office. It simply changed the name and modified the scope of the duties. This it had the power to do. *Crenshaw v. United States*, 134 U. S. 99, 109, 33 L. Ed. 825.

**56. Judiciary independent and co-ordinate.**—*Vanhorne v. Dorrance*, 2 Dall. 304, 309, 1 L. Ed. 391; *Calder v. Bull*, 3 Dall. 286, 1 L. Ed. 648; *In re Tyler*, 149 U. S. 164, 182, 37 L. Ed. 689; *In re Swan*, 150 U. S. 637, 652, 37 L. Ed. 1207. Chief Justice Taney to Mr. Chase, 157 U. S., appx., 701, 702.

**57. Same; powers co-extensive with those of the other departments.**—*Cohens v. Virginia*, 6 Wheat. 264, 384, 5 L. Ed. 257; *Osborn v. United States Bank*, 9 Wheat. 738, 818, 6 L. Ed. 204; *Kendall v. United States*, 12 Pet. 524, 608, 9 L. Ed. 1181; *In re Tyler*, 149 U. S. 164, 182, 37 L. Ed. 689; *In re Swan*, 150 U. S. 637, 652, 37 L. Ed. 1207.

**58. Same.**—Const. U. S., Art. 3, § 2. *Cohens v. Virginia*, 6 Wheat. 264, 384, 5 L. Ed. 257; *Osborn v. United States Bank*, 9 Wheat. 738, 818, 6 L. Ed. 204. See, also, ante, "Power of Judiciary to Declare

Statutes Unconstitutional," VI, D, 3, d, (4), (b), (aa), et seq.

Under the constitution the judicial powers of the federal government are potentially co-extensive with the powers of the executive and legislative departments, and the judicial department may receive from the legislature the power of construing and expounding every law which the legislature may make. *Osborn v. United States Bank*, 9 Wheat. 738, 818, 6 L. Ed. 204.

Speaking upon this point, Chief Justice Marshall says: "All governments which are not extremely defective in their organization, must possess, within themselves, the means of expounding, as well as enforcing their own laws. If we examine the constitution of the United States, we find, that its framers kept this great political principle in view. The 2d article vests the whole executive power in the president; and the 3d article declares, 'that the judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.' This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it, by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares, that the judicial power shall extend to all cases arising under the constitution, laws and treaties of the United States." *Osborn v. United States Bank*, 9 Wheat. 738, 819, 6 L. Ed. 204.

**59. As to property in custodia legis.**—*In re Tyler*, 149 U. S. 164, 37 L. Ed. 689; *In re Swan*, 150 U. S. 637, 652, 37 L. Ed. 1207. See, also, ante, "State Interference with Proceedings in Federal Courts," VI, D, 3, c, (6), (b), (cc), (bbb).

faithfully and firmly to perform its duty, it engrafted it upon the constitution itself, and declared that this court should have appellate power in all cases arising under the constitution and laws of the United States. So long, therefore, as the constitution shall endure, this tribunal must exist with it. It is beyond the power of the legislative department to abolish it.<sup>60</sup> The existence of this court is therefore, as essential to the organization of the government established by the constitution as the election of a president or members of congress. It is the tribunal which is ultimately to decide all judicial questions confided to the government of the United States. No appeal is given from its decisions, nor any power given to the legislative or executive departments to interfere with its judgments or process of execution. Its jurisdiction and powers and duties being defined in the organic law of the government, and being all strictly judicial, congress cannot require or authorize the court to exercise any other jurisdiction or power, or perform any other duty. Chancellor Kent says: "The judicial power of the United States is, in point of origin and title, equal with the other powers of the government, and is as exclusively vested in the court created by or pursuant to the constitution, as the legislative power is vested in congress, or the executive power in the president."<sup>61</sup> 1 Kent Com. 290-291. 6th Ed. The reason for giving such unusual power to a judicial tribunal is obvious. It was necessary to give it from the complex character of the government of the United States, which is in part national and in part federal. Where two separate governments exercise certain powers of sovereignty over the same territory, each independent of the other within its appropriate sphere of action, there is an absolute necessity, in order to preserve internal tranquility, that there should be some tribunal to decide between the government of the United States and the government of a state whenever any controversy shall arise as to their relative and respective powers in the common territory. The supreme court was created for that purpose, and to insure its impartiality it was absolutely necessary to make it independent of the legislative power, and the influence direct or indirect of congress and the executive. Hence the care with which its jurisdiction, powers, and duties are defined in the constitution, and its independence of the legislative branch of the government secured.<sup>62</sup>

**Power of Congress to Reduce or Withhold Compensation of Judges.**

—"The judiciary is one of the three great departments of the government, created and established by the constitution. Its duties and powers are specifically set forth, and are of a character that requires it to be perfectly independent of the two other departments, and in order to place it beyond the reach and above even the suspicion of any such influence, the power to reduce their compensation is expressly withheld from congress, and excepted from their powers of legislation."<sup>63</sup> Therefore, an act of congress retaining in the treasury a portion of the compensation of the judges is unconstitutional and void.<sup>64</sup>

**The Judicial Department the Weakest of All.**—While by the constitution the judicial department is recognized as one of the three great branches among which all the powers and functions of the government are distributed, it is inherently the weakest of them all for the purposes of self-protection and for the enforcement of the powers which it exercises. The ministerial

60. **Independence of the federal supreme court.**—*Ableman v. Booth*, 21 How. 506, 521, 16 L. Ed. 169.

61. **Same.**—*Gordon v. United States*, U. S. 117, appx., 697, 700.

62. **Same.**—*Gordon v. United States*, 117 U. S., appx., 697, 700, 701. See, also, ante, "Jurisdiction of the Federal Supreme Court," VI, D, 3, d, (3), (d), (bb).

63. **Power to reduce or withhold compensation of judges.**—Chief Justice Taney to Mr. Chase, 157 U. S., appx., 701, 702.

64. **Same.**—Chief Justice Taney to Mr. Chase, 157 U. S., appx., 701, 702.

The act of congress imposing a tax of three per cent. on the salaries of all officers in the employment of the United States, diminishes the compensation of every judge three per cent., and if it can be diminished to that extent by the name of a tax, it may in the same way be reduced from time to time at the pleasure of the legislature. Such act is unconstitutional and void. Chief Justice Taney to Mr. Chase, 157 U. S., appx., 701.



officers through whom its commands must be executed are marshals of the United States, who belong emphatically to the executive department of the government. They are appointed by the president with the advice and consent of the senate, and are removable from office at his pleasure. Dependent as its courts are for the enforcement of their judgments upon officers appointed by the executive and removable at his pleasure, with no patronage and no control of the purse or the sword, their power and influence rest solely upon the public sense of the necessity for the existence of a tribunal to which all may appeal for the assertion and protection of rights guaranteed by the constitution and by the laws of the land, and on the confidence reposed in the soundness of their decisions and the purity of their motives.<sup>65</sup>

**Protection of Judicial Officers.**—The legislative branch of the government can only protect the judicial officers by the enactment of laws for that purpose.<sup>66</sup> But if we turn to the executive department of the government, we find a very different condition of affairs. The constitution, § 3, art. 2, declares that the president "shall take care that the laws be faithfully executed." This duty is not limited to the enforcement of acts of congress or of treaties of the United States according to their express terms, but it includes the rights, duties and obligations growing out of the constitution itself, our international relations, and all the protection implied by the nature of the government under the constitution.<sup>67</sup> The duty imposed upon the president by this section of the constitution, to see that the laws are faithfully executed, authorizes him, even in the absence of a statute, and acting through the head of one of the executive departments, to designate a United States marshal to accompany a justice of the supreme court of the United States during the time such justice is traveling to and from or within the limits of the judicial circuit to which he is assigned, and charge such marshal with the duty of protecting such justice from anticipated assaults and personal violence while engaged in the discharge of his duties as a judge of the circuit courts in that circuit.<sup>68</sup>

(5) *Limitation of Rules with Respect to Separation and Independence of Departments.*—To the general propositions, that the departments of the federal government are separate, independent, and co-ordinate, and that neither may exercise the functions properly belonging to another, nor coerce the action of another within the sphere of its powers, there are some important exceptions made by the constitution itself.<sup>69</sup> One of these is, that the president is so far made a part of the legislative power that his assent is required to the enactment of all statutes and resolutions of congress. This, however, is so only to a limited

65. Judicial department the weakest of all.—United States *v.* Lee, 106 U. S. 196, 223, 27 L. Ed. 171; In re Neagle, 135 U. S. 1, 63, 34 L. Ed. 55.

66. Protection of judicial officers.—In re Neagle, 135 U. S. 1, 64, 34 L. Ed. 55.

67. Same; power of the executive.—In re Neagle, 135 U. S. 1, 64, 34 L. Ed. 55.

68. Same.—In re Neagle, 135 U. S. 1, 34 L. Ed. 55. See, also, ante, "To Execute Its Own Laws and Exercise Jurisdiction over All Persons and Places," VI, D. 2, c. (4).

69. Limitation of rule with respect to separation of departments.—Cooper *v.* Telfair, 4 Dall. 14, 18, 1 L. Ed. 721; Kilbourn *v.* Thompson, 103 U. S. 168, 191, 26 L. Ed. 377; Dreyer *v.* Illinois, 187 U. S. 71, 84, 47 L. Ed. 79.

"When we speak," said Story, 'of a separation of the three great departments of government, and maintain that that

separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree. The true meaning is, that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free constitution.' Story's Const. (5th Ed.) 393. Again: 'Indeed, there is not a single constitution of any state in the Union, which does not practically embrace some acknowledgment of the maxim, and at the same time some admixture of powers constituting an exception to it.' Story's Const. (5th Ed.) 395." Dreyer *v.* Illinois, 187 U. S. 71, 84, 47 L. Ed. 79.



extent, for a bill may become a law, notwithstanding the refusal of the president to approve it, by a vote of two-thirds of each house of congress. So, also, the senate is made a partaker in the functions of appointing officers and making treaties, which are supposed to be properly executive, by requiring its consent to the appointment of such officers and the ratification of treaties. The senate also exercises the judicial power of trying impeachments, and the house of preferring articles of impeachment.<sup>70</sup> And although the constitution vests in the president power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment, this power has never been held to take from congress the power to pass acts of general amnesty, or to authorize the remission of penalties and forfeitures.<sup>71</sup> So the lawmaking power may commit something to the discretion of the other departments, and the precise boundary of those powers is a subject of delicate and difficult inquiry, into which a court will not unnecessarily enter.<sup>72</sup> In short, the general principles contained in the constitution with respect to the separation of the departments are not to be regarded as rules to fetter and control, but as merely declaratory and directory.<sup>73</sup>

*e. Delegation of Constitutional Powers*—(1) *Devolution of Power by One Department upon Another*—(a) *Generally*.—See ante, "Power of Congress to Impose Legislative or Executive Duties upon the Judiciary," VI, D, 3, d, (3), (d), et seq.; "Power to Impose Judicial Functions upon Non-Judicial Tribunals," VI, D, 3, d, (3), (e); "Limitation of Rules with Respect to Separation and Independence of Departments," VI, D, 3, d, (5).

(b) *Devolution of Legislative Powers upon the Judiciary*—(aa) *Generally*.—See ante, "Power of Congress to Impose Legislative or Executive Duties upon the Judiciary," VI, D, 3, d, (3), (d), et seq.; "Limitation of Rules with Respect to Separation and Independence of Departments," VI, D, 3, d, (5).

(bb) *Power of Congress to Punish for Contempt*.—Congress cannot divest itself or either of its houses of the essential and inherent power to punish for

**70. Same.**—*Kilbourn v. Thompson*, 103 U. S. 168, 191, 26 L. Ed. 377.

**71. Same.**—*Brown v. Walker*, 161 U. S. 591, 601, 40 L. Ed. 819.

"In the case of *The Laura*, 114 U. S. 411, 29 L. Ed. 147, objection was made that a remission by the secretary of the treasury, under Rev. Stat., § 4294, of penalties incurred by a steam vessel for taking on board an unlawful number of passengers, was ineffectual to destroy liability by reason of the fact that it involved an exercise of the pardoning power. It was held that, in view of the practice in reference to remissions by the secretary of the treasury and other officers, which had been sanctioned by statute and acquiesced in for nearly a century, the power vested in the president was not exclusive in the sense that no other officer could remit forfeitures or penalties incurred for the violation of the laws of the United States. Citing *United States v. Morris*, 10 Wheat. 246, 6 L. Ed. 314." *Brown v. Walker*, 161 U. S. 591, 601, 40 L. Ed. 819.

**72. Same.**—*Wayman v. Southard*, 10 Wheat. 1, 46, 6 L. Ed. 253; *Bank of United States v. Halstead*, 10 Wheat. 51, 6 L. Ed. 264; *Union Bridge Co. v. United States*, 204 U. S. 364, 378, 379, 51 L. Ed. 523.

"In *Wayman v. Southard*, 10 Wheat. 1, 43, 45, 46, 6 L. Ed. 253, Chief Justice Mar-

shall, delivering the unanimous judgment of the court, said, that although congress could not delegate to the courts or to any other tribunals powers strictly and exclusively legislative, and although the line had not been exactly drawn that separates the important subjects which must be entirely regulated by the legislature itself from those of less interest 'in which a general provision may be made, and powers given to those who are to act under such general provisions to fill up the details,' yet 'congress may certainly delegate to others powers which the legislature may rightly exercise itself,' and 'the maker of the law may commit something to the discretion of the other department.'" *Union Bridge Co. v. United States*, 204 U. S. 364, 378, 379, 51 L. Ed. 523.

**73. Same.**—*Cooper v. Telfair*, 4 Dall. 14, 18, 1 L. Ed. 721. See, also, ante, "Legislative Exercise of Judicial Powers," VI, D, 3, d, (3), (b), et seq.; "Power of Congress to Impose Legislative or Executive Duties upon the Judiciary," VI, D, 3, d, (3), (d), et seq.; "Power to Impose Judicial Functions upon Nonjudicial Tribunals," VI, D, 3, d, (3), (e); "Independence of the Legislative Branch," VI, D, 3, d, (4), (b), et seq.; "Judicial Control of the Executive," VI, D, 3, d, (4), (c), (bb), et seq.; "Legislative Encroachment upon the Executive," VI, D, 3, d, (4), (c), (cc).

contempt in cases to which the power of either house properly extends.<sup>74</sup> But congress may provide that contumacy in a witness called to testify in a matter properly under consideration by either house, and deliberately refusing to answer questions pertinent thereto, shall be a misdemeanor against the United States, and confer jurisdiction upon the courts of justice to entertain a prosecution therefor.<sup>75</sup>

(c) *Devolution of Judicial Functions upon the Legislative and Executive Departments.*—The judicial department has imposed upon it by the constitution the solemn duty of interpreting the laws, in the last resort; and however its own judgment as to the proper interpretation of a law may differ from that of the legislative department or from that of high functionaries in the executive department, it is not at liberty to surrender or to waive it.<sup>76</sup>

(d) *Devolution of Legislative Powers upon the Executive, Heads of Departments, etc.*—See post, "Exceptions and Limitations; Statutes Dependent upon the Discretion of the Executive, etc.," VI, D, 3, e, (2), (a), (ee).

(2) *Delegation of Powers by the Legislative Departments.*—(a) *By Congress*—(aa) *Generally.*—Congress cannot delegate to the courts, or to any other tribunals, those powers which are strictly and exclusively legislative.<sup>77</sup> The powers of government are delegated in trust to the United States, and are incapable of transfer to any other parties. They cannot be abandoned or surrendered. Nor can their exercise be hampered, when needed for the public good, by any considerations of private interest. The exercise of these public trusts is not the subject of barter or contract.<sup>78</sup>

(bb) *Delegation of Congressional Powers to the States.*—(aaa) *General Rule.*—The state assemblies do not constitute a legislative body for the Union. They possess no portion of that legislative power which the constitution vests exclusively in congress, and cannot receive it by delegation.<sup>79</sup>

**74. Power to punish for contempt.**—In re Chapman, 166 U. S. 661, 672, 41 L. Ed. 1154.

**75. Same; offense may be declared a misdemeanor.**—In re Chapman, 166 U. S. 661, 672, 41 L. Ed. 1154.

The act of 1857, "providing for the punishment of contempt in witnesses appearing before it by the District of Columbia criminal court," sought to aid each of the houses in the discharge of its constitutional functions; it does not involve any delegation of the power in each to punish for contempt and is not open to objection on that account. In re Chapman, 166 U. S. 661, 671, 41 L. Ed. 1154.

**76. Power of judiciary to devolve duties upon other departments.**—United States v. Dickson, 15 Pet. 141, 162, 10 L. Ed. 689; Greely v. Thompson, 10 How. 225, 234, 13 L. Ed. 397. See also, ante, "Power to Impose Judicial Functions upon Non-judicial Tribunals," VI, D, 3, d, (3), (e).

**77. Power of congress to delegate powers.**—Wayman v. Southard, 10 Wheat, 1, 43, 46, 6 L. Ed. 253; United States Bank v. Halstead, 10 Wheat. 51, 6 L. Ed. 264; People's Railroad v. Memphis Railroad, 10 Wall. 38, 50, 19 L. Ed. 844; The Chinese Exclusion Case, 130 U. S. 581, 609, 32 L. Ed. 1068; Field v. Clark, 143 U. S. 649, 36 L. Ed. 294.

**78. Same.**—The Chinese Exclusion Case, 130 U. S. 581, 609, 32 L. Ed. 1068; Fong Yue Ting v. United States, 149 U. S. 698, 722, 37 L. Ed. 905.

**79. Delegation of congressional powers to the states.**—Wayman v. Southard, 10 Wheat. 1, 48, 6 L. Ed. 253; United States Bank v. Halstead, 10 Wheat. 51, 6 L. Ed. 264; Cooley v. Board of Wardens, 12 How. 299, 318, 13 L. Ed. 996; Van Allen v. The Assessors, 3 Wall. 573, 585, 18 L. Ed. 229; United States v. Dewitt, 9 Wall. 41, 19 L. Ed. 593; Gunn v. Barry, 15 Wall. 610, 623, 21 L. Ed. 212; United States v. Jones, 109 U. S. 513, 518, 27 L. Ed. 1015; The Chinese Exclusion Case, 130 U. S. 581, 609, 32 L. Ed. 1068; In re Rahrer, 140 U. S. 545, 560, 35 L. Ed. 572.

**Same.**—"It does not admit of argument that congress can neither delegate its own powers nor enlarge those of a state." In re Rahrer, 140 U. S. 545, 560, 35 L. Ed. 572. See also, ante, "Neither Government Authorize the Other to Pass the Limits Fixed by the Constitution," VI, D, 3, c, (6), (b), (gg).

**Power of taxation.**—Thus congress cannot confer upon a state the sovereign power of taxation with which it has been entrusted. Van Allen v. The Assessors, 3 Wall. 573, 585, 18 L. Ed. 229.

**Power of eminent domain.**—So the power of appropriating private property to public uses vested in the general government—its right of eminent domain, which Vattel defines to be the right of disposing, in case of necessity and for the public safety, of all the wealth of the country—cannot be transferred to a state any more than its other sovereign at-

**Imposing Federal Duties upon State Officers.**—The federal government, under the constitution, has no power to impose on a state officer, as such, any duty whatever, and compel him to perform it; for if it possessed this power, it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the state, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the state.<sup>80</sup> Congress may, however, authorize a particular state officer to perform a particular duty; but if he declines to do so, it does not follow that he may be coerced or punished for his refusal.<sup>81</sup>

(bbb) *Exceptions and Limitations*—(aaaa) *Where States and Congress Have Concurrent Power.*—As respects a subject matter over which congress and the states may exercise a concurrent power, but from the exercise of which congress, by reason of its paramount authority, may exclude the states, there is no doubt congress may withhold the exercise of that authority and leave the states free to act.<sup>82</sup> An example of this relation existing between the federal and state governments is found in the pilot laws of the states and the health and quarantine laws.<sup>83</sup> So the power of taxation, under the constitution, as a general rule, is a concurrent power. The qualifications of the rule are the exclusion of the states from the taxation of the means and instruments employed in the exercise of the functions of the federal government.<sup>84</sup>

**Same; Disposition of Public Lands.**—The disposition of the public lands of the United States, situated within any state, must be provided for by congress through the exercise of legislative powers entrusted to it by the constitution, which powers cannot be delegated to the states.<sup>85</sup> But while the disposition of these lands is provided for by congressional legislation, such legislation savors somewhat of mere rules prescribed by an owner of property for its disposal. It is not of a legislative character in the highest sense of the term; and as an owner may delegate to his principal agent the right to employ subordinates, giving

tributes. *United States v. Jones*, 109 U. S. 513, 518, 27 L. Ed. 1015.

But there is no reason why the compensation to be made may not be ascertained by an appropriate tribunal capable of estimating the value of the property. There is nothing in the nature of the matter to be determined which calls for the establishment of any special tribunal by the appropriating power. *United States v. Jones*, 109 U. S. 513, 519, 27 L. Ed. 1015.

Whether the tribunal shall be created directly by an act of congress, or one already established by the states shall be adopted for the occasion, is a mere matter of legislative discretion. *United States v. Jones*, 109 U. S. 513, 519, 27 L. Ed. 1015.

The provisions of the act of 1875, with reference to the property overflowed by dams constructed in the improvement of the navigation of the Fox and Wisconsin rivers, that the compensation to be made shall be ascertained in the mode and manner prescribed by the laws of the state and by a tribunal created under the laws of the state, are constitutional and valid. *United States v. Jones*, 109 U. S. 513, 521, 27 L. Ed. 1015.

**80. Imposing federal duties upon state officers.**—*Kentucky v. Dennison*, 24 How. 66, 108, 16 L. Ed. 717.

**81. Same.**—*Kentucky v. Dennison*, 24 How. 66, 108, 16 L. Ed. 717.

"It has long been held that power may

be conferred upon a state officer, as such, to execute a duty imposed under an act of congress, and the officer may execute the same, unless its execution is prohibited by the constitution or legislation of the state. *Prigg v. Pennsylvania*, 16 Pet. 539, 622, 10 L. Ed. 1060; *Robertson v. Baldwin*, 165 U. S. 275, 41 L. Ed. 715." *Dallemagne v. Moisan*, 197 U. S. 169, 174, 49 L. Ed. 709.

There is nothing in the constitution or laws of the state of California which forbids or prevents an officer of that state from arresting a deserting seaman upon request made by a French consul pursuant to the treaty made with France in 1853. *Dallemagne v. Moisan*, 197 U. S. 169, 174, 49 L. Ed. 709. See, also, ante, "Qualification, Tenure and Removal of State Officers; Congress Not to Enforce State Laws, nor Coerce State Officers." VI, D, 3, c, (4), (d).

**82. Exceptions and limitations.**—*Van Allen v. The Assessors*, 3 Wall. 573, 585, 18 L. Ed. 229.

**83. Same; pilot laws; health and quarantine regulations.**—*Cooley v. Board of Wardens*, 12 How. 299, 13 L. Ed. 996; *Van Allen v. The Assessors*, 3 Wall. 573, 585, 18 L. Ed. 229.

**84. Same; taxation.**—*Van Allen v. The Assessors*, 3 Wall. 573, 585, 18 L. Ed. 229.

**85. Same; disposition of public lands.**—*Butte City Water Co. v. Baker*, 196 U. S. 119, 49 L. Ed. 409.



to them a limited discretion, so congress, after prescribing the main and substantial conditions respecting the disposal of the public lands, may rightfully entrust to the local state legislature the determination of minor matters respecting their disposal.<sup>86</sup> Not only so, but as respects mining claims, congress may even delegate to the miners themselves the power to make certain rules and regulations not in conflict with the laws of the United States, or may ratify and adopt regulations already made.<sup>87</sup>

(bbbb) *Adoption of State Laws.*—Congress may also adopt state laws and make them the rule of action for federal officers and tribunals, provided they are not inconsistent with the constitution of the United States.<sup>88</sup>

**86. Same.**—*Butte City Water Co. v. Baker*, 196 U. S. 119, 126, 49 L. Ed. 409, upholding the validity of § 3612, of the Montana Code.

**87. Same.**—*Jackson v. Roby*, 109 U. S. 440, 441, 27 L. Ed. 990; *Erhardt v. Boaro*, 113 U. S. 527, 535, 28 L. Ed. 1113; *Butte City Water Co. v. Baker*, 196 U. S. 119, 127, 49 L. Ed. 409.

Section 2324, Revised Statutes, distinctly grants to the miners of each mining district the power to make regulations, and the validity of this grant has been expressly affirmed in *Jackson v. Roby*, 109 U. S. 440, 441, 27 L. Ed. 990. In that case the court said: "The act of congress of 1866 gave the sanction of law to these rules of miners, so far as they were not in conflict with the laws of the United States, 14 Stat. 251, c. 262, § 1. Subsequent legislation specified with greater particularity the modes of location and appropriation and extent of each mining claim, recognizing, however, the essential features of the rules framed by miners, and among others that which required work on the claim for its development as a condition of its continued ownership."

See, also, *Erhardt v. Boaro*, 113 U. S. 527, 28 L. Ed. 1113, in which (p. 535) is this declaration: "And although since 1866 congress has to some extent legislated on the subject, prescribing the limits of location and appropriation and the extent of mining ground which one may thus acquire, miners are still permitted, in their respective districts, to make rules and regulations not in conflict with the laws of the United States or of the state or territory in which the districts are situated governing the location, manner of recording, and amount of work necessary to hold possession of a claim." See, also, ante, "Concurrent Powers of State and Federal Governments," VI, D, 3, c. (5), et seq.

**88. Adoption of state laws by congress.**—*Wayman v. Southard*, 10 Wheat. 1, 48, 6 L. Ed. 253; *United States Bank v. Halstead*, 10 Wheat. 51, 6 L. Ed. 264; *Cooley v. Board of Wardens*, 12 How. 299, 318, 13 L. Ed. 996; *In re Rahrer*, 140 U. S. 545, 560, 35 L. Ed. 572.

**Same.**—Congress cannot sanction a state law in violation of the constitution; and if it adopt a state law as its own, it must be one that it would be competent for it

to enact itself, and not a law passed in the exercise of the police power. *In re Rahrer*, 140 U. S. 545, 560, 35 L. Ed. 572.

The adoption of a state law by congress upon any subject necessarily implies a power in the state to legislate upon that subject; for if the sovereign power of the state has been so limited that it no longer extends to a particular subject, it cannot in any proper sense be said to enact laws thereon. *Cooley v. Board of Wardens*, 12 How. 299, 318, 13 L. Ed. 996.

**Adopting state rules of procedure in federal courts.**—The 34th section of the judiciary act of 1789, ch. 20, which provides that the laws of the several states, except, etc., shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply, and a provision that the practice and modes of procedure in the federal courts, in actions at common law, shall conform to the practice of the courts of the respective states, etc., are not delegations of the legislative power of congress to the state legislature, but are merely a legislative adoption by congress, of the state laws and regulations as to those subjects. *Wayman v. Southard*, 10 Wheat. 1, 48, 6 L. Ed. 253; *United States Bank v. Halstead*, 10 Wheat. 51, 6 L. Ed. 264. See, also, ante, "Jurisdiction and Procedure of Federal Courts," VI, D, 3, e, (3), (d).

**State regulations respecting interstate shipments of intoxicating liquors.**—The act of August 8, 1890, entitled "An act to limit the effect of the regulations of commerce between the several states and with foreign countries in certain cases," which reads as follows: "That all fermented, distilled or other intoxicating liquors or liquids transported into any state or territory or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquors or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise," is not an unconstitutional delegation to the states

(cccc) *State Powers Exercised by Consent of Congress*.—See ante, "State Powers as Dependent upon the Assent of Congress," VI, D, 3, b, (5).

(cc) *Delegation of Congressional Powers to District of Columbia*.—As the repository of the legislative power of the United States, congress, in creating the District of Columbia "a body corporate for municipal purposes," could only authorize it to exercise municipal powers.<sup>89</sup>

**Regulation of Interstate Commerce by District Legislative Body.**—The power of congress to regulate commerce of that character which calls for uniform rules and national legislation cannot be treated as a mere matter of local concern and committed to those immediately interested in the affairs of a particular locality.<sup>90</sup> It was beyond the constitutional power of congress, therefore, to delegate to the legislative assembly of the District of Columbia the power to enact clause 3 of § 21 of the act of August 23, 1871, as amended by act of June 20, 1872, requiring commercial agents offering merchandise for sale by sample, including those representing nonresident principals, to pay for and take out a license.<sup>91</sup>

(dd) *Delegation of Congressional Powers to Territorial Legislatures*.—In organizing a territorial government, congress may either define the jurisdiction of the territorial courts by direct legislation, or may delegate authority for that purpose to the territorial legislature.<sup>92</sup>

(ee) *Exceptions and Limitations; Statutes Dependent upon the Discretion of the Executive, etc.*—That congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution.<sup>93</sup> But while congress cannot delegate those powers which are strictly and exclusively legislative, it may delegate certain powers which it may rightfully exercise itself. The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions, to fill up the details. The precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not unnecessarily enter.<sup>94</sup>

of power to legislate upon a matter exclusively confided to congress, but is a valid and constitutional exercise of the legislative power conferred upon congress. In re Rahrer, 140 U. S. 545, 549, 35 L. Ed. 572.

**Recognition of certain state laws in the national bankruptcy acts.**—In the recognition, in a bankruptcy act, of the local law in the matter of exemptions, dower, priority of payments, and the like, there is no attempt by congress to unlawfully delegate its legislative power. Hanover Nat. Bank v. Moyses, 186 U. S. 181, 190, 46 L. Ed. 1113; In re Rahrer, 140 U. S. 545, 560, 35 L. Ed. 572.

**89. Delegation of congressional powers to District of Columbia.**—Stoutenburgh v. Hennick, 129 U. S. 141, 147, 32 L. Ed. 637.

**90. Same; as to interstate commerce.**—Stoutenburgh v. Hennick, 129 U. S. 141, 148, 32 L. Ed. 637.

**91. Same.**—Stoutenburgh v. Hennick, 129 U. S. 141, 149, 32 L. Ed. 637.

**92. Delegation of congressional powers to territorial legislatures.**—Littensdorfer v. Webb, 20 How. 176, 182, 15 L. Ed. 891. See, also, ante, "Powers of Territorial Government," VI, D, 2, c, (3), (c), (cc), (bbb), (dddd).

**93. Exceptions and limitations; statutes dependent upon the discretion of the executive, etc.**—Field v. Clark, 143 U. S. 649, 692, 36 L. Ed. 294; St. Louis Consolidated Coal Co. v. Illinois, 185 U. S. 203, 210, 46 L. Ed. 872; Union Bridge Co. v. United States, 204 U. S. 364, 379, 381, 51 L. Ed. 523.

**94. Same.**—Wayman v. Southard, 10 Wheat. 1, 43, 46, 6 L. Ed. 253. Accord: United States Bank v. Halstead, 10 Wheat. 51, 6 L. Ed. 264. See, also, ante, "Power of Congress to Impose Legislative or Executive Duties upon the Judiciary," VI, D, 3, d, (3), (d), et seq.; "Limitation of Rules with Respect to Separation and Independence of Departments," VI, D, 3, d, (5); "Exceptions and Limitations," VI, D, 3, e, (2), (a), (bb), (bbb); "Delegation of Congressional Powers to Territorial Legislature," VI, D, 3, e, (2), (a), (dd).

**Defining piracy by reference to law of nations.**—The act of the 3d of March, 1819, § 5, referring to the law of nations for a definition of the crime of piracy, is a constitutional exercise of the power of congress to define and punish that crime. United States v. Smith, 5 Wheat. 153, 5 L. Ed. 57.

**To heads of departments to make rules and regulations for the conduct of the**



**Operation of Statutes Dependent upon Contingency, Discretion of Subordinate Agency, etc.**—"While it is undoubtedly true that legislative power cannot be delegated to the courts or to the executive, there are some exceptions to the rule under which it is held that congress may leave to the president the power of determining the time when, or the exigency upon the happening of which, a certain act shall take effect."<sup>95</sup> The efficiency of an act, as a declaration of legislative will, must, of course, come from congress, but the ascertainment of the contingency upon which the act shall take effect may be left to the executive or to such other agencies as congress may designate.<sup>96</sup> The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the

**business of their departments, the better administration of the law, etc.**—Regulations prescribed by the president and by the heads of departments, under authority granted by congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law. *United States v. Eaton*, 144 U. S. 677, 688, 36 L. Ed. 591.

Congress may constitutionally invest the secretary of the treasury with authority to prescribe regulations not inconsistent with law for the conduct of the business of his department, and to provide for the custody, use and preservation of the records, papers and property appertaining to it. *Boske v. Comingore*, 177 U. S. 459, 44 L. Ed. 846, affirming the constitutionality of § 161 of the Revised Statutes.

It is not an unconstitutional delegation of power to one person where an act of congress, in regulating the manufacture and sale of oleomargarine and imposing a tax thereon, grants to the commissioner of internal revenue authority to make suitable regulations descriptive of the stamps, marks and brands which the act requires to be used on each package sold. The act prescribes the penalties for failure to adopt such marks, stamps, brands, etc., as the act requires and fully defines the crime itself. The power of the commissioner to define the marks, stamps, and brands to be used is not power to determine what acts shall be criminal, but is a mere matter of detail. *In re Kollock*, 165 U. S. 526, 41 L. Ed. 813. See, also, *United States v. Bailly*, 9 Pet. 238, 9 L. Ed. 113; *United States v. Eaton*, 144 U. S. 677, 36 L. Ed. 591; *Caha v. United States*, 152 U. S. 211, 38 L. Ed. 415.

Considered as a revenue act, the designation of the stamps, marks and brands which the commissioner of internal revenue is authorized to make by the act of August 2, 1886, ch. 840, regulating the manufacture and sale of oleomargarine, is merely in the discharge of an administrative function and falls within the numerous instances of regulations needful to the operation of the machinery of par-

ticular laws, authority to make which has always been recognized as within the competency of the legislative power to confer. *In re Kollock*, 165 U. S. 526, 536, 41 L. Ed. 813. See, also, *Wayman v. Southard*, 10 Wheat. 1, 6 L. Ed. 253; *Ex parte Reed*, 100 U. S. 13, 25 L. Ed. 538; *Smith v. Whitney*, 116 U. S. 167, 29 L. Ed. 601; *United States v. Symonds*, 120 U. S. 46, 30 L. Ed. 557.

"But it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense." *United States v. Eaton*, 144 U. S. 677, 688, 36 L. Ed. 591. See, also, *In re Kollock*, 165 U. S. 526, 41 L. Ed. 813; *Caha v. United States*, 152 U. S. 211, 38 L. Ed. 415.

**Establishment of interstate commerce commission.**—It is competent for congress to create and establish an administrative body known as the interstate commerce commission and vest it with authority to investigate the subject of interstate commerce and with power to call witnesses before it and to require the production of books, documents and papers relating to that subject. *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 474, 38 L. Ed. 1047.

**Delegation of power with respect to the Philippine Islands.**—Congress, in dealing with the Philippine Islands, may delegate legislative authority to such agencies as it may select. *United States v. Heinzen*, 206 U. S. 370, 385, 51 L. Ed. 1098; *Dorr v. United States*, 195 U. S. 138, 49 L. Ed. 128.

**95. Statutes dependent upon contingency, discretion of subordinate agency, etc.**—*St. Louis Consolidated Coal Co. v. Illinois*, 185 U. S. 203, 210, 46 L. Ed. 872.

**96. Same.**—*The Brig Aurora v. United States*, 7 Cranch 382, 3 L. Ed. 378; *South Carolina v. Georgia*, 93 U. S. 4, 13, 23 L. Ed. 782; *Miller v. New York*, 109 U. S. 385, 394, 27 L. Ed. 971; *Field v. Clark*, 143 U. S. 649, 36 L. Ed. 294; *In re Kollock*, 165 U. S. 526, 41 L. Ed. 813; *In re Chapman*, 166 U. S. 661, 41 L. Ed. 1154.



law. The first cannot be done; to the latter no valid objection can be made.<sup>97</sup>

(b) *Delegation of Power by State Legislative Bodies*—(aa) *To Counties and Municipal Corporations*.—It is within the competency of state legislatures

97. **Same.**—*Field v. Clark*, 143 U. S. 649, 693, 36 L. Ed. 294; *Union Bridge Co. v. United States*, 204 U. S. 364, 382, 383, 51 L. Ed. 523.

**Making revival of act to depend upon proclamation of president as to the occurrence or existence of certain facts.**—The earliest and leading case is that of *The Brig Aurora*, 7 Cranch 382, 3 L. Ed. 378, which involved the question whether congress could make the revival of a law (which had ceased to be in force) depend upon the existence of certain facts to be ascertained by the president and set forth in a proclamation by him. The court said: "We can see no sufficient reason why the legislature should not exercise its discretion in reviving the act of March 1st, 1809, either expressly or conditionally, as their judgment should direct. The 19th section of that act, declaring that it should continue in force to a certain time, and no longer, could not restrict their power of extending its operation without limitation upon the occurrence of any subsequent combination of events." Referring to this language, it was said, in the subsequent case of *Field v. Clark*, 143 U. S. 649, 683, 36 L. Ed. 294: "This certainly is a decision that it was competent for congress to make the revival of an act depend upon the proclamation of the president, showing the ascertainment by him of the fact that the edicts of certain nations had been so revoked or modified that they did not violate the neutral commerce of the United States. The same principle would apply in the case of the suspension of an act upon a contingency to be ascertained by the president and made known by his proclamation." See, also, *Union Bridge Co. v. United States*, 204 U. S. 364, 378, 51 L. Ed. 523.

**Whether bridge an obstruction of navigation.**—Congress may delegate to the secretary of war the power and duty to determine whether or not a proposed bridge across a navigable water will constitute an obstruction of commerce, and may authorize him to approve or disapprove the plans and specifications, and to make changes therein. And in so doing congress does not abrogate any of its authority to determine what shall or shall not be deemed an obstruction of the navigation of a river. It simply declares that, upon a certain fact being established, the bridge shall be deemed a lawful structure, and employ the secretary of war as an agent to ascertain that fact. *Miller v. New York*, 109 U. S. 385, 393, 27 L. Ed. 971; *Union Bridge Co. v. United States*, 204 U. S. 364, 386, 51 L. Ed. 523.

Congress may by statute declare that navigation shall be free from unreasonable obstruction arising from bridges of

insufficient height; and after the declaration of this general rule, it may impose upon the secretary of war the duty of ascertaining what particular cases come within the rule prescribed by congress. *Union Bridge Co. v. United States*, 204 U. S. 364, 386, 51 L. Ed. 523.

**Delegation by congress to head of department of power to select particular land to be taken under power of eminent domain.**—In providing for the exercise of its right of eminent domain in the condemnation of land for the purposes of the government, it is not necessary that congress should itself select the particular land to be taken, but it may delegate to the head of an executive department the power to select the land to be taken. *Chappell v. United States*, 160 U. S. 499, 510, 40 L. Ed. 510. See, also, *Kohl v. United States*, 91 U. S. 367, 23 L. Ed. 449.

**Admission or exclusion of aliens.**—See the title ALIENS, vol. 1, p. 250, et seq.

**Vesting president with power to suspend customs duties in certain cases.**—The act of October 1st, 1890, § 3, conferring upon the president authority to suspend by proclamation the free introduction of certain commodities when he should become satisfied that other countries producing such commodities had imposed discriminating duties upon agricultural or other products of the states, was not inconsistent with this principle. It did not, in any real sense, invest the president with the power to legislate. He was the mere agent of the lawmaking department to ascertain and declare the event upon which its expressed will was to take effect. *Field v. Clark*, 143 U. S. 649, 693, 36 L. Ed. 294. See, also, *Buttfield v. Stranahan*, 192 U. S. 470, 496, 48 L. Ed. 525; *Union Bridge Co. v. United States*, 204 U. S. 364, 379, 381, 51 L. Ed. 523.

Neither is such statute objectionable as investing the president with the treaty-making power. *Field v. Clark*, 143 U. S. 649, 694, 36 L. Ed. 294.

**Statute providing for the fixing of standard samples of imports by board appointed by secretary of the treasury; tea inspection act.**—The case of *Buttfield v. Stranahan*, 192 U. S. 470, 491, 496, 48 L. Ed. 525, involved the constitutionality of the act of congress of March 2, 1897, 29 Stat. 604, ch. 358, relating to the 'Importations of impure and unwholesome tea.' The act provided for the appointment by the secretary of the treasury of a board of seven tea experts, who should prepare and submit to him standard samples of that article. In that case it was contended that the act was unconstitutional, as making the right to import tea depend upon the arbitrary action of the secretary of

to create counties and municipal corporations and vest them with legislative and governmental powers to a limited extent for the better administration of local affairs.<sup>98</sup> And such ordinances, if legally enacted, have the force of laws passed by the legislature of the state and are to be respected by all.<sup>99</sup>

(bb) *To Boards, Commissions and Similar Agencies.*—So various powers not strictly legislative may be entrusted to boards, commissions, or other like

the treasury, and a board appointed by him; as excluding from import wholesome, genuine and unadulterated tea; and, as discriminating unequally in the admission of the different kinds of teas for import, as well as in the right to sell and purchase that article. The act conferred, it was objected, upon the secretary and the board the uncontrolled power of fixing standards of purity, quality and fitness for consumption, and thus to prescribe arbitrarily what teas might be imported and dealt in. The question of constitutional law so raised was thus disposed of by the court: "The claim that the statute commits to the arbitrary discretion of the secretary of the treasury the determination of what teas may be imported, and therefore in effect vests that official with legislative power, is without merit. We are of opinion that the statute, when properly construed, as said by the circuit court of appeals, but expresses the purpose to exclude the lowest grades of tea, whether demonstrably of inferior purity, or unfit for consumption, or presumably so because of their inferior quality." The case is within the principle of *Field v. Clark*, 143 U. S. 649, 36 L. Ed. 294. See *Union Bridge Co. v. United States*, 204 U. S. 364, 384, 385, 51 L. Ed. 523.

**98. Delegation of state legislative powers to municipal corporations, etc.**—*Barnes v. District of Columbia*, 91 U. S. 540, 544, 23 L. Ed. 440; *Commissioners v. Commissioners*, 92 U. S. 307, 310, 23 L. Ed. 552; *Board of Commissioners v. Lucas*, 93 U. S. 108, 114, 23 L. Ed. 822; *United States v. New Orleans*, 98 U. S. 381, 25 L. Ed. 225; *Klein v. New Orleans*, 99 U. S. 149, 150, 25 L. Ed. 430; *Wright v. Nagle*, 101 U. S. 791, 794, 25 L. Ed. 921; *Louisiana v. Pilsbury*, 105 U. S. 278, 300, 26 L. Ed. 1090; *Read v. Plattsmouth*, 107 U. S. 568, 576, 27 L. Ed. 414; *Hager v. Reclamation District*, No. 108, 111 U. S. 701, 704, 28 L. Ed. 569; *Stoutenburgh v. Hennick*, 129 U. S. 141, 147, 32 L. Ed. 637; *Barnett v. Denison*, 145 U. S. 135, 139, 36 L. Ed. 652; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 453, 36 L. Ed. 1018; *New Orleans Waterworks Co. v. New Orleans*, 164 U. S. 471, 481, 41 L. Ed. 518; *City R. Co. v. Citizens' Street R. Co.*, 166 U. S. 557, 563, 41 L. Ed. 1114; *Williams v. Eggleston*, 170 U. S. 304, 310, 42 L. Ed. 1047; *Detroit Citizens' Street R. Co. v. Detroit Railway*, 171 U. S. 48, 55, 43 L. Ed. 67; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 43 L. Ed. 341; *Covington v. Kentucky*, 173 U. S. 231, 241, 43 L. Ed. 679; *St. Louis*

*Consolidated Coal Co. v. Illinois*, 185 U. S. 203, 210, 46 L. Ed. 872.

"State legislatures may not only exercise their sovereignty directly, but may delegate such portions of it to inferior legislative bodies as, in their judgment, is desirable for local purposes." *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 9, 43 L. Ed. 341.

It has been the immemorable policy in this country and in England to vest in municipal organizations certain local powers in respect to which they are peculiarly interested, and of the necessities of which they are much better informed than a general legislature possibly could be. *St. Louis Consolidated Coal Co. v. Illinois*, 185 U. S. 203, 210, 46 L. Ed. 872.

**Thus the power of taxation** which belongs exclusively to the legislative branch of the state government, may be delegated in part to municipal corporations. *United States v. New Orleans*, 98 U. S. 381, 25 L. Ed. 225; *Louisiana v. Pilsbury*, 105 U. S. 278, 300, 26 L. Ed. 1090.

**School regulations.**—And where the constitution of a state makes it the duty of the legislature "to pass suitable laws to encourage schools and the means of instruction," the legislature may do so either by direct action, or through the agency of a municipal corporation or other subdivision. *Read v. Plattsmouth*, 107 U. S. 568, 576, 27 L. Ed. 414.

**Reclamation districts.**—So the establishment of a district for the reclamation of swamp lands may be delegated to the supervisors of the county in which the lands are situated; and the fact that the lands are situated in more than one county does not affect the power of the legislature to delegate the power to establish the district to the supervisors of that county in which the greater portion of the lands are situated. *Hagar v. Reclamation District*, No. 108, 111 U. S. 701, 704, 28 L. Ed. 569; *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112, 178, 41 L. Ed. 369.

**Exclusive grants to street railway.**—Conceding that a state legislature has power to make an exclusive grant to a street railway company, it may exercise such power either directly or through agencies duly established and clothed with authority for that purpose. *City R. Co. v. Citizens' Street R. Co.*, 166 U. S. 557, 563, 41 L. Ed. 1114; *Wright v. Nagle*, 101 U. S. 791, 794, 25 L. Ed. 921.

**99. Same.**—*New Orleans Waterworks Co. v. New Orleans*, 164 U. S. 471, 481, 41 L. Ed. 518.

agencies created by the legislature.<sup>1</sup> And in several instances the delegation to

**1. Delegation of state legislative powers to board, commissions, etc.**—*Hagar v. Reclamation District*, No. 108, 111 U. S. 701, 704, 28 L. Ed. 569; *Railroad Commission Cases*, 116 U. S. 307, 29 L. Ed. 636; *Carter County v. Sinton*, 120 U. S. 517, 524, 30 L. Ed. 701; *Spencer v. Merchant*, 125 U. S. 345, 356, 31 L. Ed. 763; *Dent v. West Virginia*, 129 U. S. 114, 32 L. Ed. 623; *Chicago, etc., R. Co. v. Minnesota*, 134 U. S. 418, 33 L. Ed. 970; *Minneapolis, Eastern R. Co. v. Minnesota*, 134 U. S. 467, 33 L. Ed. 985; *Crowley v. Christensen*, 137 U. S. 86, 91, 34 L. Ed. 620; *New York, etc., R. Co. v. Bristol*, 151 U. S. 556, 571, 38 L. Ed. 269; *Connecticut, etc., R. Co. v. Woodruff*, 153 U. S. 689, 38 L. Ed. 869; *Reagan v. Farmers' Loan, etc., Co.*, 154 U. S. 362, 38 L. Ed. 1014; *Murray v. Louisiana*, 163 U. S. 101, 41 L. Ed. 87; *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112, 178, 41 L. Ed. 369; *Davis v. Massachusetts*, 167 U. S. 43, 42 L. Ed. 71; *Wilson v. Eureka City*, 173 U. S. 32, 43 L. Ed. 603; *Gundling v. Chicago*, 177 U. S. 183, 44 L. Ed. 725; *St. Louis Consolidated Coal Co. v. Illinois*, 185 U. S. 203, 211, 46 L. Ed. 872; *Fischer v. St. Louis*, 194 U. S. 361, 48 L. Ed. 1018; *Jacobson v. Massachusetts*, 197 U. S. 11, 25, 49 L. Ed. 643; *New York v. Van De Carr*, 199 U. S. 552, 561, 50 L. Ed. 305.

**As to public health and safety.**—The state may invest local bodies called into existence for purposes of local administration with authority in some appropriate way to safeguard the public health and the public safety. *Jacobson v. Massachusetts*, 197 U. S. 11, 25, 49 L. Ed. 643.

Thus it was competent to vest in a local board of health the authority to determine upon the necessity of a general vaccination of all the inhabitants of the locality under its jurisdiction. *Jacobson v. Massachusetts*, 197 U. S. 11, 25, 49 L. Ed. 643.

**Mine inspection.**—In enacting a law with regard to the inspection of mines, there is no objection, in case the legislature find it impracticable to classify the mines for the purposes of inspection, to commit that power to a body of experts who are not only experienced in the operation of mines, but who are acquainted with the details necessary to be known in order to make a reasonable classification, although it may affect the amount of fees to be paid by the mine owners. *St. Louis Consolidated Coal Co. v. Illinois*, 185 U. S. 203, 211, 46 L. Ed. 872.

**Granting of licenses.**—The legislature may constitutionally delegate to an administrative board the discretionary power of granting or refusing licenses to carry on a particular trade or business. *New York v. Van De Carr*, 199 U. S. 552, 561, 50 L. Ed. 305; *Accord: Davis v. Massachusetts*, 167 U. S. 43, 42 L. Ed. 71; *Wilson v. Eureka City*, 173 U. S. 32, 43 L. Ed. 603; *Gundling v. Chicago*, 177 U. S. 183,

44 L. Ed. 725; *Fischer v. St. Louis*, 194 U. S. 361, 48 L. Ed. 1018; *Jacobson v. Massachusetts*, 197 U. S. 11, 49 L. Ed. 643. See, also, *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. Ed. 1145; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. Ed. 220.

It has been held in some of the state courts to be contrary to the spirit of American institutions to vest this dispensing power in the hands of a single individual, but the authority to delegate that discretion to a board appointed for that purpose is sustained by the great weight of authority. *Wilson v. Eureka City*, 173 U. S. 32, 43 L. Ed. 603; *Gundling v. Chicago*, 177 U. S. 183, 44 L. Ed. 725; *Fischer v. St. Louis*, 194 U. S. 361, 48 L. Ed. 1018; *New York v. Van De Carr*, 199 U. S. 552, 561, 50 L. Ed. 305.

**Settling of county indebtedness.**—It is within the competency of a state legislature to create or designate a board, commission, or other agency for the purpose of compromising, funding or settling a county indebtedness, and vest it with power to do so without submitting the question to a vote of the electors of the county and regardless of their approval or disapproval. *Carter County v. Sinton*, 120 U. S. 517, 524, 30 L. Ed. 701.

**As to public improvements.**—So the legislature, having the power to fix the sum necessary to be levied for the expense of a public improvement, and to determine the lands which will receive the benefit and which should, therefore, bear the burden, may, if it sees fit, commit the ascertainment of either or both of these facts to the judgment of commissioners. *Spencer v. Merchant*, 125 U. S. 345, 356, 31 L. Ed. 763.

**Reclamation districts.**—Likewise, authority to establish a district for the reclamation of swamp or arid lands may be lodged in any board or tribunal which the legislature may designate. *Hagar v. Reclamation District*, No. 108, 111 U. S. 701, 704, 28 L. Ed. 569; *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112, 178, 41 L. Ed. 369.

After a legislature has prescribed by general rule the manner of organizing and incorporating an irrigation district and the conditions which must exist in order to permit the inclusion of any land within such district, it may constitutionally delegate to a board of supervisors the determination of the necessary questions of fact, and leave it to such board and to the people to say whether such corporation shall be created. In so doing the legislature really delegates none of its power, but prescribes conditions upon the performance of which the corporation is to be regarded as organized. *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112, 167, 178, 41 L. Ed. 369.

**Railroad commissions.**—Statutes creating a board of commissioners authorized to



a single individual of the power to grant or withhold licenses to carry on a particular trade or business or to perform certain acts has been upheld by the federal supreme court.<sup>2</sup>

(cc) *To Private Corporations.*—The legislature cannot delegate legislative powers to private corporations, but if it has the power to accomplish a certain work, it may do so through the agency of a private corporation and vest it with whatever powers may be necessary to carry the work into execution.<sup>3</sup>

**Legislature May Authorize Corporation to Transfer Its Franchises.**—It is within the power of the legislature, in creating a corporation, to authorize it to sell and transfer its franchises.<sup>4</sup>

(c) *Irrevocable Delegation of Legislative Power.*—One of the highest attributes and duties of a legislature is to regulate public matters with all public bodies from time to time in the manner which the public welfare may appear to demand. It cannot devolve these duties permanently on other public bodies, nor permanently suspend or abandon them itself, without attempting what is wholly beyond its constitutional competency. In other words, it cannot constitutionally preclude itself from revoking, or reassuming, at any time, powers which it has devolved upon such public bodies.<sup>5</sup>

supervise the operation of railroads within the state and to regulate freight, passenger and warehouse charges are not unconstitutional as delegating legislative or judicial powers. *Railroad Commission Cases*, 116 U. S. 307, 29 L. Ed. 636; *Chicago, etc., R. Co. v. Minnesota*, 134 U. S. 418, 33 L. Ed. 970; *Minneapolis Eastern R. Co. v. Minnesota*, 134 U. S. 467, 468, 33 L. Ed. 985; *Reagan v. Farmers' Loan, etc., Co.*, 154 U. S. 362, 38 L. Ed. 1014. See, also, *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155, 24 L. Ed. 94; *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *New York, etc., R. Co. v. Bristol*, 151 U. S. 556, 571, 38 L. Ed. 269; *Connecticut, etc., R. Co. v. Woodruff*, 153 U. S. 689, 38 L. Ed. 869.

**Granting of franchises and privileges.**—In the absence of constitutional restriction, the legislature may exercise its authority to grant franchises (to establish toll bridges, for example) either by direct legislation or through agencies duly established and having power for that purpose as for example, the courts of law. *Wright v. Nagle*, 101 U. S. 791, 794, 25 L. Ed. 921.

**2. To single individual.**—*Davis v. Massachusetts*, 167 U. S. 43, 42 L. Ed. 71; *Wilson v. Eureka City*, 173 U. S. 32, 43 L. Ed. 603; *Gundling v. Chicago*, 177 U. S. 183, 44 L. Ed. 725.

**3. Delegation of powers to private corporations.**—*McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *Briscoe v. Bank*, 11 Pet. 257, 316, 9 L. Ed. 709; *Slaughter-House Cases*, 16 Wall. 36, 21 L. Ed. 394; *Davidson v. New Orleans*, 96 U. S. 97, 101, 24 L. Ed. 616; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 29 L. Ed. 516; *New Orleans Waterworks Co. v. Fives*, 115 U. S. 674, 680, 29 L. Ed. 525.

The state has the right to use a private corporation and confer upon it the necessary powers to carry into effect sanitary regulations. *Slaughter-House Cases*, 16 Wall. 36, 21 L. Ed. 394; *Davidson v. New Orleans*, 96 U. S. 97, 101, 24 L. Ed. 616.

So the legislature of Louisiana had the right to organize a private corporation to carry out the work of draining the swamp lands in and around the city of New Orleans. *Davidson v. New Orleans*, 96 U. S. 97, 101, 24 L. Ed. 616.

The state is capable—her authority in the premises not being, at the time, limited by her own organic law—of providing for supplying gas to one of her municipalities and its inhabitants, by means of a valid contract with a private corporation of her own creation. *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 670, 29 L. Ed. 516; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 680, 29 L. Ed. 525.

**4. May authorize corporation to transfer franchises.**—*Willamette Mfg. Co. v. Bank*, 119 U. S. 191, 198, 30 L. Ed. 384.

**5. Irrevocable delegation of legislative power.**—*East Hartford v. Hartford Bridge Co.*, 10 How. 511, 534, 13 L. Ed. 518; *State Bank v. Knopp*, 16 How. 369, 380, 14 L. Ed. 977; *Board of Commissioners v. Lucas*, 93 U. S. 108, 114, 23 L. Ed. 822; *New Orleans v. Clark*, 95 U. S. 644, 654, 24 L. Ed. 521; *Newton v. Commissioners*, 100 U. S. 548, 25 L. Ed. 710; *Williamson v. New Jersey*, 130 U. S. 189, 199, 32 L. Ed. 915; *The Chinese Exclusion Case*, 130 U. S. 581, 609, 32 L. Ed. 1068; *Essex Public Road Board v. Skinkle*, 140 U. S. 334, 339, 35 L. Ed. 446; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 453, 36 L. Ed. 1018; *Fong Yue Ting v. United States*, 149 U. S. 698, 722, 37 L. Ed. 905.

"In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the state the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes." *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 453, 36 L. Ed. 1018.

(3) *Delegation of Executive Powers.*—The president's duty, in general, requires his superintendence of the administration, yet he cannot be required to become the administrative officer of every department and bureau, or to perform in person the numerous details incident to services, which, nevertheless, he is, in a correct sense, by the constitution and laws, required and expected to perform. Such a practice, if it were possible, would absorb the duties of the various departments of the government in the personal action of the one chief executive officer, and be fraught with mischief to the public service. There are many duties, therefore, which must, from their nature, be delegated to the heads of the executive departments or their subordinates.<sup>6</sup> The president speaks and acts therefore, through the heads of the several departments in relation to subjects which appertain to their respective duties; and acts done by the heads of departments, within the scope of their respective duties, must be considered as the acts of the president of the United States.<sup>7</sup>

**Delegation of Powers by Heads of Departments.**—So when a secretary of the government is required to give information on any subject, he may act, and generally does act, through officers under him. He is not expected to make over his own signature all the communications required from the department of which he is the head. It would be impracticable for him to do so. The official communication is deemed made by him when it is made under his sanction and direction.<sup>8</sup>

(4) *Delegation of Judicial Powers*—See ante, "Devolution of Judicial Functions upon the Legislative and Executive Departments," VI, D, 3, e, (1), (c), and the references there given.

f. *The Legislative Departments*—(1) *Legislative Department of the Federal Government*—(a) *How Constituted.*—All legislative powers granted to the United States are vested in the federal congress, which consists of the senate and house of representatives.<sup>9</sup>

**Apportionment of Representatives.**—See U. S. Const., Art. 1, § 2; Fourteenth Amendment, § 2.

**Reduction of Representation.**—The first section of the fourteenth amendment does not refer to the exercise of the elective franchise, though the second provides that if the right to vote is denied or abridged to any male inhabitant of the state having attained majority, and being a citizen of the United States, then the basis of representation to which each state is entitled in the congress shall be proportionately reduced. Whenever presidential electors are appointed by popular election, then the right to vote cannot be denied or abridged without invoking the penalty, and so of the right to vote for representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof.<sup>10</sup>

6. **Delegation of powers by the executive.**—*Williams v. United States*, 1 How. 290, 11 L. Ed. 135.

7. **Same.**—*Wilcox v. McConnell*, 13 Pet. 498, 10 L. Ed. 264.

Thus by the act of congress of 1830, all lands were exempted from pre-emption which were reserved from sale by the president of the United States. Both military posts and Indian affairs, including agencies, belong to the war department. Held, that a reservation of land made at the request of the secretary of war for purposes in his department, must be considered as made by the president of the United States, within the terms of the act of congress. *Wilcox v. McConnell*, 13 Pet. 498, 10 L. Ed. 264.

The act of congress passed January

31st, 1823, prohibiting the advance of public money, in any case whatsoever to the disbursing officers of government, except, under the special direction of the president, does not require the personal and ministerial performance of this duty, to be exercised in every instance by the president under his own hand. *Williams v. United States*, 1 How. 290, 11 L. Ed. 135.

8. **Delegation of powers by heads of departments.**—*Miller v. New York*, 109 U. S. 385, 394, 27 L. Ed. 971.

9. **Congress, how constituted.**—Const. U. S., Art. 1, § 1.

10. **Reduction of representation.**—*McPherson v. Blacker*, 146 U. S. 1, 39, 36 L. Ed. 869.

(b) *Qualification of Members.*—The constitution provides that each house shall be the judge of the elections, returns, and qualifications of its own members.<sup>11</sup> When, therefore, the senators and representatives of a state are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority; and its decision is binding upon every other department of the government, and cannot be questioned in a judicial tribunal. The right to decide is placed there and not in the courts.<sup>12</sup>

(c) *Election of Members.*—As to the powers of congress with respect to supervising the election of its members, see the title ELECTIONS.

(d) *Status of Senators as Officers of the United States.*—"While the senate, as a branch of the legislative department, owes its existence to the constitution, and participates in passing laws that concern the entire country, its members are chosen by state legislatures, and cannot properly be said to hold their places 'under the government of the United States.'"<sup>13</sup>

(e) *Privileges of Members.*—See the title PRIVILEGE.

(f) *Compensation of Members.*—Section 51 of the Revised Statutes provides that: "Whenever a vacancy occurs in either house of congress, by death or otherwise, of any member or delegate elected or appointed thereto, after the commencement of the congress to which he has been elected or appointed, the person elected or appointed to fill it shall be compensated and paid from the time that the compensations of his predecessor ceased. Within the meaning of this statute, a person who presents his credentials as a member of the house of representatives, is sworn in, draws his salary and mileage and exercises all the powers and functions of a de jure member until he is unseated and his place declared vacant by a resolution of the house, is to be deemed the predecessor of the member elected to fill the vacancy thus created, and such member is entitled to compensation only from the time the compensation of the unseated member ceased."<sup>14</sup>

**Predecessor Construed.**—The reference to a predecessor in the statute above quoted is plainly intended to apply only to a predecessor in the same congress. If no such person be found because no such person was duly elected, then the claimant had no predecessor in the sense of this statute, and it does not apply.<sup>15</sup>

(g) *Organization; Procedure*—(aa) *Quorum.*—The constitution provides that a majority of each house shall constitute a quorum to do business.<sup>16</sup> In other words, when a majority are present, the house is in a position to do business. Its capacity to transact business is then established, created by the mere presence of a majority, and does not depend upon the disposition or assent or action of any single member or fraction of the majority present. All that the constitution requires is the presence of a majority, and when that majority is present, the power of the house arises.<sup>17</sup>

**Validity of Act of Majority of Quorum.**—It is a general rule of all parlia-

11. *Qualifications of members.*—Const. U. S., Art. 1, § 5.

12. *Same, political questions; validity of government under which appointed.*—*Luther v. Borden*, 7 How. 1, 42, 12 L. Ed. 581. See, also, *Virginia v. West Virginia*, 11 Wall. 39, 20 L. Ed. 67.

13. *Senators as officers of the United States.*—*Burton v. United States*, 202 U. S. 344, 369, 50 L. Ed. 1957.

14. *Compensation of members.*—Page v. *United States*, 127 U. S. 67, 69, 32 L. Ed. 65.

15. *Same.*—Page v. *United States*, 127 U. S. 67, 69, 32 L. Ed. 65.

16. *Organization and procedure; quo-*

*rum.*—Const. U. S., Art. 1, § 5.

17. *Same.*—*United States v. Ballin*, 144 U. S. 1, 5, 36 L. Ed. 321.

The provision in rule 15 of the house of representatives of the fifty-first congress, that upon the demand of any member or at the suggestion of the speaker the names of members present and not voting should be counted in order to determine the presence of a quorum was not an infringement upon constitutional or fundamental rights of members, but was a valid exercise of the power of the house to prescribe its rules of procedure. *United States v. Ballin*, 144 U. S. 1, 6, 36 L. Ed. 321.



mentary bodies, in the absence of a contrary provision in the organic act constituting the body, that a quorum being present, the act of a majority of the quorum is the act of the body. There being no such limitation found in the constitution of the United States, this general rule applies to the proceedings of the respective houses of the American congress.<sup>18</sup>

(bb) *Rules of Procedure*.—Each house may determine the rules of its proceedings.<sup>19</sup> As respects the validity of the rules adopted, the question with the courts, when called to pass thereon, is solely one of power. As stated, the constitution empowers each house to determine its rules of proceedings. Neither house may, by its rules, ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode of procedure established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, or more accurate or more just.<sup>20</sup>

**Power to Make Rules Never Exhausted.**—It is no objection to the validity of a rule that a different one has been prescribed and in force for a length of time. The power to make rules is never exhausted. It is always subject to be exercised by the house, and within the limitations above mentioned, is absolute and beyond the challenge of any other body or tribunal.<sup>21</sup>

(cc) *Journal of Proceedings*.—It is one of the constitutional requirements that each house shall keep a journal of its proceedings.<sup>21a</sup>

**Journal Imports Verity.**—This journal must be assumed to speak the truth, in other words, it is a record, importing absolute verity, and cannot be impeached by extrinsic evidence.<sup>22</sup>

(dd) *Compulsory Attendance of Members*.—The penalty which each house is authorized to inflict in order to compel the attendance of absent members may be imprisonment, and this may be for a violation of some order or standing rule on that subject.<sup>23</sup>

(ee) *Disorderly Behavior; Expulsion of Members*.—The constitution expressly empowers each house to punish its members for disorderly behavior,

**18. Validity of act of majority of quorum.**—United States v. Ballin, 144 U. S. 1, 6, 36 L. Ed. 321.

**19. Rules of procedure.**—Const. U. S., Art. 1, § 5.

**20. Same, judicial questions.**—United States v. Ballin, 144 U. S. 1, 5, 36 L. Ed. 321.

Thus it is within the competency of the house of representatives to prescribe any method determining the presence of a majority necessary to a quorum which shall be reasonably certain to ascertain the fact. United States v. Ballin, 144 U. S. 1, 6, 36 L. Ed. 321.

Rule fifteen of the house of representatives of the fifty-first congress requiring the names of members present and not voting to be noted by the clerk and recorded in the journal, and reported to the speaker of the house with the names of the members voting, to be counted and announced in determining the presence of a quorum, was held to prescribe a constitutional method of ascertaining the presence of a quorum to do business. United States v. Ballin, 144 U. S. 1, 6, 36 L. Ed. 321.

**21. Power to make rules never exhausted.**—United States v. Ballin, 144 U. S. 1, 5, 36 L. Ed. 321.

**21a. Journal of proceedings.**—Const. U.

S., Art. 1, § 5.

**22. Journal imports verity.**—Field v. Clark, 143 U. S. 649, 36 L. Ed. 294; United States v. Ballin, 144 U. S. 1, 4, 36 L. Ed. 321; Lyons v. Woods, 153 U. S. 649, 663, 38 L. Ed. 854. See, also, Harwood v. Wentworth, 162 U. S. 547, 560, 40 L. Ed. 1069; Twin City Bank v. Nebeker, 167 U. S. 196, 203, 42 L. Ed. 134. And see, ante, "Records of Legislative Bodies," VI, D, 3, d, (3), (c), (ii).

**Invalidating statute by appeal to journal.**—The journals of the respective houses of congress cannot be resorted to for the purpose of impairing an act of congress which has been signed by the speaker of the house of representatives and by the president and senate, and after being thus attested, approved and signed by the president and deposited in the department of state according to law. Field v. Clark, 143 U. S. 649, 36 L. Ed. 294; United States v. Ballin, 144 U. S. 1, 36 L. Ed. 321; Lyons v. Woods, 153 U. S. 649, 663, 38 L. Ed. 854; Harwood v. Wentworth, 162 U. S. 547, 560, 40 L. Ed. 1069. And see, also, Twin City Bank v. Nebeker, 167 U. S. 196, 203, 42 L. Ed. 134. See, generally, the title STATUTES.

**23. Compulsory attendance of members.**—Kilbourn v. Thompson, 103 U. S. 168, 176, 190, 26 L. Ed. 377.

and with the concurrence of two-thirds, to expel a member.<sup>24</sup> As regards the senate, it has been held that in view of this provision, together with those which confer upon it the power to try impeachments, to judge of the elections, returns and qualifications of its members, and to determine the rules of its proceedings, it must be deemed to possess the inherent power of self-protection.<sup>25</sup> The punishment authorized may be for a refusal to obey some rule on that subject made by the house for the preservation of order.<sup>26</sup> It may, in a proper case, extend to the imprisonment of the offending member.<sup>27</sup> The right to expel extends to all cases where the offense is such as in the judgment of the senate or house is inconsistent with the trust and duty of a member.<sup>28</sup>

**Legislative Interference with Exclusive Right to Punish or Expel.—**

"While the framers of the constitution intended that each department should keep within its appointed sphere of public action, it was never contemplated that the authority of the senate to admit to a seat in its body one who had been duly elected as a senator, or its power to expel him after being admitted, should, in any degree, limit or restrict the authority of congress to enact such statutes, not forbidden by the constitution, as the public interests required for carrying into effect the powers granted to it."<sup>29</sup> Congress has authority by legislation to make it an offense against the United States for a senator, after his election and during his continuance in office, to agree to receive or to receive compensation for services to be rendered or rendered to any person, before a department of the government, in relation to a proceeding, matter or thing in which the United States is a party or directly or indirectly interested.<sup>30</sup> Such a statute is not open to the objection that, through its necessary operation, it interferes with the legitimate authority of the senate over its members, in that a judgment of conviction under it may exclude a senator from the senate before his constitutional term expires; whereas, under the constitution, a senator is elected to serve a specified number of years and the senate is, by that instrument, made the sole judge of the qualifications of its members and vested with the exclusive power to expel members.<sup>31</sup> And although such a statute may declare that persons convicted thereunder shall be rendered forever incapable of holding any office of honor, trust or profit under the United States, a final judgment of conviction thereunder does not operate ipso facto to vacate the seat of the convicted person in the national senate, even though it reiterates the declaration of the statute that he shall forever afterward be incapable of holding any office of honor, trust, or profit under the government of the United States, since the members of the senate are chosen by the state legislatures and cannot properly be said to hold their places "under the government of the United States."<sup>32</sup> The seat into which a senator is originally inducted can only become vacant by his death, or by expiration of his term of office, or by some direct action on the part of the senate in the exercise of its constitutional powers.<sup>33</sup>

**24. Disorderly behavior; expulsion of members.**—Const. U. S., Art. 1, § 5.

**25. Same.**—In re Chapman, 166 U. S. 661, 668, 41 L. Ed. 1154.

**26. Same, punishment.**—Kilbourn v. Thompson, 103 U. S. 168, 176, 190, 26 L. Ed. 377.

**27. Same.**—Kilbourn v. Thompson, 103 U. S. 168, 176, 190, 26 L. Ed. 377.

**28. Same.**—In re Chapman, 166 U. S. 661, 668, 41 L. Ed. 1154.

**29. Legislative interference with right of either house.**—Burton v. United States, 202 U. S. 344, 367, 50 L. Ed. 1057.

**30. Same.**—Burton v. United States, 202 U. S. 344, 365, 50 L. Ed. 1057.

Section 1782 of the Revised Statutes, which makes it an offense for a senator,

after his election, and during his continuance in office, to receive or agree to receive compensation, in any form, from any person, in relation to a proceeding, matter or thing before a department, in which the United States is a party, or directly or indirectly interested, does not, by its necessary operation, impinge upon the authority of powers of the senate of the United States, nor interfere with the legitimate functions, privileges or rights of senators. *Burton v. United States*, 202 U. S. 344, 370, 50 L. Ed. 1057.

**31. Same.**—*Burton v. United States*, 202 U. S. 344, 366, 50 L. Ed. 1057.

**32. Same.**—*Burton v. United States*, 202 U. S. 344, 369, 50 L. Ed. 1057.

**33. Same.**—*Burton v. United States*, 202 U. S. 344, 369, 50 L. Ed. 1057.

**Same; Not an Infringement of Privileges of Members.**—Neither is such an act unconstitutional as an attempted restriction or infringement of the constitutional privileges of members. The proper discharge of his duties does not require a senator to appear before an executive department in order to enforce his particular views, or the views of others, in respect of matters committed to that department for determination. He may often do so without impropriety, and, so far as existing law is concerned, may do so whenever he chooses, provided he neither agrees to receive nor receives compensation for such services.<sup>34</sup> There can be no reason, however, why the government may not, by legislation, protect each department against such evils, indeed, against everything, from whatever source it proceeds, that tends or may tend to corruption or inefficiency in the management of public affairs. A senator cannot claim immunity from legislation directed to that end, simply because he is a member of a body which does not owe its existence to congress, and with whose constitutional functions there can be no interference.<sup>35</sup>

(ff) *Contempts; Power to Punish*—See the title CONTEMPT.

(h) *Legislative Powers of Congress*—(aa) *Nature and Scope.*—**Legislation Defined.**—Legislation is the exercise of sovereign authority.<sup>36</sup>

**As the Legislature of the Union.**—Congress is not a local legislature, but exercises all its powers, in its high character, as the legislature of the Union.<sup>37</sup> It possesses the entire legislative authority of the United States.<sup>38</sup>

**Relation of Powers to Each Other.**—The powers conferred upon congress by the constitution must be regarded as related to each other, and all means for a common end. Each is but part of a system, a constituent of one whole. No single power is the ultimate end for which the constitution was adopted.<sup>39</sup> The same statement is true as to the non-enumerated powers included in the authority expressly given "to make all laws which shall be necessary and proper for carrying into execution the specified powers vested in congress, and all other powers vested by the constitution in the government of the United States, or in any department or officer thereof."<sup>40</sup>

**"Rules and Regulations"**—In What Sense Used.—The words "rules and regulations" are usually employed in the constitution in speaking of some particular specified power which it means to confer on the government, and not, when granting general powers of legislation; as for example, in the particular power of congress "to make rules for the government and regulation of the land and naval forces, or the particular and specified power to regulate commerce," or "to establish a uniform rule of naturalization;" "to coin money and regulate the value thereof."<sup>41</sup>

**Powers Limited to Specified Objects, but Plenary as to Those Objects.**—See ante, "Limited in Number and Scope," VI, D, 3, a, (2); "Generally," VI, D, 3, b, (6), (a).

**Express Powers Limited to the Objects for Which They Were Entrusted.**—The express powers of congress are limited in their exercise to the objects for which they are entrusted, and in order to justify congress in exercising any incidental or implied power to carry into effect its express authority, it must appear that there is some relation between the means employed and

34. **Same; not an infringement of privileges of members.**—*Burton v. United States*, 202 U. S. 344, 367, 50 L. Ed. 1057.

35. **Same.**—*Burton v. United States*, 202 U. S. 344, 368, 50 L. Ed. 1057.

36. **Legislation defined.**—*Vanhorne v. Dorrance*, 2 Dall. 304, 307, 1 L. Ed. 391.

37. **Powers of congress as the legislature of the Union.**—*Respublica v. Cobbett* (Sup. Ct. Pal.), 3 Dall. 467, 473, 1 L. Ed. 683; *Cohens v. Virginia*, 6 Wheat. 264, 429, 5 L. Ed. 257; *Worcester v. Georgia*, 6 Pet. 515, 571, 8 L. Ed. 483; *White v.*

*Hart*, 13 Wall. 646, 650, 20 L. Ed. 685.

38. **Same.**—*Burton v. United States*, 202 U. S. 344, 367, 50 L. Ed. 1057.

39. **Relation of powers one to another.**—*Legal Tender Cases*, 12 Wall. 457, 532, 20 L. Ed. 287.

40. **Same; nonenumerated powers.**—*Legal Tender Cases*, 12 Wall. 457, 533, 20 L. Ed. 287.

41. **"Rules and regulations;" in what sense used.**—*Scott v. Sandford* (opinion of Taney, C. J.), 19 How. 393, 440, 15 L. Ed. 691.



the legitimate end.<sup>42</sup> But it must be left to congress in the exercise of a sound discretion to determine in what manner it will exercise the power it undoubtedly possesses.<sup>43</sup>

**The Constitution a Grant of Powers.**—See ante, "The Federal Constitution a Grant of Powers," VI, D, 3, a, (3).

(bb) *Constitutional Limitations upon Legislative Powers*—(aaa) *Generally*.—The powers of legislation granted to the government of the United States, as well as to the several state governments, by their respective constitutions, are all limited.<sup>44</sup> There is no such thing in the theory of our governments, state and national, as unlimited power in any of their branches. The executive, the legislative, and the judicial departments are all of limited and defined powers.<sup>45</sup> There are limitations of such powers which arise out of the essential nature of all free governments: implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name.<sup>46</sup>

**Express Powers Subject to the Express Limitations.**—Every function of the government being derived from the constitution, it follows that that instrument is everywhere and at all times potential in so far as its provisions are applicable.<sup>47</sup> The powers expressly granted to congress must be exercised within the limit imposed by the restrictions contained in that instrument. Wherever a power is given by the constitution and there is a limitation imposed on the authority, such restriction operates upon and confines every action on the subject within its constitutional limits.<sup>48</sup>

**42. Express powers limited to objects for which given.**—In *re Rapier*, 143 U. S. 110, 133, 36 L. Ed. 93.

**43. Discretion as to manner of exercise.**—In *re Rapier*, 143 U. S. 110, 134, 36 L. Ed. 93.

**Use of express powers to accomplish ulterior and forbidden ends.**—Thus it has been held that while the legitimate end of the exercise of the power to establish post office and post roads is to furnish mail facilities for the people of the United States, yet it is not true that mail facilities are required to be furnished for every purpose, and that congress may, therefore, forbid the use of the mails for the purpose of circulating obscene pictures, immoral publications, lottery advertisements and tickets, etc., and that in so doing it does not make an unconstitutional use of such power for the purpose of suppressing crime and immorality within the states. In *re Rapier*, 143 U. S. 110, 134, 36 L. Ed. 93.

**44. Constitutional limitations of legislative powers.**—*Green v. Biddle* (opinion of Washington, J.). 8 Wheat. 1, 88, 5 L. Ed. 547.

**45. Powers all limited.**—*Loan Ass'n v. Topeka*, 20 Wall. 665, 22 L. Ed. 455.

**46. Limitations arising out of nature of government.**—*Loan Ass'n v. Topeka*, 20 Wall. 665, 22 L. Ed. 455.

Among these is the limitation of the right of taxation, that it can only be used in aid of a public object, an object which is within the purpose for which governments are established. *Loan Ass'n v. Topeka*, 20 Wall. 665, 22 L. Ed. 455. See, also, ante, "Limited in Number and Scope," VI, D, 3, a, (2); "The Federal

Constitution a Grant of Powers," VI, D, 3, a, (3).

**47. Express powers subject to express limitations.**—*Downes v. Bidwell*, 182 U. S. 244, 45 L. Ed. 1088.

**48. Same.**—*Kilbourn v. Thompson*, 103 U. S. 168, 190, 26 L. Ed. 377; *Boyd v. United States*, 116 U. S. 616, 29 L. Ed. 746; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. Ed. 463; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 38 L. Ed. 1047; In *re Chapman*, 166 U. S. 661, 668, 41 L. Ed. 1154; *United States v. Joint Traffic Ass'n*, 171 U. S. 505, 571, 43 L. Ed. 259; *Fairbank v. United States*, 181 U. S. 283, 300, 301, 45 L. Ed. 862; *Downes v. Bidwell*, 182 U. S. 244, 45 L. Ed. 1088.

"The constitutional requirement of due process of law, which embraces compensation for private property taken for public use, applies in every case of the exertion of governmental power. If in the execution of any power, no matter what it is, the government, federal or state, finds it necessary to take private property for public use, it must obey the constitutional injunction to make or secure just compensation to the owner. *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641, 659, 34 L. Ed. 295; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 336, 37 L. Ed. 463; *Sweet v. Rechel*, 159 U. S. 380, 399, 402, 40 L. Ed. 188; *United States v. Lynah*, 188 U. S. 445, 47 L. Ed. 539." *Union Bridge Co. v. United States*, 204 U. S. 364, 396, 397, 51 L. Ed. 523.

Thus it has been held that congress has supreme control over the regulation of commerce, but that if, in exercising that

**Effect of the Eleventh Amendment.**—The immunity of the individual states from suits by citizens of other states, provided for in the eleventh amendment, is not to be interpreted as nullifying those other provisions which confer power on congress to regulate commerce among the several states, which forbid the states from entering into any treaty, alliance or confederation, from passing any bill of attainder, ex post facto law or law impairing the obligation of contracts, or, without the consent of congress, from laying any duty of tonnage, entering into any agreement or compact with other states, or from engaging in war—all of which provisions existed before the adoption of the eleventh amendment, which still exist, and which would be nullified and made of no effect, if the judicial power of the United States could not be invoked to protect citizens affected by the passage of state laws disregarding these constitutional limitations.<sup>49</sup> "Much less can the eleventh amendment be successfully pleaded as an invincible barrier to judicial inquiry whether the salutary provisions of the fourteenth amendment have been disregarded by state enactments. On the other hand, the judicial power of the United States has not infrequently been exercised in securing to the several states, in proper cases, the immunity intended by the eleventh amendment."<sup>50</sup>

**The Fourteenth Amendment.**—The fourteenth amendment is not a limitation upon the powers of congress. The due process clause thereof imposes no restriction upon congress when legislating for the District of Columbia. Congress is subject, however, to the restriction contained in the fifth amendment.<sup>51</sup>

**Construction of Powers and of Limitations upon Powers; Whether Strict or Liberal.**—See ante, "Construction Strict or Liberal, When," III, B, 17.

(bbb) *Limitations upon Power to Protect Civil Rights.*—See the title CIVIL RIGHTS, vol. 3, pp. 816, 818, 834.

(ccc) *Impairment of the Obligation of Contracts.*—See the title IMPAIRMENT OF OBLIGATION OF CONTRACTS.

(ddd) *Titles of Nobility.*—The granting of any title of nobility by the United States is expressly prohibited.<sup>52</sup>

**Term Self-Defining.**—A title of nobility, it is said, is a term which defines itself.<sup>53</sup>

(eee) *Legislative Discretion.*—See ante, "Judicial Control of Legislative Discretion," VI, D, 3, d, (4), (b), (bb), et seq.

(fff) *Abuse of Legislative Power.*—See ante, "Judicial Control of Legislative Discretion," VI, D, 3, d, (4), (b), (bb), et seq.

supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by the fifth amendment and can take only on payment of just compensation. *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. Ed. 463; *Carroll v. Greenwich Ins. Co.*, 199 U. S. 401, 409, 50 L. Ed. 246.

The power so given is not to be taken as authorizing congress to override the fifth amendment so far as that amendment protects fundamental personal rights. *Carroll v. Greenwich Ins. Co.*, 199 U. S. 401, 409, 50 L. Ed. 246.

So the fifth section of the act of June 22, 1874, 18 Stats. 186, which authorized a court of the United States in revenue cases, on motion of the district attorney, to require the defendant or the claimant to produce in court his private books, invoices and papers, or else that the allegations of the attorney as to their contents should be taken as confessed, was

held unconstitutional and void as applied to an action for penalties, or to establish a forfeiture of the party's goods, because repugnant to the fourth and fifth amendments of the constitution. *Boyd v. United States*, 116 U. S. 616, 29 L. Ed. 746.

49. **Effect of the eleventh amendment.**—*Prout v. Starr*, 188 U. S. 537, 543, 47 L. Ed. 584.

50. **Same.**—*Hans v. Louisiana*, 134 U. S. 1, 10, 33 L. Ed. 842; *North Carolina v. Temple*, 134 U. S. 22, 33 L. Ed. 849; *Harkrader v. Wadley*, 172 U. S. 148, 43 L. Ed. 399; *Fitts v. McGhee*, 172 U. S. 516, 43 L. Ed. 535; *Prout v. Starr*, 188 U. S. 537, 543, 47 L. Ed. 584.

51. **Fourteenth amendment not a limitation upon congress.**—*Wight v. Davidson*, 181 U. S. 371, 384, 45 L. Ed. 900.

52. **Titles of nobility forbidden.**—Const. U. S., Art. 1, § 9.

53. **Title of nobility self-defining.**—*Briscoe v. Bank* (opinion of Baldwin, J.), 11 Pet. 257, 328c, 9 L. Ed. 709.



(ggg) *Limitations of Implied Powers*.—See ante, "Legislative Discretion as to Occasion or Necessity; Choice of Means, etc.," VI, D, 3, d, (4), (b), (bb), (bbb); post, "Limitations of Implied Powers," VI, D, 3, f, (1), (h), (bb), (ggg), et seq.

(cc) *Manner of Enacting Statutes; Constitutional Requirements*.—See the title STATUTES.

(dd) *Particular Powers of Congress*—(aaa) *To Lay and Collect Taxes, Imposts and Excises, and to Pay the Debts of the United States*.—As to the power of congress to lay and collect taxes, imposts, and excises, see, generally, the titles REVENUE LAWS; TAXATION.

**To Pay the Debts of the United States—What May Constitute a Debt.**  
—"Under the provisions of the constitution (art. 1, § 8), congress has power to lay and collect taxes, etc., 'to pay the debts' of the United States. Having power to raise money for that purpose, it of course follows that it has power, when the money is raised, to appropriate it to the same object. What are the debts of the United States within the meaning of this constitutional provision? It is conceded, and, indeed, it cannot be questioned, that the debts are not limited to those which are evidenced by some written obligation or to those which are otherwise of a strictly legal character. The term 'debts' includes those debts or claims which rest upon a merely equitable or honorary obligation, and which would not be recoverable in a court of law if existing against an individual. The nation, speaking broadly, owes a 'debt' to an individual when his claim grows out of general principles of right and justice; when, in other words, it is based upon considerations of a moral or merely honorary nature, such as are binding on the conscience or the honor of an individual, although the debt could obtain no recognition in a court of law. The power of congress extends at least as far as the recognition and payment of claims against the government which are thus founded."<sup>54</sup> It is for congress to determine whether, under the circumstances of a particular case, justice requires that compensation be made to a person or corporation suffering incidentally from the exercise of its constitutional powers by the national government.<sup>55</sup>

(bbb) *To Regulate Commerce Foreign and Interstate, and with the Indian Tribes*.—See the titles CARRIERS, vol. 3, p. 556; INTERSTATE AND FOREIGN COMMERCE; INDIANS, ETC.

(ccc) *Powers with Respect to Navigable Waters*.—See the titles INTERSTATE AND FOREIGN COMMERCE; NAVIGABLE WATERS.

(ddd) *Control of Indian Tribes; Civil and Political Status of Indians, etc.*—See the title INDIANS.

**54. To pay the debts of the United States; what may constitute a debt.**—United States *v.* Realty Co., 163 U. S. 427, 440, 41 L. Ed. 215.

"In regard to the question whether the facts existing in any given case bring it within the description of that class of claims which congress can and ought to recognize as founded upon equitable and moral considerations and grounded upon principles of right and justice, we think that generally such question must in its nature be one for congress to decide for itself. Its decision recognizing such a claim and appropriating money for its payment can rarely, if ever, be the subject of review by the judicial branch of the government." United States *v.* Realty Co., 163 U. S. 427, 444, 41 L. Ed. 215.

Upon the general principle that the government of the United States, through congress, has the right to pay the debts

of the United States, and that the claims of sugar producers who had complied with the bounty provision of the tariff act of 1890 were obligations which that body might rightfully decide to constitute debts payable by the United States, upon considerations of justice and honor, it was held that the act of congress of March 2, 1895, ch. 189, 28 Stat. 910, 933, making appropriations for the payment of such claims, was valid without reference to the question of the validity or invalidity of the original act providing for the payment of bounties to manufacturers of sugar, as contained in the tariff act of 1890. United States *v.* Realty Co., 163 U. S. 427, 444, 41 L. Ed. 215.

**55. Same; congress to determine what claims to be paid.**—Union Bridge Co. *v.* United States, 204 U. S. 364, 403, 51 L. Ed. 523.



(eee) *To Establish Uniform Rule of Naturalization.*—See the title NATURALIZATION.

(fff) *To Enact Bankrupt and Insolvent Laws.*—See the title BANKRUPTCY, vol. 2, p. 792. See, also, ante, "Bankruptcy and Insolvency Laws," VI, D, 3, c, (5), (b), (bb), (aaa).

(ggg) *To Establish Post Offices and Post Roads.*—See the title POSTAL LAWS.

(hhh) *To Constitute Tribunals Inferior to the Supreme Court.*—See the title COURTS.

(iii) *To Define and Punish Crime.*—See the titles CRIMINAL LAW; TREASON.

(jjj) *To Declare War, Suppress Insurrections, Conclude Treaties, etc.*—See the titles INSURRECTION; TREATIES; WAR.

(kkk) *To Raise and Support Armies; Provide a Navy; Organize, Equip and Regulate the Militia.*—See the titles ARMY AND NAVY, vol. 2, p. 494; MILITARY LAW; MILITIA.

(lll) *To Exercise Exclusive Jurisdiction over the District of Columbia, Places Ceded or Purchased, etc.*—See the titles DISTRICT OF COLUMBIA; UNITED STATES. See, also, ante, "Jurisdiction in the District of Columbia and Places under Exclusive Federal Control," VI, D, 3, c, (3), (b).

(mmm) *To Dispose of and Make Needful Rules and Regulations Respecting Territory of the United States.*—See the title PUBLIC LANDS; TERRITORIES. See, also, ante, "Power to Acquire, Govern and Dispose of Territory," VI, D, 2, c, (3), et seq.

(nnn) *To Exclude or Expel Aliens.*—See the title ALIENS, vol. 1, p. 210.

(ooo) *Power to Enforce the Fourteenth Amendment; Protection of Civil Rights.*—See the title CIVIL RIGHTS, vol. 3, p. 814, et seq. See, also, post, "Citizenship under the Fourteenth Amendment and the Privileges and Immunities of United States Citizenship," XVII, A, 3, b, et seq.

(ppp) *To Create Private Corporations.*—See the title BANKS AND BANKING, vol. 3, p. 1; CORPORATIONS.

(qqq) *Power to Borrow Money and Provide a Currency*—(aaaa) *Of the Power to Borrow Money: General Nature.*—The power conferred upon congress to borrow money upon the credit of the United States is the power to raise money for the public use on a pledge of the public credit, and may be exercised to meet either present or anticipated expenses and liabilities of the government.<sup>56</sup>

**How Construed.**—As used in the constitution, the words "to borrow money," designate a power vested in the national government for the safety and welfare of the whole people, and are not to receive that limited and restricted interpretation which they would have in a penal statute, or in an authority conferred by law or contract upon trustees or agents for private purposes.<sup>57</sup>

**Cannot Be Burdened or Impeded by State Action.**—"The constitution has conferred upon the government power to borrow money on the credit of the United States, and that power cannot be burdened or impeded or in any way affected by the action of any state. This principle was announced in *Weston v. Charleston*, 2 Pet. 449, 7 L. Ed. 481, where it was held that taxes upon the stock of the United States levied by one of the municipal corporations of South Carolina were invalid. From that time no one has questioned the immunity of national securities from state taxation."<sup>58</sup>

(bbbb) *Power to Borrow Includes the Power to Issue Appropriate Obligations.*—The power to borrow includes the power to issue, in return for the

56. **Power to borrow money; general nature.**—*Legal Tender Case*, 110 U. S. 421, 444, 28 L. Ed. 204.

57. **Same; construction liberal.**—*Legal Tender Case*, 110 U. S. 421, 444, 28 L. Ed. 204.

58. **States not to burden or impede.**—*Home Sav. Bank v. Des Moines*, 205 U.

S. 503, 512, 51 L. Ed. 901. See the title TAXATION. And see, also, ante, "State Taxation of United States Bank, VI, D, 3, c, (6), (cc), (fff), (gggg): "State Taxation of United States Bonds, Certificates of Indebtedness, etc.," VI, D, 3, c, (6), (cc), (fff), (hhhh).

money borrowed, the obligations of the United States in any appropriate form of stock, bonds, bills or notes.<sup>59</sup>

**May Make Obligations a Circulating Medium.**—Congress has authority to issue these obligations in a form adapted to circulation from hand to hand in the ordinary transactions of commerce and business. It may impress upon them such qualities as currency for the purchase of merchandise and the payment of debts, as accord with the usage of sovereign governments.<sup>60</sup> In order to promote and facilitate their circulation, to better adapt them to use as currency, and to make them more current in the market, it may provide for their redemption in coin or bonds, and make them receivable in payment of debts to the government.<sup>61</sup>

**May Issue Treasury Notes or Bills of Credit.**—Congress may constitutionally authorize the emission of bills of credit, and make them receivable in payment of debts to the government, and to fit them for use in all the transactions of commerce, may make them a currency, uniform in value and description; and provide for their redemption.<sup>62</sup> United States treasury notes and the notes of national banks may be properly described as bills of credit, for both are furnished by the government; both are issued on the credit of the government; and the government is responsible for the redemption of both; primarily as to those of the first description, and immediately upon default of the bank as to those of the second.<sup>63</sup> The power of congress to issue treasury notes or bills arises also out of the necessity of providing a proper currency for the country, and especially of providing for the failure or disappearance of the ordinary currency in times of financial pressure and threatened collapse of commercial credit.<sup>64</sup>

**“Legal Tender Acts.”**—The power to make treasury notes or bills of credit issued by the United States a “legal tender” in payment of all debts both public and private, including obligations incurred previous to the enactment of such act as well as those incurred afterward, is incidental to the power of issuing such notes or bills themselves. In other words, such a power is included in the plenary power conferred upon congress to borrow money and provide a currency.<sup>65</sup> The constitutional grant to congress of the power to coin money and regulate the value thereof does not imply a prohibition against the power of congress to enact statutes declaring treasury notes to be a legal tender. If such grant raises any implications, they are of complete power over the currency, rather than restraining.<sup>66</sup>

**Same—An Appropriate Means to an Express Power.**—On the other hand, impressing upon the treasury notes of the United States, the quality of being a legal tender in payment of private debts is an appropriate means, conducive and plainly adapted to the execution of the undoubted powers of congress,

59. Includes the power to issue appropriate obligations.—*Legal Tender Case*, 110 U. S. 421, 444, 28 L. Ed. 204.

60. May make obligations a circulating medium.—*Legal Tender Case*, 110 U. S. 421, 444, 447, 28 L. Ed. 204.

61. May make obligations receivable in payment of debts to the government and provide for their redemption in coin.—*Legal Tender Case*, 110 U. S. 421, 444, 28 L. Ed. 204.

62. May issue treasury notes or bills of credit.—*Veazie Bank v. Fenno*, 8 Wall. 533, 548, 19 L. Ed. 482; *Legal Tender Cases*, 12 Wall. 457, 560, 20 L. Ed. 287; *Legal Tender Case*, 110 U. S. 421, 446, 28 L. Ed. 204.

63. Same.—*Veazie Bank v. Fenno*, 8 Wall. 533, 549, 19 L. Ed. 482.

64. Same.—*Legal Tender Cases* (con-

curring opinion of Bradley, J.), 12 Wall. 457, 462, 20 L. Ed. 287.

65. Legal tender acts; retrospective operation; constitutionality.—*Legal Tender Cases*, 12 Wall. 457, 560, 567, 20 L. Ed. 287; *Legal Tender Case*, 110 U. S. 421, 448, 28 L. Ed. 204.

The act of May 31st, 1878, ch. 146, which provides that when any United States legal tender notes may be redeemed or received into the treasury, and shall belong to the United States, they shall be reissued and paid out again, and kept in circulation, is constitutional and valid. *Legal Tender Case*, 110 U. S. 421, 450, 28 L. Ed. 204.

66. Same; no implied prohibition.—*Legal Tender Cases*, 12 Wall. 457, 547, 20 L. Ed. 287, overruling *Hepburn v. Griswold*, 8 Wall. 606, 19 L. Ed. 513.

consistent with the letter and spirit of the constitution, and therefore, within the meaning of that instrument, "necessary and proper for carrying into execution the powers vested by this constitution in the government of the United States."<sup>67</sup>

**Same—Occasion or Necessity a Political Question.**—The question, whether at any particular time, in war or in peace, the exigency is such, by reason of unusual and pressing demands on the resources of the government, or of the inadequacy of the supply of gold and silver coin to furnish the currency needed for the uses of the government and of the people, it is, as matter of fact, wise and expedient to resort to this means, is a political question, to be determined by congress, when the question of exigency arises, and not a judicial question, to be afterwards passed upon by the courts.<sup>68</sup> The power to make treasury notes a legal tender is, nevertheless, a power which should not be resorted to except upon extraordinary and pressing occasions, such as war and public exigencies of great gravity and importance; and should be no longer exerted than all the circumstances of the case demand. But of the occasion when, and of the times how long, it shall be exercised and in force, it is for the legislative department of the government to judge.<sup>69</sup>

**Same—Not Prohibited by the Fifth Amendment.**—The legal tender acts were not prohibited by the spirit of the fifth amendment which forbids the taking of private property for public use without just compensation or due process of law. That provision refers only to a direct appropriation and not to consequential injuries resulting from the exercise of lawful power, and has never been supposed to have any bearing upon or to inhibit laws that indirectly work harm and loss to individuals.<sup>70</sup>

**Same—Not Forbidden by the Contract Clause.**—"The power of making the notes of the United States a legal tender in payment of private debts, being included in the power to borrow money and to provide a national currency, is not defeated or restricted by the fact that its exercise may affect the value of private contracts previously entered into. If, upon a just and fair interpretation of the whole constitution, a particular power or authority appears to be vested in congress, it is no constitutional objection to its existence, or to its exercise, that the property or the contracts of individuals may be incidentally affected."<sup>71</sup> Every contract for the payment of money simply is necessarily subject to the constitutional power of the government over the currency, whatever that power may be, and the obligation of the parties is, therefore, assumed with reference to that power.<sup>72</sup> The acts of congress known as the legal tender acts are constitutional, therefore, both as to contracts made before and after their passage.<sup>73</sup>

**Legal Tender Acts Not Applicable to Involuntary Exactions by States.**—The acts of congress making the notes of the United States a legal tender do not apply to involuntary contributions exacted by a state, but only to debts, in the strict sense of that term, that is, to obligations for the payment of money founded on contracts, express or implied. This point was decided in *Lane*

67. Legal tender acts an appropriate means.—*Legal Tender Case*, 110 U. S. 421, 450, 28 L. Ed. 204.

68. Occasion or necessity; a political question.—*Legal Tender Case*, 110 U. S. 421, 450, 28 L. Ed. 204.

69. Resorted to only under extraordinary circumstances.—*Legal Tender Cases* (concurring opinion of Bradley, J.), 12 Wall. 457, 567, 20 L. Ed. 287.

70. Legal tender acts not prohibited by the fifth amendment.—*Legal Tender Cases*, 12 Wall. 457, 551, 20 L. Ed. 287.

71. Not forbidden by the contract clause.—*Legal Tender Case*, 110 U. S. 421, 448,

28 L. Ed. 204.

72. Same.—*Legal Tender Cases*, 12 Wall. 457, 549, 20 L. Ed. 287; *Legal Tender Case*, 110 U. S. 421, 449, 28 L. Ed. 204.

73. Same.—*Legal Tender Cases*, 12 Wall. 457, 20 L. Ed. 287 (overruling *Hepburn v. Griswold*, 8 Wall. 603, 19 L. Ed. 513); *Dooley v. Smith*, 13 Wall. 604, 20 L. Ed. 547; *Bieler v. Waller*, 14 Wall. 297, 308, 20 L. Ed. 891; *Railroad Co. v. Johnson*, 15 Wall. 195, 21 L. Ed. 178; *Legal Tender Case*, 110 U. S. 421, 448, 28 L. Ed. 204.



County *v. Oregon*, with reference to the first legal tender act of 1862. Subsequent acts imparting the legal tender quality to notes did not change the general language of that act.<sup>74</sup> Assessment upon property for local improvements are involuntary exactions, and in that respect stand on the same footing with ordinary taxes. They are, therefore, covered by this decision; the state can determine in what manner they shall be discharged.<sup>75</sup>

(cccc) *Of the Power to Provide a Currency*—(aaaaa) *Generally*.—It cannot be doubted that under the constitution the power to provide a circulation of coin is given to congress.<sup>76</sup> And under the power to borrow money on the credit of the United States, and to issue circulating notes for the money borrowed, its power to define the quality and force of those notes as currency is as broad as the like power over a metallic currency under the power to coin money and to regulate the value thereof. Under the two powers, taken together, congress is authorized to establish a national currency, either in coin or in paper, and to make that currency lawful money for all purposes, as regards the national government or private individuals.<sup>77</sup>

(bbbbb) *Power to Regulate Value Never Exhausted*.—The power to regulate the value of money coined, and of foreign coins, is not exhausted by the first regulation. This power to change the value of the coinage has been exercised by congress more than once; and it seems to have been left to congress to determine what metal shall be coined, its purity, and how far its statutory value as money shall correspond, from time to time, with the market value of the same metal as bullion.<sup>78</sup>

(ccccc) *By What Means Currency May Be Provided*.—For the purpose of providing a currency congress may employ any appropriate means adapted to that end and not inconsistent with the plain precepts of the constitution.<sup>79</sup>

**Bank of the United States.**—Thus, while the power to create a bank or a private corporation is not one of the enumerated powers of congress, nevertheless, under its power to provide a currency for the whole country and to enable it to carry on the fiscal operations of the government, congress had power to incorporate the bank of the United States,<sup>80</sup> and to establish its branch offices within any state of the Union.<sup>81</sup>

**National Banks.**—And so congress has the power to incorporate national banks, with the capacity, for their own profit as well as for the use of the government in its money transactions, of issuing bills which under ordinary circumstances pass from hand to hand as money at their nominal value, and which, when so current, the law has always recognized as a good tender in payment of money debts, unless specifically objected to at the time of the tender.<sup>82</sup>

74. Legal tender acts not applicable to involuntary exactions by the states.—*Hagar v. Reclamation District*, No. 108, 111 U. S. 701, 706, 28 L. Ed. 569; *Lane County v. Oregon*, 7 Wall. 71, 19 L. Ed. 101.

75. *Hager v. Reclamation District*, No. 108, 111 U. S. 701, 706, 28 L. Ed. 569.

76. Of the power to provide a currency.—*Veazie Bank v. Fenno*, 8 Wall. 533, 548, 19 L. Ed. 482; *Legal Tender Case*, 110 U. S. 421, 445, 28 L. Ed. 204.

77. Same.—*Legal Tender Case*, 110 U. S. 421, 448, 28 L. Ed. 204.

78. Power to regulate value never exhausted.—*Legal Tender Cases*, 12 Wall. 457, 547, 20 L. Ed. 287.

79. Means by which currency provided.—*McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *Osborn v. United States Bank*, 9 Wheat. 738, 861, 6 L. Ed. 204; *Legal Tender Cases*, 12 Wall. 457, 20 L. Ed. 287; *Legal Tender Case*, 110 U. S. 421, 28 L. Ed. 204.

80. Same; Bank of the United States.—*McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *Osborn v. United States Bank*, 9 Wheat. 738, 861, 6 L. Ed. 204.

The act of the 10th of April, 1816, ch. 44, to "incorporate the subscribers to the bank of the United States," was a law made in pursuance of the constitution. *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579.

81. Same; branch offices.—*McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *Osborn v. United States Bank*, 9 Wheat. 738, 860, 6 L. Ed. 204.

The bank of the United States as incorporated by congress under the act of the 10th of April, 1816, ch. 44, had, constitutionally a right to establish its branches or offices of discount and deposit within any state. *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579.

82. Same; national banks.—*United States Bank v. Bank*, 10 Wheat. 333, 347, 6 L. Ed. 334; *Ward v. Smith*, 7 Wall. 447,

**Power to Issue Treasury Notes and Bills of Credit and Make Same a Legal Tender.**—See ante, "Power to Borrow Includes the Power to Issue Appropriate Obligations," VI, D, 3, f, (1), (h), (dd), (qqq), (bbbb).

(dddd) *Power to Protect Currency and Secure the Benefit Thereof.*—**By Punishing Forgery and Counterfeiting.**—See the title **FORGERY AND COUNTERFEITING.**

**By Suppressing Any Other Medium of Circulation.**—Congress having undertaken, in the exercise of undisputed constitutional power, to provide a currency for the whole country, may constitutionally secure the benefit of it to the people by appropriate legislation, and to that end may restrain, by suitable enactments, the circulation of any notes, not issued under its own authority.<sup>83</sup>

**Ten Per Cent Tax upon State Bank Issues.**—Thus congress, having undertaken to supply a national currency, consisting of coin, of treasury notes of the United States, and of the bills of national banks, is authorized to impose on all state banks, national banks, and private bankers, paying out the notes of individual or state banks, a tax of ten per cent. upon the amount of such notes so paid out.<sup>84</sup>

(eeee) *Power to Coin Money, Emit Bills of Credit, and Prescribe a Legal Tender, an Exclusive Power.*—The power to coin money and regulate its value, and to emit bills of credit, is an exclusive power of congress, because expressly prohibited to the states.<sup>85</sup> Likewise, the states are forbidden to make anything but gold or silver coin a tender in payment of debts, and this prohibition is said to be but a member of the same subject of currency, committed to the general government and prohibited to the states.<sup>86</sup> In short, whatever power there is over the currency is vested in congress.<sup>87</sup>

451, 19 L. Ed. 297; Legal Tender Case, 110 U. S. 421, 445, 28 L. Ed. 204.

**83. Power to protect currency; by suppressing other mediums of circulation.**—*Veazie Bank v. Fenno*, 8 Wall. 533, 549, 19 L. Ed. 482; *National Bank v. United States*, 101 U. S. 1, 6, 25 L. Ed. 979; Legal Tender Case, 110 U. S. 421, 446, 28 L. Ed. 204.

**84. Same; ten per cent. tax upon state banks of issue.**—*Veazie Bank v. Fenno*, 8 Wall. 533, 548, 19 L. Ed. 482; *National Bank v. United States*, 101 U. S. 1, 25 L. Ed. 979; Legal Tender Case, 110 U. S. 421, 446, 28 L. Ed. 204.

The tax of ten per centum imposed by the act of July 13th, 1866, on the notes of state banks paid out after the 1st of August, 1866, is warranted by the constitution. *Veazie Bank v. Fenno*, 8 Wall. 533, 19 L. Ed. 482. Also, the tax imposed by the Act of March 26, 1867, Rev. Stats., U. S., § 3413. *National Bank v. United States*, 101 U. S. 1, 6, 25 L. Ed. 979.

**Not a direct tax.**—The 9th section of the act of July 13th, 1866, amendatory of prior internal revenue acts, and which provides that every national banking association, state bank, or state banking association, shall pay a tax of ten per centum on the amounts of the notes of any state bank, or state banking association, paid out by them after the 1st day of August, 1866, does not lay a direct tax within the meaning of that clause of the constitution which ordains that "direct taxes shall be apportioned among the several states, according to their respec-

tive numbers." *Veazie Bank v. Fenno*, 8 Wall. 533, 19 L. Ed. 482.

**85. Power to coin money, emit bills of credit, and prescribe a legal tender, an exclusive power.**—*Houston v. Moore*, 5 Wheat. 1, 49, 5 L. Ed. 19; *Ogden v. Saunders*, 12 Wheat. 213, 328, 6 L. Ed. 606; *Craig v. Missouri*, 4 Pet. 410, 7 L. Ed. 903; *Briscoe v. Bank*, 11 Pet. 257, 9 L. Ed. 709; *Woodruff v. Trapnall*, 10 How. 190, 208, 13 L. Ed. 383; *Darrington v. Bank*, 13 How. 12, 14 L. Ed. 30; Legal Tender Cases, 12 Wall. 457, 20 L. Ed. 287; *Virginia Coupon Cases*, 114 U. S. 269, 29 L. Ed. 185.

**86. Same.**—*Ogden v. Saunders*, 12 Wheat. 213, 328, 6 L. Ed. 606, per Trimble, J.

**87. Same.**—Legal Tender Cases, 12 Wall. 457, 545, 20 L. Ed. 287; *Veazie Bank v. Fenno*, 8 Wall. 533, 548, 19 L. Ed. 482; Legal Tender Case, 110 U. S. 421, 445, 28 L. Ed. 204.

The constitutional authority of congress to provide a currency for the whole country is now firmly established. In *Veazie Bank v. Fenno*, 8 Wall. 533, 548, 19 L. Ed. 482, Chief Justice Chase, in delivering the opinion of the court, said: "It cannot be doubted that under the constitution the power to provide a circulation of coin is given to congress." Accord: Legal Tender Case, 110 U. S. 421, 445, 28 L. Ed. 204.

The grant to congress of the power of coining money, and regulating the current coin, and the prohibition upon the states, evidently take away from the states all power of legislation and action on the



**Bills of Credit—Construction of Word State.**—By the word state, as used in the provision prohibiting the emission of bills of credit, is meant a state of the Union.<sup>88</sup>

**Same—Constitution Forbids the Emission, Not the Making.**—The constitution forbids a state to "emit bills of credit." The loan of these certificates is the very act which is forbidden. It is not the making of them while they lie in the loan offices, but the issuing of them, the putting them into circulation, which is the act of emission—the act that is forbidden by the constitution.<sup>89</sup>

**The word emit,** used with reference to bills of credit means an emission of paper; a putting off, putting out, putting forth; or issuing bills by a state, for the payment of money, at some time, or some person, and on credit.<sup>90</sup>

**Emission of Bills of Credit Distinguished from Tender Laws.**—The constitution considers the emission of bills of credit, and the enactment of tender laws, as distinct operations, independent of each other, which may be separately performed; both are forbidden. To sustain the one, because it is not also the other; to say, that bills of credit may be emitted, if they be not made a tender in payment of debts; is, in effect, to expunge that distinct independent prohibition, and to read the clause as if it had been entirely omitted.<sup>91</sup>

**State Cannot Do Indirectly That Which It Is Forbidden to Do Directly.**—The coinage of money by the states is prohibited in terms so precise that they are susceptible of but one construction. And it is certain, that a state cannot incorporate any number of individuals, and authorize them to coin money; such an act would be as much a violation of the constitution, as if money were coined by an officer of the state, under its authority; the act being prohibited, cannot be done by a state, directly or indirectly. The same rule applies to bills of credit issued by a state.<sup>92</sup>

**Bank Charter Not Affected by Void Tender Act.**—If the legislature of a state attempt to make the notes of any bank a tender, the act will be unconsti-

subject, and must, of course, apply to the future action of laws, either then made, or to be made. The language plainly indicates, that it is the act of "coining money," and the act of emitting bills of credit, which is forbidden, without any reference to the time of passing the law, whether before or after the adoption of the constitution. The other prohibition to "make anything but gold or silver coin a tender in payment of debts," is but a member of the same subject of currency, committed to the general government, and prohibited to the states. And the same remark applies to it, already made as to the other two. The prohibition is not, that no state shall pass any law; but that even if a law does exist the "state shall not make anything but gold and silver coin a legal tender." The language plainly imports, that the prohibited tender shall not be made a legal tender, whether a law of the state exists or not. The whole subject of tender, except in gold and silver, is withdrawn from the states. (Opinion of Trimble, J.) *Ogden v. Saunders*, 12 Wheat. 213, 328, 6 L. Ed. 606.

**88. Bills of credit; "state" construed.**—*Briscoe v. Bank* (opinion of Baldwin, J.), 11 Pet. 257, 328d, 9 L. Ed. 709.

**89. Same; constitution forbids the emission and not the making.**—*Marshall, C.*

*J.*, in delivering the majority opinion in *Craig v. Missouri*, 4 Pet. 410, 436, 7 L. Ed. 903.

**90. The word "emit."**—*Briscoe v. Bank* (opinion of Baldwin, J.), 11 Pet. 257, 328d, 9 L. Ed. 709.

"The word 'emit' is never employed in describing those contracts by which a state binds itself to pay money at a future day for services actually received, or for money borrowed for present use; nor are instruments executed for such purposes, in common language, denominated 'bills of credit.' To 'emit bills of credit,' conveys to the mind the idea of issuing paper intended to circulate through the community for its ordinary purposes, as money, which paper is redeemable at a future day. This is the sense in which the terms have been always understood." *Craig v. Missouri*, 4 Pet. 410, 432, 7 L. Ed. 903, quoted with approval in *Houston, etc., R. Co. v. Texas*, 177 U. S. 66, 85, 44 L. Ed. 673.

**91. Emission of bills of credit distinguished from tender laws.**—*Craig v. Missouri* (three justices dissenting), 4 Pet. 410, 7 L. Ed. 903.

**92. State not to do indirectly that which it is forbidden to do directly.**—*Briscoe v. Bank*, 11 Pet. 257, 9 L. Ed. 709.



tutional; but such attempt could not affect in any degree the validity of the charter of the bank.<sup>93</sup>

**Definition and Nature of Bills of Credit.**—In its enlarged, and perhaps literal sense, the term "bills of credit" may comprehend any instrument by which a state engages to pay money at a future day: thus including a certificate given for money borrowed,<sup>94</sup> but as used in the constitution, the term has been construed in the light of the historical circumstances which are known to have led to the adoption of the clause prohibiting their emission by the states, and in view of the great public and private mischiefs experienced during and prior to the war of independence, in consequence of unrestrained issues, by the colonial and state governments, of paper money based alone upon credit.<sup>95</sup> The definition thus deduced is not founded on the abstract meaning of the words, so as to include everything in the nature of an obligation to pay money, reposing on the public faith and subject to future redemption, but is limited to those particular forms of evidences of debt which had been so abused to the detriment of both private and public interests.<sup>96</sup>

**Same—Must Be Issued to Circulate upon the Credit of the State.**—The definition then which includes all classes of bills of credit within the constitutional prohibition is: a paper issued by the sovereign power of the state, containing a pledge of its faith, and designed to circulate as money, upon the credit of the state.<sup>97</sup> The prohibition was intended to prohibit and does pro-

**93. Bank charter not affected by void tender act.**—*Briscoe v. Bank*, 11 Pet. 257, 9 L. Ed. 709.

Thus it was held that the act relating to the receiving of the notes of the Bank of the Commonwealth of Kentucky was not connected with the charter. *Briscoe v. Bank*, 11 Pet. 257, 9 L. Ed. 709.

**94. Definition and nature of bills of credit.**—*Craig v. Missouri*, 4 Pet. 410, 7 L. Ed. 903.

In its mercantile sense.—The terms, bills of credit, in their mercantile sense, comprehend a great variety of evidences of debt, which circulate in a commercial country; in the early history of banks, it seems, their notes were generally denominated "bills of credit;" but in modern times, they have lost that designation, and are now called either bank bills, or bank notes. But the inhibitions of the constitution apply to bills of credit, in a limited sense. *Briscoe v. Bank*, 11 Pet. 257, 9 L. Ed. 709.

A letter addressed by one merchant to another to give credit to the bearer for money or goods, such letter being in the nature of a bill of exchange, is called a bill of credit and so treated. (Opinion of Baldwin, J.) *Briscoe v. Bank*, 11 Pet. 257, 328d, 9 L. Ed. 709.

**As applied to paper issued by a bank.**—The term bills of credit, when applied to the paper issued by a bank, must be understood to mean an instrument under its corporate seal, payable to some person, and assignable by indorsement, and not a note payable to order or bearer, and transferable as an inland bill of exchange, according to the universal acceptance of the term in England. (Opinion of Baldwin, J.) *Briscoe v. Bank*, 11 Pet. 257, 328e, 9 L. Ed. 709.

**The word "bill."**—The word "bill," as

used in the provision prohibiting the emission of bills of credit, must be taken as a paper, containing some evidence that a certain sum is due to the person to whom it was emitted or issued, or by whom it is held. It is a word of legal import, as well defined as any in the English language, according to the subject matter to which it is applied. (Opinion of Baldwin, J.) *Briscoe v. Bank*, 11 Pet. 257, 328d, 9 L. Ed. 709.

**Refers to the payment of money.**—A bill of credit refers to the payment of money. (Opinion of Baldwin, J.) *Briscoe v. Bank*, 11 Pet. 257, 328d, 9 L. Ed. 709.

**95. As used in the constitution.**—*Craig v. Missouri*, 4 Pet. 410, 7 L. Ed. 903; *Briscoe v. Bank*, 11 Pet. 257, 9 L. Ed. 709; *Woodruff v. Trapnall*, 10 How. 190, 208, 13 L. Ed. 383, *Bennett v. Hunter*, 9 Wall. 326, 19 L. Ed. 672; *Tacey v. Irwin*, 18 Wall. 549, 21 L. Ed. 786; *Atwood v. Weems*, 99 U. S. 183, 25 L. Ed. 471; *Hills v. Change Bank*, 105 U. S. 319, 26 L. Ed. 1052; *United States v. Lee*, 106 U. S. 196, 27 L. Ed. 171; *Virginia Coupon Cases*, 114 U. S. 269, 283, 284, 29 L. Ed. 185.

**96. Same.**—*Woodruff v. Trapnall*, 10 How. 190, 208, 13 L. Ed. 383; *Craig v. Missouri*, 4 Pet. 410, 7 L. Ed. 903; *Briscoe v. Bank*, 11 Pet. 257, 9 L. Ed. 709; *Bennett v. Hunter*, 9 Wall. 326, 19 L. Ed. 672; *Tacey v. Irwin*, 18 Wall. 549, 21 L. Ed. 786; *Atwood v. Weems*, 99 U. S. 183, 25 L. Ed. 471; *Hills v. Change Bank*, 105 U. S. 319, 26 L. Ed. 1052; *United States v. Lee*, 106 U. S. 196, 27 L. Ed. 171; *Virginia Coupon Cases*, 114 U. S. 269, 283, 284, 29 L. Ed. 185.

**97. Same; definition which includes all prohibited classes.**—*Briscoe v. Bank*, 11 Pet. 257, 314, 9 L. Ed. 709; *Virginia Coupon Cases*, 114 U. S. 269, 29 L. Ed. 185;

hibit, a state from emitting bills, on its own credit, and not on any other credit. The prohibition is confined to a state, to an emission by a state, of bills of credit, emitted upon the faith of a state, which can be pledged only by a law of the state; and the words cannot be tortured to mean more, to mean less, or mean anything else than the credit of a state.<sup>98</sup>

**Persons Issuing Must Have Power to Bind the State.**—The individual or committee who issue the bill must have the power to bind the state; they must act as agents, and of course not incur any personal responsibility, nor impart, as individuals, any credit to the paper.<sup>99</sup>

**Same—Form of Bill.**—When a state emits bills of credit, the amount to be issued is fixed by law; as also the fund out of which they are to be paid, if any fund be pledged for their redemption; and they are issued on the credit of the state, which, in some form, appears upon the face of the notes, or by the signature of the person who issues them.<sup>1</sup>

**Same—Name Immaterial.**—The constitution meant to prohibit things and not names, and the provision against the emission of bills of credit cannot be evaded by the device of issuing bills which are in fact bills of credit and calling them by some other designation. The constitution is not to be openly evaded by giving a new name to an old thing.<sup>2</sup>

**Same—Must Be Fitted to Circulate as Money.**—It must not only be that they are capable of sometimes being used instead of money, but they must have a fitness for general circulation in the community as a representative and substitute for money in the common transactions of business. This is what is meant by the expression "intended to circulate as money."<sup>3</sup> That the holder might on some occasion be able to so use the warrant as to enable him to thereby discharge an obligation from himself to a third person who was willing to accept it does not bring the warrant so used within the ordinary meaning of the term money. It is not money in that sense.<sup>4</sup>

Houston, etc., *R. Co. v. Texas*, 177 U. S. 66, 87, 44 L. Ed. 673.

To constitute a bill of credit within the constitutional prohibition, it must be issued by a state on the faith of the state, and be designed to circulate as money. It must be a paper which circulates on the credit of the state, and so received and used in the ordinary business of life. *Briscoe v. Bank*, 11 Pet. 257, 311, 314, 9 L. Ed. 709; *Woodruff v. Trapnall*, 10 How. 190, 205, 13 L. Ed. 383; *Darrington v. Bank*, 13 How. 12, 16, 14 L. Ed. 30; *Virginia Coupon Cases*, 114 U. S. 269, 29 L. Ed. 185.

"Bills of credit" signify a paper medium, intended to circulate between individuals, and between government and individuals, for the ordinary purposes of society. Marshall, C. J., delivering the majority opinion in *Craig v. Missouri*, 4 Pet. 410, 432, 7 L. Ed. 903. Accord: *Virginia Coupon Cases*, 114 U. S. 269, 29 L. Ed. 185.

"If the prohibition means anything, if the words are not empty sounds, it must comprehend the emission of any paper medium by a state government for the purpose of common circulation." Marshall, C. J., delivering the majority opinion in *Craig v. Missouri*, 4 Pet. 410, 7 L. Ed. 903.

**98. Same; refers to bills issued on credit of the states.**—*Briscoe v. Bank*,

(opinion of Baldwin, J.), 11 Pet. 257, 328i, 9 L. Ed. 709.

**99. Persons issuing must have power to bind the state.**—*Briscoe v. Bank*, 11 Pet. 257, 331, 9 L. Ed. 709; *Darrington v. Bank*, 13 How. 12, 16, 14 L. Ed. 30.

**1. Same; form of bill.**—*Briscoe v. Bank*, 11 Pet. 257, 9 L. Ed. 709.

**2. Same; the name immaterial.**—*Craig v. Missouri*, 4 Pet. 410, 433, 7 L. Ed. 903.

**3. Must be fitted to circulate as money.**—*Houston, etc., R. Co. v. Texas*, 177 U. S. 66, 84, 44 L. Ed. 673.

**4. Same.**—*Houston, etc., R. Co. v. Texas*, 177 U. S. 66, 84, 44 L. Ed. 673.

The word "emit" is never employed in describing those contracts by which a state binds itself to pay money at a future day, for services actually received, or for money borrowed for present use; nor are instruments executed for such purposes, in common language, denominated "bills of credit." "To emit bills of credit," conveys to the mind the idea of issuing paper intended to circulate through the community, for its ordinary purposes, as money; which paper is redeemable at a future day; this is the sense in which the terms have always been understood. (Three justices dissenting.) *Craig v. Missouri*, 4 Pet. 410, 7 L. Ed. 903, quoted with approval in *Houston, etc., R. Co. v. Texas*, 177 U. S. 66, 85, 44 L. Ed. 673.

A warrant drawn by the state author-

**Same—Size and Shape of State Warrant as Evidence of Unlawful Purpose.**—That the size of the warrant, both as to amount and shape, might somewhat facilitate a holder, upon occasion, to discharge a debt, and in that way use it as money, is not at all sufficient or indeed any proper evidence of an unlawful intent on the part of the legislature.<sup>5</sup>

**Same—Doubts to Be Resolved in Favor of Validity of the Paper.**—"If any fair doubt could arise, it should be solved in favor of the validity of the paper. There must be an intention on the part of the legislature that the paper should circulate as money. There must, in other words, be an intention to violate the constitution."<sup>6</sup>

**State Bank Notes.**—It follows from the foregoing discussion that the constitutional inhibition does not extend to notes issued by state banks to circulate, not upon the credit of the state, but upon the credit of the corporation derived from its capital stock or upon the faith of some fund provided, pledged, and effectually chargeable with their redemption, even though the state may be the sole stockholder in the bank.<sup>7</sup> The principal ground, in the cases of *Briscoe v.*

*ities* in payment of an appropriation made by the legislature, where the warrant is payable upon presentation, if there be funds in the treasury, and which has been issued to an individual in payment of the debt of the state to him, cannot be properly called a bill of credit or a treasury warrant intended to circulate as money. *Houston, etc., R. Co. v. Texas*, 177 U. S. 66, 89, 44 L. Ed. 673.

**Whether same must be made a legal tender.**—In his separate opinion in *Craig v. Missouri*, 4 Pet. 410, 7 L. Ed. 903, and in *Briscoe v. Bank*, 11 Pet. 257, 328m, 328p, 9 L. Ed. 709, Mr. Justice Baldwin was of the opinion that to constitute a bill of credit within the contemplation of the constitutional prohibition it was not sufficient that it be issued by the state, on the faith of the state, and designed to circulate as money, and that the holders of such notes should have no means of coercing payment by the state, but that it was also requisite that such bill, in order to come within the constitutional prohibition, must be made a tender in payment of debts.

**5. Same; size and shape as evidence of unlawful purpose.**—*Houston, etc., R. Co. v. Texas*, 177 U. S. 66, 83, 44 L. Ed. 673.

**6. Same; doubts to be resolved in favor of validity of paper.**—*Houston, etc., R. Co. v. Texas*, 177 U. S. 66, 89, 44 L. Ed. 673.

A provision of the statute directing the officers of the state to receive them in payment of taxes and other dues to the state, and to pay them as money to such persons as will receive them in payment of the indebtedness of the state to them, is not sufficient to show that they are intended to circulate between individuals for the ordinary purposes of society or to make them bills of credit within the meaning of the constitution. *Houston, etc., R. Co. v. Texas*, 177 U. S. 66, 83, 44 L. Ed. 673.

**7. State bank notes.**—*Briscoe v. Bank*, 11 Pet. 257, 9 L. Ed. 709; *Darrington v. Bank*, 13 How. 12, 14 L. Ed. 30; *Curran*

*v. Arkansas*, 15 How. 304, 318, 14 L. Ed. 705.

The bills of a banking corporation, which has corporate property, are not like bills of credit within the meaning of the constitution, although the state which created the bank is the only stockholder, and pledges its faith for the ultimate redemption of the bills. *Darrington v. Bank*, 13 How. 12, 14 L. Ed. 30.

A state may grant acts of incorporation, for the attainment of those objects, which are essential to the interests of society; this power is incident to sovereignty, and there is no limitation on its exercise by the states, in respect to the incorporation of banks, in the federal constitution. *Briscoe v. Bank*, 11 Pet. 257, 9 L. Ed. 709.

The act incorporating the bank of the commonwealth was a constitutional exercise of power by the state of Kentucky; and consequently the notes issued by that bank were not bills of credit within the meaning of the federal constitution. (Opinion of McLean, J.) *Briscoe v. Bank*, 11 Pet. 257, 327, 9 L. Ed. 709.

The notes issued by the Bank of Kentucky were distinguished from the bills of credit prohibited by the constitution in that, first, the law created a fund to which the holders of notes could look for payment, and which could be legally responsible; second, every holder of these notes could not only look to the funds of the bank for payment but he had in his power the means of enforcing it by suit; whereas in the case of bills of credit emitted by a state, the state was not liable to suit at the hands of the holder of the notes. (Opinion of McLean, J.) *Briscoe v. Bank*, 11 Pet. 257, 320, 321, 9 L. Ed. 709.

By becoming a stockholder in a bank, a state imparts none of its attributes of sovereignty to the institution; and this is equally the case, whether it own a whole or a part of the stock of the bank. (Opinion of McLean, J.) *Briscoe v. Bank*, 11 Pet. 257, 325, 9 L. Ed. 709, fol-



Bank, 11 Pet. 257, 9 L. Ed. 709, and *Darrington v. Bank*, 13 How. 12, 14 L. Ed. 30, upon which such bills were distinguished from bills of credit emitted by the state, was that, in those cases, the bills did not rest on the credit of the state, but on the credit of the corporation, derived from its capital stock. Therefore, if the charter of a bank, in which the state is the sole stockholder, has not provided any fund, effectually chargeable with the redemption of its bills, if what is called its capital is liable to be withdrawn at the pleasure of the state, leaving no means of redeeming its bills, then such bills rest wholly upon the faith of the state and not upon the credit of the corporation, founded on its property, and would be obnoxious as bills of credit within the constitutional inhibition.<sup>8</sup>

**Illustrations of Principles.**—See footnotes.<sup>9</sup>

following *United States Bank v. Planters' Bank*, 9 Wheat. 904, 6 L. Ed. 244; *Bank v. Wister*, 2 Pet. 318, 7 L. Ed. 437.

8. **Same.**—*Curran v. Arkansas*, 15 How. 304, 318, 14 L. Ed. 705.

9. **Issues held to be within the constitution inhibition; Missouri act of June 27, 1821.**—On the 27th day of June, 1821, the legislature of the state of Missouri passed an act, entitled "an act for the establishment of loan offices;" by the third section of which, the officers of the treasury of the state, under the directions of the governor, were required to issue certificates to the amount of \$200,000, of denominations not exceeding ten dollars, nor less than fifty cents, in the following form: "This certificate shall be receivable at the treasury, or any of the loan offices in the state of Missouri, in discharge of taxes or debts due to the state, for the sum of — dollars, with interest for the same, at the rate of two per centum per annum from this date." These certificates were to be receivable at the treasury, and by tax-gatherers and other public officers, in payment of taxes, or moneys due or to become due to the state, or to any town or county therein, and by all officers, civil and military, in the state, in discharge of salaries and fees of office, and in payment for salt made at the salt springs owned by the state, and to be afterwards leased by the authority of the legislature; the 23d section of the act pledged certain property of the state for the redemption of these certificates; and the law authorized the governor to negotiate a loan of silver or gold for the same purpose. A provision was made in the law for the gradual withdrawal of the certificates from circulation; and all the certificates had since been redeemed. The commissioners of the loan offices were authorized to make loans of the certificates to citizens of the state, assigning to each district a proportion of the amount of the certificates, to be secured by mortgage or personal security; the loans to bear interest not exceeding six per cent per annum, and the loans on personal property to be for less than \$200. Held, that the certificates issued under the authority of the law of Missouri, were "bills of credit;" and that their emission

was prohibited by the constitution of the United States, which declares that no state shall "emit bills of credit." (Three justices dissenting.) *Craig v. Missouri*, 4 Pet. 410, 7 L. Ed. 903; *Byrne v. Missouri*, 8 Pet. 40, 8 L. Ed. 859.

A promissory note given for certificates issued at the loan office of Chariton, in Missouri, payable to the state of Missouri, under the act of legislature "establishing loan offices," was void. (Three justices dissenting.) *Craig v. Missouri*, 4 Pet. 410, 7 L. Ed. 903.

**Issues held not to be bills of credit; Kentucky act of November 29, 1820.**—On the 29th of November, 1820, the legislature of Kentucky, passed an act, establishing a bank, by the name of "The Bank of the Commonwealth of Kentucky;" the first section of the act declared the bank should be established, "in the name and behalf of the commonwealth of Kentucky," under the direction of a president and twelve directors, to be chosen by the legislature; the second section enacted, that the president and directors should be a corporation, capable of suing and being sued, and of purchasing and selling every description of property; the third section declared the bank to be exclusively the property of the commonwealth; the fourth section authorized the issuing of notes; and the fifth declared the capital to be \$2,000,000; to be paid by all moneys afterwards paid into the treasury for the vacant lands of the state, and so much of the capital stock as was owned by the state in the Bank of Kentucky; and as the treasurer of the state received those moneys, he was required to pay them into the bank. The bank had authority to receive money on deposit, to make loans on good personal security, or on mortgage; and was prohibited increasing its debts beyond its capital. Limitations were imposed on loans, and the accommodations of the bank were apportioned among the different counties of the state. The bank was, by a subsequent act, authorized to issue \$3,000,000; and the dividends of the bank were to be paid to the treasurer of the state; the notes of the bank were issued in the common form of bank notes; in which the bank promised to pay to the bearer, on demand, the sum stated on the face of the note. The pleadings ex-

(ee) *Auxiliary and Implied Powers of Congress*—(aaa) *Of the Existence of Implied Powers*.—There is nothing in the constitution of the United States, similar to the articles of confederation, which excludes incidental or implied powers.<sup>10</sup> Congress has the right to exercise those powers which are necessary and proper to carry into effect rights expressly given, and duties expressly en-

cluded the court from considering that any part of the capital had been paid by the state; but in the argument of the case, it was stated, and not denied, that all the notes which had been issued, and payment of which had been demanded, had been redeemed by the bank. By an act of the legislature of Kentucky, it was required, that the notes of the bank should be received on all executions, by plaintiffs, and if they failed to indorse on such execution, that they would be so received, further proceedings on the judgment were delayed for two years. The Bank of the Commonwealth of Kentucky instituted a suit against the plaintiffs in error, on a promissory note, for which the notes of the bank had been given, as a loan, to the makers of the note; the defendants in the suit claimed, that the note given by them was void, as the same was given for the notes of the bank, which were "bills of credit" issued by the state of Kentucky, against the provisions of the constitution of the United States, which prohibits the issuing of "bills of credit" by the states of the United States and that the act of the legislature of Kentucky, which established the bank, was unconstitutional and void. Held, the act incorporating the Bank of the Commonwealth of Kentucky, was a constitutional exercise of power, by the state of Kentucky; and the notes issued by the bank were not bills of credit, within the meaning of the constitution of the United States. *Briscoe v. Bank*, 11 Pet. 257, 9 L. Ed. 709, distinguishing *Craig v. Missouri*, 4 Pet. 410, 7 L. Ed. 903.

**Same; Virginia coupons.**—The Virginia coupons issued under the funding act of March 30, 1871, are not bills of credit within the constitutional prohibition under any definition of that class of prohibited securities. On their face they were made receivable for taxes, debts, and other demands due the state; but otherwise there was nothing on their face, or in their form or nature nor in terms of the law which authorize their issuance, nor in the circumstances of their creation or use, on which found an inference that they were designed to circulate in common transactions of business, as money. *Virginia Coupon Cases*, 114 U. S. 269, 29 L. Ed. 185.

The fact that these coupons were not receivable in payment of taxes until they were due, and were entitled to be paid at maturity, precludes the idea that they were intended for circulation at all. *Virginia Coupon Cases*, 114 U. S. 269, 29 L. Ed. 185.

**Same; Texas treasury warrants.**—This

reasoning applies with equal force to treasury warrants issued by the state of Texas. Both classes of paper must be intended to circulate as money, and the same conditions regarding such intention and the same evidence to prove it would be necessary in each case. *Houston, etc., R. Co. v. Texas*, 177 U. S. 66, 88, 44 L. Ed. 673.

**Same; Alabama state bank notes.**—In the case of *Darrington v. Bank*, 13 How. 12, 15, 14 L. Ed. 30, the state was the sole stockholder and the management of the bank was placed under directors elected by the legislature; but one-half the capital, amounting to the sum of one million dollars, was in its vaults and pledged for the redemption of its bills, which on their face contained no promise to pay by the state, but an express promise to pay by the bank. Held, that the notes were not bills of credit within the constitutional inhibition.

**Same; the Arkansas bank note cases.**—In 1836 the legislature of Arkansas chartered a bank, the whole of the capital of which belonged to the state, and the president and directors of which were appointed by the general assembly. The 28th section provided that the bills and notes of said institution should be received in all payments of debts due to the state of Arkansas. Bills of this bank were not made payable by the state, but the capital was provided for their redemption, and the general management of the bank was committed to the president and directors as in ordinary banking associations, who were empowered to obtain judgments against the debtors of the bank in a summary manner. The directors were not expressly made liable to suit, yet they were responsible for any abuse of the trust committed to them. Held, that the notes of the bank were not bills of credit within the constitutional inhibition. *Woodruff v. Trapnall*, 10 How. 190, 205, 13 L. Ed. 383.

In the case of *Curran v. Arkansas*, 15 How. 304, 14 L. Ed. 705, the state was the sole stockholder, but its capital stock was chargeable with the redemption of its bills. It was held that its notes were not bills of credit within the constitutional inhibition, and that various statutes of the state diverting the funds from the redemption of its notes were unconstitutional as impairing the obligation of the contract between the bill holders on the one hand and the bank and the state on the other.

**10. Existence of implied powers.**—*McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579.

joined by the constitution; the end being required, it is a just and necessary implication that the means to accomplish it are given also; or, in other words, that the power flows as a necessary means to accomplish the end.<sup>11</sup> That which is implied is as much a part of the constitution as that which is expressed.<sup>12</sup>

**Not Left to General Reasoning.**—The constitution of the United States has not, however, left the right of congress to employ the necessary means, for the execution of the powers conferred on the government to general reasoning, but to its enumeration of powers is added, that of making "all laws which shall be necessary and proper for the carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department thereof."<sup>13</sup> The auxiliary powers of congress, therefore, are as expressly given as the powers expressly enumerated. The only difference is that the so-called implied or auxiliary powers grouped in the last clause of section eight of the first article are not catalogued or enumerated like the others.<sup>14</sup> This provision was introduced to exclude all doubt in respect to the existence of implied powers.<sup>15</sup>

(bbb) *Nature and Extent of Implied Powers.*—All the implied powers are included under the description of powers to make all laws necessary and proper for carrying into execution powers expressly granted to congress or vested by the constitution in the government or in any of its departments or officers.<sup>16</sup> Under this provision of the constitution, the government has express authority to make all such laws (usually regarded as inherent and implied) as may be

11. *Same.*—*Prigg v. Pennsylvania*, 16 Pet. 539, 619, 10 L. Ed. 1060; *Hepburn v. Griswold*, 8 Wall. 603, 613, 19 L. Ed. 513; *Broderick v. Magraw*, 8 Wall. 639, 19 L. Ed. 531.

12. *Same.*—*South Carolina v. United States*, 199 U. S. 437, 451, 50 L. Ed. 261. See, also, ante, "Implied Powers," III, B, 19, et seq.; *Incidental and Implied Powers of the Federal Government*, VI, D, 3, a, (5), et seq.; "Legislative Discretion as to Occasion or Necessity; Choice of Means, etc.," VI, D, 3, d, (4), (b), (bb), (bbb).

While the government of the United States under the constitution is one of limited powers, it is not necessary in order to prove the existence of a particular authority to show a particular and express grant. The design of the constitution was to establish a government competent to the direction and administration of the affairs of a great nation, and at the same time, to mark by sufficiently definite lines the sphere of its operation. To this end it was needful only to make express grants of general powers, coupled with a further grant of such incidental and auxiliary powers as might be required for the exercise of the powers expressly granted. *Hepburn v. Griswold*, 8 Wall. 603, 613, 19 L. Ed. 513; *Broderick v. Magraw*, 8 Wall. 639, 19 L. Ed. 531.

As said by Mr. Justice Miller in *Ex parte Yarbrough*, 110 U. S. 651, 658, 28 L. Ed. 274: "The proposition that it has no such power is supported by the old argument often heard, often repeated, and in this court never assented to, that when a question of the power of congress arises, the advocate of the power must be able to place his finger on the words which expressly grant it. The brief of counsel

before us, though directed to the authority of that body to pass criminal laws, uses the same language. Because there is no express power to provide for preventing violence exercised on the voter as a means of controlling his vote, no such law can be enacted. It destroys at one blow, in construing the constitution of the United States, the doctrine universally applied to all instruments of writing, that what is implied is as much a part of the instrument as what is expressed." *South Carolina v. United States*, 199 U. S. 437, 451, 50 L. Ed. 261.

"Any act of congress which plainly and directly tends to enhance the respect and love of the citizen for the institutions of his country and to quicken and strengthen his motives to defend them, and which is germane to and intimately connected with and appropriate to the exercise of some one or all of the powers granted by congress, must be valid." *United States v. Gettysburg Electric R. Co.*, 160 U. S. 668, 681, 40 L. Ed. 576.

13. **Not left to general reasoning; auxiliary powers expressly conferred.**—*McCulloch v. Maryland*, 4 Wheat. 316, 411, 4 L. Ed. 579; *Ex parte Curtis*, 106 U. S. 371, 372, 27 L. Ed. 232. See, also, ante, "Legislative Discretion as to Occasion or Necessity; Choice of Means, etc.," VI, D, 3, d, (4), (b), (bb), (bbb).

14. *Same.*—*Legal Tender Cases*, 12 Wall. 457, 550, 20 L. Ed. 287.

15. *Same.*—*Hepburn v. Griswold*, 8 Wall. 603, 614, 19 L. Ed. 513; *Broderick v. Magraw*, 8 Wall. 639, 19 L. Ed. 531.

16. **Nature and extent.**—*Hepburn v. Griswold*, 8 Wall. 603, 613, 19 L. Ed. 513, followed in *Broderick v. Magraw*, 8 Wall. 639, 19 L. Ed. 531.



necessary and proper for carrying on the government as constituted, and vindicating its authority and existence.<sup>17</sup> These powers are necessarily extensive, and it has been found, indeed, in the practical administration of the government, that a very large part, if not the largest part, of its functions have been performed in the exercise of powers thus implied.<sup>18</sup> In determining their nature and extent, the powers which they were intended to subserve must be considered. Those purposes reach beyond the mere execution of all powers definitely intrusted to congress and mentioned in detail; they embrace the execution of all other powers vested by the constitution in the government of the United States, or in any department or officer thereof.<sup>19</sup>

**Same—Construction Strict or Liberal.**—From this and other declarations it is clear that the constitution is not to be construed technically and narrowly, as an indictment, or even as a grant presumably against the interest of the grantor, and passing only that which is clearly included within its language, but as creating a system of government whose provisions are designed to make effective and operative all the governmental powers granted.<sup>20</sup>

**Existence of Express Power Relating to Same Subject Not Exclusive.**—Power over a particular subject may be exercised as auxiliary to an express power, though there is another express power relating to the same subject, less comprehensive. Thus the express power conferred upon congress to punish certain classes of crimes is not to be regarded as an objection to deducing authority to punish other crimes from another substantive and defined grant of power.<sup>21</sup>

**Need Not Be Absolutely Necessary.**—It is essential to a just construction that many words which import something excessive should be understood in a more mitigated sense—that is, in that sense which common usage justifies. The word “necessary,” as used in that section of the federal constitution which provides that congress shall have power to make all laws which shall be necessary and proper for carrying into execution its enumerated powers, is of this description.<sup>22</sup> It is not to be construed as limiting the power of congress to only those means which are absolutely necessary, but it is to be taken in connection with the rest of the sentence, and with the other provisions of the constitution, and so construed it does not take away the discretion of congress as to the means to be employed, but leaves it to the discretion of congress to employ such means in carrying out its powers as may be useful or convenient and which tend directly to the execution of the constitutional powers of the government.<sup>23</sup>

**17. Same.**—Legal Tender Cases (concurring opinion of Bradley, J.), 12 Wall. 457, 556, 20 L. Ed. 287.

While no powers are to be ceded to the federal government which cannot be regularly and legitimately founded on the charter of its creation, on the other hand no power or attribute is to be withheld which by the same charter has been declared necessary to the execution of expressly granted powers, and to the fulfillment of clear and well-defined duties. *Dobbins v. Commissioners*, 16 Pet. 435, 10 L. Ed. 1022; *United States v. Marigold*, 9 How. 560, 568, 13 L. Ed. 257; *United States v. Hall*, 98 U. S. 343, 351, 25 L. Ed. 180; *United States v. Fox*, 95 U. S. 670, 672, 24 L. Ed. 538; *United States v. Arizona*, 120 U. S. 479, 483, 30 L. Ed. 728.

“There is no doubt of the competency of congress to provide, by suitable penalties, for the enforcement of all legislation necessary or proper to the execution of powers with which it is intrusted.”

*United States v. Fox*, 95 U. S. 670, 672, 24 L. Ed. 538.

**18. Same.**—*Hepburn v. Griswold*, 8 Wall. 603, 613, 19 L. Ed. 513, followed in *Broderick v. Magraw*, 8 Wall. 639, 19 L. Ed. 531.

**19. Same; express powers to be considered.**—Legal Tender Cases, 12 Wall. 457, 433, 20 L. Ed. 287.

**20 Construction strict or liberal.**—*Kansas v. Colorado*, 206 U. S. 46, 88, 51 L. Ed. 956. See, also, ante, “Construction Strict or Liberal When,” III, B, 17.

**21. Express powers not exclusive.**—Legal Tender Cases, 12 Wall. 457, 545, 20 L. Ed. 287; *United States v. Marigold*, 9 How. 560, 13 L. Ed. 257.

**22. Need not be absolutely necessary.**—*McCulloch v. Maryland*, 4 Wheat. 316, 414, 4 L. Ed. 579.

**23. Same.**—*McCulloch v. Maryland*, 4 Wheat. 316, 413, 419, 4 L. Ed. 579. See ante, “Legislative Discretion as to Occasion or Necessity; Choice of Means, etc.,” VI, D, 3, (4), (b), (bb), (bbb).

**No Independent Power to Be Derived by Implication.**—The last paragraph of the eighth section of article one of the constitution, which authorizes congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department, or office thereof," is not the delegation of a new and independent power, but simply provision for making effective the powers previously mentioned.<sup>24</sup> And while the constitution is to be liberally construed in favor of the powers granted therein, no independent and unmentioned power passes to the national government or can rightfully be exercised by congress.<sup>25</sup>

(ccc) *Limitations upon Implied Powers*—(aaaa) *Discretion of Congress as to Necessity or Occasion for Exercise; Choice of Means; etc.*—See ante, "Legislative Discretion as to Occasion or Necessity; Choice of Means; etc.," VI, D, 3, d. (4), (b), (bb), (bbb).

(bbbb) *As Restrained by Provision to Establish Justice.*—One of the objects of the constitution, as declared therein, was the establishment of justice, and it has been held that congress, in the exercise of its implied powers, can enact no law contrary to this fundamental principle.<sup>26</sup>

(ddd) *Illustrations*—(aaaa) *To Protect the Public Safety.*—That "the safety of the people is the supreme law," not only comports with, but is indispensable to the exercise of those powers in their public functionaries without which that safety cannot be guarded.<sup>27</sup>

(bbbb) *To Create or Employ Corporations for the Accomplishment of Express Powers.*—The power to establish a bank, or to create a corporation, is not among the enumerated powers of congress.<sup>28</sup> Neither is the power of establishing a corporation a distinct sovereign power or end of government, but only the means of carrying into effect other powers which are sovereign.<sup>29</sup> But whenever it becomes an appropriate means of exercising any of the powers given by the constitution to the government of the Union, it may be exercised by that government.<sup>30</sup>

**Same—Corporations Employed as Federal Agencies; Government Aid; etc.**—In the exercise of powers incidental to the express powers enumerated in the constitution, congress may make or authorize contracts with individuals or corporations for the service of the government; may grant aids, by money or land, in preparation for and in the performance of, such services; may make any stipulation and conditions in relation to such aids not contrary to the constitution; and may exempt, in its discretion, the agencies employed in such serv-

24. **Grants no new or independent power.**—*Kansas v. Colorado*, 206 U. S. 46, 87, 51 L. Ed. 956.

25. **No independent power derived through mere implication.**—*Kansas v. Colorado*, 206 U. S. 46, 88, 51 L. Ed. 956.

26. **As restrained by provision to establish justice.**—*Hepburn v. Griswold*, 8 Wall. 603, 622, 19 L. Ed. 513; *Broderick v. McGraw*, 8 Wall. 639, 19 L. Ed. 531.

27. **Power to protect the public safety.**—*Johnson, J.*, delivering the opinion in *Anderson v. Dunn*, 6 Wheat. 204, 227, 5 L. Ed. 242. Accord: *The Chinese Exclusion Case*, 130 U. S. 581, 606, 32 L. Ed. 1068.

28. **To create banks and other corporations in aid of express powers.**—*McCulloch v. Maryland*, 4 Wheat. 316, 406, 4 L. Ed. 579.

29. **Same.**—*McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *Luxton v. North*

*River Bridge Co.*, 153 U. S. 525, 529, 38 L. Ed. 808.

30. **Same.**—*McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579. Accord: *Thomson v. Pacific Railroad*, 9 Wall. 579, 589, 19 L. Ed. 792; *Slaughter-House Cases*, 16 Wall. 36, 64, 21 L. Ed. 394; *Davidson v. New Orleans*, 96 U. S. 97, 101, 24 L. Ed. 616; *Pacific R. Removal Cases*, 115 U. S. 1, 29 L. Ed. 319; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 29 L. Ed. 516; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 680, 29 L. Ed. 525; *California v. Central Pac. R. Co.*, 127 U. S. 1, 39, 32 L. Ed. 150; *Luxton v. North River Bridge Co.*, 153 U. S. 525, 529, 38 L. Ed. 808.

Congress has the implied or incidental power to incorporate a bank. *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *Osborn v. United States Bank*, 9 Wheat. 738, 861, 6 L. Ed. 204.

ice from a state taxation which will really prevent or impede the performance of them.<sup>31</sup>

**Power to Create Bank of the United States.**—See ante, "By What Means Currency May Be Provided," VI, D, 3, f, (1), (h), (dd), (qqq), (cccc), (ccccc).

**Power to Create National Banks.**—See ante, "By What Means Currency May Be Provided," VI, D, 3, f, (1), (h), (dd), (qqq), (cccc), (ccccc). See, also, the title BANKS AND BANKING, vol. 3, p. 1.

**Creation of Corporations to Construct Bridges, Railroads, etc.**—See the titles BRIDGES, vol. 3, p. 516; CORPORATIONS; INTERSTATE AND FOREIGN COMMERCE; RAILROADS; etc.,

(cccc) *To Promote the Integrity and Efficiency of the Public Service.*—To promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service, is clearly within the just scope of the legislative powers of congress.<sup>32</sup>

(dddd) *Powers Incident to War and Treaty Powers.*—The constitution gives to congress power to declare war, grant letters of marque or reprisal, and to make rules concerning captures on land or water; to raise and support armies; to provide and maintain a navy and to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions. The powers of congress under this provision are not limited to victors in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress.<sup>33</sup>

**To Suspend Statute of Limitations.**—Under its power to make war and suppress insurrections, congress has power to provide for the suspending of

31. Same; corporations employed as federal agencies; government aid, etc.—*Thomson v. Pacific Railroad*, 9 Wall. 579, 589, 19 L. Ed. 792.

32. Power to promote the integrity and efficiency of the public service.—Ex parte *Curtis*, 106 U. S. 371, 373, 27 L. Ed. 232; *Burton v. United States*, 202 U. S. 344, 369, 50 L. Ed. 1057.

Thus an act of congress forbidding certain officers of the United States to solicit from certain other officers of the United States money or property for political purposes, or to give to, or receive from, certain designated officers, money or property, for political purposes, is constitutional and valid. Ex parte *Curtis*, 106 U. S. 371, 27 L. Ed. 232.

Likewise Rev. Stats., § 1782, which forbids any member of congress from receiving or making any agreement to receive any compensation for services rendered before any department of the government, is constitutional and valid. *Burton v. United States*, 202 U. S. 344, 369, 50 L. Ed. 1057.

To invest the secretary of the treasury with authority to prescribe regulations not inconsistent with law for the conduct of the business of his department, and to provide for the custody, use and preservation of the records, papers and property appertaining to it, is a means appropriate and plainly adapted to the successful administration of the affairs of that department. *Boske v. Comingore*, 177 U. S. 459, 469, 44 L. Ed. 846.

"A regulation adopted under § 161 of the Revised Statutes should not be disre-

garded or annulled unless, in the judgment of the court, it is plainly and palpably inconsistent with law. Those who insist that such a regulation is invalid must make its invalidity so manifest that the court has no choice except to hold that the secretary has exceeded his authority and employed means that are not at all appropriate to the end specified in the act of congress." *Boske v. Comingore*, 177 U. S. 459, 470, 44 L. Ed. 846.

It was not inconsistent with law for the secretary to adopt a regulation declaring that all records in the offices of collectors of internal revenue, or any of their deputies, are in their custody and control "for purposes relating to the collection of the revenues of the United States only," and that collectors "have no control of them, and no discretion with regard to permitting the use of them for any other purpose." *Boske v. Comingore*, 177 U. S. 459, 469, 44 L. Ed. 846.

33. Powers incident to war and treaty powers.—*Stewart v. Kahn*, 11 Wall. 493, 507, 20 L. Ed. 176; *United States v. Wiley*, 11 Wall. 508, 20 L. Ed. 211.

"Congress has power to declare war and to create and equip armies and navies. It has the great power of taxation to be exercised for the common defense and general welfare. Having such powers, it has such other and implied ones as are necessary and appropriate for the purpose of carrying the powers expressly given into effect." *United States v. Gettysburg Electric R. Co.*, 160 U. S. 668, 681, 40 L. Ed. 576.



the statute of limitations as to claims against persons upon whom process cannot be served by reason of the existence of war or insurrection, and to make such statutes applicable to cases in the state courts as well as to cases in the federal courts.<sup>34</sup>

**To Acquire Territory.**—See ante, "Power of Acquisition," VI, D, 2, c, (3), (a).

**Enforcement of Treaty Stipulations.**—"The power of congress to make all laws necessary and proper for carrying into execution the powers enumerated in § 8 of article one of the constitution, as well as all others vested in the government of the United States, or in any department or the officers thereof, includes the power to enact such legislation as is appropriate to give efficacy to any stipulations which it is competent for the president by and with the advice and consent of the senate to insert in a treaty with a foreign power."<sup>35</sup>

(eeee) *Congressional Investigations; Compulsory Attendance of Witnesses, Production of Books, Papers, etc.*—**Limitations of Power; Private Affairs of the Citizen.**—The constitutional limitations intended to secure the protection of personal rights must necessarily attend all investigations conducted under the authority of congress. Neither branch of the legislative department, still less any merely administrative body, like the interstate commerce commission, established by congress, possesses or can be invested with a general power of making inquiry into the private affairs of the citizen.<sup>36</sup> In exercising its power to regulate interstate commerce, congress cannot overlook the constitutional limitations intended for the protection of personal rights.<sup>37</sup> The case is

**34. Same; power to suspend statute of limitations.**—*Stewart v. Kahn*, 11 Wall. 493, 20 L. Ed. 176, followed in *Mayfield v. Richards*, 115 U. S. 137, 29 L. Ed. 334.

The act of June 11, 1864, in relation to limitation of actions in certain cases, and which provided, in part, that whenever by reason of the existence of the rebellion, the courts were closed and defendants could not be arrested or served with process, the time during which such person should be beyond the reach of legal process should not be deemed or taken as any part of the time limited by law for the commencement of such action, fell within the latter category. It was applicable in cases in both the state and federal courts, and the power to pass the same was necessarily implied from the power to make war and suppress insurrections. *Stewart v. Kahn*, 11 Wall. 493, 507, 20 L. Ed. 176; *United States v. Wiley*, 11 Wall. 508, 20 L. Ed. 211.

**35. Enforcement of treaty stipulations.**—*Neely v. Henkel* (No. 1), 180 U. S. 109, 121, 48 L. Ed. 448.

**Statute in aid of treaty; extradition acts.**—No crime is mentioned in the extradition act of June 6, 1900, that does not have some relation to the safety of life and property. And the provisions of that act requiring the surrender of any public officer, employee or depository fleeing to the United States after having committed in a foreign country or territory occupied by or under the control of the United States the crime of "embezzlement or criminal malversation of the public funds" have special application to Cuba in its present relations to this country. The act is not in violation of the constitution

of the United States. *Neely v. Henkel* (No. 1), 180 U. S. 109, 122, 48 L. Ed. 448.

**36. Congressional investigations; limitations of power.**—*Kilbourn v. Thompson*, 103 U. S. 168, 190, 26 L. Ed. 377; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 478, 38 L. Ed. 1047.

"We said in *Boyd v. United States*, 116 U. S. 616, 630, 29 L. Ed. 746—and it cannot be too often repeated—that the principles that embody the essence of constitutional liberty and security forbid all invasions on the part of the government and its employees of the sanctity of a man's home, and the privacies of his life. As said by Mr. Justice Field in *In re Pacific Railway Commission*, 32 Fed. Rep. 241, 250, 'of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all others would lose half their value.'" *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 479, 38 L. Ed. 1047.

**37. Same; interstate commerce commission.**—*Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 478, 38 L. Ed. 1047.

Thus where the Interstate Commerce Commission, by a petition filed in the circuit court of the United States, sought, upon grounds distinctly set forth, an order to compel witnesses summoned before it, to answer particular questions and to produce certain books, papers, etc., in their possession, it was open to each of

wholly different where specific charges publicly made against senators have been brought to the attention of the senate, and the senate has determined that investigation is necessary.<sup>38</sup> In such cases congress possesses the constitutional power to enact a statute to enforce the attendance of witnesses and to compel them to make disclosure of evidence to enable the respective bodies to discharge their legitimate functions.<sup>39</sup>

**Procedure; Due Process.**—"Except in the particular instances enumerated in the constitution, and considered in *Anderson v. Dunn*, 6 Wheat. 204, 5 L. Ed. 242, and in *Kilbourn v. Thompson*, 103 U. S. 168, 190, 26 L. Ed. 377, of the right of either house of congress to punish disorderly behavior upon the part of its members, and to compel the attendance of witnesses, and the production of papers in election and impeachment cases, and in cases that may involve the existence of those bodies, the power to impose fine or imprisonment in order to compel the performance of a legal duty imposed by the United States, can only be exerted, under the law of the land, by a competent judicial tribunal having jurisdiction in the premises."<sup>40</sup>

(ffff) *Power to Protect Rights, Privileges and Immunities of Citizens.*—See the title *CIVIL RIGHTS*, vol. 3, p. 814. See, also, post, "Political Rights and Privileges and Their Protection," XVII, et seq.

(gggg) *To Exercise the Power of Eminent Domain within the States.*—See ante, "Local Municipal Jurisdiction, Sovereignty and Eminent Domain," VI, D, 3, c, (4), (b). See, also, the title *EMINENT DOMAIN*.

(hhhh) *To Authorize the Construction of Railroads within the States.*—See the titles *INTERSTATE AND FOREIGN COMMERCE*; *POSTAL LAWS*; *RAILROADS*.

(2) *State Legislative Departments*—(a) *Nature and Scope of Powers*—(aa) *Generally.*—The people of the several states, with the exception of the

said witnesses to contend before that court that he was protected by the constitution from making answer to the questions propounded to him or that he was not legally bound to produce the books, papers, etc., ordered to be produced, or that neither the questions propounded nor the books, papers, etc., called for related to the particular matter under investigation, nor to any matter which the commission was entitled under the constitution or laws to investigate. *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 479, 38 L. Ed. 1047.

**38. Where charges made against members.**—In *re Chapman*, 166 U. S. 661, 668, 41 L. Ed. 1154.

**39. Same.**—In *re Chapman*, 166 U. S. 661, 671, 41 L. Ed. 1154.

A committee appointed to investigate charges made in certain newspapers, that members of congress have yielded to corrupt influences touching the framing of the sugar schedule of a tariff bill pending before congress, may properly ask a witness summoned before it whether he, or the brokerage firm of which he is a member, has bought or sold any sugar stocks for or on account of any member of congress between specified dates, covering the period of the pendency of the bill. Such a question was pertinent to the inquiry, and did not constitute an unwarranted attempt at prying into the private affairs of the witness. In *re Chapman*, 166 U. S. 661, 668, 669, 41 L. Ed. 1154.

"Sections 102 and 104 were intended, in

the language of the title of the original act of January 24, 1857, 'more effectually to enforce the attendance of witnesses on the summons of either house of congress, and to compel them to discover testimony.' To secure this result it was provided that when a person summoned as a witness by either house to give testimony or produce papers, upon any matter under inquiry before either house, or any committee of either house, willfully fails to appear, or, appearing, refuses to answer 'any question pertinent to the question under inquiry,' he shall be deemed guilty of a misdemeanor and punished accordingly. \* \* \* It is true that the reference is to 'any' matter under inquiry, and so on, and it was suggested this was fatally defective because too broad and unlimited in its extent; but nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion," and therefore, the word any, as used in these sections, is to be construed as referring to matters within the jurisdiction of the two houses of congress, before them for consideration and proper for their action; to questions pertinent thereto; and to facts or papers bearing thereon. In *re Chapman*, 166 U. S. 661, 667, 41 L. Ed. 1154.

**40. Procedure; due process.**—*Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 485, 38 L. Ed. 1047, reaffirmed in *In re Lochren*, 163 U. S. 692, 41 L. Ed. 319.

powers surrendered by the constitution of the United States, being absolutely and unconditionally sovereign within their respective territories, may, by the form of the government they adopt, confer on their public servants and representatives all the powers and rights of sovereignty which they themselves possess; or may restrict them within such limits as may be deemed best and safest for the public interest.<sup>41</sup> Except as restricted by the state or federal constitutions, the powers of a state legislature extend to everything within the sphere of legislative power.<sup>42</sup>

**Same—Construing State Constitutions.**—In construing a state constitution, therefore, the rule to be applied is just the opposite to that which governs in the construction of the federal constitution; there the federal congress must be held to have only those powers which are granted, either expressly or by necessary implication; but the legislature of a state must be held to have the right to exercise all powers which are properly legislative, except as it is restricted by the state or national constitutions.<sup>43</sup>

**As Including Judicial and Executive Functions.**—Not only so, but there is nothing in the federal constitution forbidding the exercise of judicial powers by state legislative bodies.<sup>44</sup> It is within the power of the body politic, therefore, in forming a state constitution, to make such distribution of the powers of government as it may see fit,<sup>44a</sup> and it has been held that wherever the power of a state legislature is undefined, it will include both the judicial and executive functions.<sup>45</sup>

**Powers Expressly Granted Are to Be Considered as Derived from the Constitution, Notwithstanding They Would Exist in Absence of Such Grant.**—When the constitution says that the legislature "is invested" with a certain power, invests it with that power, and does so notwithstanding that, in the absence of those words, a more or less similar power would be implied by more general expressions in the same instrument.<sup>46</sup>

The inquiry whether a witness before the interstate commerce commission is bound to answer a particular question propounded to him, or to produce books, papers, etc., in his possession and called for by that body, is one that cannot be committed to a subordinate administrative tribunal for final determination. Such a body could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment. *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 485, 38 L. Ed. 1047, reaffirmed in *In re Lochren*, 163 U. S. 692, 41 L. Ed. 319.

**41. State legislative departments; nature and scope of powers.**—*Ohio Life Ins., etc., Co. v. Debolt*, 16 How. 416, 428, 14 L. Ed. 997; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 671, 29 L. Ed. 516; *Stearns v. Minnesota*, 179 U. S. 223, 241, 45 L. Ed. 162.

The several state legislatures retain all the powers of legislation delegated to them by the state constitution, which are not expressly taken away by the constitution of the United States. (Opinion of Chase, J.) *Calder v. Bull*, 3 Dall. 386, 387, 1 L. Ed. 648.

**42. Same.**—*Calder v. Bull*, 3 Dall. 386, 387, 1 L. Ed. 648; *Fletcher v. Peck*, 6 Cranch 87, 136, 3 L. Ed. 162; *Railroad Co. v. County of Otoe*, 16 Wall. 667, 672,

21 L. Ed. 375; *Township of Pine Grove v. Talcott*, 19 Wall. 666, 676, 22 L. Ed. 227; *Giozza v. Tiernan*, 148 U. S. 657, 661, 37 L. Ed. 599.

**43. Same; construing state constitutions.**—*Calder v. Bull*, 3 Dall. 386, 387, 1 L. Ed. 648; *Fletcher v. Peck*, 6 Cranch 87, 136, 3 L. Ed. 162; *Railroad Co. v. County of Otoe*, 16 Wall. 667, 672, 21 L. Ed. 375; *Township of Pine Grove v. Talcott*, 19 Wall. 666, 676, 22 L. Ed. 227. See, also, ante, "The Federal Constitution a Grant of Powers," VI, D, 3, a, (3).

**44. As including judicial and executive functions.**—*Satterlee v. Matthewson*, 2 Pet. 380, 7 L. Ed. 458; *Baltimore, etc., R. Co. v. Nesbit*, 10 How. 395, 400, 13 L. Ed. 469; *Randall v. Kreiger*, 23 Wall. 137, 147, 23 L. Ed. 124.

**44a. Same.**—*Livingston v. Moore*, 7 Pet. 469, 546, 8 L. Ed. 751.

**45. Same.**—*Cooper v. Telfair*, 4 Dall. 14, 1 L. Ed. 721. See, also, ante, "Power of Body Politic with Respect to Distribution of Powers," VI, D, 3, d, (1).

**46. Powers expressly granted deemed to have been derived from constitution.**—*Tampa Waterworks Co. v. Tampa*, 199 U. S. 241, 244, 251, 50 L. Ed. 172.

Thus it is held that notwithstanding the legislature would have power to regulate rates or bind itself not to regulate rates, even though the constitution contains no provision on the subject, yet where that instrument does contain a



(bb) *Powers Not Lost by Nonuser*.—A power of government which actually exists is not lost by nonuser.<sup>47</sup> As said by Mr. Justice Cooley, in his *Constitutional Limitations* (6th Ed.), page 85: "A power is frequently yielded to merely because it is claimed, and it may be exercised for a long period in violation of the constitutional prohibition, without the mischief which the constitution was designed to guard against appearing, or without any one being sufficiently interested in the subject to raise the question; but these circumstances cannot be allowed to sanction a clear infraction of the constitution."<sup>48</sup>

(b) *Constitutional Limitations upon Legislative Powers*—(aa) *Generally*.—A state legislature can exercise no powers inconsistent with the instrument which created it. The interest of the individual cannot be affected by the exercise of powers which the people have forbidden their legislature to exercise.<sup>49</sup> But irrespective of the operation of the federal constitution and restrictions asserted to be inherent in the nature of American institutions, the general rule is that there are no limitations upon the legislative power of the legislature of a state, except those imposed by its written constitution.<sup>50</sup> See, also, ante, "State Constitutions as the Supreme Law," IV, B. 3; "Power of Judiciary to Declare Statutes Unconstitutional," VI, D. 3, d. (4), (b), (aa), et seq.

(bb) *Constitutional Requirements with Respect to Method of Enacting Statutes*.—See the title STATUTES.

(cc) *Constitutional Provisions with Respect to Titles and Subject Matter of Statutes*.—See the title STATUTES.

(dd) *Special, Local and Private Acts*.—See the title STATUTES. See, also, post, "Special, Private and Local Acts; Class Legislation," VII, G.

(ee) *Implied Limitations upon State Legislative Powers*.—Leaving aside the question of the distribution of the powers of government and the implied prohibition against one department assuming to encroach upon or exercise the functions of another, all of which has been fully treated elsewhere,<sup>51</sup> it has been held that there is no such thing in the theory of our governments, either state or national, as unlimited power in any of their branches; that the legislative, executive and judicial departments are all subject to implied limitations arising out of the essential nature of free governments; implied reservations of individual rights which are respected by all governments entitled to the name.<sup>52</sup>

**What Constitutes Exercise of Legislative Power.**—As to what constitutes a legitimate exercise of legislative power, authority given to a municipal corporation to aid in the construction of a turnpike, canal, or railroad is within the constitutional powers of the legislature, unless expressly forbidden.<sup>53</sup> Like-

provision vesting the legislature with full power to prevent unjust discrimination and excessive charges by common carriers and public service companies, the power is to be considered as derived from the constitution, since the legislature, as it actually exists, derives its being and powers from the constitution. *Tampa Waterworks Co. v. Tampa*, 199 U. S. 241, 244, 50 L. Ed. 172.

**47. Powers not lost by nonuser.**—*Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155, 24 L. Ed. 94.

**48. Same.**—*Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677, 690, 40 L. Ed. 849.

Thus the fact that the power of the legislature to regulate the maximum rates of fares and freight rates was not exercised for more than twenty years after the incorporation of a railroad company

is unimportant. *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155, 24 L. Ed. 94.

**49. Constitutional limitations.**—*Green v. Biddle*, 8 Wheat. 1, 98, 5 L. Ed. 547 (opinion of Johnson, J.); *Stearns v. Minnesota*, 179 U. S. 223, 241, 45 L. Ed. 162.

**50. Same.**—*Giozza v. Tiernan*, 148 U. S. 657, 661, 37 L. Ed. 599.

**51.** See ante, "Separation of Departments and Distribution of Powers," VI, D. 3, d. et seq.

**52. Implied limitations upon state legislative powers.**—See ante, "Implied Limitations upon Legislative Powers; Statutes Opposed to Natural Justice, etc.," VI, D. 3, d. (4), (b), (dd).

**53. Exercise of legislative power; municipal and state aid.**—*Rogers v. Burlington*, 3 Wall. 654, 663, 18 L. Ed. 79; *Railroad Co. v. County of Otoe*, 16 Wall. 667, 673, 21 L. Ed. 375; *St. Joseph Township v. Rogers*, 16 Wall. 644, 663, 21 L. Ed.

wise the propriety or necessity of terminating the marriage relations between particular individuals has been held to be a rightful subject of legislation, and the granting of a legislative divorce within the competency of a state or territorial legislature.<sup>54</sup> On the other hand, it has been held that for the legislature, through its power of taxation, to lay its hands upon the property of one citizen and bestow it upon another, to aid him in the establishing of a private manufacturing enterprise, is not an exercise of legislative power, but nothing less than a robbery under the forms of law.<sup>55</sup>

(ff) *Powers Restricted to State Limits.*—See post, "No State to Exercise Its Legislative or Judicial Powers within the Limits of Another," VI, D, 9, a, (2).

(gg) *Power to Barter Sovereign Rights or Bind Succeeding Legislatures.*—It is a general principle that, as to questions of general policy, one legislature cannot abridge the powers of those which shall come after it, and that unless forbidden by some exceptional constitutional provision, the same power which makes the law can repeal it.<sup>56</sup>

**Limitations of Rule—Contracts and Vested Rights.**—The limitation of this rule is, that when a law is in its nature a contract, or when individuals have acquired absolute or vested rights under a statute, a subsequent repeal cannot impair the obligation of the contract or divest the rights which have become vested under the statute.<sup>57</sup>

328; *Olcott v. Supervisors*, 16 Wall. 678, 21 L. Ed. 382. See, also, the title MUNICIPAL, COUNTY, STATE AND FEDERAL AID.

**54. Same; legislative divorces.**—*Maynard v. Hill*, 125 U. S. 190, 209, 31 L. Ed. 654.

**55. Same; taxation for other than public purpose.**—*Loan Ass'n v. Topeka*, 20 Wall. 665, 22 L. Ed. 455.

See further, upon this subject, ante, "Powers of Territorial Governments," VI, D, 2, c, (3), (c), (cc), (bbb), (dddd); "Implied Limitations upon Legislative Powers; Statutes Opposed to Natural Justice, etc.," VI, D, 3, d, (4), (b), (dd). See, also, the titles EMINENT DOMAIN; MUNICIPAL, COUNTY, STATE AND FEDERAL AID; TAXATION.

**56. Power to barter sovereign rights or bind succeeding legislatures.**—*Fletcher v. Peck*, 6 Cranch 87, 135, 3 L. Ed. 162; *Woodruff v. Trapnall*, 10 How. 190, 207, 13 L. Ed. 383; *New Jersey v. Yard*, 95 U. S. 104, 113, 24 L. Ed. 352; *Manigault v. Springs*, 199 U. S. 473, 487, 50 L. Ed. 274. See, also, the title IMPAIRMENT OF OBLIGATION OF CONTRACTS.

A general law enacted by the legislature may be repealed, amended, or disregarded by the legislature which enacted it, whether at the same or at a subsequent session. *Manigault v. Springs*, 199 U. S. 473, 487, 50 L. Ed. 274.

So held with reference to the Revised Statutes of South Carolina of 1893, which declared that no bill for the granting of any privilege or immunity, or for any other private purpose, should be introduced or entertained in either house of the general assembly except by petition, etc. *Manigault v. Springs*, 199 U. S. 473, 487, 50 L. Ed. 274.

A mere statutory reservation of the

right to alter, amend or repeal corporate charters, unlike a constitutional reservation of such right to the legislature, is not binding upon succeeding legislatures, and does not prevent a subsequent legislature from entering into an irrevocable contract with a corporation to tax it in an agreed manner in lieu of all other taxation. *New Jersey v. Yard*, 95 U. S. 104, 111, 24 L. Ed. 352.

A legislative act prescribing the mode in which counties shall issue their bonds is but the act of one legislature; and, accordingly, a special act, giving to a county a right to issue its bonds in disregard of the ordinary legislative provisions, authorizes an issue in accordance with the later act. *Railroad Co. v. County of Otoe*, 16 Wall. 667, 21 L. Ed. 375.

A limitation contained in the charter of a municipal corporation as to the amount of indebtedness it may incur is not binding upon subsequent legislatures. A subsequent act, authorizing a subscription and bond issue in aid of a railroad company, in an amount which, with existing indebtedness, will exceed the charter limitation upon the amount of the city's indebtedness, is an authority to the city to exceed the original charter limitation. *Amey v. Allegheny City*, 24 How. 364, 16 L. Ed. 614.

**Repeal of act creating public office.**—See the title IMPAIRMENT OF OBLIGATION OF CONTRACTS.

**57. Same; limitations; vested and contract rights.**—*Fletcher v. Peck*, 6 Cranch 87, 135, 3 L. Ed. 162; *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629; *Green v. Biddle*, 8 Wheat. 1, 92, 5 L. Ed. 547; *Providence Bank v. Billings*, 4 Pet. 514, 7 L. Ed. 939; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. Ed. 773; *Woodruff v. Trapnall*, 10 How.

**Same—Contract Divesting State of Sovereign Powers.**—There are cases in which a state may, by contract, lay aside its sovereignty and restrict the exercise of some of its most important powers.<sup>58</sup> Especially is this true with regard to the power of taxation, the rule with respect thereto being that, for a valuable consideration, the legislature, in the absence of constitutional prohibition, may enter into binding contracts with corporations or individuals, restricting either wholly or partially, its power to tax the property of such corporations or persons.<sup>59</sup> But no government dependent on taxation for support can bargain away its whole power of taxation, for that would be substantially, abdication. All that has been determined thus far is, that for a consideration it may, in the exercise of a reasonable discretion, and for the public good, surrender a part of its powers in this particular.<sup>60</sup>

**Same—Same—Limitation upon Power of State.**—On the other hand, the sovereign power to govern, to preserve the public health and the public morals, to protect public and private rights, to legislate upon those subjects within the domain of the general legislative power of the state and involving the public welfare of the entire community, or body politic is a trust committed by the people to the state legislative body, no part of which can be bargained away or abridged.<sup>61</sup>

190, 207, 13 L. Ed. 383; *Curran v. Arkansas*, 15 How. 304, 14 L. Ed. 705; *State Bank v. Knoop*, 16 How. 369, 389, 14 L. Ed. 977; *Davis v. Gray*, 16 Wall. 203, 21 L. Ed. 447; *Newton v. Commissioners*, 100 U. S. 548, 556, 25 L. Ed. 710. See, also, the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**.

**58. Contract divesting state of sovereign powers.**—*New Jersey v. Wilson*, 7 Cranch 164, 3 L. Ed. 303; *Gordon v. Appeal Tax Court*, 3 How. 133, 145, 11 L. Ed. 529; *Curran v. Arkansas*, 15 How. 304, 14 L. Ed. 705; *State Bank v. Knoop*, 16 How. 369, 14 L. Ed. 977; *Jefferson Branch Bank v. Skelly*, 1 Black 436, 17 L. Ed. 173; *Home of the Friendless v. Rouse*, 8 Wall. 430, 19 L. Ed. 495; *Wilmington Railroad v. Reid*, 13 Wall. 264, 20 L. Ed. 568; *Tomlinson v. Jessup*, 15 Wall. 454, 458, 24 L. Ed. 204; *Davis v. Gray*, 16 Wall. 203, 21 L. Ed. 447; *Newton v. Commissioners*, 100 U. S. 548, 556, 25 L. Ed. 710. See, also, the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**.

**May authorize municipal corporation to bind itself not to regulate water rates.**—It is competent for the legislature, in the absence of constitutional restrictions or a declared policy of the state to the contrary, to invest municipal corporations with the power to bind themselves by irrevocable contract not to regulate water rates. *Freeport Water Co. v. Freeport City*, 180 U. S. 587, 593, 45 L. Ed. 679; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. Ed. 525; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 7, 43 L. Ed. 341; *Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558, 44 L. Ed. 886; *Freeport Water Co. v. Freeport City*, 180 U. S. 587, 593, 45 L. Ed. 679; *Danville Water Co. v. Danville*, 180 U. S. 619, 624, 45 L. Ed. 696.

But the power granted to a municipal corporation to bind itself not to exercise

its governmental powers and functions must be expressed in clear and unambiguous language; any doubt or ambiguity will be resolved against the existence of the power. *Freeport Water Co. v. Freeport City*, 180 U. S. 587, 593, 45 L. Ed. 679; *Danville Water Co. v. Danville*, 180 U. S. 619, 45 L. Ed. 696; *Rogers Park Water Co. v. Fergus*, 180 U. S. 624, 45 L. Ed. 702.

**59. Same; contract restricting power of taxation.**—*New Jersey v. Wilson*, 7 Cranch 164, 166, 3 L. Ed. 303; *Gordon v. Appeal Tax Court*, 3 How. 133, 11 L. Ed. 529; *State Bank v. Knoop*, 16 How. 369, 376, 14 L. Ed. 977; *Ohio Life Ins., etc., Co. v. Debolt*, 16 How. 416, 428, 14 L. Ed. 997; *Jefferson Branch Bank v. Skelly*, 1 Black 436, 17 L. Ed. 173; *Home of the Friendless v. Rouse*, 8 Wall. 430, 19 L. Ed. 495; *Wilmington Railroad v. Reid*, 13 Wall. 264, 266, 20 L. Ed. 568; *Tomlinson v. Jessup*, 15 Wall. 454, 458, 24 L. Ed. 204; *Humphrey v. Pegues*, 16 Wall. 244, 248, 21 L. Ed. 326; *Farrington v. Tennessee*, 95 U. S. 679, 689, 24 L. Ed. 558; *Railroad Companies v. Gaines*, 97 U. S. 697, 24 L. Ed. 1091; *Asylum v. New Orleans*, 105 U. S. 362, 368, 26 L. Ed. 1128; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 665, 29 L. Ed. 516. See, also, the titles **IMPAIRMENT OF OBLIGATION OF CONTRACTS**; **POLICE POWER**; **TAXATION**.

**60. Same.**—*Stone v. Mississippi*, 101 U. S. 814, 820, 25 L. Ed. 1079.

**61. Limitations upon power to barter sovereign powers.**—*Young v. Bank*, 4 Cranch 384, 2 L. Ed. 655; *Bank of Columbia v. Okely*, 4 Wheat. 235, 245, 4 L. Ed. 559; *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629; *Goszler v. Georgetown*, 6 Wheat. 593, 596, 598, 5 L. Ed. 339; *Clark v. Washington*, 12 Wheat. 40, 54, 6 L. Ed. 544; *Charles River Bridge v. Warren Bridge*, 11 Pet.



**Same—Property Held as a Public Trust.**—So it is with regard to trusts connected with public property or property of a special character. "There can be no irrevocable contract in a conveyance of property by a grantor in disregard of a public trust, under which he is bound to hold and manage it."<sup>62</sup>

420, 9 L. Ed. 773; *Maryland v. Baltimore*, etc., R. Co., 3 How. 534, 552, 11 L. Ed. 714; *Butler v. Pennsylvania*, 10 How. 402, 416, 13 L. Ed. 472; *Ohio Life Ins., etc., Co. v. Debolt*, 16 How. 416, 431, 14 L. Ed. 997; *Newton v. Commissioner*, 100 U. S. 548, 25 L. Ed. 710; *Stone v. Mississippi*, 101 U. S. 814, 820, 25 L. Ed. 1079; *Illinois Central R. Co. v. Illinois*, 146 U. S. 387, 460, 36 L. Ed. 1018; *Illinois Cent. R. Co. v. Chicago*, 176 U. S. 646, 659, 44 L. Ed. 622.

There can be no contract and no irrevocable law upon governmental subjects. Legislative acts concerning public interests are necessarily public laws. Every succeeding legislature possesses the same jurisdiction and power as its predecessor. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less. All occupy in this respect a footing of perfect equality. This is necessarily so in the nature of things; and it is vital to the public welfare that each one should be able, at all times, to do whatever the varying circumstances and present exigencies attending the subject may require. *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 459, 36 L. Ed. 1018; *Newton v. Commissioners*, 100 U. S. 548, 25 L. Ed. 710.

"The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they cannot give away nor sell the discretion of those that are to come after them in respect to matters the government of which, from the very nature of things, must 'vary with varying circumstances.'" *Stone v. Mississippi*, 101 U. S. 814, 820, 25 L. Ed. 1079. Accord: *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 460, 36 L. Ed. 1018.

The forms of administering justice and the duties and powers of courts as incident to the exercise of a branch of sovereign power must always be subject to the legislative will, and the power over them is unalienable, so as to bind subsequent legislatures. *Young v. Bank*, 4 Cranch 384, 2 L. Ed. 655; *Bank v. Okely*, 4 Wheat. 235, 245, 4 L. Ed. 559.

While by the constitution of a state, a legislature may be restricted as to the amount of indebtedness it may contract upon behalf of the state, in the absence of such restriction it is doubtful whether a state legislature can bind itself or succeeding legislatures not to create any fur-

ther debt or not to issue any more bonds, since such an agreement, if binding, involves the surrender of a prerogative which might seriously affect the public safety. *Board of Liquidation v. McComb*, 92 U. S. 531, 535, 23 L. Ed. 623. See, also, the titles **IMPAIRMENT OF OBLIGATION OF CONTRACTS**; **POLICE POWER**.

**62. Property held as a public trust.**—*Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 454, 460, 36 L. Ed. 1018.

**Applicability of doctrine to navigable waters, beds of harbors, etc.**—This doctrine applies with full force to navigable waters and the lands under them. The ownership of the navigable waters of harbors and of the lands under them is a subject of public concern to the whole people of the state. The trust with which they are held, therefore, is governmental and cannot be alienated, except in instances of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining. *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 455, 36 L. Ed. 1018; *Illinois Cent. R. Co. v. Chicago*, 176 U. S. 646, 659, 44 L. Ed. 622.

"The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the state may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants. It is grants of parcels of lands under navigable waters, that may afford foundation for wharves, piers, docks and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the state." *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 452, 36 L. Ed. 1018.

"But that is a very different doctrine from the one which would sanction the abdication of the general control of the state over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public. The trust devolving upon the state for the public, and which can only be discharged by the management

**Powers of This Nature Not Exhausted by Exercise.**—As to powers of this nature, the state can and should exercise them again and again as often as the public interest may require.<sup>63</sup>

(hh) *Enforcement of Constitutional Limitations.*—There are many constitutional provisions mandatory upon the legislature which cannot be directly enforced—the duty, for example, when creating a debt, to provide adequate ways and means for its payment. It affects the public generally, but no individual in particular, in such manner as to give him a legal remedy. So the state debt may be increased beyond the prescribed limit, without admitting of judicial redress.<sup>64</sup>

and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining." *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 452, 36 L. Ed. 1018.

"It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested that the language of the adjudged cases can be reconciled." *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 453, 36 L. Ed. 1018.

"A grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace." *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 453, 36 L. Ed. 1018.

**Same—Statute alienating rights of state in Lake Michigan and in Chicago harbor.**

—The state of Illinois holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the state holds title to soils under the tide water by the common law, and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. But it is a title different in character from that which the state holds in lands intended for sale. It is different from the

title which the United States hold in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 452, 36 L. Ed. 1018; *Illinois Cent. R. Co. v. Chicago*, 176 U. S. 646, 659, 44 L. Ed. 622.

The harbor of Chicago is of immense value to the people of the state of Illinois in the facilities it affords to its vast and constantly increasing commerce; and the idea that its legislature can deprive the state of control over its bed and waters and place the same in the hands of a private corporation created for a different purpose, one limited to transportation of passengers and freight between distant points and the city, is a proposition that cannot be defended. "The legislation which may be needed one day for the harbor may be different from the legislation that may be required at another day. Every legislature must, at the time of its existence, exercise the power of the state in the execution of the trust devolved upon it." *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 460, 36 L. Ed. 1018.

Any attempted cession of the ownership and control of the state in and over the submerged lands in Lake Michigan to the Illinois Central Railroad, by the act of April 16, 1869, was inoperative to affect, modify or in any respect to control the sovereignty and dominion of the state over the lands, or its ownership thereof, and any such attempted operation of the act was annulled by the repealing act of April 15, 1873, which to that extent was valid and effective. *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 460, 36 L. Ed. 1018.

**63. Powers not exhausted by exercise.**—*East Hartford v. Hartford Bridge Co.*, 10 How. 511, 535, 13 L. Ed. 518.

**64. Enforcement of constitutional limitations.**—*Board of Liquidation v. McComb*, 92 U. S. 531, 536, 23 L. Ed. 603. See, also, ante, "Who May Raise Constitutional Questions," IV, G; "Power of Judiciary to Declare Statutes Unconstitutional," VI, D, 3, d, (4), (b), (aa), et seq. See, also, the title STATES.



(ii) *Presumption and Construction in Case of Doubt*.—See ante, "Power of Judiciary to Declare Statutes Unconstitutional," VI, D, 3, d, (4) (b), (aa).

(c) *Specific Powers and Their Limitations*.—See the specific titles CIVIL RIGHTS, vol. 3, p. 814; CORPORATIONS; DUE PROCESS OF LAW; EMINENT DOMAIN; IMPAIRMENT OF OBLIGATION OF CONTRACTS; MUNICIPAL CORPORATIONS; TAXATION; etc. See, also, post, "Equal Protection of the Laws; Class Legislation," VII, et seq.; "Vested Rights and Retrospective Legislation," VIII, et seq.; and other subheads in this article.

g. *The Executive Department*—(1) *The Executive Department of the United States*.—See ante, "Independence of the Executive," VI, D, 3, d, (4). (c), et seq.; "Limitation of Rules with Respect to Separation and Independence of Departments," VI, D, 3, d, (5); "Delegation of Executive Powers," VI, D, 3, e, (3). See, also, the titles PARDON; PRESIDENT OF UNITED STATES; UNITED STATES.

(2) *State Executive Departments*.—See the titles GOVERNOR; STATES.

h. *The Judicial Department*—(1) *Of the Federal Government*—(a) *The Judicial Power of the United States*—(aa) *Whence Derived*.—The judicial power of the United States is derived from the federal constitution. The third article of that instrument commences with organizing the judicial department: the first clause of the second section enumerates the cases to which it shall extend; and the second clause of the same section distributes the powers previously described.<sup>65</sup> The whole judicial authority of the federal courts is derived from the constitution of the United States and the laws enacted by congress in pursuance thereof; nothing contained in the laws of any state, or in the ordinance of 1787, or any other law or ordinance promulgated under the authority of the old articles of confederation can add or detract anything therefrom.<sup>66</sup>

(bb) *Nature and Extent*.—**Generally**.—The judicial power of the United States rests upon the same basis as the other departments of the government, and is exercised upon the people of the Union just as the judicial power of a state is exercised upon the people of the state.<sup>67</sup> One of the declared objects of the constitution, as enumerated in its preamble, was "to establish justice." The precise latitude to be accorded these words is shown in the provisions made in the constitution upon this head.<sup>68</sup> These provisions are found in the first and second sections of the third article of the constitution and in the eleventh amendment thereof. From these sections we learn that the judicial power of the United States shall be vested in one supreme court and in such inferior courts as congress may from time to time ordain and establish, and that it shall extend "to all cases, in law and equity, arising under the constitutions, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more

65. **Judicial power of the United States; whence derived**.—Const. U. S., Art. 3; *Durousseau v. United States*, 6 Cranch 307, 313, 3 L. Ed. 232; *Worcester v. Georgia*, 6 Pet. 515, 571, 8 L. Ed. 483.

66. **Same**.—*United States v. Peters*, 5 Cranch 115, 3 L. Ed. 53; *Wayman v. Southard*, 10 Wheat. 1, 6 L. Ed. 253; *Bank v. Dudley*, 2 Pet. 492, 7 L. Ed. 496; *Beers v. Houghton*, 9 Pet. 329, 9 L. Ed. 145; *Steamboat Orleans v. Phœbus*, 11 Pet. 175, 9 L. Ed. 677; *Suydam v. Broadnax*, 14 Pet. 67, 10 L. Ed. 357; *Strader v. Graham*, 10 How. 82, 96, 13 L. Ed. 337; *Union Bank v. Vaiden*, 18 How. 503, 517, 25 L. Ed. 472; *Hyde v. Stone*, 20 How.

170, 15 L. Ed. 874; *Cowler v. Mercer County*, 7 Wall. 118, 19 L. Ed. 86; *The Belfast*, 7 Wall. 624, 19 L. Ed. 266; *Ex parte Schollenberger*, 96 U. S. 369, 24 L. Ed. 853; *Smith v. Railroad Co.*, 99 U. S. 398, 25 L. Ed. 437; *Lincoln County v. Luning*, 133 U. S. 529, 33 L. Ed. 766. See, also, ante, "Jurisdiction and Procedure of Federal Courts," VI, D, 3, c, (3), (d).

67. **Judicial power of the United States; nature and extent**.—*Worcester v. Georgia*, 6 Pet. 515, 571, 8 L. Ed. 483. (Opinion of McLean, J.)

68. **Same**.—*Chisholm v. Georgia*, 2 Dall. 419, 475, 1 L. Ed. 440.



states, between a state and citizens of another state, between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects;"<sup>69</sup> said enumeration not to be construed, however, as extending the judicial power "to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."<sup>70</sup>

**Distinction between Legislative and Judicial Powers as to Their Nature and Extent.**—With respect to the nature and scope of these provisions, it is held that there is this significant difference between them and those sections of article one which relate to the legislative power; that is to say: The first article, treating of legislative powers, does not make a general grant of legislative power. It reads: "Article 1, § 1. All legislative powers herein granted shall be vested in a congress," etc.; and then in article seven mentions and defines the legislative powers that are granted. By reason of the fact that there is no general grant of legislative power it has become an accepted constitutional rule that this is a government of enumerated powers.<sup>71</sup> On the other hand, in article three, which treats of the judicial department, § 1, reads that "the judicial power of the United States shall be vested in one supreme court and in such inferior courts as the congress may from time to time ordain and establish. It is held that this section grants the entire judicial power of the nation, and that § 2 of the same article, which provides that "the judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States," etc., is not a limitation nor an enumeration, but a definite declaration, a provision that the judicial power shall extend to—that is, shall include—the several matters particularly mentioned, leaving unrestricted the general grant of the entire judicial power.<sup>72</sup> It is further held that if there are any limitations upon this power, they must be expressed, for otherwise the general grant would vest in the courts all the judicial power which the nation is capable of exercising.<sup>73</sup>

**Judicial Power Extends to All Controversies of a Justiciable Nature.**—As it is, it is held that the judicial power of the nation extends to all controversies of a justiciable nature,<sup>74</sup> and that the judicial department is capable of receiving jurisdiction to the full extent of the constitution, laws and treaties of the United States when any question respecting them shall assume such a form that the judicial power is capable of acting on it.<sup>75</sup>

**Cases Arising under the Constitution and Laws, Cases Affecting Ambassadors, and Admiralty and Maritime Cases, Are Distinct Classes.**—The constitution declares that "the judicial power shall extend to all cases in law and equity arising under it, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction." The constitution certainly contemplates these as three distinct classes of cases, and if they are distinct, the grant of jurisdiction over

69. *Same*.—Const. U. S., Art. 3, § 2.

This section constitutionally defines the judicial power. *Chisholm v. Georgia*, 2 Dall. 419, 475, 1 L. Ed. 440; *Robertson v. Baldwin*, 165 U. S. 275, 279, 41 L. Ed. 715.

70. *Same*.—Const. U. S., Amend. XI.

71. **Nature and extent; distinction between legislative and judicial powers.**—*Kansas v. Colorado*, 206 U. S. 46, 81, 51 L. Ed. 956.

72. *Same*.—*Kansas v. Colorado*, 206 U. S. 46, 82, 51 L. Ed. 956.

73. *Same*.—*Kawananakoa v. Polyblank*, 205 U. S. 349, 51 L. Ed. 834; *Kansas v. Colorado*, 206 U. S. 46, 82, 51 L. Ed. 956.

"When a legislative power is claimed

for the national government the question is whether that power is one of those granted by the constitution, either in terms or by necessary implication, whereas in respect to judicial functions the question is whether there be any limitations expressed in the constitution on the general grant of national power." *Kansas v. Colorado*, 206 U. S. 46, 83, 51 L. Ed. 956.

74. **Judicial power extends to all controversies of a justiciable nature.**—*Kawananakoa v. Polyblank*, 205 U. S. 349, 51 L. Ed. 834; *Kansas v. Colorado*, 206 U. S. 46, 82, 51 L. Ed. 956.

75. *Same*.—*Osborn v. United States*

one of them does not confer jurisdiction over either of the other two; the discrimination made between them is conclusive against their identity.<sup>76</sup>

**Arising under the Constitution, Laws, etc., Extends Only to "Cases in Law and Equity."**—The constitution does not extend the judicial power to every violation of the constitution which may possibly take place, but to "a case in law or equity," in which a right under such law is asserted in a court of justice. If the question cannot be brought into a court, then there is no case in law or equity, and no jurisdiction is given by the words of the article.<sup>77</sup>

**What Is a Case in Law and Equity Arising under the Constitution and Laws of the United States.**—The judicial power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares that the judicial power shall extend to all cases arising under the constitution, laws and treaties of the United States.<sup>78</sup> A case in law or equity consists of the right of the one party as well as the other, and may be truly said to arise under the constitution or a law of the United States whenever its correct decision depends upon the right construction of either.<sup>79</sup> If, in any controversy depending in a court, the cause should depend on the validity of such a law, that would be a case arising under the constitution to which the judicial power of the United States would extend.<sup>80</sup> Such a case arises not merely where a party comes into court to demand something conferred upon him by the constitution, a law of the United States, or a treaty, but wherever its correct decision as to the right, privilege, claim, protection, or defense of a party, in whole or in part depends upon the construction of either. It is in the power of congress to give the circuit courts of the United States jurisdiction of such a case, although it may involve other questions of fact or of law.<sup>81</sup>

Bank, 9 Wheat. 738, 819, 6 L. Ed. 204; Interstate Commerce Commission v. Brimson, 154 U. S. 447, 475, 38 L. Ed. 1047; Madisonville Traction Co. v. St. Bernard Min. Co., 196 U. S. 239, 246, 49 L. Ed. 462.

**76. Enumerated cases are distinct classes.**—American Ins. Co. v. Canter, 1 Pet. 511, 7 L. Ed. 243.

**77. Cases arising under constitution and laws, etc.; includes only cases in law and equity.**—Cohens v. Virginia, 6 Wheat. 264, 405, 5 L. Ed. 257; La Abra Silver Min. Co. v. United States, 175 U. S. 423, 455, 44 L. Ed. 223. See, also, the title COURTS.

**78. What constitutes a case in law or equity.**—Osborn v. United States Bank, 9 Wheat. 738, 819, 6 L. Ed. 204; Smith v. Adams, 130 U. S. 167, 173, 32 L. Ed. 895; Interstate Commerce Commission v. Brimson, 154 U. S. 447, 475, 38 L. Ed. 1047; Madisonville Traction Co. v. St. Bernard Min. Co., 196 U. S. 239, 246, 49 L. Ed. 462. See, also, the title COURTS.

In Smith v. Adams, 130 U. S. 167, 173, 32 L. Ed. 895, Mr. Justice Field, speaking for the court, said that the terms "cases" and "controversies" in the constitution embraced "the claims or contentions of litigants brought before the courts for adjudication by regular proceedings established for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs." See, also, Interstate Commerce Commission v. Brimson, 154 U. S. 447, 475, 38 L. Ed. 1047.

**79. Same.**—Marbury v. Madison, 1 Cranch 137, 173, 2 L. Ed. 60; Mayor v. Cooper, 6 Wall. 247, 253, 18 L. Ed. 851; Boyd v. Nebraska, 143 U. S. 135, 36 L. Ed. 103; McPherson v. Blacker, 146 U. S. 1, 23, 24, 36 L. Ed. 869.

**80. Same.**—Cohens v. Virginia, 6 Wheat. 264, 405, 5 L. Ed. 257; La Abra Silver Min. Co. v. United States, 175 U. S. 423, 455, 44 L. Ed. 223.

**81. Same.**—Tennessee v. Davis, 100 U. S. 257, 25 L. Ed. 648. See, generally, the title COURTS. And see ante, "Exercise of Legislative or Political Functions by the Judiciary," VI, D, 3, d, (3), (c), et seq.

**Federal appointee seeking to enforce right to commission of office.**—A case in law or equity arising under the constitution and laws of the United States includes the case of an appointee to a federal office (justice of the peace in the District of Columbia) seeking to enforce his right to his commission of office, or a copy thereof, because the right claimed is given by a law of the United States. Marbury v. Madison, 1 Cranch 137, 173, 2 L. Ed. 60.

**Controversy between states over diversion of waters of interstate stream.**—A controversy between two of the states of the Union, wherein one seeks to restrain the other from diverting to its injury the waters of a river which traverses both states, is one of a justiciable nature to which the judicial power of the United States extends. Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956. See, also, ante,



**Embraces All Cases So Arising.**—Under this language, “all cases” so arising are embraced. None are excluded; it is declared to extend “to all cases arising under the constitution and laws of the United States” without discrimination as to the latter; nor is there any restriction as to the tribunal—state or federal—in which they may arise. Wherever found, they are within the reach of this authority, and subject, for its exercise, to the lawmaking power of the nation.<sup>82</sup>

**No Matter Who the Parties May Be.**—“Speaking generally, it may be observed that the judicial power of a nation extends to all controversies justiciable in their nature, the parties to which or the property involved in which may be reached by judicial process, and when the judicial power of the United States was vested in the supreme and other courts, all the judicial power which the nation was capable of exercising was vested in those tribunals, and unless there be some limitations expressed in the constitution it must be held to embrace all controversies of a justiciable nature arising within the territorial limits of the nation, no matter who may be the parties thereto. This general truth is not inconsistent with the decisions that no suit or action can be maintained against the nation in any of its courts without its consent, for they only recognize the obvious truth that a nation is not, without its consent, subject to the controlling action of any of its instrumentalities or agencies. The creature cannot rule the creator.”<sup>83</sup> In this general grant of power, no exception is made to those cases in which a state may be a party, and there is nothing in the spirit of the constitution to control its words and justify an exception to this grant of power in those cases in which a state may be a party. Therefore, a case arising under the constitution or laws of the United States is cognizable in the courts of the Union, whoever may be the parties to that case.<sup>84</sup>

“Generally as to Political Questions,” VI, D, 3, d, (3), (c), (bb).

**Proceeding to annul fraudulent award against Mexican Republic.**—A proceeding based on the act of congress of December 28, 1892, authorizing the attorney general to bring suit in the name of the United States in the court of claims against the La Abra Silver Mining Company, to determine whether the award in favor of that company against the Republic of Mexico was obtained by fraud effectuated by false swearing, or other fraudulent practices on the part of said company, etc., was a “case” within the meaning of art. 3, § 2, of the constitution declaring that the judicial power of the United States shall extend to all cases in law and equity arising under that instrument, the laws of the United States, or treaties made under their authority, since the rights involved were of such a nature as to be susceptible of judicial determination, and since, by the terms of the act, the decree rendered by the court of claims therein was, unless reversed, to be, not merely advisory, but binding upon the United States, and the defendants. *La Abra Silver Min. Co. v. United States*, 175 U. S. 423, 44 L. Ed. 223.

**Validity of state law relating to appointment of presidential electors.**—See ante, “Validity of State Law Providing for Appointment of Presidential Electors,” VI, D, 3, d, (3), (c), (nn).

**State gubernatorial contest.**—The judicial power of the United States extends also to a state gubernatorial contest where the same is justiciable in the state courts

and the defence relied upon by the contestee is based upon rights conferred by act of congress. *Boyd v. Nebraska*, 143 U. S. 134, 36 L. Ed. 103.

But it is otherwise where the determination of the entire matter is committed to the state legislature and it is held by the state court of last resort that it has no jurisdiction to review or go behind the decision of the legislative body. *Taylor v. Beckham*, 178 U. S. 548, 44 L. Ed. 1187.

And this is true even though the complainants set up that they are deprived of vested or property rights without due process of law. *Taylor v. Beckham*, 178 U. S. 548, 44 L. Ed. 1187. See, generally, as to the judicial determination of rightful state government, ante, “Generally as to International Relations; Determination of Rightful Sovereign or Government,” VI, D, 3, d, (3), (c), (cc).

**82. Embraces all cases so arising.**—*Marbury v. Madison*, 1 Cranch 137, 173, 2 L. Ed. 60; *Cohens v. Virginia*, 6 Wheat. 264, 382, 5 L. Ed. 257; *Fitch v. Creighton*, 24 How. 159, 162, 16 L. Ed. 596; *Mayor v. Cooper*, 6 Wall. 247, 253, 18 L. Ed. 851.

**83. No matter who the parties may be.**—*Kansas v. Colorado*, 206 U. S. 46, 83, 51 L. Ed. 956; *Kawananakoa v. Polyblank*, 205 U. S. 349, 51 L. Ed. 834.

**84. Same.**—*Cohens v. Virginia*, 6 Wheat. 264, 382, 383, 5 L. Ed. 257. See ante, “Generally as to Political Questions,” VI, D, 3, d, (3), (c), (bb); “Constitutional Status of Seceding States,” VI, D, 3, d, (3), (c), (dd); “Boundary Questions,” VI, D, 3, d, (3), (c), (ff). See, also, the titles



**Embraces Criminal as Well as Civil Cases.**—The provision of the constitution declaring that the judicial power of the United States extends "to all cases in law and equity arising under the constitution, the laws of the United States, and treaties made or which shall be made under their authority," embraces alike civil and criminal cases. Both are equally within that power.<sup>85</sup>

**Review of State Decisions.**—See the title APPEAL AND ERROR, vol. 1, p. 546, et seq.

**Power to Declare Statutes Unconstitutional.**—See ante, "Power of Judiciary to Declare Statutes Unconstitutional," VI, D, 3, d, (4), (b), (aa), et seq. See, also, the title STATUTES.

**No Common-Law Jurisdiction.**—See ante, "No Common Law of the United States," VI, D, 3, a, (4). See, also, the titles COMMON LAW, vol. 3, p. 970; COURTS.

(cc) *Where Vested.*—The constitution expressly declares that the judicial power of the United States shall be vested in one supreme court and in such inferior courts as the congress may from time to time ordain and establish.<sup>86</sup> This same section further provides that the judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office. It is settled that these courts, as here described and constituted, are the constitutional courts in which the judicial power of the United States must be vested, and that congress cannot confer any part of it upon any other court or tribunal the judge of which does not possess the constitutional tenure of office; as, for example, territorial courts in which the judges hold only for a term of years.<sup>87</sup> Neither can any part of the judicial

#### COURTS; JURISDICTION; STATES; UNITED STATES.

The doctrine of *Chisholm v. Georgia*, 2 Dall. 419, 1 L. Ed. 440, however, holding that the judicial power of the United States extended to suits against a state by citizens of another state, was abolished by the eleventh amendment.

#### Suits by and against the United States.

—Under this same general grant of judicial power jurisdiction over suits brought by the United States has been sustained. *United States v. Texas*, 143 U. S. 621, 36 L. Ed. 285; *United States v. Texas*, 162 U. S. 1, 40 L. Ed. 867; *United States v. Michigan*, 190 U. S. 379, 47 L. Ed. 1103; *Kansas v. Colorado*, 206 U. S. 46, 84, 51 L. Ed. 956.

Under this section of the constitution a dispute as to the title to real estate in which the real parties in interest are a state and the United States, is a question of a justiciable nature and can properly be determined in a judicial proceeding. *Minnesota v. Hitchcock*, 185 U. S. 373, 46 L. Ed. 954. See, also, ante, "Title or Possession of Property," VI, D, 3, d, (3), (c), (oo).

"The exemption of the United States to suit in one of its own courts without its consent has been repeatedly recognized." *Kansas v. United States*, 204 U. S. 331, 341, 51 L. Ed. 510; *Kansas v. Colorado*, 206 U. S. 46, 85, 51 L. Ed. 956. See, also, the title UNITED STATES.

**Controversies between states.**—By the express words of the constitution the judicial power of the United States is made to embrace controversies between states.

*Kansas v. Colorado*, 206 U. S. 46, 51 L. Ed. 956. See, also, ante, "Generally as to Political Questions," VI, D, 3, d, (3), (c), (bb); "Boundary Questions," VI, D, 3, d, (c), (ff). See the titles COURTS; JURISDICTION; STATES.

**85. Embraces both civil and criminal cases.**—*Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257; *Tennessee v. Davis*, 100 U. S. 257, 25 L. Ed. 648.

**86. Judicial power of the United States; where vested.**—Const. U. S., Art. 3, § 1. See, also, *Ex parte Wisner*, 203 U. S. 449, 455, 51 L. Ed. 264. And see the title COURTS.

**87. Same.**—*Martin v. Hunter*, 1 Wheat. 304, 330, 4 L. Ed. 97; *American Ins. Co. v. Canter*, 1 Pet. 511, 546, 7 L. Ed. 243; *Benner v. Porter*, 9 How. 235, 244, 13 L. Ed. 119; *United States v. Ferreira*, 13 How. 40, 14 L. Ed. 42; *United States v. Ritchie*, 17 How. 525, 533, 15 L. Ed. 236; *Clinton v. Englebrecht*, 13 Wall. 434, 20 L. Ed. 659; *Good v. Martin*, 95 U. S. 90, 98, 24 L. Ed. 341; *Reynolds v. United States*, 98 U. S. 145, 154, 25 L. Ed. 244; *The City of Panama*, 101 U. S. 453, 460, 25 L. Ed. 1061; *Clough v. Curtis*, 134 U. S. 361, 33 L. Ed. 945; *McAllister v. United States*, 141 U. S. 174, 35 L. Ed. 693; *Wingard v. United States*, 141 U. S. 201, 35 L. Ed. 719; *In re Cooper*, 143 U. S. 472, 36 L. Ed. 232; *United States v. Coe*, 155 U. S. 76, 85, 39 L. Ed. 76; *Robertson v. Baldwin*, 165 U. S. 275, 279, 41 L. Ed. 715; *United States v. McMillan*, 165 U. S. 504, 510, 41 L. Ed. 805. See, also, ante, "Power of Congress to Impose Legislative or Executive Duties upon

power of the United States, strictly speaking, be vested in state officers or tribunals as such.<sup>88</sup> But this does not forbid the vesting in state officers by congress of powers which are incidental to the judicial power, but not properly a part of it.<sup>89</sup>

**Duty of Congress to Establish Courts of the United States.**—Section one of article three of the constitution is mandatory, and congress cannot constitutionally refuse to establish either the supreme or inferior courts therein provided for.<sup>90</sup>

(dd) *Distribution of the Judicial Power.*—See the title COURTS.

(b) *Organization, Jurisdiction and Powers of the Federal Courts.*—See the title COURTS. See, also, ante, "Jurisdiction and Procedure of Federal Courts," VI, D, 3, c, (3), (d).

(2) *State Judicial Departments.*—See the titles COURTS: STATES. See also, ante, "State Courts; Their Constitution, Jurisdiction and Procedure," VI, D, 3, c, (4), (e).

4. **EQUALITY OF THE STATES.**—See post. "New States and Admission into the Union," VI, D, 6.

5. **THE FEDERAL GUARANTY OF REPUBLICAN GOVERNMENT TO THE STATES AND PROTECTION AGAINST DOMESTIC VIOLENCE—a Sense in Which Term "State" Used in This Connection**—In the constitution the term state most frequently expresses the combined idea of people, territory and government, a political community of free citizens occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed.<sup>91</sup> But the term state is also used to express the idea of a people or political community, as distinguished from the government: and it is in this sense that it is used in the clause which provides that the United States shall guarantee to every state in the Union a republican form of government, and shall protect each of them against

the Judiciary," VI, D, 3, d, (3), (d), et seq.; "Power to Impose Judicial Functions upon Nonjudicial Tribunals," VI, D, 3, d, (3), (e). See, also, the title COURTS.

"The judges of the superior courts of Florida hold their offices for four years; these courts, then, are not constitutional courts, in which the judicial powers conferred by the constitution on the general government can be deposited; they are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government; or in virtue of that clause which enables congress to make laws regulating the territories belonging to the United States; the jurisdiction with which they are invested is not a part of that judicial power which is defined in the third article of the constitution, but is conferred by congress in the exercise of its powers over the territories of the United States." *American Ins. Co. v. Canter*, 1 Pet. 511, 7 L. Ed. 243.

**88. Judicial power of United States cannot be vested in state tribunals.**—*Martin v. Hunter*, 1 Wheat. 304, 330, 4 L. Ed. 97, per Story, J.; *Robertson v. Baldwin*, 165 U. S. 275, 278, 41 L. Ed. 715; *Houston v. Moore*, 5 Wheat. 1, 27, 5 L. Ed. 19.

**89. Same.**—*Dallemagne v. Moisan*, 197 U. S. 169, 174, 49 L. Ed. 709; *Robertson v. Baldwin*, 165 U. S. 275, 279, 41 L. Ed.

715; *Prigg v. Pennsylvania*, 16 Pet. 539, 10 L. Ed. 1060; *Moore v. Illinois*, 14 How. 13, 14 L. Ed. 306; *In re Kaine*, 14 How. 103, 14 L. Ed. 345.

Thus congress has power to authorize judicial officers of the several states to exercise such powers as are ordinarily given to officers of courts not of record. *Robertson v. Baldwin*, 165 U. S. 275, 41 L. Ed. 715.

Congress may constitutionally confer upon justices of the peace power to arrest deserting seamen and deliver them on board of their vessel. Such power is not within the definition of the "judicial power" as defined by the constitution, and may be lawfully conferred upon state officers. *Robertson v. Baldwin*, 165 U. S. 275, 280, 41 L. Ed. 715.

Section 4598 of the Revised Statutes authorizing justices of the peace to issue warrants for the apprehension and delivery of deserting seamen held not to be unconstitutional as vesting any part of the judicial power of the United States in state officers. *Robertson v. Baldwin*, 165 U. S. 275, 278, 41 L. Ed. 715.

**90. Duty of congress to establish inferior federal courts.**—*Martin v. Hunter*, 1 Wheat. 304, 330, 4 L. Ed. 97. See, also, the title COURTS.

**91. "State" as used in the guaranty of a republican form of government.**—*Texas v. White*, 7 Wall. 700, 19 L. Ed. 227.

invasion and domestic violence.<sup>92</sup>

**Includes Freedmen Emancipated by War.**—When slavery was abolished the new freemen necessarily became part of the people; and the people still constituted the state: for states, like individuals, retain their identity, though changed, to some extent in their constituent elements. And it was the state, thus constituted, which was now entitled to the benefit of the constitutional guaranty.<sup>93</sup>

**b. Republican Form of Government Defined.**—The United States guarantees to every state a republican form of government. No particular government is designated as republican, neither is the exact form to be guaranteed, in any manner especially designated. Here, as in other parts of the instrument, we are compelled to resort elsewhere to ascertain what was intended.<sup>94</sup> The provision must be construed in connection with the other parts of the instrument, and in the light of surrounding circumstances.<sup>95</sup> In the case of *Chisholm v. Georgia*, 2 Dall. 419, 457, 1 L. Ed. 440, Mr. Justice Wilson defines a republican government to be one constructed upon such principles that the supreme power resides in the body of the people.

**Distinguishing Features.**—The distinguishing feature of a republican form of government is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, their governments, national and state, have been limited by written constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities.<sup>96</sup>

**Does Not Require Election Contests to Be Determined by Judicial Department.**—The constitutional guaranty of a republican form of government does not require that a contest arising out of an election for governor and other state officers shall be determined by the judicial department of the state government. That the state constitution provides that contested elections for governor and lieutenant governor shall be determined by the general assembly of the state, does not render the state government unrepublican in form.<sup>97</sup>

**The Right of Universal Suffrage Not an Essential.**—The right of universal suffrage is not, and has never been, deemed essential to a republican form of government in the states. Therefore a constitutional provision which restricts the right of suffrage to the male citizens of the state, thereby excluding women from the right to vote, is not invalid as establishing a government for the state which is not republican in form, in contravention of this provision of the federal constitution.<sup>98</sup>

**Does Not Restrain State Control of Its Subordinate Municipalities.**—This provision of the constitution is not violated by a state legislature asserting its powers to create and alter school districts and divide and apportion the property of such districts, even if it be admitted that said section applies to the creation, or to the powers, or to the property rights of the subordinate municipalities of a state.<sup>99</sup>

**A Military Government Not Republican.**—A military government established as a permanent government of a state, could not be a republican govern-

92. Same.—*Texas v. White*, 7 Wall. 700, 19 L. Ed. 227.

93. Includes freedom.—*Texas v. White*, 7 Wall. 700, 19 L. Ed. 227.

94. Republican form of government defined.—*Minor v. Happersett*, 21 Wall. 162, 175, 22 L. Ed. 627.

95. Same.—*Minor v. Happersett*, 21 Wall. 162, 175, 22 L. Ed. 627.

96. Same; distinguishing features.—In

re *Duncan*, 139 U. S. 449, 461, 35 L. Ed. 219.

97. Does not require election contests to be determined by the judiciary.—*Taylor v. Beckham* (No. 1), 178 U. S. 548, 580, 44 L. Ed. 1187.

98. Universal suffrage not an essential.—*Minor v. Happersett*, 21 Wall. 162, 175, 22 L. Ed. 627.

99. Does not lessen power of state over



ment, and it would be the duty of congress to overthrow it.<sup>1</sup> But a state may use its military power to put down an armed insurrection, too strong to be controlled by the civil authorities. The power is essential to the existence of every government, and for the preservation of order and free institutions, and is as necessary to the states of the Union as to any other government. The state itself must determine what degree of force the crisis demands.<sup>2</sup>

c. *Duty of States to Provide*.—This guaranty necessarily implies a duty on the part of the states themselves to provide such a government.<sup>3</sup>

d. *Right and Duty of Federal Government to Intervene for Purpose of Suppressing Violence and Maintaining Republican Form of Government*.—(1) *Generally*.—If a state cannot protect itself against domestic violence the United States may, upon the call of the executive, when the legislature cannot be convened, lend their assistance for that purpose. This is a guaranty of the constitution (art. 4, § 4).<sup>4</sup>

**Does Not Obligate National Government to Do Mere Police Duty.**—This provision does not, however, obligate the United States to do mere police duty in the states. It does not apply to a case where certain defendants are charged with conspiring to put certain citizens in great fear of bodily harm, and to injure and oppress them, because, being duly qualified voters, they had exercised their right of suffrage at an election lawfully held: there being no allegation that the conspiracy was formed on account of race, color, or previous condition of the parties against whom the conspirators were to act.<sup>5</sup>

**Nor Authorize Interference Where State in Full Possession of Its Faculties and Exercising Its Powers.**—So where a state is in full possession of its faculties as a member of the Union, and its legislative, executive, and judicial departments are peacefully operating by the orderly and settled methods prescribed by its fundamental law, no exigency exists requiring the interference of the general government to enforce the guaranties of the constitution, or to repel invasion or to put down domestic violence.<sup>6</sup> And it is immaterial, that there may be difficulties and disturbances arising from the pendency and determination of a contest over the election of a governor and other state officers, when those who assert that they were aggrieved by the decision of the general assembly upon the contest have resorted not to violence, but to the constitutionally designated tribunals for the redress of their grievances, and are pursuing their remedies therein.<sup>7</sup>

**Limited to Cases Where Rightful Government Is Subverted by Violence.**—This power is necessarily limited to cases where the rightful government is subverted by revolutionary violence, or in imminent danger of being overthrown by an opposing government set up by force within the state.<sup>8</sup>

(2) *Political Department Charged with Duty of Enforcing Guaranty*.—It was long ago settled that the enforcement of this guaranty belongs to the political department of the government.<sup>9</sup>

its municipal subdivisions.—*Kies v. Lowrey*, 199 U. S. 233, 239, 50 L. Ed. 167.

1. A military government not republican.—*Luther v. Borden*, 7 How. 1, 45, 12 L. Ed. 581.

2. But state may use military to put down insurrection.—*Luther v. Borden*, 7 How. 1, 45, 12 L. Ed. 581.

3. Duty of states to provide a republican form of government.—*Minor v. Happersett*, 21 Wall. 162, 175, 22 L. Ed. 627.

4. Interference by federal government to suppress insurrection, and maintain republican form of government.—*United States v. Cruikshank*, 92 U. S. 542, 556, 23 L. Ed. 588.

5. Same; federal government not required to do mere police duty.—*United*

*States v. Cruikshank*, 92 U. S. 542, 556, 23 L. Ed. 588.

6. Interference not authorized where state in full possession and exercise of its powers.—*In re Duncan*, 139 U. S. 449, 461, 35 L. Ed. 219; *Taylor v. Beckham* (No. 1), 178 U. S. 548, 579, 44 L. Ed. 1187.

7. Same; disturbances attendant upon gubernatorial contest.—*Taylor v. Beckham* (No. 1), 178 U. S. 548, 580, 44 L. Ed. 1187.

8. Interference limited to cases where rightful government subverted by violence.—*Texas v. White*, 7 Wall. 700, 19 L. Ed. 227.

9. Enforcement of guaranty rests with political department.—*Luther v. Borden*, 7 How. 1, 12 L. Ed. 581; *Texas v. White*,

**Delegation of Power to Decide upon Necessity for Interference.**—Congress may either place it in the power of a court to decide when the contingency has happened which requires the federal government to interfere, or it may delegate such power to the president of the United States.<sup>10</sup>

**Congress to Decide between Opposing Governments.**—Under the 4th section of the 4th article of the federal constitution, providing that the United States shall guarantee to every state in the Union a republican form of government, and upon the application of the legislature or of the executive, shall protect such state against domestic violence, the question as to which of two opposing governments in the state is the lawful government is a political question which rests with the congress of the United States, since congress must necessarily decide which government is the established one in a state before it can determine whether it is republican or not.<sup>11</sup>

**Or May Delegate Authority to the President.**—In the case of foreign nations the government acknowledged by the president is always recognized in the courts of justice; and this principle has been applied by act of congress to the sovereign states of the Union.<sup>12</sup> Congress having delegated to the president of the United States the duty of enforcing the guarantee that the United States shall protect each state against domestic violence, upon the application of the legislature or the executive thereof, it rests on the president to determine which of two rival governments is the lawful government of the state, and the president having recognized one of the governments as the rightful government of the state, such recognition is binding upon the judicial department.<sup>13</sup>

**Admission of Senators and Representatives as Recognition of Rightful Government.**—And when the senators and representatives of a state are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority; and its decision is binding upon every other department of the government, and cannot be questioned in a judicial tribunal. The right to decide is placed there, and not in the courts.<sup>14</sup>

**Congress to Determine the Means to Be Employed.**—Under the constitutional provision that the United States, upon the application of the legislature or the executive of a state, shall protect each state against domestic violence, it rests with congress to determine the means proper to be adopted to fulfill this guarantee.<sup>15</sup> In the exercise of this power, as in the exercise of every other constitutional power, a discretion in the choice of means is necessarily allowed. The granted power carries with it the right to use the requisite means.<sup>16</sup> It is essential only that the means must be necessary and proper for carrying into execution the power conferred, and that no acts be done, and no authority exerted, which either prohibited or unsanctioned by the constitution.<sup>17</sup>

(3) *Constitutional Guaranty of Republican Government as Authority for Re-*

7 Wall. 700, 19 L. Ed. 227; *Taylor v. Beckham* (No. 1), 178 U. S. 548, 578, 44 L. Ed. 1187.

10. Delegation of power to decide upon necessity for interference.—*Luther v. Borden*, 7 How. 1, 43, 12 L. Ed. 581.

11. Congress to decide between opposing governments.—*Luther v. Borden*, 7 How. 1, 42, 12 L. Ed. 581; *Texas v. White*, 7 Wall. 700, 730, 19 L. Ed. 227; *Taylor v. Beckham* (No. 1), 178 U. S. 548, 579, 44 L. Ed. 1187.

12. Or may delegate authority to the president.—*Luther v. Borden*, 7 How. 1, 44, 12 L. Ed. 581.

13. Recognition by the president binding upon the judiciary.—*Luther v. Borden*,

7 How. 1, 43, 44, 12 L. Ed. 581. See, also, *Martin v. Mott*, 12 Wheat. 19, 29, 31, 6 L. Ed. 537.

14. Recognition of rightful government by admission of representatives to congress.—*Luther v. Borden*, 7 How. 1, 43, 12 L. Ed. 581. See, also, *Virginia v. West Virginia*, 11 Wall. 39, 20 L. Ed. 67.

15. Congress to determine means to be employed.—*Luther v. Borden*, 7 How. 1, 43, 12 L. Ed. 581.

16. Same; discretion as to choice of means.—*Texas v. White*, 7 Wall. 700, 19 L. Ed. 227; *White v. Hart*, 13 Wall. 646, 651, 20 L. Ed. 685.

17. Same.—*Texas v. White*, 7 Wall. 700, 19 L. Ed. 227.



*construction Measures.*—Congress not only had authority to put down the rebellion under its power to suppress insurrection and carry on war, but under the obligation imposed upon it to guarantee a republican form of government to every state, it had authority to provide for the restoration of the state governments to their constitutional relations, under a republican form of government, using such means as might be necessary and proper to carry into execution the power conferred, not inconsistent with the constitution of the United States.<sup>18</sup>

6. **NEW STATES AND ADMISSION INTO THE UNION**—a. *Creation of New States by Division of Old*—(1) *Consent of State to Division of Its Territory.*—**Necessity for Consent of Old State to Division.**—Section 3 of article 4 of the constitution, relating to the admission of new states into the Union, provides, “but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned, as well as of the congress.” Under the terms of this prohibition, congress has no authority after having defined the boundaries of a new state and admitted it into the Union, to include any part of its territory within the limits of a subsequently admitted state without the consent of the state first admitted.<sup>19</sup> Acts of congress admitting states, passed at different times, are not acts in *pari materia* in any proper sense. They provide for the admission of separate states, and the subject of each is not identical with that of the others. They do not form part of a homogenous whole, of a common system, so as to allow a claimant under the later act to successfully contend that it changed the earlier act by construction or affected such change because declaratory of the meaning of the prior act.<sup>20</sup> Although congress may refuse its consent to the proposed separation or division of a state of the Union, it has no power to declare the portion desiring the separation to be a separate and independent state without the assent of the old state, or upon terms variant from those which the old state has prescribed.<sup>21</sup>

**Sufficiency of Consent—Virginia-West Virginia Case.**—The ordinance of the organic convention of the commonwealth of Virginia, under which the state of West Virginia was organized, and the act of May 13th, 1862, of the said commonwealth, constituted a proposition of the former state that the counties of Jefferson and Berkeley and others might, on certain conditions, become part of the new state; and the provisions of the constitution of the new state concerning those counties were an acceptance of that proposition.<sup>22</sup>

**Same—Conditions of Transfer.**—The condition of the agreement on which the transfer of these two counties was to be made was, that a majority of the votes cast on that question in the counties should be found in favor of the proposition.<sup>23</sup>

18. **As authority for reconstruction measures.**—*Texas v. White*, 7 Wall. 700, 19 L. Ed. 227; *White v. Hart*, 13 Wall. 646, 651, 20 L. Ed. 685.

19. **New states; consent of old state to division of territory.**—*Wedding v. Meyler*, 192 U. S. 573, 581, 48 L. Ed. 570; *Louisiana v. Mississippi*, 202 U. S. 1, 40, 50 L. Ed. 913.

20. **Different acts of admission not construed in *pari materia*.**—*Louisiana v. Mississippi*, 202 U. S. 1, 41, 50 L. Ed. 913.

As the act admitting Mississippi was passed five years after the Louisiana act, congress, after the admission of Louisiana, could not take away any portion of that state and give it to the state of Mississippi. The rule, *Qui prior est tempore, potior in jure*, applied, and held that § 3 of article 7 of the constitution does not permit the claims of any particular state to be prejudiced by the exercise of the

power of congress therein conferred. *Louisiana v. Mississippi*, 202 U. S. 1, 40, 50 L. Ed. 913.

21. **Congress powerless to act without consent of old state.**—*Green v. Biddle*, 8 Wheat. 1, 87, 5 L. Ed. 547; *Wedding v. Meyler*, 192 U. S. 573, 581, 48 L. Ed. 570.

Although congress might have refused its consent to the proposed separation of Kentucky from Virginia, they had no authority to declare Kentucky a separate and independent state without the assent of Virginia, or upon terms variant from those which Virginia had prescribed. *Green v. Biddle*, 8 Wheat. 1, 87, 5 L. Ed. 547; *Wedding v. Meyler*, 192 U. S. 573, 581, 48 L. Ed. 570.

22. **Sufficiency of consent; Virginia-West Virginia case.**—*Virginia v. West Virginia*, 11 Wall. 39, 20 L. Ed. 67.

23. **Same; conditions of transfer.**—



### Rescission or Setting Aside Consent—Virginia-West Virginia Case.—

The statutes of the Virginia legislature having authorized the governor of the state to certify the result of the voting on that proposition to the state of West Virginia, if, in his opinion, the vote was favorable, and he having certified the fact that it was so, under the seal of the state to the governor of West Virginia, and the latter state having accepted and exercised jurisdiction over those counties for several years, the state of Virginia is bound by her acts in the premises.<sup>24</sup> The state of Virginia cannot, under such circumstances, be permitted to set aside the whole transaction in a court of equity, on the ground that no fair vote was taken, that her own governor was deceived and misled by the election officers, with no charge of fraud or improper conduct on the part of West Virginia, nor can she withdraw her consent two years after the vote was taken and the transfer of the counties accomplished.<sup>25</sup>

(2) *Consent of Congress.—May Be Implied.*—The consent required by the constitution to make valid agreements between the states for division of territory need not necessarily be by an express assent to every proposition of the agreement. In the Virginia-West Virginia case the assent was held to be an irresistible inference from the legislation of congress admitting the state of West Virginia into the Union at the request of the commonwealth of Virginia, with the provisions for the transfer of those counties in the constitution of the new state, and in the acts of the Virginia legislature; that this was an implied consent to the agreement of those states on that subject.<sup>26</sup> And where the consent of the old state is given upon condition, congress necessarily assents to and adopts the condition when it assents to the act in which it is contained.<sup>27</sup>

b. *Equality of States upon Admission into the Union.*—(1) *Generally.*—All the states of the Union, regardless of the date of their admission, stand upon an equal footing under the constitution, invested with equal rights and powers and subject only to similar restrictions.<sup>28</sup> The constitution was a compromise

Virginia *v.* West Virginia, 11 Wall. 39, 40, 20 L. Ed. 67.

24. *Rescission or setting aside consent; Virginia-West Virginia case.*—Virginia *v.* West Virginia, 11 Wall. 39, 40, 20 L. Ed. 67.

25. *Same.*—Virginia *v.* West Virginia, 11 Wall. 39, 40, 20 L. Ed. 67.

26. *Consent of congress may be implied.*—Virginia *v.* West Virginia, 11 Wall. 39, 20 L. Ed. 67. *Accord:* Green *v.* Biddle, 8 Wheat. 1, 86, 5 L. Ed. 547; Virginia *v.* Tennessee, 148 U. S. 503, 37 L. Ed. 537; Wharton *v.* Wise, 153 U. S. 155, 173, 38 L. Ed. 669.

27. *Same; acquiescence in conditions named by old state.*—Wedding *v.* Meyler, 192 U. S. 573, 583, 48 L. Ed. 570; Green *v.* Biddle, 8 Wheat. 1, 27, 5 L. Ed. 547. See, also, Pennsylvania *v.* Wheeling, etc., Bridge Co., 13 How. 518, 566, 14 L. Ed. 249.

28. *Equality of states upon admission.*—New Orleans *v.* De Armas, 9 Pet. 224, 235, 9 L. Ed. 109; Groves *v.* Slaughter, 15 Pet. 449, 10 L. Ed. 800; Pollard *v.* Hagan, 3 How. 212, 11 L. Ed. 565; Permoli *v.* First Municipality, 3 How. 589, 610, 11 L. Ed. 739; McNulty *v.* Batty, 10 How. 72, 78, 13 L. Ed. 303; Strader *v.* Graham, 10 How. 82, 94, 13 L. Ed. 337; Calkin *v.* Cocke, 14 How. 227, 235, 14 L. Ed. 398; Scott *v.* Sandford, 19 How. 393, 508, 509, 15 L. Ed. 691; Withers *v.* Buckley, 20 How. 84, 93, 15 L. Ed. 816; Cummings *v.*

Missouri, 4 Wall. 277, 278, 319, 18 L. Ed. 356; United States *v.* Council, 6 Wall. 514, 516, 18 L. Ed. 933; Texas *v.* White, 7 Wall. 700, 722, 19 L. Ed. 227; Pennoyer *v.* Neff, 95 U. S. 714, 722, 24 L. Ed. 565; United States *v.* McBratney, 104 U. S. 621, 26 L. Ed. 869; Escanaba Co. *v.* Chicago, 107 U. S. 678, 688, 27 L. Ed. 442; Cardwell *v.* American River Bridge Co., 113 U. S. 205, 211, 28 L. Ed. 959; Van Brocklin *v.* Tennessee, 117 U. S. 151, 159, 29 L. Ed. 845; Hamilton *v.* Vicksburg, etc., Railroad, 119 U. S. 280, 30 L. Ed. 393; Huse *v.* Glover, 119 U. S. 543, 546, 30 L. Ed. 487; Sands *v.* Manistee River Imp. Co., 123 U. S. 288, 296, 31 L. Ed. 149; Williamette Iron Bridge Co. *v.* Hatch, 125 U. S. 1, 9, 31 L. Ed. 629; Boyd *v.* Nebraska, 143 U. S. 135, 170, 36 L. Ed. 103; Illinois Cent. R. Co. *v.* Illinois, 146 U. S. 387, 434, 36 L. Ed. 1018; Shively *v.* Bowlby, 152 U. S. 1, 51, 38 L. Ed. 331; Ward *v.* Race Horse, 163 U. S. 504, 41 L. Ed. 244; Draper *v.* United States, 164 U. S. 240, 244, 41 L. Ed. 419; Bolln *v.* Nebraska, 176 U. S. 83, 87, 44 L. Ed. 382; Overby *v.* Gordon, 177 U. S. 214, 222, 44 L. Ed. 741; Stearns *v.* Minnesota, 179 U. S. 223, 245, 45 L. Ed. 162; Mobile Transp. Co. *v.* Mobile, 187 U. S. 479, 483, 47 L. Ed. 266; Hardin *v.* Shedd, 190 U. S. 508, 519, 47 L. Ed. 1156; United States *v.* Winans, 198 U. S. 371, 49 L. Ed. 1089; Kansas *v.* Colorado, 206 U. S. 46, 95, 51 L. Ed. 956.

between all the states of conflicting rights among them,<sup>29</sup> and the object of one of those compromises was to preserve as far as possible the equality of power among the states in the councils of the nation. To this end, the national legislature was created with two branches, in one of which the states are represented equally, and in the other according to their respective populations. As a part of the treaty-making power, the states are equal,<sup>30</sup> and the constitution itself provides that no state, without its consent, shall be deprived of its equal representation in the senate.<sup>31</sup>

(2) *Power of Congress to Impose Conditions Incompatible with the Equality of the State as a Member of the Union.*—In admitting a new state, congress cannot exact the surrender of some attribute inherent in her character as a sovereign, independent state, or indispensable to her equality with her sister states, necessarily implied and guarantied by the very nature of the federal compact.<sup>32</sup>

"One cardinal rule, underlying all the relations of the states to each other, is that of equality of right. Each state stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none." *Kansas v. Colorado*, 206 U. S. 46, 97, 51 L. Ed. 956. Accord: *Pennoy v. Neff*, 95 U. S. 714, 722, 24 L. Ed. 565; *Overby v. Gordon*, 177 U. S. 214, 222, 44 L. Ed. 741.

"There can be no distinction between the several states of the Union in the character of the jurisdiction, sovereignty and dominion which they may possess and exercise over persons and subjects within their respective limits." *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 434, 36 L. Ed. 1018. Accord: *Escanaba Co. v. Chicago*, 107 U. S. 678, 27 L. Ed. 442; *Cardwell v. American River Bridge Co.*, 113 U. S. 205, 28 L. Ed. 959; *Williamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 31 L. Ed. 629; *Boyd v. Nebraska*, 143 U. S. 135, 170, 36 L. Ed. 103; *Ward v. Race Horse*, 163 U. S. 504, 41 L. Ed. 244.

When Alabama was admitted into the Union, it was on an equal footing with the original states, and she succeeded to all the rights of sovereignty, jurisdiction and eminent domain which Georgia possessed at the date of the cession of her western lands to the United States, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States for the temporary purposes provided in the deed of cession from Georgia to the United States and the legislative acts connected with it. *Pollard v. Hagan*, 3 How. 212, 223, 11 L. Ed. 565; *Mobile Transp. Co. v. Mobile*, 187 U. S. 479, 483, 47 L. Ed. 266.

"The state of Illinois was admitted into the Union in 1818 on an equal footing with the original states in all respects. Such was one of the conditions of the cession from Virginia of the territory northwest of the Ohio River, out of which the state was formed. But the equality prescribed would have existed if it had not been thus stipulated." *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 434, 36 L. Ed. 1018

Iowa was admitted into the Union on an equal footing with the original states in all respects. *United States v. Council*, 6 Wall. 514, 516, 18 L. Ed. 933.

Kansas and Colorado stand upon an equal footing in all respects with all the other states in the Union. *Kansas v. Colorado*, 206 U. S. 46, 95, 51 L. Ed. 956.

The third article of the treaty ceding Louisiana to the United States, stipulated that "the inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the meantime, they shall be maintained and protected in the free enjoyment of their liberty, property and the religion which they profess." Held, that this article contemplates two objects; one, that Louisiana shall be admitted into the Union, as soon as possible, upon an equal footing with the other states; and the other, that, until such admission, the inhabitants of the ceded territory shall be protected in the free enjoyment of their liberty, property and religion. *New Orleans v. De Armas*, 9 Pet. 224, 235, 9 L. Ed. 109.

"The republic of Texas was admitted into the Union, as a state, on the 27th of December, 1845. By this act the new state, and the people of the new state, were invested with all the rights, and became subject to all the responsibilities and duties of the original states under the constitution." *Texas v. White*, 7 Wall. 700, 722, 19 L. Ed. 227; *Calkin v. Cocke*, 14 How. 227, 235, 14 L. Ed. 398.

**29. Same; constitution a compromise.**—*Passenger Cases* (opinion of Catron, J.), 7 How. 283, 449, 12 L. Ed. 702.

**30. Same; equality as to treaty-making power.**—*Passenger Cases* (opinion of Catron, J.), 7 How. 283, 449, 12 L. Ed. 702.

**31. Same; equal representation in the senate.**—*Const. U. S., Art. V.*

**32. Power of congress to impose conditions incompatible with equality.**—*Groves v. Slaughter*, 15 Pet. 449, 10 L. Ed. 800; *Pollard v. Hagan*, 3 How. 212, 11 L. Ed. 565; *Permolli v. First Municipality*,



It is the right of the people of a new state to constitute their own social and political system within the limits defined by the federal constitution, without let or hinderance from congress, and any claim on the part of congress of a concurrent or supervisory right in the shaping of the constitution of a new state, or of the right to strike anything therefrom or to add anything thereto, is entirely without constitutional warrant and wholly subversive of the principles upon which our government is founded.<sup>33</sup> This necessarily results from the principle that the constitution operates alike in all states, and that the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty or eminent domain within the limits of a state or elsewhere, except in cases where it is delegated.<sup>34</sup>

**Provision Respecting Navigable Waters Not to Be Construed as Imposing Unequal Restriction.**—The new states admitted into the Union since

3 How. 589, 11 L. Ed. 739; *Scott v. Sandford*, 19 How. 393, 508, 509, 15 L. Ed. 691; *Withers v. Buckley*, 20 How. 84, 93, 15 L. Ed. 816; *Cardwell v. American River Bridge Co.*, 113 U. S. 205, 211, 28 L. Ed. 959.

**33. Same; right of new state to frame its own constitution.**—*Permoli v. First Municipality*, 3 How. 589, 610, 11 L. Ed. 739; *Scott v. Sandford* (opinion of Campbell, J.), 19 How. 393, 508, 509, 15 L. Ed. 691.

The proposal of congress to exclude Missouri from a place in the Union, unless her people would adopt a constitution containing a prohibition upon the subject of slavery, according to the proscription of congress, was entirely without constitutional warrant. This clause to impose a restriction upon the people of Missouri involved a denial of the constitutional relations between the people of the states and congress, and affirmed a concurrent right for the latter with their people, to constitute the social and political system of the new states. A successful maintenance of this clause would have altered the basis of the constitution. The new states would have become members of a Union defined in part by the constitution and in part by congress. They would not have been admitted to "this Union." Their sovereignty would have been restricted by congress as well as by the constitution. The demand was unconstitutional and subversive. (Opinion of Campbell, J.) *Scott v. Sandford* 19 How. 393, 508, 509, 15 L. Ed. 691.

The act of February 20, 1811, authorizing the people of the territory of Orleans to form a constitution and state government, contained, in the third section thereof, two provisos; one in the nature of instructions how the constitution was to be formed, and the other reserving to the United States the property in the public lands, their exemption from state taxation, and the common right to navigate the Mississippi. Held, that no fundamental principle could be added by congress to the state constitution as formed, by way of amendment, since congress had no right to make any part of the state constitution; that the first of

these provisos was fully satisfied by the act of 1812 admitting Louisiana into the Union on an equal footing with the original states; that the conditions and terms referred to in the act of admission referred solely to the proviso involving rights to property and navigation. *Permoli v. First Municipality*, 3 How. 589, 610, 11 L. Ed. 739.

The provision in the act of congress of April 19, 1864, 13 Stats. 47, enabling the people of Nebraska to form a constitution and state government for admission into the Union, that "the members of the convention \* \* \* shall declare, on behalf of the people of said territory, that they adopt the constitution of the United States," and the provision in the state constitution as subsequently framed, that said constitution was formed and that the state of Nebraska asked to be admitted into the Union "on the condition and faith of the terms and proposition stated and specified" in said act of congress, etc., and the subsequent admission of the state upon the prescribed terms, did not mean that the state adopted the federal constitution as its fundamental law—that is, that it did not incorporate the provisions of the federal constitution into the state constitution—but merely that the state acknowledged, as every other state has done, the supremacy of the federal constitution. It is not to be supposed that, by such indefinite language as that quoted from the enabling act, congress intended to differentiate Nebraska from her sister states and impose more onerous conditions upon her than upon them, even if it had possessed the power to do so. *Bolln v. Nebraska*, 176 U. S. 83, 87, 88, 44 L. Ed. 382.

**34. Same.**—*Scott v. Sandford*, 19 How. 393, 508, 15 L. Ed. 691. Accord: *Groves v. Slaughter*, 15 Pet. 449, 10 L. Ed. 800; *Pollard v. Hagan*, 3 How. 212, 11 L. Ed. 565.

Admission on an equal footing with the original states, in all respects whatever, involves equality of constitutional right and power, which cannot thereafter be controlled. *Boyd v. Nebraska*, 143 U. S. 135, 170, 36 L. Ed. 103.



the adoption of the constitution have the same rights as the original states in the tide waters, and in the lands under them, within their respective jurisdiction. The title and rights of riparian or littoral proprietors in the soil below high-water mark, therefore, are governed by the laws of the several states, subject to the rights granted to the United States by the constitution."<sup>35</sup> A provision in an act admitting a new state that all the navigable waters within the said state shall be common highways and forever free, as well to the inhabitants of said state as to the citizens of the United States, without any tax, impost, or duty therefor, is not to be construed as in any way impairing the powers which the state could exercise over such waters if such provision had been omitted. Such a provision can have no effect towards restricting the new state in any of its necessary attributes as an independent and sovereign government, nor can it diminish its perfect equality with the states with which it is to be associated.<sup>36</sup>

**But New State May Enter into Compact by Accepting Conditions of Enabling Act.**—The provisions of an enabling act and the constitution may, in form at least, make a compact between the United States and the state.<sup>37</sup> "In an inquiry as to the validity of such a compact, this distinction must at the outset be noticed. There may be agreements or compacts attempted to be entered into between two states, or between a state and the nation, in reference to political rights and obligations, and there may be those solely in reference to property belonging to one or the other. That different considerations may underlie the question as to the validity of these two kinds of compacts or agreements is obvious. It has often been said that a state admitted into the Union enters therein in full equality with all the others, and such equality may forbid any agreement or compact limiting or qualifying political rights and obligations; whereas, on the other hand, a mere agreement in reference to property involves no question of equality of status, but only of the power of a state to deal with

**35. Same; provisions regarding navigable waters; effect upon equality of states.**

—*Goodtitle v. Kibbe*, 9 How. 471, 13 L. Ed. 220; *Hallett v. Beebe*, 13 How. 25, 14 L. Ed. 35; *Weber v. Board of Commissioners*, 18 Wall. 57, 21 L. Ed. 798; *Knight v. United States Loan Ass'n*, 142 U. S. 161, 183, 35 L. Ed. 974; *Shively v. Bowlby*, 150 U. S. 1, 26, 38 L. Ed. 331.

**36. Same.**—*Pollard v. Hagan*, 3 How. 212, 223, 11 L. Ed. 565; *Goodtitle v. Kibbe*, 9 How. 471, 13 L. Ed. 220; *Hallett v. Beebe*, 13 How. 25, 14 L. Ed. 35; *Withers v. Buckley*, 20 How. 84, 93, 15 L. Ed. 816; *Weber v. Board of Commissioners*, 18 Wall. 57, 21 L. Ed. 798; *Escanaba Co. v. Chicago*, 107 U. S. 678, 688, 27 L. Ed. 442; *Cardwell v. American River Bridge Co.*, 113 U. S. 205, 211, 28 L. Ed. 959; *Huse v. Glover*, 119 U. S. 543, 30 L. Ed. 487; *Sands v. Manistee River Imp. Co.*, 123 U. S. 288, 296, 31 L. Ed. 149; *Williamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 9, 31 L. Ed. 629; *Knight v. United States Land Ass'n*, 142 U. S. 161, 183, 35 L. Ed. 974; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 435, 36 L. Ed. 1018; *Shively v. Bowlby*, 152 U. S. 1, 57, 38 L. Ed. 331. See, also, ante, "Local Municipal Jurisdiction, Sovereignty and Eminent Domain," VI, D. 3, c. (4), (b).

"The act admitting California declares that she is 'admitted into the Union on an equal footing with the original states

in all respects whatever.' She was not, therefore, shorn by the clause as to navigable waters within her limits of any of the powers which the original states possessed over such waters within their limits." *Cardwell v. American River Bridge Co.*, 113 U. S. 205, 212, 28 L. Ed. 929.

The act of March 1, 1817, admitting the state of Mississippi into the Union, and prescribing the free navigation of the Mississippi river and the navigable tributaries leading into the same, had and could have, no effect to restrict the new state or any of its necessary attributes as an independent sovereign government nor inhibit or diminish its perfect equality with the states with which it is associated. It cannot be imputed to congress that they ever designed to forbid, or to withhold from the state of Mississippi, the power of improving the inferior of that state, by means either of roads or canals, or by regulating the rivers within its territorial limits, although the plan of improvements adopted might embrace or affect the course or the flow of rivers situated within the interior of the state. Such an attempt on the part of congress would have been unconstitutional and inoperative. *Withers v. Buckley*, 20 How. 84, 93, 15 L. Ed. 816.

**37. But new state may enter into compact.**—*Stearns v. Minnesota*, 179 U. S. 223, 244, 45 L. Ed. 162.

the nation or with any other state in reference to such property.”<sup>38</sup> “That a state and the nation are competent to enter into an agreement of such a nature with one another has been affirmed in past decisions of the federal supreme court, and that they have been frequently made in the admission of new states, as well as subsequently thereto, is a matter of history.”<sup>39</sup>

**Congress May Make Grants Which Will Be Binding upon the New State.**—And so congress may make a grant of land or other right in a territory which will be binding upon it after its admission as one of the states of the Union.<sup>40</sup>

(3) *Effect of Admission upon Laws and Ordinances Respecting the Territories.*—Upon the admission of a state into the Union, the territorial government, together with the ordinances and regulations of congress, whether under the old confederation or the new constitution, for the government of the territories in general, or of the newly admitted state, while it was yet a territory, in particular, cease to exist. The state being admitted upon an equal footing with the other states of the Union, is to be governed, after admission, by its own constitution and laws, and not by the acts of the territorial legislature, nor the rules

**38. Same; distinctions; compacts relating to property and compacts affecting political status.**—*Stearns v. Minnesota*, 179 U. S. 223, 245, 45 L. Ed. 162.

**39. Same.**—*Stearns v. Minnesota*, 179 U. S. 223, 245, 45 L. Ed. 162. See, also, *The Kansas Indians*, 5 Wall. 737, 757, 18 L. Ed. 667; *Beecher v. Wetherby*, 95 U. S. 517, 24 L. Ed. 440.

Thus in the case of *The Kansas Indians*, 5 Wall. 737, 757, 18 L. Ed. 667, it was said: “There can be no question of state sovereignty in the case, as Kansas accepted her admission into the family of states on condition that the Indian rights should remain unimpaired, and the general government at liberty to make any regulation respecting them, their lands, property, or other rights, which it would have been competent to make if Kansas had not been admitted into the Union. \* \* \* While the general government has a superintending care over their interests, and continues to treat with them as a nation, the state of Kansas is estopped from denying their title to it. She accepted this status when she accepted the act admitting her into the Union.”

And so a new state by accepting conditions stated in an enabling act may enter into a valid compact securing to the United States full control of the disposition of the public lands within the limits of the state. *Stearns v. Minnesota*, 179 U. S. 223, 250, 251, 45 L. Ed. 162.

And within the scope of the power reserved to congress by such a compact, that body may grant to a railroad company public lands within the state to aid in the construction of its road, withholding not only the legal title, but also exemption from state taxation until such time as some one shall pay into the treasury of the company the full value of the land in money to be used in the construction of its road. And any statute passed by the state in violation of such compact, or in

violation of the rights given to the railroad company by congress in virtue of its reserved powers thereunder, will be declared null and void. *Stearns v. Minnesota*, 179 U. S. 223, 250, 251, 45 L. Ed. 162.

**40. Congress may make grants binding upon new state.**—*Shively v. Bowlby*, 152 U. S. 1, 38 L. Ed. 331; *United States v. Winans*, 198 U. S. 371, 383, 49 L. Ed. 1089. See, also, *Stearns v. Minnesota*, 179 U. S. 223, 244, 45 L. Ed. 162.

Congress has the power to make grants of lands below high-water mark of navigable waters in any territory of the United States whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects for which the United States holds the territory. And such grants will be binding upon the territory after its admission into the Union as a state. *Shively v. Bowlby*, 152 U. S. 1, 38 L. Ed. 331.

It is competent for congress, in treating with Indian tribes for a surrender of their lands, to reserve to the Indians, by stipulations in the treaty, the right of taking fish at all usual and accustomed places in common with the citizens of the territory, and the right of erecting temporary buildings for curing them; and this right, so reserved, survives the admission of the territory into the Union as a state and the private acquisition of lands bordering upon the streams where the right of fishery is to be exercised. Such right cannot be denied or disregarded upon the theory that the state was admitted upon an equal footing with the original states, and that it was not competent for congress to impose any condition or make any treaty stipulation implying the contrary. *United States v. Winans*, 198 U. S. 371, 49 L. Ed. 1089.



and regulations enacted by congress for the government of the territories.<sup>41</sup>

**The Ordinance of 1787.**—The ordinance of 1787 for the government of the Northwest Territory was passed before the constitution took effect, although it appears by various acts of congress to have been afterwards treated as in force in the territories, except as modified by them.<sup>42</sup> But from the very conditions on which the states formed out of the Northwest Territory were admitted into the Union, the provisions of the ordinance became inoperative except as adopted by them. All the states thus formed were, in the language of the resolutions or acts of congress, "admitted into the Union on an equal footing with the original states in all respects whatever."<sup>43</sup>

41. *Cardwell v. American River Bridge Co.*, 113 U. S. 205, 28 L. Ed. 959; *Van Brocklin v. Tennessee*, 117 U. S. 151, 159, 29 L. Ed. 845; *Hamilton v. Vicksburg, etc., Railroad*, 119 U. S. 280, 30 L. Ed. 393; *Huse v. Glover*, 119 U. S. 543, 546, 30 L. Ed. 487; *Sands v. Manistee River Imp. Co.*, 123 U. S. 288, 296, 31 L. Ed. 149; *Williamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 9, 31 L. Ed. 629; *De Lima v. Bidwell*, 182 U. S. 1, 197, 45 L. Ed. 1041.

Upon the admission of a state into the Union, the territorial government ceases to exist, and all authority under it, including the laws organizing its courts of justice and providing for a revision of their judgments in the federal supreme court by appeals or writs of error. *McNulty v. Batty*, 10 How. 72, 78, 13 L. Ed. 303.

The regulations of congress, under the old confederation or the present constitution, for the government of a particular territory, could have no force beyond its limits. Such regulations could not restrict the power of the states within their respective territories, nor in any manner interfere with their laws and institutions; since upon the admission of a state into the Union, it is placed upon an equality with the existing states, governed by its own constitution and laws, all territorial regulations having ceased upon its admission. *Strader v. Graham*, 10 How. 82, 94, 13 L. Ed. 337.

Upon the admission of a state into the Union, it becomes entitled to, and possesses, all the rights of dominion and sovereignty which belong to the original states; it stands upon an equal footing with the original states in all respects whatsoever, regardless of what might have been the restrictions placed upon its powers as a territorial government. *Escanaba Co. v. Chicago*, 107 U. S. 678, 27 L. Ed. 442; *Cardwell v. American River Bridge Co.*, 113 U. S. 205, 28 L. Ed. 959; *Williamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 31 L. Ed. 629; *Ward v. Race Horse*, 163 U. S. 504, 41 L. Ed. 244; *Bolln v. Nebraska*, 176 U. S. 83, 88, 44 L. Ed. 382; *De Lima v. Bidwell*, 182 U. S. 1, 197, 45 L. Ed. 1041.

**Effect of admission upon treaties and compacts respecting the territories.**—The article of the treaty ceding Louisiana to the United States which provided that its

inhabitants should be maintained and protected in the free enjoyment of their liberty, property and the religion which they professed, ceased to operate when Louisiana became a member of the Union upon an equal footing with the other states. *New Orleans v. De Armas*, 9 Pet. 224, 235, 9 L. Ed. 109.

The compact between Virginia and the United States that slavery should be prohibited in the northwest territory ceded by Virginia, and which provision was embodied in the ordinance of 1787, only meant that slavery should not exist while the United States exercised the power of government in the territorial form, for when a new state came in, it might do so with or without slavery. (*Opinion of Catron, J.*) *Scott v. Sandford*, 19 How. 393, 523, 15 L. Ed. 691.

42. **Ordinance of 1787.**—*Escanaba Co. v. Chicago*, 107 U. S. 678, 27 L. Ed. 442; *Huse v. Glover*, 119 U. S. 543, 546, 30 L. Ed. 487.

43. **Same.**—*Pollard v. Hagan*, 3 How. 212, 11 L. Ed. 565; *Permoli v. First Municipality*, 3 How. 589, 600, 11 L. Ed. 739; *Escanaba Co. v. Chicago*, 107 U. S. 678, 688, 27 L. Ed. 442; *Cardwell v. American River Bridge Co.*, 113 U. S. 205, 28 L. Ed. 959; *Van Brocklin v. Tennessee*, 117 U. S. 151, 159, 29 L. Ed. 845; *Huse v. Glover*, 119 U. S. 543, 546, 30 L. Ed. 487; *Sands v. Manistee River Imp. Co.*, 123 U. S. 288, 296, 31 L. Ed. 149; *Williamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 9, 31 L. Ed. 629.

The act enabling the people of Illinois territory to form a constitution and state government, and the resolution of congress admitting the state, into the Union, referred to the principles of the ordinance, according to which the constitution was to be formed; but its provisions could not control the powers and authority of the state after her admission. Whatever the limitation of her powers as a government whilst in a territorial condition, whether from the ordinance of 1787 or the legislation of congress, it ceased to have any operative force, except as voluntarily adopted by her after she became a state of the Union; for on her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original states. The language of the resolution admitting her was, that she "is admitted



c. *Date of Admission*.—See footnotes.<sup>44</sup>

7. THE UNION INDISSOLUBLE; THE STATES INDESTRUCTIBLE—*a. The Union Indissoluble*—(1) *Generally*.—The Union of the states never was a purely artificial and arbitrary relation. It began among the colonies and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form, and character, and sanction from the articles of confederation. By these the Union was solemnly declared to “be perpetual.” And, when these articles were found to be inadequate to the exigencies of the country, the constitution was ordained “to form a more perfect Union.”<sup>45</sup> It created not a confederacy of states, but a government of individuals. It assumed that the government and the Union which it created, and the states which were incorporated into the Union, would be indestructible and perpetual; and as far as human means could accomplish such a work, it intended to make them so.<sup>46</sup> The doctrine so long contended for, that the federal Union was a mere compact of states, and that the states, if they chose, might annul or disregard the acts of the national legislature, or might secede from the Union at their pleasure, and that the general government had no power to coerce them into submission to the constitution, should be regarded as definitely and forever overthrown.<sup>47</sup>

into the Union on an equal footing with the original states in all respects whatever.” *Escanaba Co. v. Chicago*, 107 U. S. 678, 27 L. Ed. 442; *Huse v. Glover*, 119 U. S. 543, 546, 30 L. Ed. 487. Accord: *Pollard v. Hagan*, 3 How. 212, 11 L. Ed. 565; *Permol v. First Municipality*, 3 How. 589, 11 L. Ed. 739; *Strader v. Graham*, 10 How. 82, 13 L. Ed. 337; *Cardwell v. American River Bridge Co.*, 113 U. S. 205, 28 L. Ed. 959; *Hamilton v. Vicksburg, etc., Railroad*, 119 U. S. 280, 30 L. Ed. 393.

The declaration contained in the ordinance of 1787, for the government of the territory of the United States northwest of the Ohio River, so far as the latter relates to the navigable waters flowing into the Mississippi and the St. Lawrence, with respect to the state of Illinois, was superseded by her admission into the Union, for she then became entitled to, and possessed of all the rights of domain and sovereignty which belonged to the original states. *Escanaba Co. v. Chicago*, 107 U. S. 678, 27 L. Ed. 442.

Michigan, on her admission, became, entitled to and possessed of all the rights of sovereignty and dominion which belonged to the original states, and could at any time afterwards exercise full control over its navigable waters except as restrained by the constitution of the United States and laws of congress passed in pursuance thereof. *Sands v. Manistee River Imp. Co.*, 123 U. S. 288, 296, 31 L. Ed. 149, affirming *Huse v. Glover*, 119 U. S. 543, 30 L. Ed. 487.

The act of 1805, ch. 83, extending to the inhabitants of Orleans territory the rights, privileges and advantages secured to the Northwest territory by the ordinance of 1787, had no further force after the adoption of the state constitution of Louisiana, than other acts of congress organizing the territorial government, and standing in connection with the ordi-

nance. None of these acts continued in force in the state of Louisiana after its admission into the Union, unless they were adopted by the state constitution. *Permol v. First Municipality*, 3 How. 589, 610, 11 L. Ed. 739.

44. *Admission of Texas*.—The state of Texas was admitted into the Union on the 29th of December, 1845 (9 Stat. At Large 108), and from that day the laws of the United States were extended over it. *Benner v. Porter*, 9 How. 235, 13 L. Ed. 119; *Calkin v. Cocke*, 14 How. 227, 235, 14 L. Ed. 398; *Texas v. White*, 7 Wall. 700, 722, 19 L. Ed. 227.

45. *The union indissoluble*.—*Texas v. White*, 7 Wall. 700, 19 L. Ed. 227.

46. *Same*.—*White v. Hart*, 13 Wall. 646, 650, 20 L. Ed. 685.

47. *Same*.—*Scott v. Sandford*, 19 How. 393, 448, 15 L. Ed. 691; *Texas v. White*, 7 Wall. 700, 19 L. Ed. 227; *Hickman v. Jones*, 9 Wall. 197, 200, 19 L. Ed. 551; *Legal Tender Cases* (concurring opinion of Bradley, J.), 12 Wall. 457, 555, 20 L. Ed. 287; *White v. Hart*, 13 Wall. 646, 650, 20 L. Ed. 685.

“The union of the states, for all the purposes of the constitution, is as perfect and indissoluble as the union of the internal parts of the states themselves; and nothing but revolutionary violence can, in either case, destroy the ties which hold the parts together.” *Hickman v. Jones*, 9 Wall. 197, 200, 19 L. Ed. 551.

When Texas became one of the United States, she entered into an indissoluble relation. The union between Texas and the other states was as complete, as perpetual, and as indissoluble as the union between the original states. There was no place for reconsideration or revocation, except through revolution or through consent of the states. *Texas v. White*, 7 Wall. 700, 19 L. Ed. 227.

(2) *Secession Ordinances Void; Seceding States Never Out of the Union.*—Considered as transactions under the constitution, the ordinances of secession passed by the seceding states were null and void, and wholly without operation in law. The states enacting them did not cease to be states of the Union, nor their citizens to be citizens of the Union. At no time were the rebellious states out of the pale of the Union.<sup>48</sup>

(3) *Constitutional Status of Seceding States and Their Inhabitants*—(a) *Generally.*—The rights of the seceding states under the constitution were suspended, but not destroyed. Their constitutional duties and obligations were unaffected and remained the same.<sup>49</sup>

**Inhabitants Considered as Enemies.**—Persons residing in the rebel states at any time during the civil war were considered as enemies, during such residence, without regard to their personal sentiments or dispositions.<sup>50</sup> But this was never held in respect to persons faithful to the Union, who escaped from those states and subsequently resided in the loyal states, or in neutral countries. Such citizens of the United States lost no rights as citizens by reason of temporary and constrained residence in the rebellious portion of the country.<sup>51</sup>

(b) *The Confederate States Government and Its Status.*—See the title STATES.

**48. Secession ordinances; validity.**—*White v. Cannon*, 6 Wall. 443, 450, 18 L. Ed. 923; *Texas v. White*, 7 Wall. 700, 19 L. Ed. 227; *Hickman v. Jones*, 9 Wall. 197, 19 L. Ed. 551; *White v. Hart*, 13 Wall. 646, 651, 20 L. Ed. 685; *Gunn v. Barry*, 15 Wall. 610, 623, 21 L. Ed. 212; *Dewing v. Perdicaries*, 96 U. S. 193, 24 L. Ed. 654; *Keith v. Clark*, 97 U. S. 454, 24 L. Ed. 1071; *Daniels v. Tearney*, 102 U. S. 415, 418, 26 L. Ed. 187.

Considered as transactions under the constitution, the ordinance of secession, adopted by the convention and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null. They were utterly without operation in law. The state did not cease to be a state, nor her citizens to be citizens of the Union. *Texas v. White*, 7 Wall. 700, 19 L. Ed. 227.

The ordinance of secession passed by the state of Louisiana, on the 26th day of January, 1861, was a nullity, and did not affect the previous jurisdiction of the supreme court of that state, or its relation to the appellate power of the supreme court of the United States. *White v. Cannon*, 6 Wall. 443, 450, 18 L. Ed. 923.

The Virginia ordinance of secession was void. *Daniels v. Tearney*, 102 U. S. 415, 418, 26 L. Ed. 187; *Texas v. White*, 7 Wall. 700, 19 L. Ed. 227; *Hickman v. Jones*, 9 Wall. 197, 19 L. Ed. 551; *Dewing v. Perdicaries*, 96 U. S. 193, 24 L. Ed. 654.

Georgia, since she came into the Union as one of the original thirteen states, has never been a state out of the Union. *Gunn v. Barry*, 15 Wall. 610, 623, 21 L. Ed. 212.

The political society which, in 1796, was organized and admitted into the Union by the name of Tennessee, has to this time remained the same body politic. Its attempt to separate itself from that Union

did not destroy its identity as a state, nor free it from the binding force of the constitution of the United States. *Keith v. Clark*, 97 U. S. 454, 24 L. Ed. 1071.

**49. Constitutional status of seceding states and their inhabitants.**—*White v. Hart*, 13 Wall. 646, 651, 20 L. Ed. 685; *Gunn v. Barry*, 15 Wall. 610, 623, 21 L. Ed. 212; *Keith v. Clark*, 97 U. S. 454, 24 L. Ed. 1071.

**Same—Impairing obligation of contracts.**—They could not then pass a law impairing the obligation of a contract any more than before the rebellion, or now, since. *White v. Hart*, 13 Wall. 646, 20 L. Ed. 685.

**Right of seceding state to sue in United States supreme court.**—But in order to the exercise, by a state, of the right to sue in the United States supreme court, there needs to be a state government, competent to represent the state in its relations with the national government, so far at least as the institution and prosecution of a suit is concerned. While Texas was controlled by a government hostile to the United States, and in affiliation with a hostile confederation, waging war upon the United States, no suit, instituted in her name, could be maintained in that court. It was necessary that the government and the people of the state should be restored to peaceful relations to the United States, under the constitution, before such a suit could be prosecuted. *Texas v. White*, 7 Wall. 700, 19 L. Ed. 227.

**50. Inhabitants considered as enemies.**—*Prize Cases*, 2 Black 635, 666, 687, 688, 17 L. Ed. 459; *The Venice*, 2 Wall. 258, 17 L. Ed. 866; *Mrs. Alexander's Cotton*, 2 Wall. 404, 17 L. Ed. 915; *The Peterhoff*, 5 Wall. 28, 60, 18 L. Ed. 564.

**51. Same—Persons escaping from seceding states.**—*The Peterhoff*, 5 Wall. 28, 60, 18 L. Ed. 564.



(c) *Validity of Acts of Confederate and Secession Governments.*—See the title STATES.

(d) *Reconstruction and Readmission of Seceding States*—(aa) *The Provisional Governments.*—So long as the war continued, it cannot be denied that the president, as commander in chief, might institute temporary governments within insurgent districts, occupied by the national forces, or take provisional measures, in any state, for the restoration of a state government faithful to the Union, employing, however, in such efforts, only such means and agents as were authorized by the constitution and laws.<sup>52</sup> These governments were provisional in their nature; they were existing at the time of the enactment of the reconstruction measures, and were capable of continuance.<sup>53</sup>

(bb) *The Reconstruction Governments.*—**Authority for Reconstruction Measures.**—The power of congress to suppress the rebellion and to enact the reconstruction measures for the restoration and establishment of the local governments in the seceding states and the renewal of their relations to the general government, is to be found in the power granted to suppress insurrection and in the duty imposed to guarantee to every state in the Union a republican form of government.<sup>54</sup>

**Reconstruction Constitutions Adopted without Coercion.**—The constitutions adopted by the seceding states as conditions precedent to their readmission, are to be deemed to have been adopted without the coercion or dictation of congress.<sup>55</sup>

b. *The States Indestructible.*—But the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence or of the right of self-government by the states. The people of each state compose a state, having its own government, and endowed with all the functions essential to separate and independent existence, and without the states in union there could be no such political body as the United States. Not only can there be no loss of separate and independent autonomy to the states, through their union under the constitution, but it may be not unreasonably said that the preservation of the states, and the maintenance of their governments, are as much within the

**52. Reconstruction and readmission; provisional governments.**—*Texas v. White*, 7 Wall. 700, 19 L. Ed. 227; *The Grapeshot*, 9 Wall. 129, 19 L. Ed. 651.

It was within the constitutional authority of the president, as commander in chief, to establish therein provisional courts for the hearing and determination of all causes arising under the laws of the state or of the United States. The provisional court for the state of Louisiana, organized under the proclamation of October 20, 1862, was, therefore, rightfully authorized to exercise such jurisdiction. *The Grapeshot*, 9 Wall. 129, 19 L. Ed. 651.

**53. Same.**—*Texas v. White*, 7 Wall. 700, 743, 19 L. Ed. 227.

**54. Authority for reconstruction measures.**—*Texas v. White*, 7 Wall. 700, 19 L. Ed. 227; *White v. Hart*, 13 Wall. 646, 651, 20 L. Ed. 685.

"The power exercised in putting down the late rebellion is given expressly by the constitution to congress. That body made the laws and the president executed them. The granted power carried with it not only the right to use the requisite means, but it reached further and carried with it also authority to guard against the

renewal of the conflict, and to remedy the evils arising from it in so far as that could be effected by appropriate legislation." *White v. Hart*, 13 Wall. 646, 651, 20 L. Ed. 685.

**Suit authorized by reconstruction government.**—The several executives of Texas, reorganized partially, at least, under the authority of the president and of congress, having sanctioned a suit brought in the name of the state, the necessary conclusion is that it was instituted and prosecuted by competent authority. *Texas v. White*, 7 Wall. 700, 19 L. Ed. 227.

**55. Reconstruction constitutions.**—*White v. Hart*, 13 Wall. 646, 20 L. Ed. 685.

The constitution adopted by Georgia, A. D. 1868, by which it was provided that "no court or officer shall have, nor shall the general assembly give, jurisdiction to try, or give judgment on, or enforce any debt, the consideration of which was a slave, or the hire thereof," is to be regarded by the court as voluntarily adopted by the state named, and not as adopted under any dictation and coercion of congress. *White v. Hart*, 13 Wall. 646, 20 L. Ed. 685.

The congress having received and recognized the said constitution as the vol-



design and care of the constitution as the preservation of the Union and the maintenance of the national government. The constitution, in all its provisions, looks to an indestructible Union, composed of indestructible states. These doctrines are at the basis of our constitutional government, and cannot be disregarded with safety.<sup>56</sup>

8. NULLIFICATION.—The doctrine that the states might annul or disregard the acts of the national legislature is to be regarded as definitely and finally overthrown.<sup>57</sup>

9. RELATIONS OF THE STATES TO ONE ANOTHER—a. *In What Respect States Foreign to One Another*—(1) *Generally*.—The states of the Union are sovereign within their respective boundaries, save that portion of power which they have granted to the federal government, and foreign to each other for all but federal purposes. This has been declared to be a fundamental principle of the constitution.<sup>58</sup>

untary and valid offering of the state of Georgia, the supreme court is concluded by such action of the political department of the government. *White v. Hart*, 13 Wall. 646, 20 L. Ed. 685.

56. **The states indestructible.**—*Passenger Cases* (opinion of Wayne, J.), 7 How. 283, 429, 12 L. Ed. 702; *Scott v. Sandford*, 19 How. 393, 448, 15 L. Ed. 691; *Lane County v. Oregon*, 7 Wall. 71, 76, 19 L. Ed. 101; *Texas v. White*, 7 Wall. 700, 725, 19 L. Ed. 227; *Collector v. Day*, 11 Wall. 113, 125, 20 L. Ed. 122; *Railroad Co. v. Peniston*, 18 Wall. 5, 31, 21 L. Ed. 787; *Smith v. Alabama*, 124 U. S. 465, 476, 31 L. Ed. 508; *Plumley v. Massachusetts*, 155 U. S. 461, 478, 39 L. Ed. 223; *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 560, 39 L. Ed. 759; *Pollock v. Farmers' Loan, etc., Co.* (rehearing), 158 U. S. 601, 607, 39 L. Ed. 1108; *Northern Securities Co. v. United States*, 193 U. S. 197, 348, 48 L. Ed. 679; *South Carolina v. United States*, 199 U. S. 437, 453, 50 L. Ed. 261. See, also, ante, "Dual Nature of Government," VI, D, 1; "Generally," VI, D, 3, c, (1); "Neither Government to Intrude upon the Jurisdiction, Interfere with the Operation, nor Burden the Instrumentalities of the Other," VI, D, 3, c, (6), (b), et seq.

"The people of each state compose a state, having its own government, and endowed with all the functions essential to separate and independent existence. The states disunited might continue to exist. Without the states in union there could be no such political body as the United States." *Lane County v. Oregon*, 7 Wall. 71, 19 L. Ed. 101; *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 560, 39 L. Ed. 759.

"The states are, and they must ever be, co-existent with the national government. Neither may destroy the other. Hence the federal constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the states, or prevent their efficient exercise." *Railroad Co. v. Peniston*, 18 Wall. 5, 31, 21 L. Ed. 787.

"In many articles of the constitution

the necessary existence of the states, and, within their proper spheres, the independent authority of the states, is distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them and to the people all powers not expressly delegated to the national government are reserved." *Lane County v. Oregon*, 7 Wall. 71, 76, 19 L. Ed. 101; *Smith v. Alabama*, 124 U. S. 465, 476, 31 L. Ed. 508; *Plumley v. Massachusetts*, 155 U. S. 461, 472, 39 L. Ed. 223; *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 560, 39 L. Ed. 759.

"The principle upon which our governments rest, and upon which alone it continues to exist, is the union of the states, sovereign and independent within their own limits in their internal and domestic concerns, and bound together as one people by a general government, possessing certain enumerated and restricted powers delegated to it by the people of the several states." *Scott v. Sandford*, 19 How. 393, 448, 15 L. Ed. 691.

"That is a very narrow view of the constitution which supposes that any political sovereign right given by it can be exercised, or was meant to be used, by the United States in such a way as to dissolve, or even disquiet the fundamental organization of either of the states. The constitution is to be interpreted by what was the condition of the parties to it when it was formed, by their object and purpose in forming it, and by the actual recognition in it of the dissimilar institutions of the states. The exercise of constitutional power by the United States, or the consequences of its exercise, are not to be concluded by the summary logic of ifs and syllogisms." (Opinion of Wayne, J.) *Passenger Cases*, 7 How. 283, 428, 429, 12 L. Ed. 702.

57. **Nullification.**—*Legal Tender Cases* (concurring opinion of Bradley, J.), 12 Wall. 457, 555, 20 L. Ed. 287.

The legislature of a state cannot annul the judgments, nor determine the jurisdiction, of the courts of the United States. *United States v. Peters*, 5 Cranch 115, 3 L. Ed. 53.

58. **Relation of states to one another;**

(2) *No State to Exercise Its Legislative or Judicial Powers within the Limits of Another.*—The legislative and judicial authority of each state is bounded by its territorial limits and cannot be exercised with respect to persons or property within other states. No state tribunal can extend its processes beyond state limits, so as to subject either persons or property; and state laws have no operation beyond state lines; except so far as is allowed by comity. Any exertion of authority of this sort beyond this limit is a mere nullity, and incapable of binding such persons or property in any other tribunals.<sup>59</sup>

**state sovereignty.**—*Rhode Island v. Massachusetts*, 12 Pet. 657, 720, 9 L. Ed. 1233; *United States Bank v. Daniel*, 12 Pet. 32, 33, 9 L. Ed. 989; *Buckner v. Finley*, 2 Pet. 586, 590, 7 L. Ed. 528. See, also, ante, "States Sovereign to What Extent," VI, D, 3, b, (6), et seq.

Although the states are members of the American Union, formed by the federal constitution, each retains its individual sovereignty, and with respect to their municipal regulations they are to each other foreign. *Buckner v. Finley*, 2 Pet. 586, 591, 7 L. Ed. 528; *Cherokee Nation v. Georgia* (opinion of Baldwin, J.), 5 Pet. 1, 47, 8 L. Ed. 25.

One state is not bound to make its laws harmonize with those of another. *Kidd v. Alabama*, 188 U. S. 730, 732, 47 L. Ed. 669; *Kansas v. Colorado*, 206 U. S. 46, 95, 51 L. Ed. 956.

States of the Union, though free and independent, appear not to be such distinct sovereignties as have no relation to each other except by general treaties and alliances, but are bound together by common interests and are jointly represented and directed as to national purposes by one body as the head of the whole. *Camp v. Lockwood*, 1 Dall. 393, 403, 1 L. Ed. 192.

"The states of this Union cannot make war upon each other. They cannot 'grant letters of marque and reprisal.' They cannot make reprisal on each other by embargo. They cannot enter upon diplomatic relations and make treaties. As Mr. Justice Baldwin remarked in *Rhode Island v. Massachusetts*, 12 Pet. 657, 726, 9 L. Ed. 1233: 'Bound hand and foot by the prohibitions of the constitution, a complaining state can neither treat, agree, nor fight with its adversary, without the consent of congress; a resort to the judicial power is the only means left for legally adjusting, or persuading a state which has possession of disputed territory, to enter into an agreement or compact, relating to a controverted boundary. Few, if any, will be made, when it is left to the pleasure of the state in possession; but when it is known that some tribunal can decide on the right, it is most probable that controversies will be settled by compact.'" *Kansas v. Colorado*, 185 U. S. 125, 143, 46 L. Ed. 838.

<sup>59</sup> **State powers not to be exercised within the limits of other states.**—*Young v. Bank*, 4 Cranch 384, 397, 2 L. Ed. 655;

*Terrett v. Taylor*, 9 Cranch 43, 52, 3 L. Ed. 650; *United States v. Bevans*, 3 Wheat. 336, 386, 4 L. Ed. 404; *Wilkinson v. Lealand*, 2 Pet. 627, 7 L. Ed. 542; *Rhode Island v. Massachusetts*, 12 Pet. 657, 733, 9 L. Ed. 1233; *Martin v. Waddell*, 16 Pet. 367, 10 L. Ed. 997; *Pollard v. Hagan*, 3 How. 212, 11 L. Ed. 565; *D'Arcy v. Ketchum*, 11 How. 165, 13 L. Ed. 648; *Den v. Jersey Co.*, 15 How. 426, 14 L. Ed. 757; *Smith v. Maryland*, 18 How. 71, 15 L. Ed. 269; *Scott v. Sandford*, 19 How. 393, 460, 461, 15 L. Ed. 691; *Ableman v. Booth*, 21 How. 506, 16 L. Ed. 169; *Kentucky v. Dennison*, 24 How. 66, 107, 16 L. Ed. 717; *McCool v. Smith*, 1 Black 459, 17 L. Ed. 218; *Christmas v. Russell*, 5 Wall. 290, 301, 18 L. Ed. 475; *Railroad Co. v. Jackson*, 7 Wall. 262, 19 L. Ed. 881; *St. Louis v. Ferry Co.*, 11 Wall. 423, 20 L. Ed. 192; *Tarble's Case*, 13 Wall. 397, 405, 20 L. Ed. 597; *State Tax on Foreign-Held Bonds*, 15 Wall. 300, 319, 21 L. Ed. 179; *Delaware Railroad Tax*, 18 Wall. 206, 21 L. Ed. 888; *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 499, 22 L. Ed. 189; *Pennoyer v. Neff*, 95 U. S. 714, 722, 24 L. Ed. 565; *Hoyt v. Sprague*, 103 U. S. 613, 630, 26 L. Ed. 585; *Bonaparte v. Tax Court*, 104 U. S. 592, 594, 26 L. Ed. 845; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 208, 29 L. Ed. 158; *Ex parte Reggel*, 114 U. S. 642, 651, 29 L. Ed. 250; *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, 358, 359, 30 L. Ed. 1187; *Manchester v. Massachusetts*, 139 U. S. 240, 263, 35 L. Ed. 159; *Carpenter v. Strange*, 141 U. S. 87, 106, 35 L. Ed. 640; *Horn Silver Min. Co. v. New York State*, 143 U. S. 305, 315, 36 L. Ed. 164; *Huntington v. Attrill*, 146 U. S. 657, 669, 36 L. Ed. 1123; *Ashley v. Ryan*, 173 U. S. 436, 440, 38 L. Ed. 773; *New York, etc., R. Co. v. Pennsylvania*, 153 U. S. 628, 646, 38 L. Ed. 846; *Hooper v. California*, 155 U. S. 648, 656, 39 L. Ed. 297; *Chicago, etc., R. Co. v. Chicago*, 166 U. S. 226, 41 L. Ed. 979; *Dewey v. Des Moines*, 173 U. S. 193, 204, 43 L. Ed. 665; *Overby v. Gorden*, 177 U. S. 214, 222, 44 L. Ed. 741; *Louisville, etc., Ferry Co. v. Kentucky*, 188 U. S. 385, 47 L. Ed. 513; *Delaware, etc., R. Co. v. Pennsylvania*, 198 U. S. 341, 358, 49 L. Ed. 1077; *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 204, 50 L. Ed. 150; *Haddock v. Haddock*, 201 U. S. 562, 579, 50 L. Ed. 867; *Kansas v. Colorado*, 206 U. S. 46, 95, 97, 51 L. Ed. 956. See, generally, upon this

(3) *Right of One State to Tax Stock or Bonds of Another.*—There is noth-

subject, the title **CONFLICT OF LAWS**, vol. 3, pp. 1025, 1029, 1035, 1037.

"The several states are of equal dignity and authority, and the independence of one implies the exclusion of power from all others." *Pennoy v. Neff*, 95 U. S. 714, 722, 24 L. Ed. 565; *Overby v. Gordon*, 177 U. S. 214, 222, 44 L. Ed. 741.

"No state or nation can, by its laws, directly affect or bind property out of its own territory, or persons not resident therein." *Hoyt v. Sprague*, 103 U. S. 613, 680, 26 L. Ed. 585.

"The authority of every tribunal is necessarily restricted by the territorial limits of the state in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and be resisted as mere abuse. *D'Arcy v. Ketchum*, 11 How. 165, 13 L. Ed. 648." *Pennoy v. Neff*, 95 U. S. 714, 720, 24 L. Ed. 565.

"No state can authorize one of its judges or courts to exercise judicial power, by habeas corpus or otherwise, within the jurisdiction of another and independent government." *Tarble's Case*, 13 Wall. 397, 405, 20 L. Ed. 597, following *Ableman v. Booth*, 21 How. 506, 16 L. Ed. 169.

A state legislature can only regulate those courts which are established under the authority of the state. It cannot affect the judicial proceedings of a court of the United States, or of any other state. *Young v. Bank*, 4 Cranch 384, 397, 2 L. Ed. 655; *Kentucky v. Dennison*, 24 How. 66, 107, 16 L. Ed. 717; *Ex parte Reegel*, 114 U. S. 642, 651, 29 L. Ed. 250.

The jurisdiction of a state, including its legislative power, is co-extensive with its territory. A place within the boundary is a part of the territory of a state. Title, jurisdiction and sovereignty are inseparable instruments until the state makes some cession. *United States v. Bevan*, 3 Wheat. 336, 386, 4 L. Ed. 404; *Rhode Island v. Massachusetts*, 12 Pet. 657, 733, 9 L. Ed. 1233; *Martin v. Waddell*, 16 Pet. 367, 10 L. Ed. 997; *Pollard v. Hagan*, 3 How. 212, 11 L. Ed. 565; *Den v. Jersey Co.*, 15 How. 426, 14 L. Ed. 757; *Smith v. Maryland*, 18 How. 71, 15 L. Ed. 269; *Manchester v. Massachusetts*, 139 U. S. 240, 263, 35 L. Ed. 159.

**Virginia laws not operative in District of Columbia after cession.**—After the cession to the federal government of that portion of the District of Columbia, situated in Virginia, and the taking exclusive control thereof by congress, the legislature of Virginia had no power to legislate with respect to corporations, persons or property within that portion of the district. *Terrett v. Taylor*, 9 Cranch 43, 52, 3 L. Ed. 650.

The right of Virginia to legislate for that part of the District of Columbia

which was ceded by her to the United States, continued until the 27th of February, 1801. *Young v. Bank*, 4 Cranch 384, 2 L. Ed. 655.

**Virginia laws not operative in Northwest Territory after cession.**—A statute of Virginia, passed after the 1st of March, 1784, when Virginia ceded to the United States her territory north and west of the Ohio, has not, and never had, any force within the limits of Illinois. *McCool v. Smith*, 1 Black 459, 17 L. Ed. 218.

**Laws respecting slaves and slavery.**—Every state or nation possesses an exclusive sovereignty and jurisdiction within its own territory, and its laws affect and bind all property and persons residing within it. It may regulate the manner and circumstances under which property is held, and the condition and capacity of all persons therein; also the remedy and modes of administering justice. On the other hand, it is equally true that no state or nation can affect or bind property out of its territory, or persons not residing within it. No state, therefore, can enact laws to operate beyond its own dominion, and if it attempts to do so such laws may be lawfully refused obedience. This principle is applicable to the states of the Union. The laws of each have no extraterritorial operation within the jurisdiction of another, except such as may be voluntarily conceded by the laws or courts of justice of such other state, upon principles of comity. (*Opinion of Nelson, J.*) *Scott v. Sandford*, 19 How. 393, 460, 461, 15 L. Ed. 691.

The state laws and regulations upon the question of slavery had no extraterritorial operation within the free states, except by virtue of the fugitive slave clause of the constitution. A master removing with his slaves from a slave into a free state became subject to the laws of such state; on the other hand, upon his moving back again into the slave state, the status of the slaves as such was then fixed by the laws of that state. The laws of neither state had any force or effect within the limits of the other. (*Opinion of Nelson, J.*) *Scott v. Sandford*, 19 How. 393, 461, 15 L. Ed. 691.

**State insolvency laws.**—See the title **CONFLICT OF LAWS**, vol. 3, pp. 1082, 1083.

**Administration of assets without the state.**—The sovereignty of the state of Georgia and the jurisdiction of its courts does not extend to or embrace the assets of a decedent situated within the territorial jurisdiction of the District of Columbia. *Overby v. Gordon*, 177 U. S. 214, 223, 44 L. Ed. 741. See, also, the titles **CONFLICT OF LAWS**, vol. 3, p. 1039; **EXECUTORS AND ADMINISTRATORS**.

**Respecting transfer of real property in another state.**—The legislative and judicial authority of New Hampshire are



ing in the constitution of the United States which prohibits one of the states of

bounded by the territory of that state, and cannot be rightfully exercised to pass estates lying in another state. The sale of real estate in Rhode Island, by an executrix, under a license granted by a court of probate of New Hampshire, is void; and a deed executed by her purporting to convey the estate is, *proprio vigore*, inoperative to pass any title of the testator to any lands described therein. *Wilkinson v. Leland*, 2 Pet. 627, 7 L. Ed. 542. See, also, the title **CONFLICT OF LAWS**, vol. 3, p. 1035, et seq.

**Law seeking to give extraterritorial operation to statute of limitations.**—A Mississippi statute enacted that "no action shall be maintained on any judgment or decree rendered by any court without this state against any person, who at the time of the commencement of the action in which such judgment or decree was or shall be rendered, was or shall be a resident of this state, in any case where the cause of action would have been barred by any act of limitation of this state, if such suit had been brought therein." It was held that this statute, instead of being a statute of limitation in any sense known to the law, was an attempt to give operation to the statute of limitation of that state in all the other states of the Union by denying the efficacy of any judgment recovered in another state against a citizen of Mississippi for any cause of action which was barred in her tribunals under that law; and that said statute was unconstitutional and void as destroying the right of any party to enforce a judgment regularly obtained in another state, and as conflicting therefore with the full faith and credit clause of the federal constitution. *Christmas v. Russell*, 5 Wall. 290, 301, 18 L. Ed. 475. See, also, the title **CONFLICT OF LAWS**, vol. 3, p. 1089.

**Requiring delivery of telegraph messages in another state.**—A state statute requiring telegraph companies to deliver messages by messenger when the person to whom addressed lives in the city or town in which the telegraph station is situated, or within one mile thereof, is unconstitutional in so far as it undertakes to compel a delivery by messenger to persons residing in another state, not only for the reason that it is an attempt to regulate interstate commerce, but for the further reason that the legislative jurisdiction of the state is confined to state limits. *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, 358, 359, 30 L. Ed. 1187.

The statute of the state of Georgia of October 22, 1887, requiring every telegraph company with a line of wires, wholly or partly within that state, to receive dispatches, and upon payment of the usual charges, to transmit and deliver them with due diligence under a penalty of \$100, is not open to the objec-

tion that was regarded as fatal in the *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, 30 L. Ed. 1187, since no attempt was made to enforce the provisions of such statute beyond the limits of the state. *Western Union Tel. Co. v. James*, 162 U. S. 650, 662, 40 L. Ed. 1105.

**Marriage and divorce.**—For the application of this doctrine to the marriage relation where only one of the parties is domiciled within the state, see the title **DIVORCE**.

**Power of state to punish crime.**—The offense which a criminal statute defines and purports to punish must be an offense committed within the limits of the jurisdiction of the legislative body enacting it. *James v. Bowman*, 190 U. S. 127, 142, 47 L. Ed. 979. See, also, *Hooper v. California*, 155 U. S. 648, 39 L. Ed. 297; *Allgeyer v. Louisiana*, 165 U. S. 578, 590, 41 L. Ed. 832; *Nutting v. Massachusetts*, 183 U. S. 553, 46 L. Ed. 324.

"Were any one state of the Union to pass a law for trying a criminal in a court not created by itself, in a place not within its jurisdiction, and direct the sentence to be executed without its territory, we should all perceive and acknowledge its incompetency to such a course of legislation." *Cohens v. Virginia*, 6 Wheat. 264, 427, 5 L. Ed. 257.

"A state legislature, the state of Maryland, for example, cannot punish those who, in another state, conceal a felony committed in Maryland." *Cohens v. Virginia*, 6 Wheat. 264, 428, 5 L. Ed. 257.

**Same—Punishment of criminals found within jurisdiction although crime committed elsewhere.**—The states may, if they think proper, in order to deter offenders in other countries from coming among them, make crimes committed elsewhere punishable in their courts if the guilty party shall be found within their jurisdiction. This is based upon the power of self-protection; the right to protect itself from paupers, criminals, etc., coming from other jurisdictions, and does not involve any question as to the exercise of state powers beyond state limits. (Opinion of Tanney, C. J.) *Holmes v. Jennison*, 14 Pet. 540, 569, 10 L. Ed. 579. See, also, the title **CONFLICT OF LAWS**, vol. 3, p. 1073, et seq.

**Same—Cannot prevent citizen from making forbidden contract without the state.**

—A citizen of a state, under the provisions of the federal constitution, has a right to contract outside of the state for insurance on his property—a right of which state legislation cannot deprive him. *Allgeyer v. Louisiana*, 165 U. S. 578, 590, 41 L. Ed. 832 (distinguishing *Hooper v. California*, 155 U. S. 648, 39 L. Ed. 297); *Nutting v. Massachusetts*, 183 U. S. 553, 46 L. Ed. 324.

Section 439 of the Penal Code of California, making it a misdemeanor for any

the Union from taxing the public stocks and securities of a sister state in the

person in that state to procure insurance for a resident in the state from an insurance company not incorporated under its laws and which has not filed a bond required by the laws of the state relative to insurance, is not unconstitutional as an attempt to forbid and punish the procurement of a contract outside of the state; since by the express terms of the act it undertakes to punish only those persons who procure the forbidden contract within the state. *Hooper v. California*, 155 U. S. 648, 656, 39 L. Ed. 297.

A Louisiana act provided that any person who should do any act to effect any marine insurance, either for himself or others, on property then in the state, in any marine insurance company which had failed to comply with the state laws in any respect, should be subject to a fine. But as applied to a case where the contract was made in New York with a company of that state, the premiums and losses to be there paid, the act was held unconstitutional, because the state had no jurisdiction thereof and it therefore amounted to a deprivation of liberty without due process of law within the meaning of the fourteenth amendment. *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 41 L. Ed. 832, distinguishing and re-affirming *Hooper v. California*, 155 U. S. 648, 39 L. Ed. 297.

Nor can the state, where the contract is made without the state, legally prohibit its citizens from doing such an act as writing a letter of notification, even though the property, which is the subject of the insurance, may be, at the time the insurance attaches, within the state. *Allgeyer v. Louisiana*, 165 U. S. 578, 591, 41 L. Ed. 832.

But the right of a citizen to make such a contract for himself beyond the limits of the state, does not empower him to authorize an agent to violate, in his behalf, the laws of his state within her own limits. Such a contention ignores the vital distinction between acts done within and acts done beyond the state limits. *Nutting v. Massachusetts*, 183 U. S. 553, 558, 46 L. Ed. 324. See, also, *Hooper v. California*, 155 U. S. 648, 39 L. Ed. 297; *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. Ed. 832.

While the legislature cannot impair the freedom of a resident when without the state to elect with whom he will contract, it can prevent insurance agents from sheltering themselves under his freedom in order to solicit within the state contracts which otherwise he would not have thought of making. It may prohibit not only agents of the insurers, but also brokers, from soliciting or intermeddling in such insurance. *Nutting v. Massachusetts*, 183 U. S. 553, 558, 46 L. Ed. 324.

The Massachusetts statute of 1894, ch. 522. § 98, which forbids any person, as-

suming to act as an insurance agent or insurance broker, to act in any manner in the negotiation or transaction of unlawful insurance with a foreign insurance company not admitted to do business in that commonwealth, is not unconstitutional as applied to the case of an insurance broker who, while in the state of Massachusetts, solicits from a resident of that state an application for insurance, pursuant to which he obtains, through his nonresident principals, a policy of insurance from a company not authorized to do business in the state, and which policy he (the broker) receives in the state and sends by mail to the person from whom the application therefor was solicited. *Nutting v. Massachusetts*, 183 U. S. 553, 46 L. Ed. 324.

**Laws respecting taxation.**—No state can legislate except with reference to its own jurisdiction. One state cannot exempt property from taxation in another. Each state is independent of all the others in this particular. *Bonaparte v. Tax Court*, 104 U. S. 592, 594, 26 L. Ed. 845.

Thus a statute exempting the bonds of the state from taxation cannot operate beyond state limits, and cannot be set up in defense of such tax imposed by the laws of another state upon its own residents and their property within its limits. *Bonaparte v. Tax Court*, 104 U. S. 592, 594, 26 L. Ed. 845.

The power to tax is limited to persons and property and business within the state; it cannot reach the person or property of a nonresident situated without the state. If the legislature of a state should enact that the citizens or property of another state or country situated beyond its geographical limits should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to valid legislative as to valid judicial action. *Railroad Co. v. Jackson*, 7 Wall. 262, 19 L. Ed. 88; *St. Louis v. Ferry Co.*, 11 Wall. 423, 20 L. Ed. 192; *State Tax on Foreign-Held Bonds*, 15 Wall. 300, 319, 21 L. Ed. 179; *Deleware Railroad Tax*, 18 Wall. 206, 21 L. Ed. 888; *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 499, 22 L. Ed. 189; *Bonaparte v. Tax Court*, 104 U. S. 592, 26 L. Ed. 845; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 208, 29 L. Ed. 158; *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, 31 L. Ed. 790; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. Ed. 613; *Massachusetts v. Western Union Tel. Co.*, 141 U. S. 40, 35 L. Ed. 628; *Maine v. Grand Trunk R. Co.*, 142 U. S. 217, 35 L. Ed. 994; *Horn Silver Min. Co. v. New York*



hands of its own citizens, it being well settled that the implied prohibition which

State, 143 U. S. 305, 315, 36 L. Ed. 164; *Ashley v. Ryan*, 153 U. S. 436, 440, 38 L. Ed. 773; *New York, etc., R. Co. v. Pennsylvania*, 153 U. S. 628, 646, 38 L. Ed. 846; *Pittsburg, etc., R. Co. v. Backus*, 154 U. S. 421, 427, 31 L. Ed. 1031; *Indianapolis, etc., R. Co. v. Backus*, 154 U. S. 438, 38 L. Ed. 1040; *Cleveland, etc., R. Co. v. Backus*, 154 U. S. 439, 38 L. Ed. 1041; *Postal Tel. Cable Co. v. Adams*, 155 U. S. 688, 39 L. Ed. 311; *Western Union Tel. Co. v. Taggart*, 163 U. S. 1, 19, 41 L. Ed. 49; *Adams Express Co. v. Ohio*, 165 U. S. 194, 41 L. Ed. 683; *Adams Express Co. v. Indiana*, 165 U. S. 255, 41 L. Ed. 707; *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 164, 41 L. Ed. 953; *Adams Express Co. v. Kentucky*, 166 U. S. 171, 41 L. Ed. 960; *Adams Express Co. v. Ohio (rehearing)*, 166 U. S. 185, 41 L. Ed. 965; *Chicago, etc., R. Co. v. Chicago*, 166 U. S. 226, 41 L. Ed. 979; *Savings, etc., Society v. Multnomah County*, 169 U. S. 421, 42 L. Ed. 803; *Dewey v. Des Moines*, 173 U. S. 193, 204, 43 L. Ed. 665; *Louisville, etc., Ferry Co. v. Kentucky*, 188 U. S. 385, 47 L. Ed. 513; *Delaware, etc., R. Co. v. Pennsylvania*, 198 U. S. 341, 358, 49 L. Ed. 1077; *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 204, 50 L. Ed. 150. See the titles CONFLICT OF LAWS, vol. 3, pp. 1025, 1029, 1035, 1038; TAXATION.

This rule receives its most familiar illustration in the cases of land, which to be taxable must be within the limits of the state. *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 204, 50 L. Ed. 150.

But it applies with equal cogency to tangible personal property situated beyond the limits, and hence beyond the jurisdiction, of the state. *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 204, 50 L. Ed. 150. See, also, *Railroad Co. v. Jackson*, 7 Wall. 262, 19 L. Ed. 88; *State Tax on Foreign-Held Bonds*, 15 Wall. 300, 21 L. Ed. 179; *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 499, 22 L. Ed. 189; *Chicago, etc., R. Co. v. Chicago*, 166 U. S. 226, 41 L. Ed. 979; *Louisville, etc., Ferry Co. v. Kentucky*, 188 U. S. 385, 47 L. Ed. 513; *Delaware, etc., R. Co. v. Pennsylvania*, 198 U. S. 341, 358, 49 L. Ed. 1077.

A state cannot tax tangible personal property owned by a corporation domiciled within the state, the property itself being out of and having no situs within the state. *Delaware, etc., R. Co. v. Pennsylvania*, 198 U. S. 341, 49 L. Ed. 1077; *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 204, 50 L. Ed. 150.

A corporation organized under the laws of Kentucky, and doing business as a transit company, is not subject to taxation upon its tangible personal property, consisting of freight cars permanently lo-

cated in other states and employed there in the prosecution of its business. *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 204, 50 L. Ed. 150.

Neither can the state attain the same end by taxing the enhanced value of the capital stock of the corporation which arises from the value of the property beyond the jurisdiction of the state. *Delaware, etc., R. Co. v. Pennsylvania*, 198 U. S. 341, 49 L. Ed. 1077.

Whether a charge be viewed as a tax, a license or a fee, if the statute imposing it involves the assertion of the right of the state to exercise its powers of taxation beyond its geographical limits, it is void. *Ashley v. Ryan*, 153 U. S. 436, 440, 38 L. Ed. 773.

But where several corporations existing under the laws of separate states are consolidated under a statute of one of the states, the exaction of the new consolidated company of a percentage on its entire authorized stock does not involve an attempt on the part of the state to extend its taxing power beyond its geographical limits. *Ashley v. Ryan*, 153 U. S. 436, 38 L. Ed. 773.

**Same—No personal judgment for taxes without personal service of process.**—The state cannot reach the person of a non-resident by attempting to impose a personal judgment upon him, without previous service of notice upon him personally, in a special assessment or tax proceeding. *Dewey v. Des Moines*, 173 U. S. 193, 204, 43 L. Ed. 665. See, also, the titles DUE PROCESS OF LAW; JURISDICTION.

**Same—Taxation of mortgage owned by nonresident.**—A statute which makes mortgages upon real estate, whether such mortgage security be owned by residents or nonresidents, taxable in the county in which the real estate is situated and in which the mortgage is recorded, is not, as applied to nonresidents, unconstitutional, either as an attempt to tax property not having its situs within the state, or as denying the owner of such mortgage the equal protection of the laws, or as depriving him of his property without process of law. *Savings, etc., Society v. Multnomah County*, 169 U. S. 421, 42 L. Ed. 803, criticising case of the *State Tax on Foreign-Held Bonds*, 15 Wall. 300, 21 L. Ed. 179, and holding it to be unsustainable on this point. See, also, the title TAXATION.

**Same—Requiring corporation to withhold tax upon interest on its corporate obligations.**—The Pennsylvania act of 1885, requiring the treasurers of private corporations doing business in that state, regardless of whether such corporations were organized under the laws of that state or not, in paying the interest due upon the securities held by residents of the state of Pennsylvania in their re-



prevents either the state or federal governments from taxing or in any way

from a tax of three mills on the dollar and pay the same into the treasury of the state, as applied to the New York and Erie Railroad Company, a corporation organized under the laws of New York and having its principal office and place of business in that state, and the interest upon whose outstanding securities was payable only in the cities of New York and London, was unconstitutional, not only as an attempt to impair the obligation of the contract between the company and its creditors, but as an attempt to tax property beyond the jurisdiction of the state. *New York, etc., R. Co. v. Pennsylvania*, 153 U. S. 628, 646, 38 L. Ed. 846.

**Same—Property on Indian reservation within the state.**—Property, real or personal, owned by persons not Indians, but situated within or upon an Indian Reservation within the limits of a state or territory, is subject to taxation by such state or territory. *Utah, etc., Railway v. Fisher*, 116 U. S. 28, 29 L. Ed. 542; *Maricopa, etc., R. Co. v. Arizona*, 156 U. S. 347, 39 L. Ed. 447; *Thomas v. Gay*, 169 U. S. 264, 42 L. Ed. 740; *Waggoner v. Evans*, 170 U. S. 588, 42 L. Ed. 1154.

**Same—Interstate bridge.**—In determining the value of the property of a bridge company owning and operating a bridge spanning a navigable river between two states, together with the approaches thereto, the state does not deprive it of its property without due process of law nor attempt to tax property situated beyond state limits, either by reason of the fact that it includes in such valuation the franchise granted by it, or because it assesses the property as a unit, taking into consideration its earning capacity, etc. *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 154, 41 L. Ed. 953. See, also, the title TAXATION.

**Same—Property of interstate railroads, telegraph companies, express companies, etc.; unit system of valuation.**—It has often been held that the property of railroad, telegraph and sleeping car companies, in the several states through which their lines of business extend, may, for the purpose of taxation, be valued as a unit, taking into consideration the uses to which it is put, together with other property owned by such companies and devoted to the same use, regardless of where situated, and all the elements making up the aggregate value; and that a proportion of the whole, fairly and properly ascertained, may be taxed by the particular state, without such method being open to the objection that the state is attempting to tax property beyond its limits and jurisdiction, or that such system operates to deprive such companies of their property without due process of law or deny them the equal protection of the laws. *Adams Express Co. v. Ohio*, 165 U. S. 194, 220, 41 L. Ed. 683, followed in

*Adams Express Co. v. Indiana*, 165 U. S. 255, 41 L. Ed. 707. Accord: *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, 31 L. Ed. 790; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. Ed. 613; *Massachusetts v. Western Union Tel. Co.*, 141 U. S. 40, 35 L. Ed. 628; *Maine v. Grand Trunk R. Co.*, 142 U. S. 217, 35 L. Ed. 994; *Pittsburg, etc., R. Co. v. Backus*, 154 U. S. 421, 31 L. Ed. 1031; *Indianapolis, etc., R. Co. v. Backus*, 154 U. S. 438, 38 L. Ed. 1040; *Cleveland, etc., R. Co. v. Backus*, 154 U. S. 439, 38 L. Ed. 1041; *Postal Tel. Cable Co. v. Adams*, 155 U. S. 688, 39 L. Ed. 311; *Western Union Tel. Co. v. Taggart*, 163 U. S. 1, 41 L. Ed. 49; *Adams Express Co. v. Kentucky*, 166 U. S. 171, 41 L. Ed. 960; *Adams Express Co. v. Ohio (rehearing)*, 166 U. S. 185, 41 L. Ed. 965. See, also, the title TAXATION.

While there is a distinction between the property of railroad and telegraph companies and that of express companies, in that the physical unity existing in the former is lacking in the latter, yet there is the same unity in the use of the entire property for the specific purpose, and there are the same elements of value arising from such use. Such a method of taxation is no more unconstitutional, therefore, when applied to express companies than when it is applied to railroad, telegraph or sleeping car companies. *Adams Express Co. v. Ohio*, 165 U. S. 194, 220, 41 L. Ed. 683, followed in *Adams Express Co. v. Indiana*, 165 U. S. 255, 41 L. Ed. 707.

That the state, in determining the value of the property of an express company for purposes of taxation, takes into consideration the franchises and the earning capacity of the company, considering its business as a unit, and then fixes its value according to the proportionate amount of property owned or business done within the state, does not render its action obnoxious to the constitution of the United States, either as an attempt to tax property situated without the state, or as depriving such companies of their property without due process of law, or as denying them the equal protection of the laws. *Adams Express Co. v. Kentucky*, 166 U. S. 171, 41 L. Ed. 960; *Adams Express Co. v. Ohio (rehearing)*, 166 U. S. 185, 41 L. Ed. 965, reaffirming *Adams Express Co. v. Ohio*, 165 U. S. 194, 41 L. Ed. 683, and *Adams Express Co. v. Indiana*, 165 U. S. 255, 41 L. Ed. 707.

The statute of the state of Ohio of April 27, 1893, 90 Laws of Ohio 330 (amended May 10, 1894, 91 Laws of Ohio 220), known as the Nichols law, which created a board of appraisers and assessors, and which, in substance, required such board, in determining the value of property owned by express and telegraph companies in Ohio, for purposes of specific corporations, to deduct there-

burdening the governmental agencies and instrumentalities of the other, has no application as between the states themselves. Such securities, therefore, are taxable at the residence of the holder just as any other property within the state.<sup>60</sup>

(4) *Invasion of Sovereignty of One State by Citizens of Another; How Redressed.*—"If the states of the Union were possessed of an absolute sovereignty,

taxation, to take into consideration and be guided by the value of such property as determined by the value of the entire capital stock of said companies, and such other evidence and rules as would enable said board to arrive at the true value in the money of the entire property of said companies within the state of Ohio, in the proportion which the same bore to the entire property of said companies as determined by the value of the entire capital stock thereof, etc., as applied to express companies, was not unconstitutional as depriving them of their property without due process of law, or as denying them the equal protection of the laws, or as attempting to tax property, not having a situs within the state and therefore not within the jurisdiction of the state. *Adams Express Co. v. Ohio*, 165 U. S. 194, 41 L. Ed. 683.

A statute of a state, requiring a telegraph company to pay a tax upon its property within the state, valued at such a proportion of the whole value of its capital stock as the length of its lines within the state bears to the length of all its lines everywhere, deducting a sum equal to the value of its real estate, and machinery subject to local taxation within the state, is not invalid as an attempted taxation of franchises granted by the federal government or as an attempt to tax property situated without the state. Such a law is constitutional and valid, notwithstanding that nothing is, in terms, directed to be deducted from the valuation, either for the value of its franchises from the United States, or for the value of its real estate and machinery situated and taxed in other states; unless there is something more showing that the system of taxation adopted is oppressive and unconstitutional. *Western Union Tel. Co. v. Taggart*, 163 U. S. 1, 19, 41 L. Ed. 49.

The Indiana statute of March 6, 1893, ch. 171, regarding telegraph companies, as construed and applied by the supreme court of that state, while it takes, as the basis of valuation of the company's property within the state, the proportion of the value of its whole capital stock which the length of its lines within the state bears to the whole length of all its lines, makes it the duty of the state board of tax commissioners to make deductions, on account of a greater proportional value of the company's property outside of the state, or for any other reason, and to assess its property within the state at its true cash value only. So construed, the statute is not unconstitutional as an at-

tempt by the state to tax the telegraph companies as a federal agency, or as an attempt to tax the franchise granted by the federal government, or as an attempt to tax property situated without the state. *Western Union Tel. Co. v. Taggart*, 163 U. S. 1, 27, 41 L. Ed. 49; following *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, 31 L. Ed. 790; *S. C., Massachusetts v. Western Union Tel. Co.*, 141 U. S. 40, 35 L. Ed. 628; *Pittsburg, etc., R. Co. v. Backus*, 154 U. S. 421, 31 L. Ed. 1031; *Indianapolis, etc., R. Co. v. Backus*, 154 U. S. 438, 38 L. Ed. 1040; *Cleveland, etc., R. Co. v. Backus*, 154 U. S. 439, 38 L. Ed. 1040.

The provisions in § 80 of the Indiana act of March 6, 1891, concerning taxation, that the "Rolling stock shall be listed and taxed in the several counties \* \* \* in the proportion that the main track used or operated in such county \* \* \* bears to the length of the main track used or operated by such person, company or corporation," and the requirement, in the schedule to be returned to the auditor of the state, of a statement of the amount of capital stock and indebtedness, does not render such statute, as applied to a railroad situated partly within the state and partly within other states, unconstitutional as an attempt to tax property situated without the state. It merely provides a method for ascertaining the value of the property actually within the state. *Pittsburg, etc., R. Co. v. Backus*, 154 U. S. 421, 427, 31 L. Ed. 1031; *Indianapolis, etc., R. Co. v. Backus*, 154 U. S. 438, 38 L. Ed. 1040.

In proceeding under such statute to assess the value of that part of the road actually within the state, it is competent for the board to treat the property for the purpose of taxation as a single property, and then determine the value of that portion within the state upon the mileage basis in accordance with the proportion which it bears to the entire mileage of the road. It is not necessary for the assessing board, in order to avoid the charge of taxing property situated without the state, to tax that proportion of the road situated within the state as an independent property, distinct from the part without, and place upon it only such valuation as it would have if operated separately from the balance of the road. *Cleveland, etc., R. Co. v. Backus*, 154 U. S. 439, 38 L. Ed. 1041.

60. *Taxation of public stocks of another state.*—*Bonaparte v. Tax Court*, 104 U. S. 592, 595, 26 L. Ed. 845.

instead of a limited one, they could demand of each other reparation for an unlawful invasion of their territory and the surrender of parties abducted, and of parties committing the offense, and in case of refusal to comply with the demand, could resort to reprisals, or take any other measures they might deem necessary as redress for the past and security for the future. But the states of the Union are not absolutely sovereign. Their sovereignty is qualified and limited by the conditions of the federal constitution. They cannot declare war or authorize reprisals on other states. Their ability to prevent the forcible abduction of persons from their territory consists solely in their power to punish all violations of their criminal laws committed within their borders, whether by their own citizens or by citizens of other states. If such violators have escaped from the jurisdiction of the state invaded, their surrender can be secured upon proper demand on the executive of the state to which they have fled. The surrender of the fugitives in such cases to the state whose laws have been violated is the only aid provided by the laws of the United States for the punishment of depredations and violence committed in one state by intruders and lawless bands from another state. The offenses committed by such parties are against the state; and the laws of the United States merely provide the means by which their presence can be secured in case they have fled from its justice."<sup>61</sup>

**Where Citizen Abducted into Another State.**—"No mode is provided by which a person unlawfully abducted from one state to another can be restored to the state from which he was taken, if held upon any process of law for offenses against the state to which he has been carried. If not thus held, he can, like any other person wrongfully deprived of his liberty, obtain his release on habeas corpus. Whether congress might not provide for the compulsory restoration to the state of parties wrongfully abducted from its territory upon application of the parties, or of the state, and whether such provision would not greatly tend to the public peace along the borders of the several states, are not matters for present consideration. It is sufficient now that no means for such redress through the courts of the United States have as yet been provided."<sup>62</sup>

b. *Settlement of Boundaries.*—See ante, "To Settle Boundaries," VI, D, 2, c, (2). See, also, the titles BOUNDARIES, vol. 3, p. 494, et seq.; STATES.

c. *Interstate Comity.*—See the titles CONFLICT OF LAWS, vol. 3, p. 1030, et seq.; STATES.

d. *Extradition of Fugitives.*—See the title EXTRADITION.

e. *Compacts between States.*—See the title STATES.

f. *Privileges and Immunities of Citizens.*—See post, "Citizenship in the States and the Protection Afforded by Art. 4, § 2, of the United States Constitution," XVII, A, 2, et seq. See, also, the titles CITIZENSHIP, vol. 3, pp. 804, 807; CIVIL RIGHTS, vol. 3, pp. 816, 829; CORPORATIONS; FOREIGN CORPORATIONS; REMOVAL OF CAUSES.

g. *Full Faith and Credit Requirement.*—See the title FOREIGN JUDGMENTS, RECORDS AND JUDICIAL PROCEEDINGS.

10. CONSTITUTIONAL AND POLITICAL STATUS OF INDIAN TRIBES AND NATIONS.—See the title INDIANS.

11. TERRITORIES AND PUBLIC DOMAIN.—See ante, "Power to Acquire, Govern and Dispose of Territory," VI, D, 2, c, (3), et seq. See, also, the titles PUBLIC LANDS; TERRITORIES.

61. **Invasion of sovereignty by citizens of another state; how redressed.**—*Mahon v. Justice*, 127 U. S. 700, 704, 32 L. Ed. 283.

62. **Same; abduction of citizens.**—*Mahon v. Justice*, 127 U. S. 700, 705, 32 L. Ed. 283.

See the case of *Mahon v. Justice*, 127 U. S. 700, 32 L. Ed. 283, discussed and the principles announced therein ap-

proved in *Pettibone v. Nichols*, 203 U. S. 192, 51 L. Ed. 148, followed in *Moyer v. Nichols*, 203 U. S. 221, 51 L. Ed. 160.

"There is no comity between the states by which a person held upon an indictment for a criminal offense in one state can be turned over to the authorities of another, though abducted from the latter." *Mahon v. Justice*, 127 U. S. 700, 706, 32 L. Ed. 283.



## VII. Equal Protection of the Laws; Class Legislation.

**A. Equal Protection as Guaranteed by Art 4, § 2, of the Federal Constitution.**—See post, "Citizenship in the States and the Protection Afforded by Art. 4, § 2, of the United States Constitution," XVII, A, 2, et seq.

**B. Equal Protection as Guaranteed by the Fourteenth Amendment—**

1. **PERSONS PROTECTED**—a. *Citizens and Aliens*.—This clause of the fourteenth amendment extends its protection to races, classes, and individuals, and prohibits any state legislation which has the effect of denying to any class or race or to any individual the equal protection of the laws.<sup>63</sup> It is not confined to the protection of citizens. It says: "Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.<sup>64</sup>

b. *Corporations*.—It is well settled that corporations are persons within the meaning of that provision of the fourteenth amendment which forbids any state to deprive any person of life, liberty or property without due process of law or to deny to any person within its jurisdiction the equal protection of the laws.<sup>65</sup>

**63. Persons protected; citizens and aliens.**—Ex parte Virginia, 100 U. S. 339, 25 L. Ed. 676; Missouri v. Lewis, 101 U. S. 22, 25 L. Ed. 989; Pace v. Alabama, 106 U. S. 583, 584, 27 L. Ed. 207; Civil Rights Cases, 109 U. S. 3, 24, 27 L. Ed. 836. See, also, the titles ALIENS, vol. 1, pp. 219, 255; CIVIL RIGHTS, vol. 3, p. 845.

**64. Same.**—Yick Wo v. Hopkins, 118 U. S. 356, 369, 30 L. Ed. 220; United States v. Wong Kim Ark, 169 U. S. 649, 694, 42 L. Ed. 890; Lau Ow Bew v. United States, 144 U. S. 47, 61, 62, 36 L. Ed. 340; Lem Moon Sing v. United States, 158 U. S. 538, 548, 39 L. E. 1082; Fong Yue Ting v. United States, 149 U. S. 698, 37 L. Ed. 905; Wong Wing v. United States, 163 U. S. 228, 238, 41 L. Ed. 140.

The fourteenth amendment was ordained to secure equal rights to all persons. Ex parte Virginia, 100 U. S. 339, 25 L. Ed. 676.

**65. Corporations.**—Lafayette Ins. Co. v. French, 18 How. 404, 407, 15 L. Ed. 451; Ducat v. Chicago, 10 Wall. 410, 19 L. Ed. 972; Insurance Co. v. Morse, 20 Wall. 445, 455, 456, 22 L. Ed. 365; Santa Clara County v. Southern Pac. R. Co., 118 U. S. 394, 396, 30 L. Ed. 118; Pembina, etc., Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 189, 31 L. Ed. 650; Missouri Pac. R. Co. v. Mackey, 127 U. S. 205, 209, 32 L. Ed. 107; Minneapolis, etc., R. Co. v. Herrick, 127 U. S. 210, 32 L. Ed. 109; Minneapolis, etc., R. Co. v. Beckwith, 129 U. S. 26, 28, 32 L. Ed. 585; Home Ins. Co. v. New York State, 134 U. S. 594, 606, 33 L. Ed. 1025; Norfolk, etc., R. Co. v. Pennsylvania, 136 U. S. 114, 118, 34 L. Ed. 394; Charlotte, etc., R. Co. v. Gibbs, 142 U. S. 386; 35 L. Ed. 1051; Covington, etc., R. Co. v. Sandford, 164 U. S. 578, 41 L. Ed. 560; Gulf, etc., R. Co. v. Ellis, 165 U. S. 150, 154, 41 L. Ed. 666; Smyth v. Ames,

169 U. S. 466, 522, 43 L. Ed. 819; Blake v. McClung, 172 U. S. 239, 259, 43 L. Ed. 432; Lake Shore, etc., R. Co. v. Smith, 173 U. S. 684, 690, 43 L. Ed. 858; Hale v. Henkel, 201 U. S. 43, 50 L. Ed. 652; Western Turf Ass'n v. Greenberg, 204 U. S. 359, 363, 51 L. Ed. 520. See, in accord, Charles River Bridge v. Warren Bridge (opinion of Baldwin, J.), 11 Pet. 420, 583b, 9 L. Ed. 773; Bank v. Earle (opinion of Taney, C. J.), 13 Pet. 519, 588, 10 L. Ed. 274. See, also, the title CORPORATIONS.

A corporation doing business within a state is no more bound by an unconstitutional enactment than a citizen of the state. Cargill Co. v. Minnesota, 180 U. S. 452, 45 L. Ed. 619; Carroll v. Greenwich, 199 U. S. 401, 409, 50 L. Ed. 246; National Council v. State Council, 203 U. S. 151, 162, 51 L. Ed. 132.

"A corporation is a person within the protection of the fourteenth amendment. Minneapolis, etc., R. Co. v. Beckwith, 129 U. S. 26, 32 L. Ed. 585; Smyth v. Ames, 169 U. S. 466, 522, 526, 43 L. Ed. 819. Although it is under governmental control, that control must be exercised with due regard to constitutional guaranties for the protection of its property." Lake Shore, etc., R. Co. v. Smith, 173 U. S. 684, 690, 43 L. Ed. 858.

"A corporation of one state, doing business in another state, under such circumstances as to be directly subject to its process at the instance of suitors, may invoke the protection of that clause of the fourteenth amendment which declares that no state shall 'deny to any person within its jurisdiction the equal protection of the laws.' Blake v. McClung, 172 U. S. 239, 261, 43 L. Ed. 432." Northwestern Nat. Life Ins. Co. v. Riggs, 203 U. S. 243, 253, 51 L. Ed. 168.

**Corporations Not Citizens.**—While corporations are held to be persons within the equal protection and due process clauses of the fourteenth amendment, they are not citizens within the privileges and immunities clause of that amendment.<sup>66</sup>

c. *Protects Only Those Persons and Corporations within the Jurisdiction of the State.*—The clause declaring that no state shall “deny to any person within its jurisdiction the equal protection of the laws,” manifestly relates only to the denial by the state of equal protection to persons “within its jurisdiction.” Observe, that the prohibition against the deprivation of property without due process of law is not qualified by the words “within its jurisdiction,” while those words are found in the succeeding clause relating to the equal protection of the laws. The court cannot assume that those words were inserted without any object, nor is it at liberty to eliminate them from the constitution and to interpret the clause in question as if they were not to be found in that instrument.<sup>67</sup>

**Foreign Corporations Must Have Come within the Jurisdiction.**—Before a foreign corporation can claim the protection of this provision against discriminatory legislation, it must first have come within the jurisdiction of the state, and this it can only do with the permission of the state and upon such terms and conditions as the state may impose. Until it has complied with the conditions of admission prescribed by the state, it is not within the jurisdiction of the state.<sup>68</sup>

**66. Corporations not citizens.**—*Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 561, 43 L. Ed. 552; *Blake v. McClung*, 172 U. S. 239, 43 L. Ed. 432; *New York Life Ins. Co. v. Cravens*, 178 U. S. 389, 44 L. Ed. 1116; *Hancock Mut. Life Ins. Co. v. Warren*, 181 U. S. 73, 45 L. Ed. 755; *Western Turf Ass'n v. Greenberg*, 204 U. S. 359, 363, 51 L. Ed. 520. See, also, post, “Natural and Artificial Persons,” XI, E, 2; “Corporations,” XVII, A, 2, a, (6). And see the titles CORPORATIONS; FOREIGN CORPORATIONS; REMOVAL OF CAUSES.

**67. Protects only persons and corporations within the jurisdiction of the state.**—*Blake v. McClung*, 172 U. S. 239, 260, 43 L. Ed. 432; *Sully v. American Nat. Bank*, 178 U. S. 289, 303, 44 L. Ed. 1072.

**68. Foreign corporation must have come within the jurisdiction.**—*Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357; *Philadelphia Fire Ass'n v. New York*, 119 U. S. 110, 30 L. Ed. 342; *Pembina, etc., Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 189, 31 L. Ed. 650; *Norfolk, etc., R. Co. v. Pennsylvania*, 136 U. S. 114, 198, 34 L. Ed. 394; *Hooper v. California*, 155 U. S. 648, 655, 39 L. Ed. 297; *Blake v. McClung*, 172 U. S. 239, 260, 43 L. Ed. 432; *Sully v. American Nat. Bank*, 178 U. S. 289, 303, 44 L. Ed. 1072; *National Council v. State Council*, 203 U. S. 151, 163, 51 L. Ed. 132. See, also, the title FOREIGN CORPORATIONS.

Therefore a foreign corporation cannot claim that it is denied the equal protection of the laws by reason of a state law exacting of it a license fee for the privilege of establishing and maintaining an office in the state. *Pembina, etc., Min. & Mill.*

*Co. v. Pennsylvania*, 125 U. S. 181, 189, 31 L. Ed. 650.

And a statute of the state of New York, which imposes a higher license tax upon foreign insurance companies seeking to do business in that state in all cases where the state in which such company is domiciled imposes a discriminating tax upon New York companies, is not open to the objection that it denies the equal protection of the laws within the meaning of this provision of the fourteenth amendment. *Philadelphia Fire Ass'n v. New York*, 119 U. S. 110, 30 L. Ed. 342.

A statute which subordinates the claims of private business corporations, not within the jurisdiction of the state, although such private corporations may be creditors of a corporation doing business in the state under the authority of that statute, to the claims, against the latter corporation, of creditors residing in the state, is not a denial of the “equal protection of the laws” secured by the fourteenth amendment to persons within the jurisdiction of the state, however unjust such a regulation may be deemed. *Blake v. McClung*, 172 U. S. 239, 261, 43 L. Ed. 432.

Section five of the Tennessee act of 1877, which subordinates the claims of nonresident creditors of a foreign corporation doing business within that state to the claims of resident creditors, is not a denial of the equal protection of the laws secured by the fourteenth amendment, since such nonresidents are not persons “within the jurisdiction of the state.” *Sully v. American Nat. Bank*, 178 U. S. 289, 303, 44 L. Ed. 1072, following *Blake v. McClung*, 172 U. S. 239, 260, 43 L. Ed. 432.

**When Foreign Corporation Said to Be within the Jurisdiction of the State.**—Without attempting to state what is the full import of the words "within its jurisdiction," it is safe to say that a corporation not created by the state, nor doing business there under conditions that subject it to process issuing from the courts of such state at the instance of suitors, is not, under the above clause of the fourteenth amendment, within the jurisdiction of that state.<sup>69</sup>

**State May Restrict or Expel Foreign Corporation by Special Act, Notwithstanding Its Previous Admission to Do Business within the State.**—A restriction upon a foreign corporation, contained in a special act limiting its right to do business or to extend its membership within the state is not unconstitutional as denying the equal protection of the laws, notwithstanding such corporation has already been admitted to do business within the state. The power of the state as to foreign corporations does not depend upon their being outside of its jurisdiction. Those within the jurisdiction, in such sense as they ever can be said to be within it, do not acquire a right not to be turned out except by general laws. A single foreign corporation may be expelled by a special act, or it may, by special act, be restricted in a more limited way.<sup>70</sup>

2. NATURE AND OBJECT OF THE GUARANTY—*a. Generally.*—The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power.<sup>71</sup> The equal protection of the laws is a right now secured to every person without regard to race, color, or previous condition of servitude; and the denial of such protection by any state is forbidden by the supreme law of the land.<sup>72</sup> The fourteenth amendment, in declaring that no state "shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition; and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses.<sup>73</sup>

*b. As Protecting the Rights of Persons of Color.*—See the titles CITIZENSHIP, vol. 3, p. 792, 793; CIVIL RIGHTS, vol. 3, p. 824, et seq.

*c. Refers to Infringement by States; Not by Individuals.*—The fourteenth amendment prohibits a state from denying to any person within its jurisdiction the equal protection of the laws, but this provision does not add anything to the rights which one citizen has under the constitution against another. The duty of protecting one citizen in his right to the equal protection of the laws against infringement by another citizen was originally assumed by the states,

69. When foreign corporation said to be within the jurisdiction.—*Blake v. McClung*, 172 U. S. 239, 261, 43 L. Ed. 432.

70. Expulsion of foreign corporation by special act.—*Security Mut. Life Ins. Co. v. Prewitt*, 202 U. S. 246, 50 L. Ed. 1013; *National Council v. State Council*, 203 U. S. 151, 163, 51 L. Ed. 132.

71. General nature and object of guaranty.—*United States v. Cruikshank*, 92 U.

S. 542, 555, 23 L. Ed. 588.

72. Same.—*Gibson v. Mississippi*, 162 U. S. 565, 582, 40 L. Ed. 1075.

73. Same.—*Barbier v. Connolly*, 113 U. S. 27, 31, 28 L. Ed. 923; *Yick Wo v. Hopkins*, 118 U. S. 356, 359, 30 L. Ed. 220; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 235, 33 L. Ed. 892; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 559, 46 L. Ed. 679.



and there it still remains. The only obligation resting upon the United States is to see that the states do not deny the right; this the amendment guarantees, but no more, and the power of the national government is limited to the enforcement of this guaranty. The remedy for individual wrongs, so far as the fourteenth and fifteenth amendments are concerned, is to be sought in the tribunals of the state, subject to a review by writ of error in the supreme court of the United States in proper cases.<sup>74</sup> But the prohibitions of the fourteenth amendment refer to all instrumentalities of the state. A state acts and can act only through its legislative, executive and judicial authorities, and the acts of such authorities, done in the course of their administration of the laws of the state, are to be deemed the acts of the state. Therefore, although a statute, on its face, may not be obnoxious to this provision of the fourteenth amendment, yet if it is so administered by the legislative, executive or judicial authorities of the states as to deny the equal protection of the laws to any individual or class of individuals, a case arises within the constitutional inhibition.<sup>75</sup>

d. *Fourteenth Amendment Confers No New or Additional Rights.*—Neither the equal protection nor any other clause of the fourteenth amendment adds anything to the rights which one citizen has under the constitution against another.

**74. Refers to state, and not individual infringement.**—*Slaughter-House Cases*, 16 Wall. 36, 21 L. Ed. 394; *United States v. Cruikshank*, 92 U. S. 542, 555, 23 L. Ed. 588; *Virginia v. Rives*, 100 U. S. 313, 25 L. Ed. 667; *Ex parte Virginia*, 100 U. S. 339, 346, 347, 25 L. Ed. 676; *Neal v. Delaware*, 103 U. S. 370, 397, 26 L. Ed. 567; *United States v. Harris*, 106 U. S. 629, 638, 27 L. Ed. 290; *Civil Rights Cases*, 109 U. S. 3, 11, 27 L. Ed. 836; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. Ed. 220; *Scott v. McNeal*, 154 U. S. 34, 45, 38 L. Ed. 896; *Gibson v. Mississippi*, 162 U. S. 565, 40 L. Ed. 1075; *Chicago, etc., R. Co. v. Chicago*, 166 U. S. 226, 233, 41 L. Ed. 979; *James v. Bowman*, 190 U. S. 127, 137, 47 L. Ed. 979; *Missouri v. Dockery*, 191 U. S. 165, 48 L. Ed. 133; *Owensboro Waterworks Co. v. Owensboro*, 200 U. S. 38, 45, 50 L. Ed. 361. *Kentucky v. Powers*, 201 U. S. 1, 26, 50 L. Ed. 633; *Hodges v. United States*, 203 U. S. 1, 51 L. Ed. 65. See, also, the titles CIVIL RIGHTS, vol. 3, pp. 826, 834, 837; DUE PROCESS OF LAW.

The prohibitions of the fourteenth amendment are directed to the states, and they are to a degree restrictions upon state power. *Ex parte Virginia*, 100 U. S. 339, 346, 25 L. Ed. 676.

"Until some state law has been passed, or some state action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the fourteenth amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity; for the prohibitions of the amendment are against state laws and acts done under state authority." *Civil Rights Cases*, 109 U. S. 3, 13, 27 L. Ed. 836; *James v. Bowman*, 190 U. S. 127, 137, 47 L. Ed. 979.

**75. Refers to all the agencies and instrumentalities of the state.**—*Virginia v.*

*Rives*, 100 U. S. 313, 318, 319, 25 L. Ed. 667; *Ex parte Virginia*, 100 U. S. 339, 346, 347, 25 L. Ed. 676; *Neal v. Delaware*, 103 U. S. 370, 397, 26 L. Ed. 567; *Bush v. Kentucky*, 107 U. S. 110, 117, 119, 27 L. Ed. 354; *Civil Rights Cases*, 109 U. S. 3, 13, 17, 27 L. Ed. 836; *Soon Hing v. Crowley*, 113 U. S. 703, 711, 28 L. Ed. 1145; *Yick Wo v. Hopkins*, 118 U. S. 356, 373, 374, 30 L. Ed. 220; *Crowley v. Christensen*, 137 U. S. 86, 92, 34 L. Ed. 620; *Scott v. McNeal*, 154 U. S. 34, 45, 38 L. Ed. 896; *Gibson v. Mississippi*, 162 U. S. 565, 40 L. Ed. 1075; *Chicago, etc., R. Co. v. Chicago*, 166 U. S. 226, 234, 41 L. Ed. 979; *Blake v. McClung*, 172 U. S. 239, 260, 43 L. Ed. 432; *Abbott v. Tacoma Bank*, 175 U. S. 409, 413, 44 L. Ed. 217; *James v. Bowman*, 190 U. S. 127, 142, 47 L. Ed. 979; *Missouri v. Dockery*, 191 U. S. 165, 48 L. Ed. 133; *Owensboro Waterworks Co. v. Owensboro*, 200 U. S. 38, 45, 50 L. Ed. 361. See, also, *Henderson v. New York City*, 92 U. S. 259, 23 L. Ed. 543; *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. Ed. 550. And see the titles CIVIL RIGHTS, vol. 3, pp. 826, 834, 837; DUE PROCESS OF LAW.

The prohibitions of the fourteenth amendment refer to all the instrumentalities of the state, to its legislative, executive and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the state, "violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state." This must be so, or, as we have often said, the constitutional prohibition has no meaning, and "the state has clothed one of its agents with power to annul or evade it." *Ex parte Virginia*, 100 U. S. 339, 346, 347, 25 L. Ed. 676; *Neal v. Delaware*, 103 U. S. 370, 26 L. Ed. 567; *Yick Wo v. Hop-*

It confers no new or additional right, but merely protects previously existing rights against state infringement.<sup>76</sup>

e. *To Be Construed in the Light of Established Usage*.—The general expressions of the fourteenth amendment must not be allowed to upset familiar and long-established methods and processes by a formal elaboration of rules which its words do not import.<sup>77</sup> The federal courts should not interfere when the complaint made is the enforcement of the settled laws of the state applicable to all persons in like circumstances and conditions, but only where there is some abuse of law amounting to confiscation of property or deprivation of personal rights.<sup>78</sup>

f. *As a Limitation upon the Police Power*.—Neither the fourteenth amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. The states can now, as before, prescribe regulations for the health, good order and safety of society, and adopt such measures as will advance their interests and prosperity.<sup>79</sup> To accomplish this end special legislation must be resorted to in numer-

kins, 118 U. S. 356, 30 L. Ed. 220; *Gibson v. Mississippi*, 162 U. S. 565, 40 L. Ed. 1075; *Chicago, etc., R. Co. v. Chicago*, 166 U. S. 226, 233, 41 L. Ed. 979.

Congress may provide for the punishment by indictment of individual officers and agents charged with the administration of laws unobjectionable in themselves when such officers and agents have been guilty of discrimination in the enforcement of those laws. *Ex parte Virginia*, 100 U. S. 339, 25 L. Ed. 676.

**76. Confers no new or additional rights.**

—*Minor v. Happersett*, 21 Wall. 162, 22 L. Ed. 627; *United States v. Cruikshank*, 92 U. S. 542, 554, 23 L. Ed. 588; *Civil Rights Cases*, 109 U. S. 3, 13, 27 L. Ed. 836; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 237, 33 L. Ed. 892; *Home Ins. Co. v. New York State*, 134 U. S. 594, 607, 33 L. Ed. 1025; *McPherson v. Blacker*, 146 U. S. 1, 38, 36 L. Ed. 869; *Mobile, etc., R. Co. v. Tennessee*, 153 U. S. 486, 506, 38 L. Ed. 793; *Maxwell v. Dow*, 176 U. S. 581, 596, 44 L. Ed. 597; *James v. Bowman*, 190 U. S. 127, 136, 47 L. Ed. 979. See the titles *CIVIL RIGHTS*, vol. 3, p. 826; *DUE PROCESS OF LAW*. And see, also, post, "Confers No Additional Privileges or Immunities," XVII. A. 3. b. (2), (g).

**77. Construed in the light of established usage.**—*Michigan Cent. R. Co. v. Powers*, 201 U. S. 245, 293, 50 L. Ed. 744; *New York v. Reardon*, 204 U. S. 152, 158, 51 L. Ed. 415.

**78. Same; where abuse of law amounts to confiscation.**—*French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 45 L. Ed. 879; *Hibben v. Smith*, 191 U. S. 310, 325, 48 L. Ed. 195.

As, for example, in the case of *Norwood v. Baker*, 172 U. S. 269, 43 L. Ed. 443, in which the assessment of the entire costs and damages of a public improvement upon the property of a single

owner amounted to the confiscation of his property. See, also, *Cass Farm Co. v. Detroit*, 181 U. S. 396, 45 L. Ed. 914; *Detroit v. Parker*, 181 U. S. 399, 45 L. Ed. 917; *Tonawanda v. Lyon*, 181 U. S. 389, 45 L. Ed. 908; *Wight v. Davidson*, 181 U. S. 371, 45 L. Ed. 900; *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 45 L. Ed. 879. And see the title *DUE PROCESS OF LAW*. See ante, "Construction with Reference to the Common Law and Previous Judicial Construction and Established Usage," III. B, 2; post, "Well-Established Methods Not Overturned," VII. B, 5, b; No Radical Change in the Theory of Government," XVII. A, 3, b, (2), (b).

**79. As a limitation upon the police power.**—*Withers v. Buckley*, 20 How. 84, 15 L. Ed. 816; *Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989; *Barbier v. Connolly*, 113 U. S. 27, 28 L. Ed. 923; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 671, 29 L. Ed. 516; *Minneapolis, etc., R. Co. v. Beckwith*, 129 U. S. 26, 29, 32 L. Ed. 585; *In re Kemmler*, 136 U. S. 436, 448, 34 L. Ed. 519; *Crowley v. Christensen*, 137 U. S. 86, 34 L. Ed. 620; *In re Converse*, 137 U. S. 624, 34 L. Ed. 796; *Giozza v. Tiernan*, 148 U. S. 657, 37 L. Ed. 599; *New York, etc., R. Co. v. Bristol*, 151 U. S. 556, 567, 38 L. Ed. 269; *Lawton v. Steele*, 152 U. S. 133, 38 L. Ed. 385; *Connecticut, etc., R. Co. v. Woodruff*, 153 U. S. 689, 38 L. Ed. 869; *Moore v. Missouri*, 159 U. S. 673, 40 L. Ed. 301; *Jones v. Brim*, 165 U. S. 180, 182, 41 L. Ed. 677; *Chicago, etc., R. Co. v. Chicago*, 166 U. S. 226, 252, 41 L. Ed. 979; *Davis v. Massachusetts*, 167 U. S. 43, 47, 42 L. Ed. 71; *Hodgson v. Vermont*, 168 U. S. 262, 273, 42 L. Ed. 461; *Atchison, etc., R. Co. v. Matthews*, 174 U. S. 96, 103, 43 L. Ed. 909; *Maxwell v. Dow*, 176 U. S. 581, 604, 44 L. Ed. 597; *L'Hote v. New Orleans*, 177 U. S. 587, 596, 44 L.



ous cases, providing against accidents, disease and danger, in the varied forms in which they may come. The nature and extent of such legislation will necessarily depend upon the judgment of the legislature as to the security needed by society. When the calling, profession or business of parties is unattended with danger to others, little legislation will be necessary respecting it. But when the calling or profession or business is attended with danger, or requires a certain degree of scientific knowledge upon which others must rely, then legislation properly steps in to impose conditions upon its exercise. The concluding clauses of the first section of the fourteenth amendment simply requires that such legislation shall treat alike all persons brought under subjection to it. The equal protection of the law is afforded when this is accomplished.<sup>80</sup>

**But Police Power Confers No License to Violate Constitution.**—But while the fourteenth amendment was not designed to abridge the reserved police powers of the states, on the other hand those powers are not to be so exercised as to transcend the limitations fixed by the fourteenth amendment or any other provision of the constitution. A question of equal protection cannot be disposed of by saying that the statute alleged to contravene this clause of the fourteenth amendment was enacted in the exercise of the police powers of the state. The federal constitution being the supreme law of the land, anything in the constitution or statutes of any state to the contrary notwithstanding, a statute of a state, even when avowedly enacted in the exercise of its police powers, must yield to that law. As previously stated, the state has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health and the public safety, but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void.<sup>81</sup>

*g. Has No Concern with the Impolicy or Injustice of Legislation.*—With the impolicy of a law the equal protection clause of the fourteenth amendment has

Ed. 899; *Leovy v. United States*, 177 U. S. 621, 34 L. Ed. 914; *Jacobson v. Massachusetts*, 197 U. S. 11, 49 L. Ed. 643; *Cunnius v. Reading School District*, 198 U. S. 458, 469, 49 L. Ed. 1125; *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, 50 L. Ed. 204; *Gardner v. Michigan*, 199 U. S. 325, 50 L. Ed. 212; *New York State v. Van DeCarr*, 199 U. S. 552, 558, 50 L. Ed. 305. See, also, post, "No Radical Change in the Theory of Government," XVII, A, 3, b, (2), (b); "Police Powers Remain Unrestricted," XVII, A, 3, b, (2), (c). See, also, the titles DUE PROCESS OF LAW; POLICE POWER.

The fourteenth amendment was not designed to interfere with the power of the state to protect the lives, liberty, or property of its citizens, nor with the exercise of that power in the adjudication of the courts of the state in administering the process provided by the law of the state. In *re Converse*, 137 U. S. 624, 34 L. Ed. 796; *Moore v. Missouri*, 159 U. S. 673, 40 L. Ed. 301.

It is well established that the constitutional inhibitions of the impairment of the obligation of contracts, of the deprivation of property without due process of law, and of the denial of the equal protection of the laws by the states are not violated by the legitimate exercise of legislative power in securing the public safety, the public health, and the public morals;

since the state cannot by contract or otherwise preclude itself from exercising all of the police power for this purpose. *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 671, 29 L. Ed. 516; *New York, etc., R. Co. v. Bristol*, 151 U. S. 556, 567, 38 L. Ed. 269; *Connecticut, etc., R. Co. v. Woodruff*, 153 U. S. 689, 38 L. Ed. 869; *Chicago, etc., R. Co. v. Chicago*, 166 U. S. 226, 252, 41 L. Ed. 979.

**80. Same.**—*Minneapolis, etc., R. Co. v. Beckwith*, 129 U. S. 26, 29, 32 L. Ed. 585; *Barbier v. Connolly*, 113 U. S. 27, 32, 28 L. Ed. 923; *Soon Sing v. Crowley*, 113 U. S. 703, 709, 28 L. Ed. 1145; *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 523, 29 L. Ed. 463; *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205, 32 L. Ed. 107.

**81. But police power confers no license to violate constitution.**—*Gibbons v. Ogden*, 9 Wheat., 1, 210, 6 L. Ed. 23; *Sinnot v. Davenport*, 22 How. 227, 243, 16 L. Ed. 243; *Lawton v. Steele*, 152 U. S. 133, 137, 38 L. Ed. 385; *Missouri, etc., R. Co. v. Haber*, 169 U. S. 613, 626, 42 L. Ed. 878; *Holden v. Hardy*, 169 U. S. 366, 348, 42 L. Ed. 780; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 558, 46 L. Ed. 679; *Dobbins v. Los Angeles*, 195 U. S. 223, 236, 237, 49 L. Ed. 169. See, also, ante, "Supremacy in Case of Conflict between State and Federal Powers," VI, D, 3, c, (6), (b), (hh). And see the title POLICE POWER.



no concern. The hardship, impolicy or injustice of state laws is not necessarily an objection to their constitutional validity. The federal supreme court is not a harbor in which can be found a refuge from ill-advised, unequal and oppressive state legislation.<sup>82</sup>

h. *Equality Rule Does Not Require Statute to Operate Indiscriminately; Admits of Classification*—(1) *Generally*.—The equal protection rule is not a substitute for municipal law; it only prescribes that that law have the attribute of equality of operation; and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relations. The state may select, distinguish and classify objects of legislation and make different regulations as to persons and property according as they are differently situated.<sup>83</sup>

(2) *Does Not Prohibit Special Legislation Merely as Such*.—All laws, it has been said, should be general in their operation,<sup>84</sup> but legislation does not infringe upon this clause of the fourteenth amendment merely because it is special in its character. On the other hand, it is well settled that this clause permits special legislation in all of its varieties; and if a law is in conflict at all with this provision, it must be on other grounds.<sup>85</sup>

(3) *Law May Be Limited in Operation Both as to Persons and Territorially*.—This clause of the fourteenth amendment does not prohibit legislation which is limited either as to its objects or as to the territory within which it is to operate.<sup>86</sup>

**82. Has no concern with the impolicy or injustice of legislation.**—*Mobile County v. Kimball*, 102 U. S. 691, 26 L. Ed. 238; *Magoun v. Illinois Trust, etc., Bank*, 170 U. S. 283, 293, 42 L. Ed. 1037; *Clark v. Kansas City*, 176 U. S. 114, 119, 44 L. Ed. 392; *Billings v. Illinois*, 188 U. S. 97, 102, 47 L. Ed. 400. See, also, ante, "Judicial Control of Legislative Discretion," VI, D, 3, d, (4), (b), (bb); "Motives of Legislation Not Subject to Judicial Inquiry," VI, D, 3, d, (4), (b), (cc); "Implied Limitations upon Legislative Powers; Statutes Opposed to Natural Justice, etc.," VI, D, 3, d, (4), (b), (dd). And see the title DUE PROCESS OF LAW.

**83. Equality rule admits of classification.**—*Kentucky Railroad Tax Cases*, 115 U. S. 321, 29 L. Ed. 414; *Hayes v. Missouri*, 120 U. S. 68, 30 L. Ed. 578; *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205, 32 L. Ed. 107; *Walston v. Nevin*, 128 U. S. 578, 32 L. Ed. 544; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 237, 33 L. Ed. 892; *Pacific Express Co. v. Seibert*, 142 U. S. 339, 35 L. Ed. 1035; *Giozza v. Tiernan*, 148 U. S. 657, 37 L. Ed. 599; *Columbus Southern R. Co. v. Wright*, 151 U. S. 470, 38 L. Ed. 238; *Marchant v. Pennsylvania R. Co.*, 153 U. S. 380, 38 L. Ed. 751; *St. Louis, etc., R. Co. v. Matthews*, 165 U. S. 1, 41 L. Ed. 611; *Gulf, etc., R. Co. v. Ellis*, 165 U. S. 150, 159, 160, 163, 41 L. Ed. 66; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 293, 42 L. Ed. 1037; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 562, 43 L. Ed. 552; *Atchison, etc., R. Co. v. Matthews*, 174 U. S. 96, 103, 43 L. Ed. 909; *Clark v. Kansas City*, 176 U. S. 114, 119, 44 L. Ed. 392; *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 46 L. Ed. 92; *St. John v. New York*, 201 U. S. 633, 636, 50 L. Ed. 896; *Bachtel v. Wilson*, 204

U. S. 36, 37, 41, 51 L. Ed. 357; *Bachtel v. Wilson*, 204 U. S. 42, 51 L. Ed. 360; *Halter v. Nebraska*, 205 U. S. 34, 43, 51 L. Ed. 696.

**84. Laws should be general in their operation.**—*Railroad Co. v. Richmond*, 96 U. S. 521, 529, 24 L. Ed. 734.

**85. Special legislation not prohibited.**—*Missouri v. Lewis*, 101 U. S. 22, 25 L. Ed. 989; *Barbier v. Connolly*, 113 U. S. 27, 32, 28 L. Ed. 923; *Hayes v. Missouri*, 120 U. S. 68, 71, 30 L. Ed. 578; *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205, 209, 32 L. Ed. 107; *Minneapolis, etc., R. Co. v. Herrick*, 127 U. S. 210, 32 L. Ed. 109; *Minneapolis, etc., R. Co. v. Beckwith*, 129 U. S. 26, 28, 32 L. Ed. 585; *Home Ins. Co. v. New York State*, 134 U. S. 594, 606, 33 L. Ed. 1025; *Duncan v. Missouri*, 152 U. S. 377, 38 L. Ed. 485; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 42 L. Ed. 1037; *Clark v. Kansas City*, 176 U. S. 114, 119, 44 L. Ed. 392.

"The fourteenth amendment was not designed to prevent all exercise of judgment by a state legislature of what the interests of the state require and to compel it to run all its laws in the channels of general legislation. It may deem that social and business condition, without penal legislation, afford ample protection to the public against wrongdoing by certain officials, while such legislation may be deemed necessary for like protection against wrongdoing by other officials charged with substantially similar duties." *Bachtel v. Wilson*, 204 U. S. 36, 41, 51 L. Ed. 357; *Bachtel v. Wilson*, 204 U. S. 42, 51 L. Ed. 360.

**86. Law may be limited in operation both as to persons and territorially.**—*Missouri v. Lewis*, 101 U. S. 22, 25 L. Ed. 989; *Barbier v. Connolly*, 113 U. S. 27, 28

(4) *Does Not Require Uniform Laws and Remedies Throughout the United States.*—The fourteenth amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states separated only by an imaginary line. On one side of this line there may be a right of trial by jury and on the other side no such right. Each state prescribes its own modes of judicial proceeding, and there is nothing in the federal constitution to prevent each from adopting any system of laws or judicature it may see fit.<sup>87</sup>

(5) *Nor in All Portions of the Same State.*—The provision in the first section of the fourteenth amendment to the constitution of the United States which prohibits a state from denying to any person the equal protection of the laws does not relate to territorial or municipal arrangements made for different portions of a state.<sup>88</sup> There is nothing in the constitution to prevent any state from adopting any system of laws or judicature for all or any part of its territory. Nor does the constitution of the United States require uniform laws and reme-

L. Ed. 923; *Hayes v. Missouri*, 120 U. S. 67, 71, 30 L. Ed. 578; *McPherson v. Blacker*, 146 U. S. 1, 39, 40, 36 L. Ed. 869; *Marchant v. Pennsylvania R. Co.*, 153 U. S. 380, 390, 38 L. Ed. 751; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 293, 42 L. Ed. 1037; *Atchison, etc., R. Co. v. Matthews*, 174 U. S. 96, 104, 43 L. Ed. 909.

**87. Does not require uniform laws and remedies throughout the United States.**—*Missouri v. Lewis*, 101 U. S. 22, 31, 25 L. Ed. 989; *Hallinger v. Davis*, 146 U. S. 314, 321, 36 L. Ed. 986; *Brown v. New Jersey*, 175 U. S. 172, 175, 44 L. Ed. 119; *Mallett v. North Carolina*, 181 U. S. 589, 599, 45 L. Ed. 1015.

**Same—Appointment or election of presidential electors.**—"If presidential electors are appointed by the legislatures, no discrimination is made; if they are elected in districts where each citizen has an equal right to vote the same as any other citizen has, no discrimination is made." *McPherson v. Blacker*, 146 U. S. 1, 40, 36 L. Ed. 869.

**88. Nor in all portions of the same state.**—*Missouri v. Lewis*, 101 U. S. 22, 25 L. Ed. 989; *Budd v. New York*, 143 U. S. 517, 548, 36 L. Ed. 247; *Williams v. Eggleston*, 170 U. S. 304, 310, 42 L. Ed. 1047; *Williams v. Parker*, 188 U. S. 491, 503, 47 L. Ed. 560.

**Powers with respect to municipal and political subdivisions.**—The regulation of municipal corporations is a matter peculiarly within the domain of state control; the state is not compelled by the federal constitution to grant to all its municipal corporations the same territorial extent, or the same duties and powers. A municipal corporation is, so far as its purely municipal relations are concerned, simply an agency of the state for conducting the affairs of government, and as such it is subject to the control of the legislature. That body may place one part of the state under one municipal organization and another part of the state under another organization of an entirely different char-

acter. These are matters of a purely local nature, in respect to which the federal constitution does not limit the power of the state. *Williams v. Eggleston*, 170 U. S. 304, 310, 42 L. Ed. 1047.

The legislature may change the political subdivisions of the commonwealth by creating, changing or abolishing particular cities, towns, or counties. It may require any of them to bear such share of the public burdens as it deems just and equitable. *Williams v. Parker*, 188 U. S. 491, 503, 47 L. Ed. 560.

**Registration of voters; classification of cities and counties.**—"The power to classify cities with reference to their population having been exercised in conformity with the constitution of the state, the circumstance that the registration law in force in the city of St. Louis was made to differ in essential particulars from that which regulates the conduct of elections in other cities in the state of Missouri, does not in itself deny to the citizens of St. Louis the equal protection of the laws." *Mason v. Missouri*, 179 U. S. 328, 335, 45 L. Ed. 214.

The exercise by the general assembly of Missouri of the discretion vested in it by the constitution of that state to "provide by law for the registration of voters in cities and counties having a population of more than one hundred thousand inhabitants" did not give rise to a violation of the fourteenth amendment to the constitution of the United States. *Mason v. Missouri*, 179 U. S. 328, 335, 45 L. Ed. 214. Accord: *Chappell Chemical, etc., Co. v. Sulphur Mines Co.*, 172 U. S. 474, 475, 43 L. Ed. 520; *Maxwell v. Dow*, 176 U. S. 581, 598, 44 L. Ed. 597.

**Classification for purpose of regulating storing and handling of grain.**—A statute prescribing a maximum rate of charge for the elevating and handling of grain does not deny the equal protection of the laws because it is made to apply to only those places within the state having a population in excess of 130,000. *Budd v. New York*, 143 U. S. 517, 548, 36 L. Ed. 247.



dies even in all portions of the same state.<sup>89</sup> A state may establish one system of law in one portion of its territory, and another system in another, provided always that it neither encroaches upon the proper jurisdiction of the United States nor abridges the privileges and immunities of citizens of the United States, nor deprives any person of his rights without due process of law, nor denies to any person within its jurisdiction the equal protection of the laws in the same district.<sup>90</sup> If the state of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the state, there is nothing in the constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the fourteenth amendment, be a denial to any person of the equal protection of the laws. If every person residing or being in either portion of the state should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.<sup>91</sup>

**Jurisdiction and Procedure of Courts in Different Subdivisions.**—For municipal purposes, each state has full power to make political subdivisions of its territory and regulate their local government, including the constitution of the courts in each subdivision, the extent of their jurisdiction, both territorially and as to subject matter, and the amount and finality of their respective judgments and decrees. There is nothing in the equal protection clause of the fourteenth amendment which requires that the constitution, jurisdiction or procedure of the courts should be the same in all the political subdivisions of the state.<sup>92</sup> If all persons within the territorial limits of their respective jurisdictions have an equal right, in like cases and under like circumstances, to resort to the courts for redress, this provision of the constitution is not violated by any diversity in the jurisdiction of the courts in different territorial subdivisions as to subject matter, amount or finality of decision.<sup>93</sup>

**89. May adopt any system for all or any part of state.**—*Missouri v. Lewis*, 101 U. S. 22, 25 L. Ed. 989; *Hallinger v. Davis*, 146 U. S. 314, 321, 36 L. Ed. 986; *Maxwell v. Dow*, 176 U. S. 581, 599, 44 L. Ed. 597; *Chappell Chemical, etc., Co. v. Sulphur Mines Co.*, 172 U. S. 474, 475, 43 L. Ed. 520; *Gardner v. Michigan*, 199 U. S. 325, 333, 50 L. Ed. 212.

**90. Same.**—*Missouri v. Lewis*, 101 U. S. 22, 25 L. Ed. 989; *Hallinger v. Davis*, 146 U. S. 314, 322, 36 L. Ed. 986; *Hodgson v. Vermont*, 168 U. S. 262, 42 L. Ed. 461; *Holden v. Hardy*, 169 U. S. 366, 42 L. Ed. 780; *Brown v. New Jersey*, 175 U. S. 172, 44 L. Ed. 119; *Mallett v. North Carolina*, 181 U. S. 589, 598, 45 L. Ed. 1015.

**91. Same.**—*Missouri v. Lewis*, 101 U. S. 22, 31, 25 L. Ed. 989; *Hallinger v. Davis*, 146 U. S. 314, 321, 36 L. Ed. 986.

**92. Same; jurisdiction and procedure of courts.**—*Missouri v. Lewis*, 101 U. S. 22, 25 L. Ed. 989; *Kentucky Railroad Tax Cases*, 115 U. S. 321, 338, 29 L. Ed. 414; *Hayes v. Missouri*, 120 U. S. 68, 30 L. Ed. 578; *Hallinger v. Davis*, 146 U. S. 314, 322, 36 L. Ed. 986; *Hodgson v. Vermont*, 168 U. S. 262, 42 L. Ed. 461; *Holden v. Hardy*, 169 U. S. 366, 42 L. E. 780; *Chappell Chemical, etc., Co. v. Sulphur Mines Co.*, 172 U. S. 474, 475, 43 L. Ed. 520;

*Brown v. New Jersey*, 175 U. S. 172, 44 L. Ed. 119; *Mallett v. North Carolina*, 181 U. S. 589, 598, 45 L. Ed. 1015; *Gardner v. Michigan*, 199 U. S. 325, 333, 50 L. Ed. 212.

**93. Same.**—*Missouri v. Lewis*, 101 U. S. 22, 30, 25 L. Ed. 989; *Kentucky Railroad Tax Cases*, 115 U. S. 321, 338, 29 L. Ed. 414; *Hayes v. Missouri*, 120 U. S. 68, 70, 30 L. Ed. 578.

**Abridging right of trial by jury in certain portions of state.**—That the constitution of Maryland abridged the right of trial by jury in the courts of Baltimore city without making a similar provision for the counties of the state, and that this denies to litigants of the city the equal protection of the laws, is not tenable. *Chappell Chemical, etc., Co. v. Sulphur Mines Co.*, 172 U. S. 474, 475, 43 L. Ed. 520.

**Selection of jury commissioners.**—A statute describing that in a certain county of the state jury commissioners shall be appointed by the governor, while under the general law prevailing throughout the limits of the state they are elected by the people, is not unconstitutional as denying to the inhabitants of that county the equal protection of the laws, it being applicable alike to all persons within the



(6) *Nor in All Portions of the Same City.*—Since all places within the same city do not necessarily require the same local legislation, the municipal authorities have the power to make the necessary discriminations.<sup>94</sup>

(7) *But Requires Uniformity as to All in Like Circumstances within the Sphere of Its Operation.*—This provision of the fourteenth amendment merely requires that all persons subjected to legislation which is limited in its operation either as to persons or places shall be treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. In other words, legislation which, in carrying out a public purpose, is limited in its application, is not within this clause of the amendment if within the sphere of its operation it affects alike all persons similarly situated.<sup>95</sup>

scope of its operation. *Gardner v. Michigan*, 199 U. S. 325, 333, 50 L. Ed. 212.

**Peremptory challenges to jurors.**—A statute which gives the state fifteen peremptory challenges in cities having a population of 100,000 and over, and restricts it to only eight in cities of less than that number, does not deny to a person tried in a city having a population of more than 100,000 the equal protection of the laws guaranteed by the fourteenth amendment. *Hayes v. Missouri*, 120 U. S. 68, 30 L. Ed. 578.

"The number of such challenges must necessarily depend upon the discretion of the legislature, and may vary according to the condition of different communities, and the difficulties in them of securing intelligent and impartial jurors. The whole matter is under its control." *Hayes v. Missouri*, 120 U. S. 68, 70, 30 L. Ed. 578.

**Adjustment of appellate jurisdiction.**—By the constitution and laws of Missouri, the St. Louis court of appeals has exclusive jurisdiction in certain cases of all appeals from the circuit courts in St. Louis, and some adjoining counties; the supreme court has jurisdiction of appeals in like cases from the circuit courts of the remaining counties of the state. Held, that this adjustment of appellate jurisdiction is not forbidden by any thing in the fourteenth amendment. *Missouri v. Lewis*, 101 U. S. 22, 25 L. Ed. 989.

Where there are two superior courts in a state it is not a denial of the equal protection of the laws to allow an appeal to the state in criminal cases from one of such courts and deny it in cases arising in the other. *Mallett v. North Carolina*, 181 U. S. 589, 598, 45 L. Ed. 1015.

The laws of the state of North Carolina which permit an appeal by the state in criminal cases from the superior court of the eastern but not in the western district of the state is not unconstitutional as denying the equal protection of the laws. *Mallett v. North Carolina*, 181 U. S. 589, 599, 45 L. Ed. 1015.

<sup>94</sup> **94. Nor in all portions of the same city.**—*Railroad Co. v. Richmond*, 96 U. S. 521, 529, 24 L. Ed. 734; *Erb v. Morasch*, 177 U. S. 584, 586, 44 L. Ed. 897.

Thus the use or location of a particular street may be such as to require the ex-

clusion of steam locomotives therefrom or even from a portion thereof, without excluding them from other streets; and an ordinance so framed is not invalid as denying the equal protection of the laws to the company whose locomotives are so excluded. *Railroad Co. v. Richmond*, 96 U. S. 521, 529, 24 L. Ed. 734.

An ordinance of the city of Richmond naming a particular railroad company and prohibiting it from operating steam locomotives upon a certain street in that city, the company named being the only company using or having the right to operate locomotives upon that street, does not deny to the company named the equal protections of the laws. *Railroad Co. v. Richmond*, 96 U. S. 521, 529, 24 L. Ed. 734.

The exception of one railway company from the operation of an ordinance regulating the speed of trains in city limits does not necessarily create a classification which is arbitrary and without reasonable basis, since it may be that owing to the sparsely settled condition of the portion of the city traversed by it, or the existence of fences beside its track, or other good reason, there is reasonable ground for excepting it from the provisions of the ordinance. At all events, the court will, in the absence of some showing to the contrary, presume that there was good reason for the exception. *Erb v. Morasch*, 177 U. S. 584, 586, 44 L. Ed. 897.

<sup>95</sup> **95. Requires uniformity as to all in like circumstances within the sphere of its operation.**—*Railroad Co. v. Richmond*, 96 U. S. 521, 529, 24 L. Ed. 734; *Missouri v. Lewis*, 101 U. S. 22, 25 L. Ed. 989; *Pace v. Alabama*, 106 U. S. 583, 584, 27 L. Ed. 207; *Barbier v. Connolly*, 113 U. S. 27, 31, 28 L. Ed. 923; *Soon Hing v. Crowley*, 113 U. S. 703, 709, 28 L. Ed. 1145; *Wurts v. Hoagland*, 114 U. S. 606, 29 L. Ed. 229; *Kentucky Railroad Tax Cases*, 115 U. S. 321, 29 L. Ed. 414; *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 523, 29 L. Ed. 463; *Hayes v. Missouri*, 120 U. S. 68, 71, 30 L. Ed. 578; *Dow v. Beidelman*, 125 U. S. 680, 31 L. Ed. 841; *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205, 209, 32 L. Ed. 107; *Minneapolis, etc., R. Co. v. Herrick*, 127 U. S. 210, 32 L. Ed. 109; *Powell v. Pennsylvania*, 127 U. S. 678, 687, 32 L.

"What satisfies this equality has not been and probably never can be precisely defined. Generally it has been said that it 'only requires the same means and methods to be applied impartially to all the constituents of a class so that the law shall operate equally and uniformly upon all persons in similar circumstances.'"<sup>96</sup>

(8) *Classification Must Be Reasonable; Arbitrary and Hostile Classification Forbidden.*—The proposition stated in the preceding paragraph implies that the classification permitted by the fourteenth amendment, to be valid, must be reasonable. The mere fact of classification is not sufficient to relieve a statute from the operation of the equality clause of the fourteenth amendment. It must appear not only that a classification has been made, but that it is based upon some reasonable ground—some difference which bears a just and proper relation to the object sought to be accomplished. Mere arbitrary selection can never be justified by calling it classification.<sup>97</sup>

**Forbids the Singling Out of Any Person or Class as the Subject of Hostile Legislation.**—The equal protection of the laws is a pledge of the pro-

Ed. 253; *Walston v. Nevin*, 128 U. S. 578, 582, 32 L. Ed. 544; *Minneapolis, etc., R. Co. v. Beckwith*, 129 U. S. 26, 28, 32 L. Ed. 585; *Chester City v. Pennsylvania*, 134 U. S. 240, 33 L. Ed. 896; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 236, 33 L. Ed. 892; *Home Ins. Co. v. New York State*, 134 U. S. 594, 606, 33 L. Ed. 1025; *In re Kemmler*, 136 U. S. 436, 449, 34 L. Ed. 519; *Pacific Express Co. v. Seibert*, 142 U. S. 339, 35 L. Ed. 1035; *McPherson v. Blacker*, 146 U. S. 1, 39, 40, 36 L. Ed. 869; *Hallinger v. Davis*, 146 U. S. 314, 321, 36 L. Ed. 986; *Yesler v. Washington Harbor Line Comm'rs*, 146 U. S. 646, 655, 36 L. Ed. 1119; *Giozza v. Tiernan*, 148 U. S. 657, 662, 37 L. Ed. 599; *Columbus Southern R. Co. v. Wright*, 151 U. S. 470, 38 L. Ed. 238; *Duncan v. Missouri*, 152 U. S. 377, 382, 38 L. Ed. 485; *Marchant v. Pennsylvania R. Co.*, 153 U. S. 380, 390, 38 L. Ed. 751; *Moore v. Missouri*, 159 U. S. 673, 678, 40 L. Ed. 301; *St. Louis, etc., R. Co. v. Matthews*, 165 U. S. 1, 41 L. Ed. 611; *Gulf, etc., R. Co. v. Ellis*, 165 U. S. 150, 41 L. Ed. 66; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 293, 42 L. Ed. 1037; *Atchison, etc., R. Co. v. Matthews*, 174 U. S. 96, 104, 43 L. Ed. 909; *Minder v. Georgia*, 183 U. S. 559, 562, 46 L. Ed. 328; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 559, 46 L. Ed. 679; *Field v. Barber Asphalt Paving Co.*, 194 U. S. 618, 621, 48 L. Ed. 1142.

**96. Same; what constitutes equality.**—*Kentucky Railroad Tax Cases*, 115 U. S. 321, 337, 29 L. Ed. 414; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 293, 42 L. Ed. 1037. *Accord: Missouri v. Lewis*, 101 U. S. 22, 31, 25 L. Ed. 989; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 558, 46 L. Ed. 679.

When legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions. *Missouri, etc., R. Co. v. Mackey*, 127 U.

S. 205, 209, 32 L. Ed. 107; *Minneapolis, etc., R. Co. v. Herrick*, 127 U. S. 210, 32 L. Ed. 109; *Home Ins. Co. v. New York State*, 134 U. S. 594, 606, 33 L. Ed. 1025.

**97. Laws must be reasonable; arbitrary classification forbidden.**—*Barbier v. Connolly*, 113 U. S. 27, 31, 28 L. Ed. 923; *Yick Wo v. Hopkins*, 118 U. S. 356, 369, 30 L. Ed. 220; *Giozza v. Tiernan*, 148 U. S. 657, 662, 37 L. Ed. 599; *Gulf, etc., R. Co. v. Ellis*, 165 U. S. 150, 165, 41 L. Ed. 66; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 294, 42 L. Ed. 1037; *Norwood v. Baker*, 172 U. S. 269, 43 L. Ed. 443; *Atchison, etc., R. Co. v. Matthews*, 174 U. S. 96, 98, 43 L. Ed. 909; *Wisconsin, etc., Railroad v. Jacobson*, 179 U. S. 287, 301, 45 L. Ed. 194; *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 45 L. Ed. 879; *Cotting v. Kansas City Stock Yards, Co.*, 183 U. S. 79, 106, 46 L. Ed. 92; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 559, 46 L. Ed. 679; *Hibben v. Smith*, 191 U. S. 310, 325, 48 L. Ed. 195; *St. John v. New York*, 201 U. S. 633, 636, 50 L. Ed. 896; *Bachtel v. Wilson*, 204 U. S. 36, 37, 41, 51 L. Ed. 357; *Bachtel v. Wilson*, 204 U. S. 42, 51 L. Ed. 360; *Halter v. Nebraska*, 205 U. S. 34, 43, 51 L. Ed. 696.

"Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations." *Gulf, etc., R. Co. v. Ellis*, 165 U. S. 150, 155, 41 L. Ed. 66.

Whether a statute, or a particular regulation provided for therein, is or is not valid, is frequently dependent upon whether, under the facts, it is a reasonable or unreasonable exercise of legislative power over the subject matter involved. *Wisconsin, etc., Railroad v. Jacobson*, 179 U. S. 287, 301, 45 L. Ed. 194.

tection of equal laws.<sup>98</sup> The equal protection guaranteed by the constitution forbids the legislature to select a person, natural or artificial, and impose upon him or it burdens and liabilities which are not cast upon others similarly situated. Clear and hostile discriminations against particular persons and classes, especially such as are of unusual character, unknown to the practice of our governments, are obnoxious to the constitutional prohibition.<sup>99</sup>

**Special Legislation Cannot Be Based upon Mere Fact That the Thing Affected Is a Corporation.**—The power to enact special legislation cannot be based upon the mere fact that the thing affected is a corporation even when the legislature has power to alter, amend or repeal the charter thereof. The power to alter or amend does not extend to the taking of the property of the corporation either by confiscation or indirectly by other means, nor to the right to deny such corporation the equal protection of the laws.<sup>1</sup>

(9) *Rigid Equality Not Required; Legislature Permitted a Wide Discretion.*—The equal protection clause of the fourteenth amendment prescribes no rigid equality, but permits to the discretion and wisdom of the state a wide latitude in so far as interference by the federal supreme court is concerned. Classification for legislative purposes is not invalid because not depending on scientific or marked differences in things or persons or in their relations. It suffices if it is practical, and is not reviewable unless palpably arbitrary.<sup>2</sup>

**98. A pledge of equal laws.**—Yick Wo v. Hopkins, 118 U. S. 356, 369, 30 L. Ed. 220; Wong Wing v. United States, 163 U. S. 228, 238, 41 L. Ed. 140; United States v. Wong Kim Ark, 169 U. S. 649, 42 L. Ed. 890; Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 46 L. Ed. 679.

**99. Forbids hostile legislation against any person or class.**—Barbier v. Connolly, 113 U. S. 27, 32, 28 L. Ed. 923; Soon Hing v. Crowley, 113 U. S. 703, 28 L. Ed. 1145; Hayes v. Missouri, 120 U. S. 68, 71, 30 L. Ed. 578; Pembina, etc., Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 188, 31 L. Ed. 650; Powell v. Pennsylvania, 127 U. S. 678, 684, 32 L. Ed. 253; Minneapolis, etc., R. Co. v. Beckwith, 129 U. S. 26, 28, 32 L. Ed. 585; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 237, 33 L. Ed. 892; Home Ins. Co. v. New York State, 134 U. S. 594, 606, 33 L. Ed. 1025; Crowley v. Christensen, 137 U. S. 86, 89, 34 L. Ed. 620; McPherson v. Blacker, 146 U. S. 1, 39, 36 L. Ed. 869; Marchant v. Pennsylvania R. Co., 153 U. S. 380, 390, 38 L. Ed. 751; Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283, 294, 42 L. Ed. 1037; Atchison, etc., R. Co. v. Matthews, 174 U. S. 96, 104, 43 L. Ed. 909; Minder v. Georgia, 183 U. S. 559, 562, 46 L. Ed. 328; Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 559, 46 L. Ed. 679; Bachtel v. Wilson, 204 U. S. 36, 37, 41, 51 L. Ed. 357; Bachtel v. Wilson, 204 U. S. 42, 51 L. Ed. 360.

"The inhibition of the amendment that no state shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation." Pembina, etc., Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 188, 31 L. Ed. 650; McPherson v. Blacker, 146 U. S. 1, 39, 36 L. Ed. 869.

Even where the selection is not obviously unreasonable and arbitrary, if the discrimination is based upon matters which have no relation to the object sought to be accomplished, the same conclusion of unconstitutionality is affirmed. Atchison, etc., R. Co. v. Matthews, 174 U. S. 96, 105, 43 L. Ed. 909.

"Discrimination, if founded upon a reasonable distinction in principle, is valid. Of course, if such discrimination were purely arbitrary, oppressive or capricious, and made to depend upon differences of color, race, nativity, religious opinions, political affiliations or other considerations having no possible connection with the duties of citizens as taxpayers, such exemption would be pure favoritism, and a denial of the equal protection of the laws to the less favored classes." American Sugar Refining Co. v. Louisiana, 179 U. S. 89, 92, 45 L. Ed. 102.

**1. Classification based upon fact of incorporation.**—Lake Shore, etc., R. Co. v. Smith, 173 U. S. 684, 696, 43 L. Ed. 858.

There is no good reason why railroad corporations alone should be punished for not paying their debts. Compelling the payment of debts is not a police regulation. Gulf, etc., R. Co. v. Ellis, 165 U. S. 150, 41 L. Ed. 66; Atchison, etc., R. Co. v. Matthews, 174 U. S. 96, 98, 43 L. Ed. 909.

**2. Rigid equality not required; legislature permitted a wide discretion.**—County of Mobile v. Kimball, 102 U. S. 691, 26 L. Ed. 238; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 237, 33 L. Ed. 892; Duncan v. Missouri, 152 U. S. 377, 38 L. Ed. 485; Marchant v. Pennsylvania R. Co., 153 U. S. 380, 386, 38 L. Ed. 751; Lowe v. Kansas, 163 U. S. 81, 88, 41 L. Ed. 78; Jones v. Brim, 165 U. S. 180, 184, 41 L. Ed. 677; Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283, 42 L. Ed.



**Law Not Invalid Because of Mere Inequality of Result; Classification Implies Inequality.**—This provision of the constitution does not invalidate legislation on the mere ground of inequality in actual result. Tax laws, for instance, in their nature are and must be general in scope, and it may often happen that in their practical application they touch one person unequally from another. But that inequality is something which it is impossible to foresee and guard against, and therefore such resultant inequality in the operation of a law

1037; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 562, 43 L. Ed. 552; *Clark v. Kansas City*, 176 U. S. 114, 119, 44 L. Ed. 392; *Erb v. Morasch*, 177 U. S. 584, 586, 44 L. Ed. 897; *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 45 L. Ed. 879; *Billings v. Illinois*, 188 U. S. 97, 102, 47 L. Ed. 400; *Hibben v. Smith*, 191 U. S. 310, 325, 48 L. Ed. 195; *Missouri, etc., R. Co. v. May*, 194 U. S. 267, 269, 48 L. Ed. 971; *Carroll v. Greenwich Ins. Co.*, 199 U. S. 401, 411, 50 L. Ed. 246; *Bachtel v. Wilson*, 204 U. S. 36, 37, 41, 51 L. Ed. 357; *Bachtel v. Wilson*, 204 U. S. 42, 51 L. Ed. 360.

"If the purpose is within the legal powers of the legislature, and the classification made has relation to that purpose (excludes no persons or objects that are affected by the purpose, includes all that are), logically speaking, it will be appropriate; legally speaking, a law based upon it will have equality of operation. And, excluding our right to consider policies or assume legislation, we have many times said that a state in its purposes and in the execution of them, must be allowed a wide range of discretion, and that this court will not make itself 'a harbor in which can be found a refuge from ill-advised, unequal and oppressive legislation.'" *Billings v. Illinois*, 188 U. S. 97, 102, 47 L. Ed. 400; *County of Mobile v. Kimball*, 102 U. S. 691, 26 L. Ed. 238.

"The fourteenth amendment, it has been held, legitimately operates to extend to the citizens and residents of the states the same protection against arbitrary state legislation, affecting life, liberty and property, as is offered by the fifth amendment against similar legislation by congress; but that the federal courts ought not to interfere when what is complained of amounts to the enforcement of the laws of a state applicable to all persons in like circumstances and conditions, and that the federal courts should not interfere unless there is some abuse of law amounting to confiscation of property or a deprivation of personal rights, such as existed in the case of *Norwood v. Baker*, 172 U. S. 269, 43 L. Ed. 443. These principles have been reiterated in a series of cases reported in 181 U. S., commencing with *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 45 L. Ed. 879, of that volume." *Hibben v. Smith*, 191 U. S. 310, 325, 48 L. Ed. 195.

**Classification held to be reasonable—Statute requiring public vaccination.**—A

statute providing for the public vaccination of citizens in time of danger from smallpox is not objectionable as denying the equal protection of the laws because of a provision therein which makes an exception in favor of children certified by a registered physician to be unfit subjects for vaccination without making any such exception in case of adults in like condition. Notwithstanding such provision the statute is applicable equally to all in like condition, and there are obviously reasons why regulations may be appropriate to adults which could not be safely applied to persons of tender years. *Jacobson v. Massachusetts*, 197 U. S. 11, 30, 49 L. Ed. 643.

**Use of flag for advertising purposes.**—A state statute which makes it a misdemeanor, punishable by fine or imprisonment, or both, for any one to sell, expose for sale or have in possession for sale, any article of merchandise upon which shall have been printed or placed for purposes of advertisement any representation of the flag of the United States is not unconstitutional as denying the equal protection of the laws by reason of the fact that it expressly excepts from its operation any newspaper, periodical, book, etc., in which shall be printed, painted or placed any representation of the flag disconnected from any advertisement. *Halter v. Nebraska*, 205 U. S. 34, 39, 51 L. Ed. 696, affirming the validity of 1 *Cobbey's Ann. Stat. Neb.* 1903, ch. 139.

**Statute respecting the driving of herds of live stock along highways.**—Section 2087 of the Compiled Laws of Utah (vol. 1, p. 743), which provides that "Any person who drives a herd of horses, mules, asses, cattle, sheep, goats or swine over a public highway, where such highway is constructed on a hillside, shall be liable for all damages done by such animals in destroying the banks or rolling rocks into or upon such highway,"—is a valid exercise of the police powers of the state to establish, maintain and control the public highways, and is not unconstitutional as denying the owners of the herds therein described the equal protection of the laws, since it is general in its application, embracing all persons under substantially like circumstances, and not being an arbitrary exercise of power. *Jones v. Brim*, 165 U. S. 180, 41 L. Ed. 677.

**Statute forbidding railroad to allow Johnson grass to go to seed upon right of way.**—In an action against a railroad company to recover a penalty of twenty-

does not defeat its validity.<sup>3</sup> The very idea of classification is that of inequality, so that it goes without saying that the mere fact of inequality in no manner determines the matter of constitutionality.<sup>4</sup>

**Greater Latitude Permitted in the Exercise of the Taxing Power.**—In *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 563, 46 L. Ed. 679, Mr. Justice Harlan, after speaking of the wide discretion which must be allowed to the state in classifying persons and property for the purposes of taxation and in selecting objects of taxation, says: "But different considerations control when the state, by legislation, seeks to regulate the enjoyment of rights and the pursuit of callings connected with domestic trade. In prescribing regulations for the conduct of trade, it cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same domestic trade to do the same things with impunity. It is one thing to exert the power of taxation so as to meet the expenses of government, and at the same time, indirectly, to build up or protect particular interests or industries. It is quite a different thing for the state, under its general police power, to enter the domain of trade or commerce, and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates." It follows therefore that the constitutional validity of statutes regulating the right to engage in trade and the enjoyment of rights and the pursuit of callings is not necessarily to be determined by the same principles that apply to taxing laws.<sup>5</sup>

**Presumption in Favor of Validity of Legislation.**—"When a state legislature has declared that, in its opinion, policy requires a certain measure, its action should not be disturbed by the court under the fourteenth amendment unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched."<sup>6</sup> The presumption is always in favor of the validity of legislation, state or municipal; and if there could exist a condition of facts justifying the classification or restriction complained of, the courts are bound to presume that it did exist.<sup>7</sup>

five dollars, brought by the owner of a farm contiguous to the railroad, on the ground that the latter has allowed Johnson grass to mature and go to seed upon its road, it was held that the Texas statute of 1901, ch. 117, directed solely against railroad companies, for permitting Johnson grass or Russian thistle to go to seed upon their right of way, subject, however, to the condition that the plaintiff has not done the same thing, is not contrary to the fourteenth amendment of the constitution of the United States, in that it denies equal protection of the law. *Missouri, etc., R. Co. v. May*, 194 U. S. 267, 268, 48 L. Ed. 971.

3. **Law not invalid because of mere inequality of result.**—*Merchants', etc., Bank v. Pennsylvania*, 167 U. S. 461, 463, 42 L. Ed. 236; *Wagoner v. Evans*, 170 U. S. 588, 592, 42 L. Ed. 1154; *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 110, 46 L. Ed. 92.

4. **Same.**—*Atchison, etc., R. Co. v. Matthews*, 174 U. S. 96, 106, 43 L. Ed. 909; *Clark v. Kansas City*, 176 U. S. 114, 120, 44 L. Ed. 392.

5. **Greater latitude permitted in the exercise of the taxing power.**—*Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 561, 46 L. Ed. 679. See, also, *Kidd v. Pearson*, 128 U. S. 1, 26, 32 L. Ed. 346; *Cook v. Marshall County*, 196 U. S. 261, 274, 49 L. Ed. 471.

"Whether there is a difference in the scope of a state's general power to legislate and its power to tax or not (*Kidd v. Pearson*, 128 U. S. 1, 26, 32 L. Ed. 346, *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 562, 563, 46 L. Ed. 679), the former does not need an extended defense so far as the fourteenth amendment alone is concerned." *Cox v. Texas*, 202 U. S. 446, 450, 50 L. Ed. 1099. See *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89, 45 L. Ed. 102; *Reymann Brewing Co. v. Brister*, 179 U. S. 445, 45 L. Ed. 269; *St. John v. New York*, 201 U. S. 633, 50 L. Ed. 896.

6. **Presumption in favor of validity.**—*Missouri, etc., R. Co. v. May*, 194 U. S. 267, 269, 48 L. Ed. 971.

7. **Same.**—*Soon Hing v. Crowley*, 113 U. S. 703, 710, 28 L. Ed. 1145; *Crowley v.*



In short, the selection, in order to become obnoxious to the fourteenth amendment, must be arbitrary and unreasonable, not merely possible, but clearly and actually so.<sup>8</sup>

**Validity Not Dependent upon Testimony of Witnesses nor the Verdicts of Juries.**—Again, conceding that there exists a difference in the circumstances under which persons engaged in the same business operate, it is not to be decided by the testimony of witnesses nor by the verdict of juries whether such difference is sufficient to authorize the application of a different rule to the one than that applied to the others, since different witnesses and different juries might take different views under exactly the same facts. Given the fact of a difference, it is for the legislature or city council to say whether separate regulations shall be applied to the two.<sup>9</sup>

i. *Equality Rule Forbids That Individual Shall Be Subjected to Arbitrary Exercise of Power*—(1) *Generally*.—It has been said that this is a government of laws and not of men; that there is no arbitrary body of individuals; that the constitutional principles upon which our government and its institutions rest do not leave room for the play and action of purely personal and arbitrary power, but that all in authority are guided and limited by those provisions which the people have, through the organic law, declared shall be the measure and scope of all control exercised over them.<sup>10</sup> In particular, the fourteenth amendment, and especially the equal protection clause thereof, forbids that the individual shall be subjected to any arbitrary exercise of the powers of government; it was intended to prohibit, and does prohibit, any arbitrary deprivation of life or liberty, or arbitrary spoliation of property.<sup>11</sup>

(2) *Where Statute Clearly Hostile and Arbitrary*.—As we have seen, a statute which makes a purely arbitrary or unreasonable classification, or which singles out any particular individual or class as the subject of hostile and discriminating legislation, is clearly unconstitutional as being opposed to the four-

Christensen, 137 U. S. 86, 34 L. Ed. 620; Davis v. Massachusetts, 167 U. S. 43, 42 L. Ed. 71; Erb v. Morasch, 177 U. S. 584, 586, 44 L. Ed. 897; Missouri, etc., R. Co. v. May, 194 U. S. 267, 269, 48 L. Ed. 971; Fischer v. St. Louis, 194 U. S. 361, 371, 48 L. Ed. 1018; Scheffe v. St. Louis, 194 U. S. 373, 48 L. Ed. 1025.

Thus it may be that owing to the density of population, or the crowded condition of the streets, or other good reason, the operation of trains in a particular portion of a city calls for a different regulation from that which prevails in other parts of the same city; and an ordinance prescribing a regulation applicable only to a particular road or to a particular portion of a city having been passed, it will be presumed, in the absence of positive proof to the contrary, that the conditions justified the distinction. Railroad Co. v. Richmond, 96 U. S. 521, 529, 24 L. Ed. 734; Erb v. Morasch, 177 U. S. 584, 586, 44 L. Ed. 897.

8. **Same; must be clearly arbitrary or unreasonable.**—Carroll v. Greenwich Ins. Co., 199 U. S. 401, 411, 50 L. Ed. 246; Bachtel v. Wilson, 204 U. S. 36, 37, 41, 51 L. Ed. 357; Bachtel v. Wilson, 204 U. S. 42, 51 L. Ed. 360.

9. **Validity not determined by testimony of witnesses nor verdict of juries.**—Erb v. Morasch, 177 U. S. 584, 587, 44 L. Ed. 897.

10. **Forbids that individual shall be subjected to the arbitrary exercise of the powers of government.**—Yick Wo v. Hopkins, 118 U. S. 356, 369, 30 L. Ed. 220; Chicago, etc., R. Co. v. Thompsons, 167 U. S. 167, 172, 44 L. Ed. 417; Cotting v. Kansas City Stock Yards Co., 183 U. S. 79, 84, 46 L. Ed. 92.

11. **Same.**—Barbier v. Connolly, 113 U. S. 27, 28 L. Ed. 92; Yick Wo v. Hopkins, 118 U. S. 356, 369, 30 L. Ed. 220; In re Kemmler, 136 U. S. 436, 448, 34 L. Ed. 519; Giozza v. Tiernan, 148 U. S. 657, 662, 37 L. Ed. 599; Jones v. Brim, 165 U. S. 180, 182, 41 L. Ed. 677; Minder v. Georgia, 183 U. S. 559, 562, 46 L. Ed. 328; Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 559, 46 L. Ed. 679; Atkin v. Kansas, 191 U. S. 207, 223, 48 L. Ed. 148; Dobbins v. Los Angeles, 195 U. S. 223, 241, 49 L. Ed. 169.

There is a class of cases wherein the court may restrain the arbitrary and discriminatory exercise of the police power which amounts to a taking of property without due process of law and an impairment of property rights protected by the fourteenth amendment to the federal constitution. Dobbins v. Los Angeles, 195 U. S. 223, 241, 49 L. Ed. 169.

"It is the solemn duty of the courts in cases before them to guard the constitutional rights of the citizen against merely arbitrary power." Atkin v. Kansas, 191 U. S. 207, 223, 48 L. Ed. 148.



teenth amendment and especially to the equal protection clause thereof. This is a plain case, and requires no further discussion.<sup>12</sup>

(3) *Where Natural and Necessary Effect of Law Is to Work Inequality.*—See ante, "Where Intent Good, but Operation and Effect Unconstitutional," VI, D, 3, d, (4), (b), (ee).

(4) *Arbitrary and Oppressive Administration of Statutes.*—Under this head there are several distinctions to be noticed.

**Statute Perfectly Valid but Unfaithfully Construed or Administered.**—In the first place, a law cannot be held unconstitutional because, while its just interpretation is consistent with the constitution, it is unfaithfully administered by those who are charged with its execution. Their doings may be unlawful while the statute is valid.<sup>13</sup> Again, the constitutionality of a statute, justly and properly interpreted, being conceded, neither prosecution nor findings, under a mistaken construction and application, which, if correct, would render it unconstitutional, will, of themselves, constitute a deprivation of property or a denial of the equal protection of the laws, since if the conclusions of the administrative officers are erroneous, the courts are open for the correction of the error.<sup>14</sup>

**Where Statute So Framed as to Be Susceptible of Arbitrary or Oppressive Administration.**—Again, a statute or ordinance may be so framed that, while perfectly fair and valid on its face, it is susceptible of unfair and unequal administration. In such case, its enforcement in an unequal and arbitrary manner for the purpose of oppressing any particular individual or class will be relieved against by the courts.<sup>15</sup> No presumption arises in such case, however, that the statute is, or will be, unequally and oppressively administered, even though it is shown that it was directed against a particular class and was designed for the purpose of enforcing an arbitrary and unjust discrimination against that class. In other words, it is not sufficient to show evil design, or the possibility of evil under the statute, but it must be shown that in its actual enforcement it is unequally and arbitrarily administered and used as an instrument of oppression against the class against whom it was directed.<sup>16</sup>

**12. Where statute clearly hostile and arbitrary.**—See ante, "Classification Must Be Reasonable; Arbitrary and Hostile Classification Forbidden," VII, B, 2, h, (8).

**13. Unfaithful administration of unobjectionable statute.**—*Cummings v. National Bank*, 101 U. S. 153, 25 L. Ed. 903; *Campagne Francaise, etc., v. Louisiana State Board of Health*, 186 U. S. 380, 392, 46 L. Ed. 1209; *Arbuckle v. Blackburn*, 191 U. S. 405, 414, 48 L. Ed. 239; *Michigan Cent. R. Co. v. Powers*, 201 U. S. 245, 301, 345, 50 L. Ed. 744.

**14. Same; prosecution and findings under mistaken construction.**—*Arbuckle v. Blackburn*, 191 U. S. 405, 414, 48 L. Ed. 239.

Thus the Ohio pure food law (2 Bates Ohio Stats. 1897, p. 2229, tit. V, cl. A) provided that food should be deemed adulterated "if it is colored, coated, polished or powdered, whereby damage or inferiority is concerned, or if by any means it is made to appear better or of greater value than it really is," with a proviso excepting mixtures and compounds, recognized as ordinary articles of food, not injurious to health, and labeled as required. It was held that the action of the charged with the enforcement of this law,

state dairy and food commissioner, in applying it to coffee glazed with a coating of sugar and eggs, and instituting prosecutions under such mistaken view, did not of itself constitute a deprivation of property or a denial of the equal protection of the law. *Arbuckle v. Blackburn*, 191 U. S. 405, 414, 48 L. Ed. 239.

**15. Where statute so framed as to be susceptible of arbitrary or oppressive administration.**—*Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. Ed. 220; *Dobbins v. Los Angeles*, 195 U. S. 223, 49 L. Ed. 169. And see the authorities cited in the next note.

**16. Same; presumption as to manner of enforcement.**—*Supervisors v. Stanley*, 105 U. S. 305, 318, 26 L. Ed. 1044; *Soon Hing v. Crowley*, 113 U. S. 703, 711, 28 L. Ed. 1145; *Crowley v. Christensen*, 137 U. S. 86, 92, 34 L. Ed. 620, distinguishing *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. Ed. 220; *Murray v. Louisiana*, 163 U. S. 101, 41 L. Ed. 87; *Williams v. Mississippi*, 170 U. S. 213, 225, 42 L. Ed. 1012; *New York State v. Barker*, 179 U. S. 279, 286, 45 L. Ed. 190, distinguishing *Cummings v. National Bank*, 101 U. S. 153, 25 L. Ed. 903; *Aikens v. Wisconsin*, 195 U. S. 194, 206, 49 L. Ed. 154; *Ah Sin v. Wittman*, 198 U. S. 500, 508, 49 L. Ed. 1142; *New York State v. Van De Carr*, 199 U. S. 552, 563,

**Same; Criminal Laws; Averment and Proof.**—And where a plaintiff in error seeks to set aside a criminal law of the state, not on the ground that it is unconstitutional on its face, nor that it is discriminatory in its tendency and ultimate actual operation, but that it is made so by the manner of its administration, no latitude of intention as to the averments made will be indulged, but there must be a certainty to every intent. Every fact necessary to show the unconstitutionality of the law must be alleged and proved.<sup>17</sup> It is not sufficient, in such a case, to aver that the statute or ordinance is enforced solely and exclusively against persons of a particular race, and not otherwise, but it must be alleged and proved that the conditions and practices to which the ordinance is directed do not exist exclusively among persons of that race and that there are other offenders against the ordinance as to whom it is not enforced.<sup>18</sup>

**Statute Vesting a Discretion in Some Officer, Board or Tribunal.**—Statutes alleged to be susceptible of arbitrary and oppressive administration have frequently been called in question in cases where, in the granting of licenses and permits, the selection of citizens for jury service, and in the performance of various other functions, something is left to the discretion of some subordinate tribunal, board, or official. In such cases the doctrine is, in the absence of anything upon the face of the law to the contrary, that the discretion vested in such tribunal, board or official, is a judicial or legal discretion, and it will not be presumed, in the absence of proof to the contrary, that it has been, or is being, used in an unreasonable, arbitrary or oppressive manner.<sup>19</sup> When a power which

50 L. Ed. 305. See, also, ante, "Where Statute Otherwise Unobjectionable Is Unfaithfully Administered," VI, D, 3, d, (4), (b), (ff).

A San Francisco city ordinance prohibited the exposure of gambling tables or implements in a barred or barricaded room, or the visiting of any one to such a room, when three or more persons were present. Under this ordinance the plaintiff was convicted and imprisoned and now seeks relief on the ground that said ordinance violates the equal protection clause of the fourteenth amendment because it was enforced against persons of the Chinese race only. But he failed to aver or prove that the ordinance had been disobeyed by others who were not punished. Therefore no discrimination was shown. *Ah Sin v. Wittman*, 198 U. S. 500, 506, 49 L. Ed. 1142.

In *Soon Hing v. Crowley*, 113 U. S. 703, 711, 28 L. Ed. 1145, the court say: "And, even if it be true as alleged, that an ordinance regulating laundries and wash houses, which is, on its face, a valid police regulation, was designed for the purpose of enforcing an unjust discrimination against Chinese residents engaged in that business, on account of their race and color, it is no ground for declaring it unconstitutional unless in its enforcement it is made to operate only against the class mentioned. *Soon Hing v. Crowley*, 113 U. S. 703, 711, 28 L. Ed. 1145.

**17. Same; criminal laws; averment and proof.**—*Ah Sin v. Wittman*, 198 U. S. 500, 508, 49 L. Ed. 1142

**18. Same.**—*Ah Sin v. Wittman*, 198 U. S. 500, 507, 49 L. Ed. 1142 (involving the constitutionality of an ordinance of the city of San Francisco designed to sup-

press gambling in barred and barricaded houses, and forbidding the visiting of such houses, and which was alleged to be unconstitutional because enforced solely against persons of the Chinese race, and not otherwise).

**19. Statutes vesting a discretion in some subordinate tribunal, board, or officer.**—*Supervisors v. Stanley*, 105 U. S. 305, 318, 26 L. Ed. 1044; *Soon Hing v. Crowley*, 113 U. S. 703, 711, 28 L. Ed. 1145; *Crowley v. Christensen*, 137 U. S. 86, 92, 34 L. Ed. 620; *Murray v. Louisiana*, 163 U. S. 101, 108, 41 L. Ed. 87; *Davis v. Massachusetts*, 167 U. S. 43, 48, 42 L. Ed. 71; *Williams v. Mississippi*, 170 U. S. 213, 225, 42 L. Ed. 1012; *Wilson v. Eureka City*, 173 U. S. 32, 43 L. Ed. 603; *Gundling v. Chicago*, 177 U. S. 183, 187, 44 L. Ed. 725; *New York State v. Barker*, 179 U. S. 279, 286, 45 L. Ed. 190, distinguishing *Cummings v. National Bank*, 101 U. S. 153, 25 L. Ed. 903; *Louisville, etc., R. Co. v. Kentucky*, 183 U. S. 503, 515, 46 L. Ed. 298; *St. Louis Consolidated Coal Co. v. Illinois*, 185 U. S. 203, 208, 212, 46 L. Ed. 872; *Fischer v. St. Louis*, 194 U. S. 361, 48 L. Ed. 1018; *Schefe v. St. Louis*, 194 U. S. 373, 48 L. Ed. 1025; *Aikens v. Wisconsin*, 195 U. S. 194, 206, 49 L. Ed. 154; *Jacobson v. Massachusetts*, 197 U. S. 11, 27, 49 L. Ed. 643; *Ah Sin v. Wittman*, 198 U. S. 500, 506, 49 L. Ed. 1142; *New York State v. Van De Carr*, 199 U. S. 552, 559, 50 L. Ed. 305. See, also, ante, "To Board Commissioners and Similar Agencies," VI, D, 3, e, (2), (b), (bb).

The proposition, that the conferring of discretionary power upon administrative boards to grant or withhold permission to carry on a trade or business which is the proper subject of regulation within the po-



has been granted to an administrative board has been shown to have been ar-

lice power of the state is not violative of rights secured by the fourteenth amendment, is undoubtedly correct. *New York State v. Van De Carr*, 199 U. S. 552, 562, 50 L. Ed. 305.

"It has been held in some of the state courts to be contrary to the spirit of American institutions to vest this dispensing power in the hands of a single individual, *Chicago v. Trotter*, 136 Illinois 430; *Matter of Frazee*, 63 Michigan 396; *States v. Fiske*, 9 R. I. 94; *Baltimore v. Radecke*, 49 Maryland 217; *Sioux Falls v. Kirby*, 6 S. Dak. 62, and in others that such authority cannot be delegated to the adjoining lot owners. *St. Louis v. Russell*, 116 Missouri 248; *Ex parte Sing Lee*, 96 California 354. But the authority to delegate that discretion to a board appointed for that purpose is sustained by the great weight of authority, *Quincy v. Kennard*, 151 Massachusetts 563; *Commonwealth v. Davis*, 162 Massachusetts 510, and by this court the delegation of such power, even to a single individual, was sustained in *Wilson v. Eureka City*, 173 U. S. 32, 43 L. Ed. 603 and *Gundling v. Chicago*, 177 U. S. 183, 44 L. Ed. 725." *Fischer v. St. Louis*, 194 U. S. 361, 371, 48 L. Ed. 1018; *Scheffe v. St. Louis*, 194 U. S. 373, 48 L. Ed. 1025.

In *New York State v. Van De Carr*, 199 U. S. 552, 563, 50 L. Ed. 305, the court said, in regard to an ordinance of the city of New York permitting the sale of milk only upon permission granted by the board of health: "We have, then, an ordinance which, as construed in the highest court of the state, authorizes the exercise of a legal discretion in the granting or withholding of permits to transact a business, which, unless controlled, may be highly dangerous to the health of the community, and no affirmative showing that the power has been exerted in so arbitrary and oppressive a manner as to deprive the appellant of his property or liberty without due process of law. In such case it is the settled doctrine of this court that no federal right is invaded, and no authority exists for declaring a law unconstitutional, duly passed by the legislative authority and approved by the highest court of the state."

And in *Aikens v. Wisconsin*, 195 U. S. 194, 206, 49 L. Ed. 154, the court said, in speaking of a statute which made malevolent motive an element of the crime of conspiring to injure another in his reputation, trade, business or profession: "It was urged farther that to make a right depend upon motives is to make it depend upon the whim of a jury and to deny the right. But it must be assumed that the constitutional tribunal does its duty and finds facts only because they are proved. The power of the legislature to make the fact of malice material we think suffi-

ciently appears from what we already have said."

**Ordinances vesting discretion in board or tribunal selecting citizens for jury service.**—That the state law confers on the jury commissioners judicial powers in the selection of citizens for jury service, is no sufficient ground for holding such statute to be in conflict with the fourteenth amendment where it is not shown or pretended that the accused was subjected to any other or different treatment, in respect to that feature of the statute, than that which prevails in other cases or on the trial of white citizens. *Murray v. Louisiana*, 163 U. S. 101, 108, 41 L. Ed. 87.

Those sections of the constitution of Mississippi of 1890 relating to elections and to the qualifications and registration of electors, and to the qualifications and selection of jurors, and the provisions of the Code of 1892 enacted pursuant thereto, do not on their face discriminate against the negro race; and it not being shown that there was any discrimination in their actual administration, but only that such discrimination was possible, the same were held not to conflict with the fourteenth amendment of the federal constitution. *Williams v. Mississippi*, 170 U. S. 213, 225, 42 L. Ed. 1012, distinguishing *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. Ed. 220.

**Same—Reassessment of undervalued property.**—Where a statute of the state of New York required all real property to be assessed at its true value, but provided for a subsequent assessment in the case of real property owned by corporations where it was found that such property had been undervalued, it was held that the court would not, in the absence of allegations or proof presume that the state officers administered the law in such manner as to habitually deny the equal protection of the laws to corporations in violation of the state constitution and laws. *New York State v. Barker*, 179 U. S. 279, 286, 45 L. Ed. 190, distinguishing *Cummings v. National Bank*, 101 U. S. 153, 25 L. Ed. 903; *Supervisors v. Stanley*, 105 U. S. 305, 318, 26 L. Ed. 1044.

**Same—License to sell intoxicating liquors.**—In the case of *Crowley v. Christensen*, 137 U. S. 86, 92, 34 L. Ed. 620, it was held that the ordinance of the city and county of San Francisco which empowered the police commissioners to grant or refuse their assent to the application of petitioners for license to sell intoxicating liquors, or, upon petitioners failing to obtain their assent upon application, requiring it to be given upon the recommendation of twelve citizens owning real estate in the block or square in which business as a retail dealer in liquors was to be carried on, was not an unconstitutional delegation of arbitrary discretion



bitrarily exercised under sanction of state authority, one thus unlawfully op-

to the police commissioners and to the real estate owners of the block which might be exercised to deprive applicants for license of the equal protection of the laws. (*Distinguishing Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. Ed. 220, upon the grounds that in that case the ordinance vested an uncontrolled discretion in the board of supervisors with reference to a business harmless in itself and useful to the community.)

**Same—Necessity for public vaccination.**—It is competent for the legislature to invest a local board of health with authority to determine upon the necessity of a general vaccination of the inhabitants in the locality subject to its jurisdiction. To invest such a body with authority over such matters is not an unusual nor an unreasonable or arbitrary requirement. *Jacobson v. Massachusetts*, 197 U. S. 11, 27, 49 L. Ed. 643.

**Same—License to sell milk or conduct a dairy.**—The requirement of the sanitary code of New York City, providing for the sale of milk only by permission of the board of health of that city, is a reasonable and valid regulation, neither depriving one of property without due process of law nor denying him equal protection of the laws. *New York State v. Van De Carr*, 199 U. S. 552, 559, 50 L. Ed. 305.

In a proceeding instituted by a criminal complaint filed by the city of St. Louis against F in the police court for a violation of an ordinance of the city in erecting, building and establishing on certain premises occupied by F a dairy and cow stable, without first having obtained permission so to do from the municipal assembly by proper ordinance, and for maintaining such dairy and cow stable without permission of such assembly, motion was made to quash the complaint upon the ground, amongst others, that § 5 of the ordinance under which the conviction was held was in violation of the fourteenth amendment of the constitution of the United States. It was held that the fact that permission to keep cattle may be granted by the municipal assembly does not impair in any degree the validity of the ordinance, or deny to the disfavored dairy keepers the equal protection of the laws. *Fischer v. St. Louis*, 194 U. S. 361, 362, 371, 48 L. Ed. 1018; *Scheffe v. St. Louis*, 194 U. S. 373, 48 L. Ed. 1025.

In *Fischer v. St. Louis*, 194 U. S. 361, 371, 48 L. Ed. 1018, the court says: "Of course, cases may be imagined where the power to issue permits may be abused and the permission accorded to social or political favorites and denied to others, who for reasons totally disconnected with the merits of the case are distasteful to the licensing power. No such complaint, however, is made to the practical application of the law in this case, and we are

led to infer that none such exists. We have no criticism to make of the principle of granting a license to one and denying it to another, and are bound to assume that the discrimination is made in the interest of the public, and upon conditions applying to the health and comfort of the neighborhood." Citing *Crowley v. Christensen*, 137 U. S. 86, 34 L. Ed. 620; *Davis v. Massachusetts*, 167 U. S. 43, 42 L. Ed. 71; *Soon Hing v. Crowley*, 113 U. S. 703, 710, 28 L. Ed. 1145."

**Same—Regulation of long and short haul charges.**—Section 218 of the Kentucky constitution, and § 820, of the Kentucky Gen. Stats. of 1894, which prohibit the charging of more for a short than for a long haul, are not unconstitutional by reasons of the proviso therein contained permitting the state railroad commission to authorize such charges in special cases after investigation and to prescribe from time to time the extent to which persons or corporations owning or operating railroads within the state may be relieved from the operation of those sections. Such a provision is *ex gratia*, and the exercise of such a discretion by the railroad commission is no more arbitrary than if the constitution had vested the same discretion in the legislature. *Louisville, etc., R. Co. v. Kentucky*, 183 U. S. 503, 515, 46 L. Ed. 298.

**Ordinance vesting discretion in single individual—Speeches on Boston Common.**—An ordinance of the city of Boston forbidding the delivery of public addresses upon Boston Common, except in accordance with a permit from the mayor, is not unconstitutional as vesting an arbitrary power in the mayor which may be used oppressively and unequally. Such ordinance merely vests an administrative function in the mayor in order to effectuate the purpose for which the common is maintained. *Davis v. Massachusetts*, 167 U. S. 43, 48, 42 L. Ed. 71.

**Same—Moving buildings along public streets.**—An ordinance which provides that no person shall, under a penalty, move any building or the frame of any building, into or upon the public streets, lots, or squares of the city, or obstruct, or cause to be obstructed the free passage of the streets, etc., without the written permission of the mayor or president of the city council, or in their absence, a councilor, is not in conflict with the first section of the fourteenth amendment. *Wilson v. Eureka City*, 173 U. S. 32, 43 L. Ed. 603.

**Same—License to sell cigarettes.**—An ordinance of the city of Chicago requiring the license from the mayor for the sale of cigarettes, and forbidding the sale without such license, and requiring the license to be issued if the mayor is satisfied that the person applying is of good character

pressed will secure redress therefor from the supreme court; but no presumption exists of arbitrary exercise of power by an executive board possessing it.<sup>20</sup>

**Same—Where Statute Vests an Absolute and Arbitrary Discretion.**

—On the other hand, it is held that the law itself is obnoxious to this provision, and unconstitutional, where, although otherwise fair and impartial upon its face, it vests a board of supervisors or other municipal body with an absolute and arbitrary discretion, without the right of appeal therefrom, to grant or refuse a license for conducting a legitimate business without regard to the character and fitness of the applicant or the suitability of the place where it is proposed to be conducted, thereby putting it within the power of such board to make arbitrary and unjust discriminations founded on differences of race or color, or upon any other arbitrary distinction, and where it is shown that in the administration of the ordinance such discriminations are actually made.<sup>21</sup>

j. *Summary of Principles.*—By way of summarizing the principles above set out, it may be said that due process of law and the equal protection of the laws are secured if the law embraces, and operates alike upon, all persons under substantially like circumstances, and does not subject the individual to an arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice. And where the subject matter of rights and regulations falls within the control of the states, the provisions of the fourteenth amendment of the constitution of the United States are satisfied if, the state law, with its benefits and its obligations, is impartially administered.<sup>22</sup>

and reputation and a suitable person to be intrusted with the sale of cigarettes, provided the applicant gives bond, etc., is not invalid as making an arbitrary discrimination between those desiring to engage in the business of selling cigarettes and those desiring to engage in any other trade or occupation. Neither is such ordinance unconstitutional as vesting an arbitrary discretion in the mayor, since it calls for exercise of a discretion of a judicial nature by him and requires him to grant a license to every person fulfilling the prescribed conditions. *Gundling v. Chicago*, 177 U. S. 183, 187, 44 L. Ed. 725.

**Same—Inspection of coal mines.**—A statute relating to the inspection of coal mines is not unconstitutional by reason of the fact that it provides that the fees for each inspection shall be not less than \$6.00 or more than \$10.00, and leaves it to the individual inspectors to fix the fees, within these limits, for each inspector; it further appearing that the inspector is dependent for his compensation, not upon the fees charged, but upon a stated salary payable by the state. *St. Louis Consolidated Coal Co. v. Illinois*, 185 U. S. 203, 208, 212, 46 L. Ed. 872.

A statute relating to the inspection of coal mines is not unconstitutional by reason of a provision that "it shall be the duty of each inspector, as often as he may deem it necessary and proper, and at least four times a year, to inspect each and every mine in his inspection district," since it requires no argument to show that, for the protection of the operators, one mine may be required to be inspected oftener than another, and that in the nature of

things the legislature cannot say just how often any one mine should be inspected. *St. Louis Consolidated Coal Co. v. Illinois*, 185 U. S. 203, 208, 209, 46 L. Ed. 872.

20. *New York State v. Van De Carr*, 199 U. S. 552, 562, 50 L. Ed. 305; *Dobbins v. Los Angeles*, 195 U. S. 223, 9 L. Ed. 169.

21. **Same; where statute vests an absolute and arbitrary discretion.**—*Yick Wo v. Hopkins*, 118 U. S. 356, 373, 374, 30 L. Ed. 220. See, also, *Henderson v. New York City*, 92 U. S. 259, 23 L. Ed. 543; *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. Ed. 550; *Soon Hing v. Crowley*, 113 U. S. 703, 711, 28 L. Ed. 1145; *Crowley v. Christensen*, 137 U. S. 86, 92, 34 L. Ed. 620.

Thus an ordinance in the city and county of San Francisco which invested the board of supervisors with arbitrary power to grant or refuse licenses for conducting laundries, without regard to the character and fitness of the applicant, and without regard to the suitability of the location, and without any review or right of appeal from their decision, was held to be unconstitutional and void, it being shown that under such ordinance it was the uniform practice to grant licenses to all members of the Caucasian race and to refuse them to all Chinamen. *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. Ed. 220.

22. **Same.**—*Walker v. Sauvinet*, 92 U. S. 90, 23 L. Ed. 678; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *Missouri v. Lewis*, 101 U. S. 22, 25 L. Ed. 989; *Hallinger v. Davis*, 146 U. S. 314, 36 L. Ed. 986; *Eldridge v. Trezevant*, 160 U. S. 452, 468, 40 L. Ed. 490.

**Summary of principles.**—*Hurtado v.*



3. REGULATION OF BUSINESS, TRADE, OCCUPATION OR PROFESSION—*a. Generally.*—The right of the state, in the exercise of its police power, and with a view to protecting the public health and welfare, to regulate certain occupations, trades and professions has been many times before the federal supreme court and is sustained by numerous decisions.<sup>23</sup> To justify the state, however, in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.<sup>24</sup> "It is primarily for the state to select the kinds of business which shall be the subjects of regulation, and if the business affected is one which may be properly the subject of such legislation, it is no valid objection that similar regulations are not imposed upon other businesses of a different kind."<sup>25</sup> The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression or spoliation of a particular class.<sup>26</sup>

*b. Right to Pursue Lawful Occupation, Acquire and Dispose of Property, without Discrimination.*—The right of a citizen to enjoy upon terms of equality with all others in similar circumstances the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is an essential part of his rights of liberty and property, as guaranteed by the fourteenth amendment.<sup>27</sup>

California, 110 U. S. 516, 535, 28 L. Ed. 232; *Leeper v. Texas*, 139 U. S. 462, 467, 35 L. Ed. 225; *Duncan v. Missouri*, 152 U. S. 377, 382, 38 L. Ed. 485; *Marchant v. Pennsylvania R. Co.*, 153 U. S. 380, 386, 38 L. Ed. 751; *Gibson v. Mississippi*, 162 U. S. 565, 591, 40 L. Ed. 1075; *Lowe v. Kansas*, 163 U. S. 81, 88, 41 L. Ed. 78; *Jones v. Brim*, 165 U. S. 180, 184, 41 L. Ed. 677; *Minder v. Georgia*, 183 U. S. 559, 562, 46 L. Ed. 328; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 559, 46 L. Ed. 679.

23. Regulation of business, trade, occupation or profession.—*Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 29 L. Ed. 516; *Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205; *Crowley v. Christensen*, 137 U. S. 86, 34 L. Ed. 620; *Lawton v. Steele*, 152 U. S. 133, 38 L. Ed. 385; *Jacobson v. Massachusetts*, 197 U. S. 11, 49 L. Ed. 643; *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, 50 L. Ed. 204; *Gardner v. Michigan*, 199 U. S. 325, 50 L. Ed. 212; *New York State v. Van De Carr*, 199 U. S. 552, 558, 50 L. Ed. 305; *Halter v. Nebraska*, 205 U. S. 34, 44, 51 L. Ed. 696.

24. Same; grounds of interference.—*Mugler v. Kansas*, 123 U. S. 623, 661, 31 L. Ed. 205; *Lawton v. Steele*, 152 U. S. 133, 137, 38 L. Ed. 385; *Otis v. Parker*, 187 U. S. 606, 608, 47 L. Ed. 323; *Dobbins v. Los Angeles*, 195 U. S. 223, 236, 49 L. Ed. 169.

25. State may select business to be regu-

lated.—*Soon Hing v. Crowley*, 113 U. S. 703, 28 L. Ed. 1145; *Fischer v. St. Louis*, 194 U. S. 361, 48 L. Ed. 1018; *New York State v. Van De Carr*, 199 U. S. 552, 563, 50 L. Ed. 305.

26. Same; must exercise reasonable discretion.—*Holden v. Hardy*, 169 U. S. 366, 398, 42 L. Ed. 780; *Dobbins v. Los Angeles*, 195 U. S. 223, 236, 49 L. Ed. 169.

27. Right to pursue lawful occupation, acquire and dispose of property without discrimination.—*Barbier v. Connolly*, 113 U. S. 27, 31, 28 L. Ed. 923; *Soon Hing v. Crowley*, 113 U. S. 703, 708, 28 L. Ed. 1145; *Yick Wo v. Hopkins*, 118 U. S. 356, 369, 30 L. Ed. 220; *Powell v. Pennsylvania*, 127 U. S. 678, 684, 32 L. Ed. 253; *Dent v. West Virginia*, 129 U. S. 114, 121, 32 L. Ed. 623; *Crowley v. Christensen*, 137 U. S. 86, 89, 34 L. Ed. 620; *Allgeyer v. Louisiana*, 165 U. S. 578, 590, 41 L. Ed. 832; *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 111, 46 L. Ed. 92; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 559, 46 L. Ed. 679; *Halter v. Nebraska*, 205 U. S. 34, 44, 51 L. Ed. 696.

"It is the right of every citizen of the United States to pursue any lawful trade or business, under such restrictions as are imposed upon all persons of the same age, sex, and condition." *Soon Hing v. Crowley*, 113 U. S. 703, 708, 28 L. Ed. 1145; *Dent v. West Virginia*, 129 U. S. 114, 121, 32 L. Ed. 623; *Crowley v. Christensen*, 137 U. S. 86, 89, 34 L. Ed. 620.



**Does Not Require All Business to Be Regulated Alike.**—It is no valid objection that similar regulations are not imposed upon other business of a different kind.<sup>28</sup> The specific regulations for one kind of business, which may be necessary for the protection of the public, can never be the just ground of complaint because like restrictions are not imposed upon other business of a different kind. The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws.<sup>29</sup> Nor does the fourteenth amendment prohibit legislation concerning only one particular business to which is attached always certain peculiar perils, though such perils concern not the whole people, but only those engaged in that class of work.<sup>30</sup>

**As between Different Branches of the Same Business.**—It is not discriminating legislation in any invidious sense that branches of the same business, from which danger is apprehended, are prohibited during certain hours of the night, whilst other branches involving no such danger are permitted.<sup>31</sup>

**But Requires Uniformity under the Same Condition.**—"But while recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all, and also recognizing the right of classification of industries and occupations, we must nevertheless always remember that the equal protection of the laws is guaranteed, and that such equal protection is denied when upon one of two parties engaged in the same kind of business, and under the same conditions, burdens are cast which are not cast upon the other."<sup>32</sup>

c. *Requiring Business to Bear Expense Incident to Its Supervision.*—Requiring that the burden of a service deemed essential to the public, in consequence of the existence of certain corporations and the exercise of privileges obtained at their request, should be borne by the corporations in relation to whom the service is rendered, and to whom it is useful, is neither denying to such corporations equal protection of the laws nor making any unjust discrimination against them.<sup>33</sup> "The rule of equality is not invaded where all corporations of the same

28. Same; does not require all business to be regulated alike.—*Soon Hing v. Crowley*, 113 U. S. 703, 28 L. Ed. 1145; *Fischer v. St. Louis*, 194 U. S. 361, 48 L. Ed. 1018; *New York State v. Van De Carr*, 199 U. S. 552, 563, 50 L. Ed. 305.

29. Same.—*Soon Hing v. Crowley*, 113 U. S. 703, 708, 28 L. Ed. 1145.

30. Does not prohibit legislation concerning one particular business; when.—*Minnesota Iron Co. v. Kline*, 199 U. S. 593, 598, 50 L. Ed. 322, reaffirmed in *Stevenson Iron Min. Co. v. Kibbe*, 205 U. S. 537, 51 L. Ed. 920.

31. Regulating different branches of the same business.—*Soon Hing v. Crowley*, 113 U. S. 703, 709, 28 L. Ed. 1145.

"If an evil is especially experienced in a particular branch of business, the constitution embodies no prohibition of laws confined to the evil, or doctrinaire requirement that they should be couched in all-embracing terms. It does not forbid the cautious advance, step by step, and the distrust of generalities which sometimes have been the weakness, but often the strength, of English legislation. *Otis v. Parker*, 187 U. S. 606, 610, 611, 47 L. Ed. 323." *Carroll v. Greenwich Ins. Co.*, 199 U. S. 401, 411, 50 L. Ed. 240.

32. Requires uniformity where conditions are alike.—*Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 111, 112, 46 L. Ed. 92.

33. Requiring business to bear expense incident to supervision.—*Charlotte, etc., R. Co. v. Gibbes*, 142 U. S. 386, 394, 35 L. Ed. 1051; *New York v. Squire*, 145 U. S. 175, 191, 36 L. Ed. 606; *St. Louis Consolidated Coal Co. v. Illinois*, 185 U. S. 203, 207, 46 L. Ed. 872; *St. Mary's, etc., Petroleum Co. v. West Virginia*, 203 U. S. 183, 51 L. Ed. 144.

A state law requiring the salaries and expenses of the state railroad commission to be met by a tax levied exclusively upon the railroads of the state, said tax being in addition to that imposed upon the property of railroad companies under the general tax laws, does not deprive them of property without due process of law nor deny to them the equal protection of the laws. *Charlotte, etc., R. Co. v. Gibbes*, 142 U. S. 386, 35 L. Ed. 1051.

It would be otherwise, however, if the extra tax were laid for the purpose of paying for services in no way connected with the railroads, as for instance, to pay the salary of the executive or judicial officers of the state. *Charlotte, etc., R.*

kind are subjected to like charges for similar services, though no charge at all is made against other corporations; there being no charge where there is no service rendered."<sup>34</sup>

d. *Statutes Discriminating in Favor of Producers*.—Whether a statute prescribing regulations for the conduct of any particular business, or regulations respecting business transactions in general, is unconstitutional by reason of exemptions or discriminations in favor of producers, depends, in each instance, upon whether or not there is anything in the circumstances affording a reasonable basis for such a classification.<sup>35</sup>

Co. v. Gibbes, 142 U. S. 386, 391, 35 L. Ed. 1051.

The New York act of May 29, 1886 (Sess. Laws of 1886, ch. 503), assessing the salaries and expenses of the board of commissioners of electrical subways upon the various companies operating electrical conductors in any city in the state, including those which had previously acquired the right, subject to the reserved police powers of the state to regulate and control such right, did not deprive such companies of their property without due process of law nor deny to them the equal protection of the laws in violation of the fourteenth amendment. *New York v. Squire*, 145 U. S. 175, 191, 36 L. Ed. 666, following *Charlotte, etc., R. Co. v. Gibbes*, 142 U. S. 386, 35 L. Ed. 1051.

The West Virginia statute which requires all foreign corporations and all non-resident domestic corporations having their offices and places of business without the state to make the state auditor their attorney in fact to accept service of process, and to pay to the auditor the sum of \$10 for the use of the state, is not invalid as denying the equal protection of the laws. *St. Mary's, etc., Petroleum Co. v. West Virginia*, 203 U. S. 183, 51 L. Ed. 144, following *Charlotte, etc., R. Co. v. Gibbes*, 142 U. S. 386, 35 L. Ed. 1051; *New York v. Squire*, 145 U. S. 175, 36 L. Ed. 666.

So, the expense of a compulsory examination of a railroad engineer, to ascertain whether he is free from color blindness, has been held to be properly chargeable against the railroad company. *Nashville, etc., Railway v. Alabama*, 128 U. S. 96, 101, 32 L. Ed. 352.

The state may appoint mining inspectors and provide for their payment by the owners of mines. *St. Louis Consolidated Coal Co. v. Illinois*, 185 U. S. 203, 207, 46 L. Ed. 872. See also, *Packet Co. v. St. Louis*, 100 U. S. 423, 25 L. Ed. 688; *County of Mobile v. Kimball*, 102 U. S. 691, 26 L. Ed. 238; *Morgan's Steamship Co. v. Louisiana, Board of Health*, 118 U. S. 455, 30 L. Ed. 237; *Nashville, etc., Railway v. Alabama*, 128 U. S. 96, 121, 32 L. Ed. 352; *Charlotte, etc., R. Co. v. Gibbes*, 142 U. S. 386, 35 L. Ed. 1051.

34. *Same*.—*Charlotte, etc., R. Co. v. Gibbes*, 142 U. S. 386, 394, 35 L. Ed. 1051.

35. *Discriminating in favor of producers*.—*American Sugar Refining Co. v. Louisiana*, 179 U. S. 89, 45 L. Ed. 102; *Connolly v. Union Sewer Pipe Co.*, 184 U. S.

540, 559, 46 L. Ed. 679; *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 133, 49 L. Ed. 689, followed in *Southern Cotton Oil Co. v. Texas*, 197 U. S. 134, 49 L. Ed. 696; *St. John v. New York*, 201 U. S. 633, 636, 50 L. Ed. 896; *Cox v. Texas*, 202 U. S. 446, 450, 50 L. Ed. 1099.

In *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 552, 562, 563, 564, 46 L. Ed. 679, the question arose as to the validity, under the equality clause of the constitution, of a statute of the state of Illinois, forbidding, under penalty, the existence of combinations of capital, skill or acts for certain specified purposes, but exempting from its operation agricultural products or live stock while in the hands of the producer. By reason of this exemption the statute was adjudged to operate as a denial of the equal protection of the laws, and was, therefore, void. The court observed that such a statute was not a legitimate exercise of the power of classification, that it rested upon no reasonable basis, was purely arbitrary, and therefore denied the equal protection of the laws to those against whom it discriminated. It said: "We conclude this part of the discussion by saying that to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the state for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill or acts to destroy competition and to control prices for their special benefit, is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary."

The supreme court of Texas having declared the provisions of the Texas anti-trust statutes of 1895 exempting agriculturalists and organized laborers from the operation thereof unconstitutional as denying the equal protection of the laws (following *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. Ed. 679), and having declared the statute separable and valid in other respects, it cannot be held unconstitutional by reason of the fact that the discriminatory provisions so held to be unconstitutional still remain in the statute, since the decision of the state su-



- e. *Store Order Acts*.—See the title STORE ORDER ACTS.
- f. *Eight Hour Laws*.—See the title LABOR.
- g. *Sunday Laws*.—See the title SUNDAYS AND HOLIDAYS. And see post, "Barber Shops," VII, B, 3, j, (1).
- h. *Regulation of Rates*.—See, generally, the title POLICE POWER.
- i. *Abolishing the Doctrine of Fellow Servants*.—See post, "Railroads," VII, B, 3, j, (14). And see, generally, the title FELLOW SERVANTS.
- j. *Particular Business, Occupation or Profession*—(1) *Barber Shops*.—A legislative act which prohibits all labor on the Sabbath day, works of necessity and of charity excepted, is not invalid as denying equal protection of the laws to the proprietors of barber shops because of a provision therein which prescribes, as a matter of law, that the keeping open of a barber shop on the Sabbath day, for the purpose of cutting hair and shaving beards, shall not be deemed a work of necessity or charity, while as to all other kinds of labor, the question whether it is a work of charity or necessity is to be determined as one of fact. It cannot be said that the classification in such a case is so palpably arbitrary as to bring the law into conflict with the federal constitution.<sup>36</sup>

(2) *Laundries*.—There is no force in the objection that an unwarrantable discrimination is made against persons engaged in the laundry business, because persons in other kinds of business are not required to cease from their labors during the same hours at night. There may be no risks attending the business of others, certainly not as great as where fires are constantly required to carry them on.<sup>37</sup>

preme court is to be taken as part of the law of the state and as having the effect of striking the discriminatory provisions from the act. *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 133, 49 L. Ed. 689, followed in *Southern Cotton Oil Co. v. Texas*, 197 U. S. 134, 49 L. Ed. 696.

In *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89, 95, 45 L. Ed. 102, it was held, that a statute of Louisiana exempting from its operation planters and farmers grinding and refining their own sugar and molasses, but which imposed a license tax upon persons and corporations carrying on the business of refining sugar and molasses, did not deny the equal protection of the laws to such persons and corporations as were thus taxed. The court justified its decision upon the ground that the tax was upon the business of refining sugar and molasses, and that those who only refined their own sugar and molasses should not be regarded as belonging to that class.

In *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 561, 46 L. Ed. 679, the court distinguished *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 42 L. Ed. 1037, and *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89, 45 L. Ed. 102, and the classification made in those cases, by saying that the laws there in question had reference to the taxing power of the state and involved considerations that could not, in the nature of things, apply to state enactments like the one involved in § 9 of the Illinois trust statute of 1893.

In *Cox v. Texas*, 202 U. S. 446, 450, 50 L. Ed. 1099, the court refused to hold the Texas liquor tax law of 1895 unconstitutional by reason of its exempting wine produced from grapes grown in the state,

and still in the hands of the producers and manufacturers thereof, from the operation of those provisions of the statute forbidding sales to minors and making the dealer liable upon the bond required to be given in respect thereto. The decision was based upon the ground that there was no natural distinction of classes among liquor dealers—one class selling domestic wines alone and another selling all intoxicants except domestic wines—and therefore there was no one class that could claim to be affected by the law more than another. Distinguishing *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. Ed. 679.

By the New York statute relating to the sale of adulterated or impure milk (laws of New York, 1893, ch. 338), nonproducing vendors are not discriminated against, and hence denied the equal protection of the laws, contrary to the provisions of the fourteenth amendment of the constitution of the United States, in that they may not, as producing vendors, may, exempt themselves from actions or penalties for violations of subdivisions one, two, three, seven and eight of § 20 by showing that the milk sold or offered for sale by them is in the same condition as when it left the herd of the producer. *St. John v. New York*, 201 U. S. 633, 636, 50 L. Ed. 896.

**36. Barber shops; Sunday laws.**—*Petit v. Minnesota*, 177 U. S. 164, 168, 44 L. Ed. 716.

**37. Laundries.**—*Soon Hing v. Crowley*, 113 U. S. 703, 708, 28 L. Ed. 1145. See, also, *Barbier v. Connolly*, 113 U. S. 27, 28 L. Ed. 923; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. Ed. 220.



(3) *Slaughtering of Live Stock*.—The regulation of the place and the manner of conducting the slaughtering of animals, and the business of butchering within a city, and the inspection of the animals to be killed for meat, and of the meat afterwards, are among the most necessary and frequent exercises of the police power, and it cannot be successfully controverted that it is both the right and the duty of the legislative body, the supreme power of the state or municipality, to prescribe and determine the localities where the business of slaughtering for a great city may be conducted, and to prescribe and enforce suitable regulations for the conducting of such business.<sup>38</sup>

(4) *Imitation and Adulterated Food Stuffs*.—The states have full power to legislate for the purpose of protecting the people against fraud and deception in the sale of food products. A state enactment forbidding the sale of deceitful imitations of articles of food in general use among the people is not unconstitutional either as interfering with interstate commerce or as denying the equal protection of the laws.<sup>39</sup>

**38. Slaughtering of live stock.**—Slaughter-House Cases, 16 Wall. 36, 61, 63, 21 L. Ed. 394.

A statute of the state of Louisiana which incorporated a slaughter house company and invested it with the exclusive privilege of maintaining a stock yard for the landing, inspection and slaughtering of all animals intended to be used as food in the city of New Orleans, and in certain parishes of that state, and which required all persons engaged in the business of butchering within the prescribed territory to have all of their animals landed, inspected and slaughtered upon the grounds of said company, the company being placed under strict regulations, backed by heavy penalties, as to the prices to be charged and the services and accommodations required to be rendered, was not unconstitutional as denying persons engaged in the butchering business within the prescribed territory the equal protection of the laws. Slaughter-House Cases, 16 Wall. 36, 66, 21 L. Ed. 394.

**39. Imitation and adulterated food stuffs.**—Powell v. Pennsylvania, 127 U. S. 678, 32 L. Ed. 253; Plumley v. Massachusetts, 155 U. S. 461, 467, 479, 39 L. Ed. 223; Capital City Dairy Co. v. Ohio, 183 U. S. 238, 246, 46 L. Ed. 171; New York State v. Van De Carr, 199 U. S. 552, 563, 50 L. Ed. 305. See, also, Gibbons v. Ogden, 9 Wheat. 1, 203, 6 L. Ed. 23; Dent v. West Virginia, 129 U. S. 114, 122, 32 L. Ed. 623. See, also, the title FOOD.

**Imitation cheese, butter, etc.**—The prohibition of the manufacture and sale, or having in possession with intent to sell, any imitation butter or cheese, or any article designed to take the place of butter or cheese, and which is not made from pure and unadulterated milk or cream, is a lawful exercise of the police power of the state, and does not deny to any person the equal protection of the laws within the meaning of the fourteenth amendment. Powell v. Pennsylvania, 127 U. S. 678, 32 L. Ed. 253; Plumley v. Massachusetts, 155 U. S. 461, 467, 39 L. Ed. 223.

The objection that the Pennsylvania

statute (Laws of Pennsylvania, 1185, p. 22, no. 25) is repugnant to the clause of the fourteenth amendment forbidding the denial by the state to any person within its jurisdiction of the equal protection of the laws, is untenable. The statute places under the same restrictions, and subjects to like penalties and burdens, all who manufacture, or sell, or offer for sale, or keep in possession to sell, the articles embraced by its prohibitions; thus recognizing and preserving the principle of equality among those engaged in the same business. Powell v. Pennsylvania, 127 U. S. 678, 687, 32 L. Ed. 253; citing Barbier v. Connolly, 113 U. S. 27, 28 L. Ed. 923; Soon Hing v. Crowley, 113 U. S. 703, 28 L. Ed. 1145; Missouri Pac. R. Co. v. Humes, 115 U. S. 512, 519, 29 L. Ed. 463.

An act of the state of Ohio which permitted the use of harmless coloring matter in butter, but which required that oleomargarine be sold in its natural state, and which prohibited the manufacture or sale within the state of any oleomargarine if it contained coloring matter of any kind, did not deprive a corporation created by the laws of Ohio, and engaged in the manufacture of oleomargarine, of its property without due process of law, nor deny to it the equal protection of the laws. It was competent to the legislature to provide a ready means by which the public might know that an article offered for sale was butter and not oleomargarine. Capital City Dairy Co. v. Ohio, 183 U. S. 238, 246, 46 L. Ed. 171. See, also, Powell v. Pennsylvania, 127 U. S. 678, 32 L. Ed. 253; Plumley v. Massachusetts, 155 U. S. 461, 39 L. Ed. 223; Gundling v. Chicago, 177 U. S. 183, 44 L. Ed. 725.

**Dairies and vendors of milk.**—In Fischer v. St. Louis, 194 U. S. 361, 48 L. Ed. 1018, an ordinance of the city of St. Louis, providing that no dairy or cow stable should thereafter be built or established within the limits of the city, and no such stable not in existence at the time of the passage of the ordinance should be maintained on any premises,

(5) *Practice of Medicine*.—The power of a state to make reasonable provisions for determining the qualifications of those engaging in the practice of medicine and punishing those who attempt to engage therein in defiance of such statutory provisions, is not open to question.<sup>40</sup>

(6) *Manufacture and Sale of Intoxicating Liquors*.—Since a state has the power to prohibit the traffic in intoxicating liquors absolutely, it may also prohibit it conditionally, and a law which permits it to be carried on subject only to conditions prescribed by the state is not invalid as denying to those desiring to engage in such business the equal protection of the laws.<sup>41</sup>

(7) *Insurance*.—A legislative act forbidding insurance companies from entering into combinations for the purpose of controlling rates, premiums, commissions, etc., is not unconstitutional because it is made to apply only to fire insurance companies. The courts cannot say that fire insurance may not present such a conspicuous example of the evil to be remedied as to justify special treatment.<sup>42</sup> And a statute applicable only to fire insurance companies and pro-

unless permission should have been first obtained from the municipal assembly by ordinance, was sustained as a proper exercise of the police power.

The requirement of the sanitary code of New York City, providing for the sale of milk only by permission of the board of health of that city, is a reasonable and valid regulation neither depriving one of property without due process of law nor denying him equal protection of the laws. *New York State v. Van De Carr*, 199 U. S. 552, 559, 50 L. Ed. 305.

Nor was there any force in the contention that the appellant was denied the equal protection of the laws because of the fact that the milk business was the only business dealing in foods which was thus regulated by the sanitary code; all milk dealers within the city being equally affected by the regulations of the sanitary code. *New York State v. Van De Carr*, 199 U. S. 552, 563, 50 L. Ed. 305.

**40. Practice of medicine.**—*Dent v. West Virginia*, 129 U. S. 114, 32 L. Ed. 623; *Hawker v. New York*, 170 U. S. 189, 42 L. Ed. 1002; *Reetz v. Michigan*, 188 U. S. 505, 506, 47 L. Ed. 563.

**41. Manufacture and sale of intoxicants.**—*Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989; *Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205; *Crowley v. Christensen*, 137 U. S. 86, 34 L. Ed. 620; *Giozza v. Tiernan*, 148 U. S. 657, 662, 37 L. Ed. 599; *Cronin v. Adams*, 192 U. S. 108, 48 L. Ed. 365; *Rippey v. Texas*, 193 U. S. 504, 48 L. Ed. 767; *Ohio v. Dollison*, 194 U. S. 445, 449, 48 L. Ed. 1062. And see, generally, the title INTOXICATING LIQUORS.

By a law of the state of Texas no person is permitted to obtain a license to pursue the occupation of selling liquor until he has given a bond in the sum of \$5,000, payable to the state of Texas, and conditioned, among other things, that the obligor will not sell intoxicating liquors, or medicated bitters capable of producing intoxication, to any person after having been notified in writing, through the sher-

iff or other peace officer, by the wife, or mother, or daughter, or sister of such person, not to sell to such person; and further that such bond may be sued on at the instance of any person so notifying and aggrieved by the violation of such conditions in said bond, and that such person so notifying shall be entitled to recover the sum of \$500 as liquidated damages for an infraction of such conditions. Held, that whether considered as imposing restrictions upon the sale in the exercise of the police powers of the state, or as levying taxes upon occupations under authority of the legislature in that behalf, such law did not arbitrarily deprive the petitioner of his property, nor deny him the equal protection of the laws. *Giozza v. Tiernan*, 148 U. S. 657, 662, 37 L. Ed. 599.

The state has power to prohibit the sale of intoxicating liquors altogether; that being so, it has power to prohibit it conditionally, and a statute does not infringe the constitution by giving those in favor of the sale a chance which it might have denied. "It does not abridge that power by adopting the form of reference to a local vote. It may favor prohibition to just such degree as it chooses, and to that end may let in a local vote upon the subject as much or as little as it may please. There is no such overmastering consideration of expediency attaching everywhere and always to the form of voting, still less is there any such principle to be drawn from the fourteenth amendment, as requires the two sides of a vote on prohibition to be treated with equal favor by the state, the subject matter of the vote being wholly within the state's control." *Rippey v. Texas*, 193 U. S. 504, 509, 510, 48 L. Ed. 767.

**42. Insurance.**—*Carroll v. Greenwich Ins. Co.*, 199 U. S. 401, 411, 50 L. Ed. 246. See, generally, post, "Statutes Respecting the Rules of Evidence," VII, B, 4, a, (5); "Laws Respecting Damages and Penalties," VII, B, 4, a, (7); "Statutes Awarding Attorney's Fees against Certain Classes of Defendants," VII, B, 4, a, (8).



viding that in suits upon fire insurance policies the company shall not be permitted to deny that the property was worth, at the date of the policy, less than the full amount for which it was insured, does not make an arbitrary classification, and is not invalid as denying to fire insurance companies the equal protection of the laws.<sup>43</sup>

(8) *Warehouses and Elevators.*—The business of elevating and storing grain is a business affected with a public use, and the power to prescribe proper rules for the conduct thereof, and to prescribe the amount of the charges therefor, is clearly within the competency of the legislature.<sup>44</sup>

(9) *Dealing in Futures.*—A state law which forbids and declares illegal all options to buy or sell grain or other property at a future time is not unconstitutional as a denial of the equal protection of the laws. If the legislature is of the opinion that such a statute is necessary for the purpose of suppressing gambling contracts, the courts cannot say that it is not an appropriate method of dealing with the question or that it has no relation to the end sought.<sup>45</sup> Likewise, a statute which goes no further than to prohibit the purchase and sale of

**43. Same; special laws relating to fire insurance.**—*Orient Ins. Co. v. Daggs*, 172 U. S. 557, 562, 43 L. Ed. 552.

**44. Warehouses and elevators.**—*Munn v. Illinois*, 94 U. S. 113, 134, 24 L. Ed. 77; *Budd v. New York*, 143 U. S. 517, 36 L. Ed. 247; *Brass v. North Dakota*, 153 U. S. 391, 403, 38 L. Ed. 757; *Cargill Co. v. Minnesota*, 180 U. S. 452, 468, 45 L. Ed. 619. See, generally, as to the regulation of rates, the title POLICE POWER.

An act of the general assembly of the state of Illinois, entitled "An act to regulate public warehouses and the warehousing and inspection of grain, and to give effect to art. 13 of the constitution of this state," approved April 25, 1871, is not repugnant to the fourteenth amendment to the federal constitution, where it prohibits the states from denying to any person the equal protection of the laws. *Munn v. Illinois*, 94 U. S. 113, 134, 24 L. Ed. 77.

The business of elevating and storing grain is a business affected with a public use, and the state law declaring those persons engaged therein to be a public warehousemen and requiring them to give bond for the faithful performance of their duties, and fixing the rates of storage, and requiring them to keep all grain stored in them insured for the benefit of the owners thereof, is a valid exercise of the police power of the state, and does not deny them the equal protection of the laws nor deprive them of their property without due process of law. *Brass v. North Dakota*, 153 U. S. 391, 403, 38 L. Ed. 757, following and reaffirming *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Budd v. New York*, 143 U. S. 517, 36 L. Ed. 247.

The provisions requiring the warehousemen to insure the grain of owners at his own expense, while it may be burdensome, does not deprive the warehousemen of the equal protection of the law if it affects alike all engaged in the same business. *Brass v. North Dakota*, 153 U. S. 391, 404, 38 L. Ed. 757.

The requirement of a license from the

owners of elevators and warehouses situated on the right of way of a railroad at one of its stations or sidings, other than at terminal points, without requiring a license in respect of elevators and warehouses differently situated, is not a denial of the equal protection of the laws. The requirement of a license is based upon reasonable ground—a difference that bears a proper relation to the classification made by the statute. *Cargill Co. v. Minnesota*, 180 U. S. 452, 468, 45 L. Ed. 619.

"As the statute applies to all of the class defined in its first section, it is not invalid by reason of its nonapplication to those who own or operate elevators not situated on the right of way of a railroad." *Cargill Co. v. Minnesota*, 180 U. S. 452, 469, 45 L. Ed. 619.

When once it is admitted that it is competent for the legislative power to control the business of elevating and storing grain, whether carried on by individuals or associations, in cities of one size and under some circumstances, it follows that such power may be legally exerted over the same business when carried on in smaller cities and under other circumstances. Argument based upon the difference in the size and geographical location of places in which the business is conducted, difference in the density of the population, and number of persons engaged in the business should be addressed to the legislature and not to the courts. *Brass v. North Dakota*, 153 U. S. 391, 403, 38 L. Ed. 757.

A statute prescribing a maximum rate of charge for the elevation and handling of grain does not deny the equal protection of the laws because it is made to apply to only those places within the state having a population in excess of one hundred and thirty thousand. *Budd v. New York*, 143 U. S. 517, 548, 36 L. Ed. 247.

**45. Dealing in futures.**—*Booth v. Illinois*, 184 U. S. 425, 46 L. Ed. 623, upholding the validity of § 130 of the Criminal Code of Illinois.



stocks on margin cannot be said to make an unreasonable classification or discrimination against persons engaged in dealing in those subjects. If the legislature is of the opinion that the prohibition of the purchase and sale of stocks on margin will stop the gambling which it desires to prevent, it is not necessary, in order to avoid running counter to the fourteenth amendment, to extend the prohibition to speculation in other things.<sup>46</sup>

(10) *Labor Agents*.—A general law of the state of Georgia, taxing occupations, was held not to be invalid, as denying the equal protection of the laws, so far as applicable to the pursuit of the business of hiring persons to labor outside the state limits, although persons engaged in the business of hiring persons to labor within the state were not subjected to any like tax. It cannot be said that such a discrimination, if it exists, does not rest on reasonable grounds, or that it is not within the discretion of the state legislature.<sup>47</sup>

(11) *Places of Amusement, Public Entertainment, etc.*—A statute which provides that it shall be unlawful for any corporation, person or association, or the proprietor, lessee, or the agents of either, of any place of public amusement or entertainment, to refuse admittance to any person over the age of twenty-one years, who presents a ticket of admission acquired by purchase, and who demands admission to such place, provided that any person under the influence of liquor or who is guilty of boisterous conduct, or any person of lewd or immoral character, may be excluded from any such place of amusement, is not unconstitutional as denying the equal protection of the laws, since it is applicable alike to all persons, corporations or associations conducting places of public amusement or entertainment.<sup>48</sup>

**Federal Statutes Securing Equal Rights and Accommodations in Theaters, Inns, etc.**—As to the validity of public acts of this character, see the title CIVIL RIGHTS, vol. 3, p. 836.

(12) *Inspection of Coal and Coal Mines*.—A statute providing for the inspection and guaging of coal and coke boats cannot be said to work an unlawful discrimination against the shippers of one state and in favor of those of another merely because all the coal imported from the one is transported by water, while that imported from the other is transported by rail. The difference between land and water carriage arises from the nature of the two modes and not from legislation. It affords a reasonable ground of classification, and the reasonableness of the classification is not affected by the fact that the shippers of one state are so situated that they are compelled, or find it more to their interest, to ship by water, while shippers from the other state ship by land.<sup>49</sup>

**Inspection of Mines**.—A statute relating to the inspection of mines is not unconstitutional as imposing penalties upon some persons engaged in the mining business, and not upon others, by reason of the fact that it is limited in its application to coal mines "where more than five men are employed at any one time." This is a species of classification which the legislature is at liberty to adopt, provided it be not wholly arbitrary or unreasonable; and it cannot be said to be arbitrary or unreasonable to assume that mines which are worked upon so

46. *Same*.—*Otis v. Parker*, 187 U. S. 606, 610, 47 L. Ed. 323.

47. *Labor agents*.—*Williams v. Fears*, 179 U. S. 270, 274, 45 L. Ed. 186.

48. *Places of amusement, public entertainment, etc.*—*Western Turf Ass'n v. Greenberg*, 204 U. S. 359, 362, 51 L. Ed. 520.

49. *Inspection of coal and coal mines*.—*Pittsburg, etc., Coal Co. v. Louisiana*, 156 U. S. 590, 600, 39 L. Ed. 544.

The laws of Louisiana (No. 147 of the Laws of La. of July 12, 1888) providing for the appointment of coal and coke boat

guagers and making it compulsory upon all persons selling coal or coke in a barge to have the same inspected and guaged as required by the provisions of the statute is not unconstitutional as unlawfully discriminating between persons transporting coal and coke from Pennsylvania and those transporting coal and coke from Alabama; the difference between the transportation of coal and coke from Alabama and from Pennsylvania being only the difference arising from the fact that one is transported by water and the other by rail. *Pittsburg, etc., Coal Co. v. Louisiana*, 156 U. S. 590, 600, 39 L. Ed. 544.

small a scale as to require only five operators are not likely to need the careful inspection provided for the larger mines.<sup>50</sup>

**Requiring Owners of Mines to Bear Expense of Inspection.**—See ante, "Requiring Business to Bear Expense Incident to Its Supervision," VII, B, 3, c.

**Fixing Amount of Inspection Fees.**—See ante, "Arbitrary and Oppressive Administration of Statutes," VII, B, 2, i, (4).

(13) *Herding Sheep on Public Lands.*—A state has the right to regulate the business of herding sheep on the public lands within its limits in such manner as, taking into consideration existing conditions of soil, climate, etc., will secure the largest welfare of its inhabitants.<sup>51</sup>

(14) *Railroads.*—Though railroad corporations are private corporations as distinguished from those created for municipal and governmental purposes, their uses are public.<sup>52</sup> The business of operating a railroad is of such a character as to justify the enactment of special statutes for its regulation without danger of running counter to the equal protection clause of the fourteenth amendment.<sup>53</sup> There is no unjust discrimination and no denial of the equal protection of the laws in regulations applicable to all railroad corporations alike.<sup>54</sup>

**50. Inspection of mines.**—*St. Louis Consolidated Coal Co. v. Illinois*, 185 U. S. 203, 207, 46 L. Ed. 872.

**51. Herding sheep on public lands.**—*Bacon v. Walker*, 204 U. S. 311, 51 L. Ed. 499; *Bown v. Walling*, 204 U. S. 320, 51 L. Ed. 503.

A statute which provides that it is not lawful for any person owning or having charge of sheep to herd the same, or permit them to be herded, on the land or possessory claims of other persons, or to herd the same or permit them to graze within two miles of the dwelling house of the owner or owners of a possessory claim, is not in violation of the constitution of the United States in that it is an unreasonable and arbitrary regulation of the use of public lands within the meaning of the equal protection clause of the fourteenth amendment. *Bacon v. Walker*, 204 U. S. 311, 314, 51 L. Ed. 499; *Bown v. Walling*, 204 U. S. 320, 51 L. Ed. 503, affirming the validity of Rev. Stat. of Idaho, § 1210.

Whether the sheep industry was, under the circumstances, legitimate and not offensive, was held to be immaterial. And as to the two-mile limit prescribed by the statute, the court said: "Nor need we make extended comment on the two-mile limit. The selection of some limit is a legislative power, and it is only against the abuse of the power, if at all, that the courts may interpose. But the abuse must be shown." *Bacon v. Walker*, 204 U. S. 311, 317, 51 L. Ed. 499; *Bown v. Walling*, 204 U. S. 320, 51 L. Ed. 503.

**52. Regulation of railroads.**—*Charlotte, etc., R. Co. v. Gibbs*, 142 U. S. 386, 393, 35 L. Ed. 1051.

**53. Same.**—*Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 29 L. Ed. 463; *Dow v. Beidelman*, 125 U. S. 680, 31 L. Ed. 841; *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205, 210, 32 L. Ed. 107; *Minneapolis, etc., R. Co. v. Herrick*, 127 U. S. 210, 32 L. Ed. 109.

**54. Same.**—*New York, etc., R. Co. v. Bristol*, 151 U. S. 556, 571, 38 L. Ed. 269; *Connecticut v. Woodruff*, 153 U. S. 689, 38 L. Ed. 869. See, also, the titles *CARRIERS*, vol. 3, p. 556; *RAILROADS*.

**Heating cars.**—A statute which forbids the heating of passenger or sleeping cars by means of stoves or furnaces kept inside the cars, or suspended therefrom, is not rendered unconstitutional, as denying the equal protection of the laws, by reason of the fact that railroads of less than fifty miles in length are excepted from its operation. Such a discrimination is not without reason to support it, and the statute being uniform in its operation as to all railroads within the class to which it is applicable, does not deny the equal protection of the laws. *New York, etc., R. Co. v. New York*, 165 U. S. 628, 633, 41 L. Ed. 853.

**Speed of trains.**—Exception of one railway company from the provisions of an ordinance in reference to the speed of trains does not necessarily create a classification which is arbitrary and without any reasonable basis, and such an ordinance does not, therefore, operate to deny the equal protection of the laws. *Erb v. Morasch*, 177 U. S. 584, 586, 44 L. Ed. 897.

The tracks of different railroads may traverse the limits of a city under circumstances so essentially different as to justify separate regulations. One may pass through crowded parts crossing or along streets constantly traveled upon by foot passengers and vehicles, while others may pass through remote parts of the city where there is little travel and little danger to individuals or carriages. One may pass through such parts of the city as will prevent its tracks from being fenced and where it is not in fact fenced, while another may pass through parts which permit of the fencing of the tracks and where its tracks are in fact fenced. Under those circumstances a difference of regulation as to the matter of speed would be per-

**Validity of Regulation as Determined by Effect upon Earnings.**—"A state enactment or regulation made under the authority of a state enactment, establishing rates for the transportation of persons or property by railroad that

fectly legitimate, and it could not be held that the classification was arbitrary or without reasonable reference to the conditions of the several roads. With the presumption always in favor of the validity of legislation, state or municipal, if the ordinance stood by itself the courts would be compelled to presume that the different circumstances surrounding the tracks of the respective railroads were such as to justify a different rule in respect to the speed of their trains. *Erb v. Morasch*, 177 U. S. 584, 586, 44 L. Ed. 897.

It is not a question to be settled by the opinions of witnesses and the verdict of a jury upon the question whether one railroad in its operation is more dangerous than another. All that is necessary to uphold the ordinance is that there is a difference, and that existing, it is for the city council to determine whether separate regulations shall be applied to the two. It is not strange that one witness differs from another in respect to the comparative danger of the two roads. One jury might also disagree with another in respect to the same matter. But neither witness nor jury determine the validity of state or municipal legislation. Given the fact of a difference, it is a part of the legislative power to determine what difference there shall be in the prescribed regulations. *Erb v. Morasch*, 177 U. S. 584, 587, 44 L. Ed. 897.

**Right to occupy streets.**—See ante, "Nor in All Portions of the Same City," VII, B, 2, h, (6), note.

**Fencing track under penalty of double damages.**—Statutes requiring railroad companies to fence their tracks, under penalty of being subjected to double damages in case of accidents resulting from failure to do so, are not unconstitutional as depriving them of their property without due process of law, or as denying them the equal protection of the laws guaranteed by the fourteenth amendment. *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 522, 29 L. Ed. 463; *Minneapolis, etc., R. Co. v. Emmons*, 149 U. S. 364, 37 L. Ed. 769. See, also, the title RAILROADS. And see ante, "Application of Principles," VI, D, 3, d, (4), (b), (bb), (ccc) notes.

The additional damages being by way of punishment, it is clear that the amount may be thus fixed; and it is not a valid objection that the sufferer instead of the state receives them. That is a matter on which the company has nothing to say. *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 522, 29 L. Ed. 463.

There is no evasion of the rule of equality where all companies are subjected to the same duties and liabilities under similar circumstances. *Missouri*

*Pac. R. Co. v. Humes*, 115 U. S. 512, 523, 29 L. Ed. 463. See, on this point, *Barbier v. Connolly*, 113 U. S. 27, 28 L. Ed. 923; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. Ed. 1145.

**Respecting liability for damages by fire.**—The statute of Missouri of March 31, 1887, by which every railroad corporation owning or operating a railroad in the state is made responsible in damages for property of any person injured or destroyed by fire communicated by its locomotive engines and is declared to have an insurable interest in property along its route, and authorized to insure such property, for its protection against such damages, is a constitutional and valid exercise of the legislative power of the state, and applies to all railroad corporations alike. Consequently, it neither violates any contract between the state and the railroad company, nor deprives the company of its property without due process of law, nor yet denies to it the equal protection of the laws. *St. Louis, etc., R. Co. v. Mathews*, 165 U. S. 1, 5, 27, 41 L. Ed. 611.

**Same; attorneys' fees.**—See post, "Statutes Awarding Attorneys' Fees against Certain Classes of Defendants," VII, B, 4, a, (8).

**Wages of employees.**—The Arkansas statute of March 25, 1889, Acts, Ark. 1889, 76, providing for the enforcement of the prompt payment, without abatement or deduction, of the wages of railway employees and of persons employed by railway and bridge contractors, under penalty of having the wages continued for such length of time as they may remain unpaid, is justified by the peculiar character of the business in which such persons are engaged, and is not invalid as denying the equal protection of the laws, or due process of law. *St. Louis, etc., R. Co. v. Paul*, 173 U. S. 404, 408, 43 L. Ed. 746, reaffirmed in *Minneapolis, etc., R. Co. v. Gano*, 190 U. S. 557, 47 L. Ed. 1183, citing *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205, 32 L. Ed. 107, and distinguishing *Gulf, etc., R. Co. v. Ellis*, 165 U. S. 150, 159, 41 L. Ed. 66.

**Abolishing fellow-servant doctrine.**—The hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employees as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employees. No objection, therefore, can be made to legislation making railroad companies liable to employees for injuries occasioned by the negligence of fellow servants, on the ground of its making an



will not admit of the carrier earning such compensation, as, under all the circumstances, is just to it and to the public, would deprive such carrier of its property without due process of law and deny to it the equal protection of the laws, and would, therefore, be repugnant to the fourteenth amendment of the constitution of the United States."<sup>55</sup> "Such, however, is not the case when the question is as to the validity of an order to do a particular act, the doing of which does not involve the question of the profitableness of the operation of the railroad as an entirety."<sup>56</sup> "It follows, therefore, that the mere incurring of a loss from the

unjust discrimination, denying to them the equal protection of the laws, and depriving them of their property without due process of law in violation of the fourteenth amendment. *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205, 210, 32 L. Ed. 107; *Minneapolis, etc., R. Co. v. Herrick*, 127 U. S. 210, 32 L. Ed. 109.

By an act of the legislature of the state of Indiana approved March 4, 1893, it was provided: "That every railroad or other corporation, except municipal, operating in this state shall be liable in damages for personal injuries suffered by any employee while in its service, the employee so injured being in the exercise of due care and diligence, in the following cases: First, when such injury is suffered by reason of any defect in the condition of ways, works, plant, tools and machinery connected with or in use in the business of such corporation, or some person entrusted by it with the duty of keeping such way, works, plant, tools or machinery in proper condition. Second, where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employee at the time of the injury was bound to conform, and did conform. Third, where such injury resulted from the act or omission of any person done or made in obedience to any rule, regulation or by-law of such corporation, or in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf. Fourth, where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch yard, shop, round house, locomotive engine or train upon a railway, or where such injury was caused by the negligence of any person, coemployee or fellow servant engaged in the same common service in any of the several departments of the service of any such corporation, the said person, coemployee or fellow servant, at the time acting in the place, and performing the duty of the corporation in that behalf, and the person so injured obeying or conforming to the order of some superior at the time of such injury, having the authority to direct; but nothing herein shall be construed to abridge the liability of the corporation under existing laws." It was contended in the Indiana courts that this act was unconstitutional as denying the

equal protection of the laws to the corporations to which it applied. By the Indiana courts it was held that the act was capable of severance; that its relation to railroad corporations was not essentially and inseparably connected in substance with its relation to other corporations; and that, therefore, whether it was unconstitutional or not as to other corporations, it might be sustained as to railroad corporations. By the supreme court of the United States it was held that, as construed by the Indiana court, the statute was not unconstitutional as denying the equal protection of the laws to railroad corporations; that the business of other corporations is not subject to similar dangers to their employees, and that no objection, therefore, could be made to the regulation on the ground of its making an unjust discrimination. *Tullis v. Lake Erie, etc., R. Co.*, 175 U. S. 348, 351, 44 L. Ed. 192, citing with approval *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205, 32 L. Ed. 107; *Minneapolis, etc., R. Co. v. Herrick*, 127 U. S. 210, 32 L. Ed. 109. See, in accord, *Chicago, etc., R. Co. v. Pontius*, 157 U. S. 209, 39 L. Ed. 675, reaffirming the validity of the Kansas act which had been previously sustained in *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205, 32 L. Ed. 107.

If A be a different kind of corporation than B, it may subject A to a different rule of responsibility to servants than B. *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205, 32 L. Ed. 107. Or to a different measure of damages than B. *Minneapolis, etc., R. Co. v. Beckwith*, 129 U. S. 26, 32 L. Ed. 585.

A Minnesota act abolished the fellow-servant rule as to railroad companies, excepting from the act, however, railroads in course of construction. This exception does not constitute discrimination within the meaning of the constitution forbidding the same, but merely denotes the stage of operation at which the law goes in force. *Minnesota Iron Co. v. Kline*, 199 U. S. 593, 597, 50 L. Ed. 322, reaffirmed in *Stevenson Iron Min. Co. v. Kibbe*, 205 U. S. 537, 51 L. Ed. 920. See, also, the title FELLOW SERVANTS; RAILROADS.

**Regulation of fares and freights.**—See the titles CARRIERS, vol. 3, p. 622, et seq.; POLICE POWER; RAILROADS.

**55. Validity of regulation as determined by effect upon earnings.**—*Smyth v. Ames*, 169 U. S. 466, 526, 43 L. Ed. 819.

**56. Same.**—*Atlantic Coast Line R. Co.*

performance of such a duty does not in and of itself necessarily give rise to the conclusion of unreasonableness, as would be the case where the whole scheme of rates was unreasonable under the doctrine of *Smyth v. Ames*, 169 U. S. 466, 520, 43 L. Ed. 819.<sup>57</sup> Whether a judgment enforcing a statute requiring track connections between two railroad corporations operated to deny to such corporation the equal protection of the laws or to deprive either of its property without due process of law, depends upon the facts surrounding the case in which the judgment was given. The reasonableness of the judgment with reference to the facts concerning each case must be a material if not a controlling factor upon the question of its validity. A statute, or a regulation provided for therein, is frequently valid or the reverse accordingly as the facts may be, whether it is a reasonable or unreasonable exercise of legislative power over the subject matter involved.<sup>58</sup> "Of course, the fact that the furnishing of a necessary facility ordered may occasion an incidental pecuniary loss is an important criteria to be taken into view in determining the reasonableness of the order, but it is not the only one. As the duty to furnish necessary facilities is coterminous with the powers of the corporation, the obligation to discharge that duty must be considered in connection with the nature and productiveness of the corporate business as a whole, the character of the services required, and the public need for its performance."<sup>59</sup>

(15) *The Right to Practice Law*.—See the titles ATTORNEY AND CLIENT, vol. 2, p. 706, 707; CIVIL RIGHTS, vol. 3, p. 834.

4. AS REQUIRING EQUAL AND IMPARTIAL JUSTICE—*a. Generally in Civil Proceedings*—(1) *Generally*.—Equality of protection implies accessibility by each one, whatever his race, upon the same terms with others, to the courts of the country for the protection of his person and property and the prevention and redress of wrongs.<sup>60</sup> No state can deprive particular persons or classes of persons of equal and impartial justice under the law.<sup>61</sup> Equality of protection im-

*v. North Carolina Corp. Commission*, 206 U. S. 1, 25, 51 L. Ed. 933.

The difference between the two cases is illustrated in *St. Louis, etc., R. Co. v. Gill*, 156 U. S. 649, 39 L. Ed. 567, and *Minneapolis, etc., R. Co. v. Minnesota*, 186 U. S. 257, 46 L. Ed. 1151; *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1, 25, 51 L. Ed. 933.

57. *Same*.—*Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1, 26, 51 L. Ed. 933.

58. *Same*.—*Wisconsin, etc., Railroad v. Jacobson*, 179 U. S. 287, 301, 45 L. Ed. 194.

59. *Same*.—*Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1, 26, 27, 51 L. Ed. 933.

*Same*; regulation of schedules and track connections.—Thus the act of the North Carolina corporation commission, requiring the Atlantic Coast Line Railroad Company to re-establish a connection with a certain train on the Southern Railway at Selma in that state, was held not to be unconstitutional as denying the equal protection of the laws, or as depriving the company of its property without due process, merely by reason of the fact that compliance therewith might necessitate the operation of an additional train or the extension of an existing service at a loss. *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1, 51 L. Ed. 933

A similar contention was adversely passed upon in *Wisconsin, etc., Railroad v. Jacobson*, 179 U. S. 287, 45 L. Ed. 194. That case involved the enforcement of an order of a state railroad commission directing a railroad company to acquire the necessary land and make a track connection for the purpose of affording facilities for the interchange of business with another road. The court, after holding that the order was not so unjust and unreasonable as to be repugnant to the constitution of the United States, disposed of the contention that the order was void because compliance with it would necessitate the incurring of expense, by saying (179 U. S. 302): "Although to carry out the judgment may require the exercise by the plaintiff in error of the power of eminent domain, and will also result in some, comparatively speaking, small expense, yet neither fact furnishes an answer to the application of defendant in error."

60. As requiring equal and impartial justice.—*Pace v. Alabama*, 106 U. S. 583, 584, 27 L. Ed. 207; *Barbier v. Connolly*, 113 U. S. 27, 31, 28 L. Ed. 923; *Yick Wo v. Hopkins*, 118 U. S. 356, 369, 30 L. Ed. 220; *Minneapolis, etc., R. Co. v. Beckwith*, 129 U. S. 26, 29, 32 L. Ed. 585; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 559, 46 L. Ed. 679. See, also, the title CIVIL RIGHTS, vol. 3, p. 831, et seq.

61. *Same*.—*Hurtado v. California*, 110



plies not merely equal accessibility to the courts for the prevention or redress of wrongs and the enforcement of rights, but equal exemption with others in like condition from charges and liabilities of every kind.<sup>62</sup>

**"The requirements of the fourteenth amendment are satisfied** if trial is had according to the settled course of judicial procedure obtaining in the particular state, and the laws operate on all persons alike and do not subject the individual to the arbitrary exercise of the powers of government."<sup>63</sup>

(2) *Service of Process*.—A statute which classifies defendants into two classes, according to residence, and provides for a personal service upon resident defendants within the state, and for a constructive service by publication upon nonresident defendants, is not open to the objection that it denies to the latter class the equal protection of the laws.<sup>64</sup>

(3) *Statutes and Decisions Changing Rules of Procedure*.—"An act of the legislature which in terms gave to one individual certain rights and denied to another similarly situated the same rights might be challenged on the ground of unjust discrimination and a denial of the equal protection of the laws. But that does not prevent a legislature, which has established a certain rule of procedure,

U. S. 516, 535, 28 L. Ed. 232; *Santa Clara County v. Southern Pac. R. Co.*, 118 U. S. 394, 30 L. Ed. 118; *Caldwell v. Texas*, 137 U. S. 692, 697, 34 L. Ed. 816; *Leeper v. Texas*, 139 U. S. 462, 467, 35 L. Ed. 225; *Gibson v. Mississippi*, 162 U. S. 565, 40 L. Ed. 1075.

**62. Same.**—*Minneapolis, etc., R. Co. v. Beckwith*, 129 U. S. 26, 29, 32 L. Ed. 585.

**63. Same; fourteenth amendment satisfied, when.**—*Minder v. Georgia*, 183 U. S. 559, 562, 46 L. Ed. 328.

There is no denial of the right of equal protection as provided for in the fourteenth amendment of the constitution, when the same law or mode of procedure which was applied to the defendant would be applied to any other person in the state under like conditions. *Tinsley v. Anderson*, 171 U. S. 101, 106, 43 L. Ed. 91.

A state officer who has been suspended from his office by the government of the state cannot claim that he was denied the equal protection of the laws when such suspension was in accordance with the constitution and laws of the state governing suspensions and removal from office. *Wilson v. North Carolina*, 169 U. S. 586, 592, 43 L. Ed. 865.

Where the rule as to the necessity of asking special instructions was administered in the plaintiff's case no differently than in others, he was not denied the equal protection of the laws. *Backus v. Fort Street Union Depot Co.*, 169 U. S. 557, 575, 42 L. Ed. 853.

**64. Service of process; classification of defendants.**—*Ballard v. Hunter*, 204 U. S. 241, 254, 51 L. Ed. 461.

Plaintiffs in error invoked the provisions of the fourteenth amendment which prohibit a state from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States, and from depriving any person within her jurisdiction of the equal protection of the laws, against the statute of Arkansas of 1893, as amended 1895, because of the different manner and time of

service of summons of the suit authorized by said statutes to enforce the payment of the levee taxes. It was contended that, by requiring personal service of summons upon resident owners or occupants of lands for at least twenty days before the rendition of the decree of sale, and providing for constructive service by publication upon nonresident owners of only four weeks, a discrimination was made between owners of lands, and that nonresident owners were thereby denied the rights secured to them by the constitution of the United States. It was held that the power of the state to so discriminate is undoubted and that personal service upon nonresidents is not always within the state's power. Its process is limited by its boundaries. Constructive service is at times a necessary resource. The land stands accountable to the demands of the state, and the owners are charged with the laws affecting it and the manner by which those demands may be enforced. *Ballard v. Hunter*, 204 U. S. 241, 254, 51 L. Ed. 461.

The West Virginia statute which puts all nonresident domestic corporations which have their places of business and works outside of the state, and all foreign corporations coming into the state, on the same footing in respect of the service of process, and which makes the state auditor their attorney in fact to accept process, provides a reasonable classification and one not open to constitutional objection as denying the equal protection of the laws. *St. Mary's, etc., Petroleum Co. v. West Virginia*, 203 U. S. 183, 191, 51 L. Ed. 144.

Neither is there any objection to that provision of the statute which requires payment of \$10 to the auditor for the use of the state. *St. Mary's, etc., Petroleum Co. v. West Virginia*, 203 U. S. 183, 51 L. Ed. 144, following *Charlotte, etc., R. Co. v. Gibbes*, 142 U. S. 386, 35 L. Ed. 1051; *New York v. Squire*, 145 U. S. 175, 36 L. Ed. 666.



and continued it in force for years, from subsequently repealing the act and establishing an entirely different mode of procedure. In other words, there is no absolute right vested in the individual as against the power of the legislature to change modes of procedure."<sup>65</sup> And a similar thought controls where the courts of the state have construed a statute as prescribing one form of procedure, and parties have acted under that construction, and then subsequently the same court has held that the statute was theretofore misconstrued and really provided a different mode of procedure. Such last adjudication cannot be set aside in the federal courts on the ground of an unjust discrimination or a denial of the equal protection of the laws.<sup>66</sup>

(4) *Change of Venue, Transfer of Cause, etc.*—"It is fundamental rights which the fourteenth amendment safeguards and not the mere forum which a state may see proper to designate for the enforcement and protection of such rights. Given, therefore, a condition where fundamental rights are equally protected and preserved, it is impossible to say that the rights which are thus protected and preserved have been denied because the state has deemed best to provide for a new trial in one forum or another."<sup>67</sup> "It is not under any view the mere tribunal in which a person is authorized to proceed by a state which determines whether the equal protection of the law has been afforded, but whether in the tribunals which the state has provided equal laws prevail."<sup>68</sup> "It follows that the mere direction of the state law that under given circumstances a cause shall be tried in one forum instead of another, or may be transferred, when brought, from one forum to another, can have no tendency to violate the guarantee of the equal protection of the laws where in both the forums equality of law governs and equality of administration prevails."<sup>69</sup>

(5) *Statutes Respecting the Rules of Evidence.*—It is obviously the province of the state legislature to provide the nature and extent of the legal presumption to be deduced from a given state of facts, and the creation by law of such presumptions is after all but an illustration of the power to classify.<sup>70</sup>

**65. Changing rules of procedure.**—*Backus v. Fort Street Union Depot Co.*, 169 U. S. 557, 571, 42 L. Ed. 853. See, also, post, "General Powers of the Legislature with Respect to Remedies," VIII, C, 13, a.

**66. Same.**—*Backus v. Fort Street Union Depot Co.*, 169 U. S. 557, 571, 42 L. Ed. 853.

Thus the fact, if true, that the state court of last resort had, in all cases previous to the plaintiff's, construed the state laws relating to condemnation proceedings as requiring a jury of inquest, one determining for itself all questions of law and fact, and that in his case, for the first time, it construed the law as requiring a common-law jury, subject to be controlled by a presiding judge charged with the duty of determining all questions of law, does not constitute a denial of the equal protection of the laws. *Backus v. Fort Street Union Depot Co.*, 169 U. S. 557, 570, 42 L. Ed. 853.

**67. Change of venue: transfer of cause, etc.**—*Cincinnati St. R. Co. v. Snell*, 193 U. S. 30, 36, 48 L. Ed. 604.

**68. Same.**—*Cincinnati St. R. Co. v. Snell*, 193 U. S. 30, 37, 48 L. Ed. 604.

**69. Same.**—*Cincinnati St. R. Co. v. Snell*, 193 U. S. 30, 37, 48 L. Ed. 604.

Section 5030 of the Revised Statutes of Ohio which provides that: "When a cor-

poration having more than fifty stockholders is a party to an action pending in a county in which the corporation keeps its principal office, or transacts its principal business, if the opposite party make affidavit that he cannot, as he believes, have a fair and impartial trial in that county, and his application is sustained by the several affidavits of five credible persons residing in such county, the court shall change the venue to the adjoining county most convenient for both parties," is not repugnant to the equal protection and the due process clauses of the fourteenth amendment. *Cincinnati St. R. Co. v. Snell*, 193 U. S. 30, 33, 48 L. Ed. 604.

**70. Statutes respecting rules of evidence.**—*Jones v. Brim*, 165 U. S. 180, 183, 41 L. Ed. 677. See, also, post, "Laws Affecting the Rules of Evidence," VIII, C, 13, f.

Thus a statute which makes the fact of damage to a highway occasioned by the rolling of stones thereon or the destruction of the banks thereof by herds of horses, cattle, sheep, swine, etc., driven thereover, conclusive presumption of negligence of the owner or person in charge, is not unconstitutional as denying equal protection of the laws. *Jones v. Brim*, 165 U. S. 180, 183, 41 L. Ed. 677.

There is no arbitrary classification or unlawful discrimination in § 3625 of the Revised Statutes of Ohio declaring the

(6) *Subjecting Defendant to Different Rule of Decision; Inconsistent Reasoning, etc.*—That the reasoning whereby a state court of last resort arrives at its final decisions is inconsistent within itself, or inconsistent with previous decisions of the same court, does not operate to deny to the unsuccessful litigant affected by such decision the equal protection of the law. If it were otherwise every case decided in the courts of last resort would be subject to the revisory power of the federal supreme court wherever the losing party deemed that the reasoning by which the state court had been led to decide adversely to his right was inconsistent with the reasoning previously announced by the same court in former cases.<sup>71</sup>

(7) *Laws Respecting Damages and Penalties.*—Whether a statute subjecting a certain class of persons to a peculiar rule with respect to the damages which they may recover, or to which they shall be subjected, is or is not valid, depends upon whether or not the classification made thereby is founded in any reasonable distinction justifying the application of a different rule to the particular class of persons from that which is applied to other litigants in the same class of actions.<sup>72</sup>

(8) *Statutes Awarding Attorney's Fees against Certain Classes of Defendants.*—The principle stated in the preceding paragraph applies also to statutes which provide for the taxation of an attorney's fee in certain cases against a certain class of

effect of answers to interrogatories in applications for policies of life insurance and providing when such answers may be used in evidence in actions to recover upon such policies; said statutes being applicable to all life insurance companies doing business in the state. *Hancock Mut. Life Ins. Co. v. Warren*, 181 U. S. 73, 45 L. Ed. 755.

The act of congress relating to the admission of Chinese into the United States does not deny the equal protection of the laws because of the provisions placing the burden of proof upon the defendants and requiring them to establish the fact of previous residence within the United States, business in which engaged, etc., by two or more credible witnesses other than Chinese. *Fong Yue Ting v. United States*, 149 U. S. 698, 37 L. Ed. 905; *Li Sing v. United States*, 180 U. S. 486, 494, 45 L. Ed. 634; *The Chinese Exclusion Case*, 130 U. S. 581, 598, 32 L. Ed. 1068.

**71. Subjecting defendant to different rule of decision; inconsistent reasoning, etc.**—*Lombard v. West Chicago Park Comm'rs*, 181 U. S. 33, 44, 45 L. Ed. 731.

Thus it was held that the plaintiff in error was not denied the equal protection of the laws because the supreme court of Illinois, having treated an ordinance providing for a special assessment as invalid for the purpose of the first assessment, afterwards upheld the ordinance for the purpose of a second assessment. *Lombard v. West Chicago Park Comm'rs*, 181 U. S. 33, 41, 45 L. Ed. 731.

**72. Laws respecting damages and penalties.**—*Atchison, etc., R. Co. v. Matthews*, 174 U. S. 96, 105, 43 L. Ed. 909.

**Validity of rule in regard to damages for injuries to postal clerks on trains.**—A statute which places postal clerks upon trains within the same class as employees

and others, not passengers, and prevents them from recovering damages against the railroad company for personal injuries except in those cases in which a recovery would be permitted to employees and others not passengers, is not unconstitutional as denying to postal clerks the equal protection of the laws. *Martin v. Pittsburg, etc., R. Co.*, 203 U. S. 284, 296, 51 L. Ed. 184, affirming the validity of Pennsylvania Statute of April 4, 1869, P. L. 58.

**Damages in actions upon life and health insurance policies.**—The statute of Texas, which directs that life and health insurance companies, who shall default in payment of life policies, shall pay twelve per cent damages, together with reasonable attorney's fees, is not unconstitutional as making an unreasonable and arbitrary discrimination and denying equal protection of the laws, by reason of the fact that the same conditions are not imposed on fire, marine and inland insurance companies, nor on mutual benefit and relief organizations doing business through lodges and through mutual relief benevolent associations. In the first place it is within the power of the state to prescribe the conditions upon which it will permit foreign insurance companies to do business within the state. In the second place, the placing of life and health insurance companies in a different class from the others named is not an arbitrary classification, but rests upon sufficient reason. It is competent for the legislature to discriminate between life and health insurance companies doing business for a profit, and lodges and associations of a mutual benefit or benevolent character. *Fidelity Mut. Life Ass'n v. Mettler*, 185 U. S. 308, 322, 46 L. Ed. 922, distinguishing *Gulf, etc., R. Co. v. Ellis*, 165 U. S. 150, 41 L. Ed. 66, and following *Atchison, etc., R. Co. v. Matthews*, 174 U. S. 96, 43 L. Ed. 909.



defendants. The question in all this class of cases, is, whether the classification or discrimination prescribed is purely arbitrary, or has it some basis in that which has a reasonable relation to the objects sought to be accomplished.<sup>73</sup> The legislature cannot pick out one individual, or one corporation, and enact that whenever he or it is sued the judgment shall be for double damages, or subject to an attorney fee in favor of the plaintiff, when no other individual or corporation is subjected to the same rule.<sup>74</sup>

**73. Statutes awarding attorney's fees against certain classes of defendants.**—*Atchison, etc., R. Co. v. Matthews*, 174 U. S. 96, 105, 43 L. Ed. 909.

**74. Same.**—*Atchison, etc., R. Co. v. Matthews*, 174 U. S. 96, 104, 43 L. Ed. 909.

**Statute awarding attorney's fee against certain defendants in case of failure to pay debts.**—"There is no good reason why railroad corporations alone should be punished for not paying their debts. Compelling the payment of debts is not a police regulation." *Atchison, etc., R. Co. v. Matthews*, 174 U. S. 96, 98, 43 L. Ed. 909; *Gulf, etc., R. Co. v. Ellis*, 165 U. S. 150, 41 L. Ed. 66.

It is, of course, proper that every debtor should pay his debts, and there might be no impropriety in giving to every successful suitor attorney's fees. Such a provision would bear a reasonable relation to the delinquency of the debtor, and would certainly create no inequality of right or protection. But before a distinction can be made between debtors, and one be punished for a failure to pay his debts, while another is permitted to become in like manner delinquent without any punishment, there must be some difference in the obligation to pay, some reason why the duty of payment is more imperative in the one instance than in the other. *Gulf, etc., R. Co. v. Ellis*, 165 U. S. 150, 156, 41 L. Ed. 66.

**Same; failure of railroad to pay for stock killed.**—A state law which provides that the owner of stock killed or injured by any railway corporation in the operation of its road may present a verified claim therefor and, in the event it is not paid within thirty days, may maintain an action thereon in the proper court, and, upon final recovery, be entitled not only to recover his costs, but a reasonable attorney's fee, not exceeding a specified amount, cannot be sustained upon the ground that corporations enjoy special privileges and that a statute which requires them to pay the attorneys' fees of successful plaintiffs is a valid classification, since, even if such classification were unobjectionable, the statute applies only to a particular class of corporations. Neither can it be sustained upon the ground that the nature of the business in which railroad companies are engaged is such as to justify such a discrimination. Such a statute is not, therefore, a valid exercise of the police power, but is unconstitutional as denying to railroad companies the due process of law and the equal protection

of the laws guaranteed by the fourteenth amendment. *Gulf, etc., R. Co. v. Ellis*, 165 U. S. 150, 41 L. Ed. 66.

**Attorneys' fees against railroads in case of damage by fire.**—A statute which prescribes that if the plaintiff, in an action against a railway company to recover for damage from fire caused by the operation of its road, shall recover, he shall be allowed a reasonable attorney's fee as part of his judgment, does not subject railway companies to an unreasonable and arbitrary classification, nor deny them the equal protection of the laws. *Atchison, etc., R. Co. v. Matthews*, 174 U. S. 96, 43 L. Ed. 909, distinguishing *Gulf, etc., R. Co. v. Ellis*, 165 U. S. 150, 41 L. Ed. 66, upon the ground that the purposes of the statute was not to compel the defendant to pay its debts, but to secure the utmost care on the part of railroad companies to prevent the escape of fire from their moving trains, and was therefore a reasonable and valid police measure. Reaffirmed in *Minneapolis, etc., R. Co. v. Gano*, 190 U. S. 557, 47 L. Ed. 1183.

**Attorneys' fees in actions against insurance companies.**—It cannot be claimed that a statute allowing a reasonable attorney's fee in case of the unsuccessful defense of a suit to enforce certain insurance policies is repugnant to the equality clause of the fourteenth amendment, because, first, it arbitrarily subjects insurance companies to a liability for attorney's fees when other defendants in other classes of cases are not subjected to such burden; second, because, whilst the obligation to pay attorney's fees is imposed on insurance companies in the cases embraced by the statute, no such burden rests on the plaintiff in favor of the insurance companies where the suit on a policy is successfully defended; and, third, because the statute arbitrarily distinguishes between insurance policies by allowing an attorney's fee in case of a suit on a policy covering real estate, where the property has been totally destroyed, and excluding the right to such fees in suits to enforce policies on other classes of property or where there has not been a total destruction of the property covered by the insurance. Each and all of these propositions must rest on the assumption that contracts of insurance, generally considered, do not possess such distinctive attributes as to justify their classification separate from other contracts, and that contracts of insurance as between themselves may not be classi-



(9) *Continuances*.—The fact that in one case the plaintiff or defendant is awarded a continuance, and in another is refused, does not make in either a denial of the equal protection of the laws. That the discretion of the court in granting or refusing to grant a continuance was improperly exercised may perhaps present a matter for consideration on appeal, but it amounts to nothing more.<sup>75</sup>

b. *In Attachment Proceedings*.—**Discrimination against Nonresident Defendants in the Matter of Requiring Plaintiff to Give Bond**.—A statute which requires the plaintiff in an attachment to give a bond where the attachment is against the property of a resident, but omits such requirement where the attachment is against the property of a nonresident, does not deprive nonresident defendants of their property without due process of law, nor prescribe any unlawful discrimination as to them.<sup>76</sup>

c. *Taking or Damaging Property; Eminent Domain Proceedings*.—The equal protection required by the fourteenth amendment forbids any state legislation, in whatever form it may be enacted, by which the property of an individual is, without compensation, wrested from him for the benefit of another or of the public.<sup>77</sup> An exception to this rule exists where a certain class of property has always been held subject to a servitude in favor of the state whereby it may be taken for certain purposes without compensation being made.<sup>78</sup>

fied separately depending upon the nature of the insurance, the character of the property covered, and the extent of the loss which may have supervened. The unsoundness of these propositions is settled by the adjudications of the federal supreme court. *Farmers', etc., Ins. Co. v. Dabney*, 189 U. S. 301, 304, 47 L. Ed. 821. See, also, *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. Ed. 552; *Hancock Mut. Life Ins. Co. v. Warren*, 181 U. S. 73, 45 L. Ed. 755; *Fidelity Mut. Life Ass'n v. Mettler*, 185 U. S. 308, 46 L. Ed. 922.

In the *Orient* case, a statute of the state of Missouri, which subjected fire insurance contracts to an exceptional rule, was upheld, not only on the ground of the right of the state to prescribe the conditions upon which an insurance company should transact business within its borders, but also because the rule in question was the lawful exercise of the power to classify. In the *Warren* case a like principle was applied to a statute of the state of Ohio establishing a particular regulation as to life insurance companies. In the *Mettler* case a statute of the state of Texas was sustained, applicable alone to life insurance policies, which authorized the enforcement, not only of a reasonable attorney's fee, but also of twelve per cent damages, after demand, in case of the unsuccessful defense of a suit to enforce a life insurance policy. In all three of the cases referred to, therefore, it was necessarily held that insurance contracts were so distinct as to justify legislative classification apart from other contracts, or to authorize a classification of insurance contracts so as to subject one character of such contracts when put in one class to one rule and other varieties of such contracts when placed in another class to a different rule. See *Farmers', etc., Ins. Co. v. Dabney*, 189 U. S. 301, 47 L. Ed. 821. See, also, the title INSURANCE.

75. *Continuances*.—*Brown v. New Jersey*, 175 U. S. 172, 177, 44 L. Ed. 119. See, also, the title CONTINUANCES.

76. *In attachment proceedings; in the matter of bonds*.—*Central Loan, etc., Co. v. Campbell, Commission Co.*, 173 U. S. 84, 98, 43 L. Ed. 623.

77. *Taking or damaging property; eminent domain proceedings*.—*Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 399, 38 L. Ed. 1014, followed and reaffirmed in *Reagan v. Mercantile Trust Co.*, 154 U. S. 413, 38 L. Ed. 1028; *Reagan v. Mercantile Trust Co.*, 154 U. S. 418, 38 L. Ed. 1030; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 420, 38 L. Ed. 1031. See, also, the titles DUE PROCESS OF LAW; EMINENT DOMAIN.

78. *Same; exception*.—*Eldridge v. Trezevant*, 160 U. S. 452, 40 L. Ed. 490.

Where certain class of property is held subject to servitude in favor of the state. —Under the constitution and laws of Louisiana, as construed by the courts of that state, all riparian owners along the Mississippi River hold their lands subject to a servitude in favor of the state by virtue of which they may be taken without compensation for the purpose of constructing levees. The ground of this doctrine is that such a servitude existed under the French laws prior to the cession of Louisiana by that country to the United States. It is held that this doctrine extends to riparian owners deriving their title from original grant made by the United States, since it is the established doctrine that the extent of the rights and interests of riparian owners deriving their titles from grants made by the United States is to be determined by the state law, and that they take no greater interest than do those persons who derive their titles from the state. Therefore a citizen of another state, owning riparian lands in Louisiana, and whose title was originally

**Awarding Different Measure of Compensation.**—Whether the awarding of one measure of compensation to one property owner and of another measure to others, operates as a denial of the equal protection of the laws depends upon whether there is any reasonable ground for the distinction.<sup>79</sup>

**Refusal to Renew Contract for Use of Property by the Public.**—Property devoted to public use under contract with the state or municipality is not taken or damaged, in any legal sense, nor is the owner thereof denied the equal protection of the laws, where it suffers a depreciation in value, rendering it partially or wholly useless, merely through the refusal of the state or municipality to renew or extend the contract.<sup>80</sup>

derived from a grant made by the United States government, is not deprived of his property without due process of law, nor denied the equal protection of the laws, within the meaning of the fourteenth amendment, when his riparian lands are appropriated without compensation, for levee purposes under the same conditions as the lands of others in like circumstances. *Eldridge v. Trezevant*, 160 U. S. 452, 40 L. Ed. 490.

**79. Awarding different measure of compensation.**—*Marchant v. Pennsylvania R. Co.*, 153 U. S. 380, 390, 38 L. Ed. 751; *Chicago, etc., R. Co. v. Chicago*, 166 U. S. 226, 41 L. Ed. 979.

**Distinction with reference to use to which property devoted; property used for railroad purposes.**—In a case in which a railroad company was awarded only nominal damages for property taken for street purposes, while other property owners were allowed actual damages, it was said: "It is further contended that the railroad company was denied the equal protection of the laws in that by the final judgment individual property owners were awarded, as compensation for contiguous property appropriated to the public use by the same proceeding, the value of their land taken, while only nominal compensation was given to the company, the value of its land, simply as land, across which the street was opened, not being taken into account. This contention is without merit. Compensation was awarded to individual owners upon the basis of the value of the property actually taken, having regard to the uses for which it was best adapted and the purposes for which it was held and used and was likely always to be used. Compensation was awarded to the railroad company upon the basis of the value of the thing actually appropriated by the public—the use of the company's right of way for a street crossing, having regard to the purposes for which the land in question was acquired and held and was always likely to be held. In the case of individual owners, they were deprived of the entire use and enjoyment of their property, while the railroad company was left in the possession and use of its property for the purposes for which it was being used and for which it was best adapted, subject only to the right of the public to have a street across

it. In this there was no denial of the equal protection of the laws, unless it be that the public cannot have a street across the tracks of a railroad company, except upon the condition precedent that it shall condemn and acquire the absolute ownership of the land, leaving untouched the right of the company to cross it with its tracks. We do not think the equal protection of the laws imposes such a burden upon the people of a city within the limits of which a railroad company has been permitted to lay its tracks." *Chicago, etc., R. Co. v. Chicago*, 166 U. S. 226, 257, 41 L. Ed. 979.

**Direct and consequential injuries.**—The judgment of a state supreme court construing the provisions of the state constitution which give a remedy for property injured by the construction of a railroad, as not extending the remedy to embrace property injured by the lawful operation of the railroad, the plaintiff not being thereby deprived of a right previously enjoyed, does not deprive a plaintiff of property without due process of law, nor deny to him the equal protection of the laws. *Marchant v. Pennsylvania R. Co.*, 153 U. S. 380, 390, 38 L. Ed. 751.

In the above case, the decision of the state supreme court, awarding damages to an abutting owner for the direct injuries resulting from his being shut off from access to, and use of, the public street in front of his premises, by reason of construction thereon of an elevated railroad, and refusing to award damages in the case of those who suffered, not from the construction of the railroad on the street on which their property abutted, but from injuries consequential to the operation of the road upon its own property, and not in the street, was held not to deny to the persons of the last named class the equal protection of the law. The two classes of circumstances differed in the critical particular that one class suffered direct and immediate damage from the construction of the railroad in such a way as to exclude them from the use of their accustomed highway, while the damages suffered by the other class were such as were consequential upon the use by the defendant company of its franchise on its own property. *Marchant v. Pennsylvania R. Co.*, 153 U. S. 380, 389, 38 L. Ed. 751.

**80. Refusal to renew contract for use of property for public purposes.**—*Skane-*



**Property Destroyed in the Interest of Public Safety, or Rendered Worthless for Certain Purposes through the Enactment of Police Regulations.**—See the titles DUE PROCESS OF LAW; INTOXICATING LIQUORS; POLICE POWER.

d. *In Criminal Proceedings*—(1) *Generally*.—The fourteenth amendment, in declaring that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, undoubtedly intended that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances, not only in the enjoyment of their personal and civil rights, but that in the administration of criminal justice no rule should be applied to one class which is not applicable to all others under like conditions, and that no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses.<sup>81</sup> Aside from these particulars, the powers of the states in dealing with crime within their borders are not limited by the fourteenth amendment. Law in its regular course of administration through courts of justice is due process; and when this is secured by the law of the state, the constitutional requirement is satisfied. Due process and equal protection of the laws is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice.<sup>82</sup>

(2) *Constitution of Grand Jury*.—See the title CIVIL RIGHTS, vol. 3, p. 831.

(3) *Indictment; Manner of Charging Crime*.—Where, under the law of a state, the crime of murder is defined as being of the first and second degree, the accused is not denied the equal protection of the laws, nor deprived of his life or liberty without due process of law, because the law and practice prevailing in the state permits him to be tried and convicted of murder in the first degree under an indictment which charges the crime of murder in a general way without distinguishing between the grades of the offense, or specifically charging him with murder in the first degree.<sup>83</sup>

*Skaneateles Waterworks Co. v. Skaneateles*, 184 U. S. 354, 46 L. Ed. 585.

**Same; use of waterworks.**—Neither the consent of a village to the incorporation of a water company and the construction of its works under its franchise, nor the fact that the village is authorized, though not obligated, to acquire the works of the company by purchase or condemnation, upon the expiration of the contract for supplying the village with water, raises any implied contract that the village will not, upon the expiration of such contract, construct a system of its own, or that it will not otherwise provide itself with water facilities except by the purchase or condemnation of the company's system; and the construction by the city, under ordinance, after the expiration of the contract between it and the water company, of a system of its own, although it may greatly depreciate if not totally destroy the value of the company's works, does not impair the obligation of any contract, nor deprive the company of its property without compensation or due process of law, nor deny to it the equal protection of the laws. *Skaneateles waterworks Co. v. Skaneateles*, 184 U. S. 354, 46 L. Ed. 585.

**81. Equal and impartial justice in criminal proceedings.**—*Barbier v. Connolly*, 113 U. S. 27, 31, 28 L. Ed. 923; *Yick Wo v. Hopkins*, 118 U. S. 356, 359, 30 L. Ed. 220; *Leeper v. Texas*, 139 U. S. 462, 467, 35 L. Ed. 225; *Gibson v. Mississippi*, 162 U. S. 565, 595, 40 L. Ed. 1075; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 559, 46 L. Ed. 679.

As to unequal punishments, see post, "Unequal Punishments," VII, B, 4, d, (8).

**82. Same; fourteenth amendment satisfied, when.**—*Hurtado v. California*, 110 U. S. 516, 535, 28 L. Ed. 232; *Leeper v. Texas*, 139 U. S. 462, 467, 35 L. Ed. 225; *Gibson v. Mississippi*, 162 U. S. 565, 591, 40 L. Ed. 1075.

**83. Indictment; manner of charging crime.**—*Bergemann v. Backer*, 157 U. S. 655, 39 L. Ed. 845; *Davis v. Utah*, 151 U. S. 262, 266, 38 L. Ed. 153; *Kohl v. Lehlback*, 160 U. S. 293, 196, 40 L. Ed. 432.

Accord, as to indictment under a state law which divides the crime of burglary into burglary of the first and second degrees, *Moore v. Missouri*, 159 U. S. 673, 679, 40 L. Ed. 301. See, also, *Caldwell v. Texas*, 137 U. S. 692, 698, 34 L. Ed. 816; *Davis v. Texas*, 139 U. S. 651, 653, 35 L. Ed. 300; *Howard v. Fleming*, 191 U. S. 126, 135, 48 L. Ed. 121.



(4) *Impaneling Jury.—Peremptory Challenges; Generally.*—See ante, "Nor in all Portions of the Same State," VII, B, 2, h, (5).

**Same—Trial by Struck Jury.**—Where the state law permits either party, state or defendant, to apply for a struck jury, and leaves it to the sound judicial discretion of the court to grant or refuse the application, defendants tried before struck juries are not denied the equal protection of the laws by reason of the fact that they are allowed fewer peremptory challenges than in ordinary cases; the same number of challenges being permitted in all cases of trial by a struck jury.<sup>84</sup> That in any given case the discretion of the court in awarding a trial by a struck jury was improperly exercised may perhaps present a matter for consideration on appeal, but it amounts to nothing more.<sup>85</sup>

**Racial Discriminations; Right of Colored Defendant to a Mixed Jury.**—See the title CIVIL RIGHTS, vol. 3, p. 831.

**Waiver; Failure to Object to Incompetent Juror.**—Where the state law renders aliens incompetent to serve as jurors and excludes them from service as jurors, a defendant who voluntarily or through negligence or through want of knowledge fails to urge in the state courts, either before or after verdict, the objection that one of the jury by which he was tried and convicted was an alien, cannot successfully urge that he was denied due process or the equal protection of the laws accorded to all others in like situation as himself.<sup>86</sup>

(5) *Rules of Evidence; Absent Witnesses.*—The fact that it is not within the power of the courts of the state to compel the attendance of witnesses who are beyond the limits of the state, or that the state law does not permit the taking or use of depositions of witnesses so situated, in criminal cases, on behalf of defendants, does not authorize federal interference with the proceedings in a state court upon the ground that the equal protection of the laws and due process of law have been denied to a defendant who has been denied a new trial under a motion based upon the ground that the court erred in refusing to continue the case on account of the absence of material witnesses residing in another state.<sup>87</sup>

(6) *Mode of Trial.*—That a state may make different arrangements for trials under different circumstances of even the same class of offenses, is well settled.<sup>88</sup>

**Summary Proceedings in Certain Classes of Offenses.**—See, generally, the titles DUE PROCESS OF LAW; MOTIONS; SUMMARY PROCEEDINGS.

**Summary Punishment for Violation of Injunction against Crime.**—A statute which provides that the courts may punish in a summary manner by fine or imprisonment, as for a contempt, persons guilty of violating injunctions restraining them from selling intoxicating liquors in violation of law, does not infringe that provision of the fourteenth amendment which declares that no state shall deny to any person the equal protection of the laws.<sup>89</sup>

**Trial before De Facto Judge.**—Where, under the law of the state, as expounded by its court of last resort, a judge appointed by the governor without authority is held to be a judge de facto, a person tried and sentenced in the court presided over by such judge is not deprived of his life or liberty without due process of law nor denied the equal protection of the laws within the meaning of the fourteenth amendment.<sup>90</sup>

(7) *In the Matter of Costs.*—A statute providing for the payment of costs in a prosecution for libel resulting in the acquittal of the defendant, by the per-

84. **Trial by struck jury.**—*Brown v. New Jersey*, 175 U. S. 172, 176, 44 L. Ed. 119.

85. **Same.**—*Brown v. New Jersey*, 175 U. S. 172, 177, 44 L. Ed. 119.

86. **Failure to object to incompetent juror.**—*Kohl v. Lehlback*, 160 U. S. 293, 299, 303, 40 L. Ed. 432.

87. **Rules of evidence; absent witnesses.**—*Minder v. Georgia*, 183 U. S. 559, 46 L. Ed. 328. See, also, ante, "Statutes Respecting Rules of Evidence," VII, B, 4,

a, (5); post, "Laws Affecting the Rules of Evidence," VIII, C, 13, f.

88. **Mode of trial.**—*Brown v. New Jersey*, 175 U. S. 172, 176, 44 L. Ed. 119. See, also, ante, "Nor in All Portions of the Same State," VII, B, 2, h, (5).

89. **Summary punishment for violation of injunction against crime.**—*Eilenbecker v. District Court*, 134 U. S. 31, 33 L. Ed. 801. See, also, the title JURY.

90. **Trial before de facto judge.**—In re *Manning*, 139 U. S. 504, 35 L. Ed. 264.

son found by the jury to be the prosecuting witness and the one who instituted the proceeding without probable cause and with malice, is not in violation of the fourteenth amendment of the constitution of the United States, guaranteeing equal protection and due process of law where liberty or property is concerned, when the record does not show that such prosecuting witness was prevented from showing the cause and reasonableness of the accusation made by him.<sup>91</sup>

(8) *Unequal Punishments*.—Equal protection of the laws under the fourteenth amendment implies not only accessibility by each one, whatever his race or color, on the same terms with others to the courts of the country for the security of his person and property, but that in the administration of criminal justice he shall not be subjected to any greater or different punishment than is imposed upon others for like offenses.<sup>92</sup>

**Different Punishment for Same Offense Where Circumstances Different.**—But a different punishment for the same offense may be inflicted under particular circumstances, provided it is dealt out to all alike who are similarly situated.<sup>93</sup>

**Same—Where Punishment Fixed by Court or Jury.**—Where three persons were tried for and convicted of conspiracy to defraud, it was held, on appeal to the supreme court of the United States, that the sentencing of two of them to ten years' and the third to only seven years' imprisonment, was not denying the equal protection of laws to the former. The court say: "At any rate, there is no such inequality as will justify us in setting aside the judgment against the two."<sup>94</sup> Neither can it be said that the defendants receiving sentences of ten years each were denied the equal protection of the laws because such sentences were more severe than any ever before inflicted in the state upon persons guilty of similar offenses, or because they were sentenced to imprisonment in the penitentiary instead of to hard labor upon the public roads.<sup>95</sup>

**Increased Punishment for Persons Previously Convicted.**—Statutes providing for an increase of punishment in the case of persons previously convicted of crime are not unconstitutional as denying the equal protection of the laws where they apply alike to all in like circumstances.<sup>96</sup>

e. *In Contempt Proceedings*.—A person charged with contempt of court is not denied the equal protection of the laws or due process of law when he is tried before the judge or judges of the court against which the contempt is alleged to have been committed. In such cases the judges act impersonally and are not to be considered as sitting in their own case.<sup>97</sup>

91. **In the matter of costs.**—*Lowe v. Kansas*, 163 U. S. 81, 41 L. Ed. 78.

92. **Unequal punishments.**—*Pace v. Alabama*, 106 U. S. 583, 584, 27 L. Ed. 207; *Barbier v. Connolly*, 113 U. S. 27, 31, 28 L. Ed. 923; *In re Kemmler*, 136 U. S. 436, 449, 34 L. Ed. 519; *In re Converse*, 137 U. S. 624, 34 L. Ed. 796; *Moore v. Missouri*, 159 U. S. 673, 678, 40 L. Ed. 301; *Hodgson v. Vermont*, 168 U. S. 262, 273, 42 L. Ed. 461.

93. **Different punishment for same offense where circumstances different.**—*Pace v. Alabama*, 106 U. S. 583, 27 L. Ed. 207; *Leeper v. Texas*, 139 U. S. 462, 35 L. Ed. 225; *Moore v. Missouri*, 159 U. S. 673, 678, 40 L. Ed. 301.

Where the criminal code of a state provides one punishment for persons guilty of adultery, where both parties are white, and by another section, provides a different and severer penalty where one of the guilty persons is white and the other a negro, such last section is not uncon-

stitutional as denying to persons convicted thereunder the equal protection of the laws. The discrimination is not against race or persons, but against the offense. *Pace v. Alabama*, 106 U. S. 583, 585, 27 L. Ed. 207.

94. **Same; where punishment fixed by court or jury.**—*Howard v. Fleming*, 191 U. S. 126, 48 L. Ed. 121.

95. **Because punishment more severe than ever inflicted for like offense.**—*Howard v. Fleming*, 191 U. S. 126, 48 L. Ed. 121.

96. **Increased punishment for subsequent convictions.**—*Moore v. Missouri*, 159 U. S. 673, 675, 678, 40 L. Ed. 301; *McDonald v. Massachusetts*, 180 U. S. 311, 45 L. Ed. 542.

97. **In contempt proceedings.**—*Respublica v. Oswald*, 1 Dall. 319, 325, 1 L. Ed. 155; *United States v. Shipp*, 203 U. S. 563, 574, 51 L. Ed. 319; *Patterson v. Colorado*, 205 U. S. 454, 463, 51 L. Ed. 879.



*f. Equal Protection as Regards the Right of Review by New Trial, Appeal, Writ of Error, etc.*—The provision securing the equal protection of the laws does not require, in any case, whether civil or criminal, an appeal, although it may be allowed in respect to other persons, differently situated.<sup>98</sup> "The power of a state to make classification in judicial or administrative proceedings carries with it the right to make such a classification as will give to parties belonging to one class two hearings before their rights are finally determined, and to parties belonging to a different class only a single hearing."<sup>99</sup> But while the constitutional guaranty of due process of law and of equal protection of the laws does not require an appeal in either civil or criminal proceedings, yet where a statutory tribunal, from whose decision there is no appeal, acts fraudulently and corruptly, by rendering a decision opposed to all the evidence and to the plain and uncontradicted facts of common knowledge, the party injured thereby is entitled to review in some form and to a reversal by the courts. Such a question, however, involves no constitutional element, but depends upon the ordinary jurisdiction of courts of justice over this class of cases.<sup>1</sup>

**Existence of Right a Question of State Law.**—Whether a writ of error in criminal cases punishable with death can or cannot be prosecuted under the laws and practice prevailing in any state, and if so, under what circumstances and upon what conditions, are matters for the state courts to determine. There is no merit, therefore, in a contention that the accused has been denied the equal protection of the laws because he has been deprived of a writ of error for the review of the record and proceedings in his case in violation of the laws of his state.<sup>2</sup>

**Refusal to Permit Amendment of Record as a Denial of Equal Protection.**—Where the state law, as declared by the highest court of the state, is that amendments to the record of a court, in derogation of its final judgment, are not permitted in that state after the expiration of the term at which the judgment was rendered, and such law is applicable to all persons within the jurisdiction of the state, its enforcement, against plaintiff in error who seeks to amend the record of the supreme court of the state so as to show that he was not present, in person or by counsel, in that court, at the time it affirmed the judgment of the trial court, and fixed the day for carrying that judgment into execution, is not a denial to him of that equal protection of the laws which is accorded by the constitution of the United States to all persons within the jurisdiction of the respective states.<sup>3</sup> Neither was such action on the part of the state court inconsistent with due process of law.<sup>4</sup>

5. AS REQUIRING EQUAL AND UNIFORM TAXATION—*a. Prescribes No Iron Rule of Equal Taxation.*—The fourteenth amendment was not intended to compel the states to adopt an iron rule of equal taxation.<sup>5</sup>

**98. Equal protection in matters of appeal, new trial, etc.**—*Pearson v. Yewdall*, 95 U. S. 294, 24 L. Ed. 436; *Missouri v. Lewis*, 101 U. S. 22, 30, 25 L. Ed. 989; *Kentucky Railroad Tax Cases*, 115 U. S. 321, 338, 29 L. Ed. 414; *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 169, 41 L. Ed. 369; *Mallett v. North Carolina*, 181 U. S. 589, 598, 45 L. Ed. 1015. See, also, ante, "Nor in All Portions of the Same State," VII, B, 2, h, (5).

**99. Same.**—*Pittsburg, etc., R. Co. v. Backus*, 154 U. S. 421, 427, 31 L. Ed. 1031; *Indianapolis, etc., R. Co. v. Backus*, 154 U. S. 438, 38 L. Ed. 1040.

Thus the Indiana act of March 6, 1891, concerning taxation, is not obnoxious to constitutional objections because it allows to the ordinary tax payer not merely his hearing before the county officials, but also a right to an appeal and a second

hearing before the state board, while it gives to railroad companies, with respect to the valuation of their property, only the one hearing before the latter board. *Pittsburg, etc., R. Co. v. Backus*, 154 U. S. 421, 427, 31 L. Ed. 1031; *Indianapolis, etc., R. Co. v. Backus*, 154 U. S. 438, 38 L. Ed. 1040.

**1. Where tribunal acts fraudulently and corruptly.**—*Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 170, 41 L. Ed. 369.

**2. Existence of right a question of state law.**—*Kohl v. Lehlback*, 160 U. S. 293, 297, 40 L. Ed. 432.

**3. Refusal to permit amendment of record.**—*Fielden v. Illinois*, 143 U. S. 452, 456, 36 L. Ed. 224.

**4. Same; due process.**—*Fielden v. Illinois*, 143 U. S. 452, 456, 36 L. Ed. 224.

**5. Prescribes no iron rule of equal taxa-**



b. *Well-Established Methods Not Overtumed*.—Neither is it to be considered as establishing any rule of delusive exactness in order to destroy methods of taxation which were well known when that amendment was adopted.<sup>6</sup>

c. *State May Adjust System in All Reasonable and Proper Ways*.—On the other hand, the equal protection clause of the fourteenth amendment was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutes. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the state in framing their constitution.<sup>7</sup>

d. *Permits Classification and Diversity in Taxation*.—This provision was not intended to restrain the legislature from making any proper and legitimate classification both as respects persons and property taxed and the methods of assessment and taxation. On the other hand, the federal supreme court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property selected either for bearing its burdens or from being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms; and that a system which imposed the same tax upon every species of property, irrespective of its nature or condition or class, would be destructive of the principles of uniformity and equality in taxation and of a just adaptation of property to its burdens.<sup>8</sup>

tion.—*Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. Ed. 892; *Chester City v. Pennsylvania*, 134 U. S. 240, 33 L. Ed. 896; *Home Ins. Co. v. New York State*, 134 U. S. 594, 33 L. Ed. 1025; *Pacific Express Co. v. Seibert*, 142 U. S. 339, 35 L. Ed. 1035; *Jennings v. Coal Ridge Imp., etc., Co.*, 147 U. S. 147, 37 L. Ed. 117; *Giozza v. Tiernan*, 148 U. S. 657, 37 L. Ed. 599; *Adams Express Co. v. Ohio*, 165 U. S. 194, 228, 41 L. Ed. 683; *Merchants', etc., Bank v. Pennsylvania*, 167 U. S. 461, 464, 42 L. Ed. 236; *Louisville, etc., R. Co. v. Barber Asphalt Paving Co.*, 197 U. S. 430, 434, 49 L. Ed. 819.

6. *Well-established methods not overturned*.—*Spencer v. Merchant*, 125 U. S. 345, 31 L. Ed. 763; *Louisville, etc., R. Co. v. Barber Asphalt Paving Co.*, 197 U. S. 430, 434, 49 L. Ed. 819; *Michigan Cent. R. Co. v. Powers*, 201 U. S. 245, 293, 50 L. Ed. 744; *New York v. Reardon*, 204 U. S. 152, 51 L. Ed. 415.

See this principle applied to uphold the validity of the tax law of New York of 1905, imposing a stamp duty upon transfers of stock based upon the par, and not upon the market value of the stock. *New York v. Reardon*, 204 U. S. 152, 51 L. Ed. 415.

7. *State may adjust system in all reasonable ways*.—*Spencer v. Merchant*, 125 U. S. 345, 31 L. Ed. 763; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. Ed. 892; *Chester City v. Pennsylvania*, 134 U. S. 240, 33 L. Ed. 896; *Home Ins. Co. v. New York*, 134 U. S. 594, 33 L.

Ed. 1025; *Pacific Express Co. v. Seibert*, 142 U. S. 339, 35 L. Ed. 1035; *Jennings v. Coal Ridge Imp., etc., Co.*, 147 U. S. 147, 37 L. Ed. 117; *Giozza v. Tiernan*, 148 U. S. 657, 662, 37 L. Ed. 599; *Adams Express Co. v. Ohio*, 165 U. S. 194, 228, 41 L. Ed. 683; *Merchants', etc., Bank v. Pennsylvania*, 167 U. S. 461, 464, 42 L. Ed. 236; *Louisville, etc., R. Co. v. Barber Asphalt Paving Co.*, 197 U. S. 430, 434, 49 L. Ed. 819.

8. *Permits classification and diversity in taxation*.—*Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 504, 22 L. Ed. 189; *State Railroad Tax Cases*, 92 U. S. 575, 612, 23 L. Ed. 663; *Barbier v. Connolly*, 113 U. S. 27, 28 L. Ed. 923; *Kentucky Railroad Tax Cases*, 115 U. S. 321, 337, 29 L. Ed. 414; *Bank v. Boston*, 125 U. S. 60, 69, 31 L. Ed. 689; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. Ed. 892; *Chester City v. Pennsylvania*, 134 U. S. 240, 33 L. Ed. 896; *Home Ins. Co. v. New York*, 134 U. S. 594, 606, 33 L. Ed. 1025; *Pacific Express Co. v. Seibert*, 142 U. S. 339, 351, 35 L. Ed. 1035; *Giozza v. Tiernan*, 148 U. S. 657, 662, 37 L. Ed. 599; *Western Union Tel. Co. v. Indiana*, 165 U. S. 304, 309, 41 L. Ed. 725; *Adams Express Co. v. Ohio*, 165 U. S. 194, 228, 41 L. Ed. 683; *Merchants', etc., Bank v. Pennsylvania*, 167 U. S. 461, 464, 42 L. Ed. 236; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 295, 296, 42 L. Ed. 1037; *Florida Cent., etc., R. Co. v. Reynolds*, 183 U. S. 471, 476, 46 L. Ed. 283; *Connolly v. Union Sewer Pipe Co.*, 184

U. S. 540, 562, 46 L. Ed. 679; *Travellers' Ins. Co. v. Connecticut*, 185 U. S. 364, 372, 46 L. Ed. 949; *Cook v. Marshall County*, 196 U. S. 261, 274, 49 L. Ed. 471.

"The amendment does not prevent the classification of property for taxation—subjecting one kind of property to one rate of taxation, and another kind of property to a different rate—distinguishing between franchises, licenses and privileges, and visible and tangible property, and between real and personal property." *Home Ins. Co. v. New York State*, 134 U. S. 594, 606, 33 L. Ed. 1025; *Pacific Express Co. v. Seibert*, 142 U. S. 339, 352, 35 L. Ed. 1035.

"If it be a fact that the franchise of a Kentucky corporation is taxed at a different rate from the tangible property in the state, there can be no question that the state had power to tax it at a different rate, so far as the constitution of the United States is concerned. *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. Ed. 892; *Merchants', etc., Bank v. Pennsylvania*, 167 U. S. 461, 464, 42 L. Ed. 236; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 295, 42 L. Ed. 1037." *Coulter v. Louisville, etc., R. Co.*, 196 U. S. 599, 608, 49 L. Ed. 615.

**Discriminating as between real and personal property.**—"It is the usual course in tax laws to treat personal property as one class and real estate as another, and it has never been supposed that such classification created an illegal discrimination, because there might be some persons who owned only personal property, and others who owned property of both classes." *Thomas v. Gay*, 169 U. S. 264, 281, 42 L. Ed. 740. See, also, *Home Ins. Co. v. New York State*, 134 U. S. 594, 606, 33 L. Ed. 1025; *Pacific Express Co. v. Seibert*, 142 U. S. 339, 352, 35 L. Ed. 1035.

"*Gilman v. Sheboygan City*, 2 Black 510, 17 L. Ed. 305, is not in conflict with these views. True, in that case a tax levied for a special purpose by the city was adjudged void on the ground that it was levied exclusively on real property, but the decision was placed upon a conflict with the constitution of the state as interpreted by its supreme court. In other words, the supreme court of the state having in several cases held that such a discrimination avoided a tax, this court simply followed those decisions, saying, p. 518, that it considered itself 'bound in cases like this to follow the settled adjudications of the highest state court giving constructions to the constitution and laws of the state.'" *Florida Cent., etc., R. Co. v. Reynolds*, 183 U. S. 471, 479, 46 L. Ed. 283.

Before the adoption of the fourteenth amendment it was said: "It is true that in many, if not in all of the constitutions of the states, provisions will be found confining the power of the legislature to the passage of uniform laws in the taxation of the real and personal property within her jurisdiction. But this is a restraint

upon the power imposed by the state itself. In the absence of any such restriction, discrimination in the tax would rest in the discretion of the legislature. Whether regulated by the constitution or by the act of the legislature is a question of state policy, to be determined by the people in convention or by the legislature. In either case the power to discriminate or not is in the state." *New York v. Commissioners of Taxes*, 2 Black 620, 17 L. Ed. 451.

A law which taxes cattle grazing upon lands situated within an Indian reservation in the state is not unconstitutional because it does not impose a tax upon real estate or other property in the reservation. *Thomas v. Gay*, 169 U. S. 264, 42 L. Ed. 740; *Wagoner v. Evans*, 170 U. S. 588, 42 L. Ed. 1154.

**May classify occupations, trades, professions, etc.**—In cases of taxation the right of classification is held to permit of discrimination between different trades and callings when not obviously exercised in a spirit of prejudice or favoritism. *Kentucky Railroad Tax Cases*, 115 U. S. 321, 29 L. Ed. 414; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 237, 33 L. Ed. 892; *Chester City v. Pennsylvania*, 134 U. S. 240, 33 L. Ed. 896; *Pacific Express Co. v. Seibert*, 142 U. S. 339, 351, 35 L. Ed. 1035; *Jennings v. Coal Ridge Imp., etc., Co.*, 147 U. S. 147, 37 L. Ed. 117; *Merchants', etc., Bank v. Pennsylvania*, 167 U. S. 461, 464, 42 L. Ed. 236; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 42 L. Ed. 1037; *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89, 45 L. Ed. 102; *Cook v. Marshall County*, 196 U. S. 261, 274, 49 L. Ed. 471; *Keherer v. Stewart*, 197 U. S. 60, 69, 49 L. Ed. 663.

"A tax may be imposed only upon certain callings and trades, for when the state exerts its power to tax, it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. It would be an intolerable burden if a state could not tax any property or calling unless, at the same time, it taxed all property or all callings." *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 562, 46 L. Ed. 679.

**Classification and diversity in the matter of assessments.**—The fourteenth amendment permits classification and diversity in the methods of assessment and taxation, as well as in the property to be taxed, provided all property similarly situated is treated in the same way. *Barbier v. Connolly*, 113 U. S. 27, 28 L. Ed. 923; *Florida Cent., etc., R. Co. v. Reynolds*, 183 U. S. 471, 476, 46 L. Ed. 283.

The legislature may authorize different modes of assessment for different properties providing the rule of assessment is the same. *Kentucky Railroad Tax Cases*, 115 U. S. 321, 337, 29 L. Ed. 414; *Pittsburg, etc., R. Co. v. Backus*, 154 U. S. 421, 31 L. Ed. 1031; *Winona, etc., Land Co. v. Minnesota*, 159 U. S. 526, 538, 40



L. Ed. 247; *Weyerhaeuser v. Minnesota*, 176 U. S. 550, 557, 44 L. Ed. 583.

Thus the statutes of Minnesota, acts of 1893, ch. 151, providing for a reassessment of property in any county when it should be made to appear to the government that there had been a gross undervaluation in the assessment of property in that county was not unconstitutional because the manner of the assessment and the opportunities for review in the reassessment provided for thereby were different from those in the original assessment. *Weyerhaeuser v. Minnesota*, 176 U. S. 550, 557, 44 L. Ed. 583.

Section 113 of the general tax law of Minnesota, as amended by the laws of 1881, p. 24, authorizes the county auditor to make the assessment of back taxes upon property which had escaped the payment of taxes during previous years, while as to property generally the assessment is made by the county assessor. The latter also acts upon actual view (§ 33), while there is in § 113 no such direction to the county auditor. The assessment made by the assessor comes before a town board of review (§ 39), and subsequently before a county board of equalization (§ 44). Neither of these provisions is found in § 113. So that the difference between the two modes of assessment may be stated thus; in the one case there is an assessment by one officer, with a right to review his action; in the other, there is an assessment by a different officer, and no provision for a review except as the matter comes before the court in the proceedings for the collection of taxes. Held, that there is nothing in this difference to affect the constitutional rights of a party. *Winona, etc., Land Co. v. Minnesota*, 159 U. S. 526, 538, 40 L. Ed. 247.

Legislation providing for the assessment of railroad property by a state board, while all other property in the state is assessed by county officials, is obnoxious to no provision in the federal constitution. *Pittsburg, etc., R. Co. v. Backus*, 154 U. S. 421, 425, 31 L. Ed. 1031; *State Railroad Tax Cases*, 92 U. S. 575, 23 L. Ed. 663; *Kentucky Railroad Tax Cases*, 115 U. S. 321, 29 L. Ed. 414; *Indianapolis, etc., R. Co. v. Backus*, 154 U. S. 438, 38 L. Ed. 1040.

**Same—Assessments may be made upon different dates.**—That one class of property is assessed for taxation on one date and other property upon another date in the year, does not deny the equal protection of the laws. It is not unusual for tax laws to authorize the assessment of different classes of property at different dates, and even of the same classes of property in different localities at different dates. Such matters of regulation must be supposed to be within the power of the state or territory, and to have their reasons in special facts known to the legislature. *Thomas v. Gay*, 169 U. S. 264, 281, 42 L. Ed. 740.

**Same—Right to re-assessment or review.**—"The mere fact that the law gives the assessors in the case of corporations two chances to arrive at a correct valuation of their real estate, when they have but one in the case of individuals, cannot be held to be a denial to the corporations of the equal protection of the laws, so long as the real estate of the individual is, in fact, generally assessed at its full value." *New York State v. Barker*, 179 U. S. 279, 285, 45 L. Ed. 190.

Thus it was held that a statute of the state of New York was not invalid as denying the equal protection of the laws because it made provision in the case of corporations for a subsequent assessment in cases where corporate owned real estate had been found to have been undervalued, but made no such provision as to real estate owned by individuals, the statute requiring real property, whether owned by corporations or individuals, to be assessed at its full value. *New York State v. Barker*, 179 U. S. 279, 45 L. Ed. 190.

If the statutory scheme for taxing the property of railroads is due process of law, the equal protection clause of the fourteenth amendment does not require that an appeal should lie from the action of the board fixing the value of such property, notwithstanding it may be allowed in respect to the valuation of the property of other persons differently situated. *Kentucky Railroad Tax Cases*, 115 U. S. 321, 338, 29 L. Ed. 414.

Nor is it necessary that the property owner should be afforded the same opportunities for review of a reassessment that were available to him upon the first assessment. *Weyerhaeuser v. Minnesota*, 176 U. S. 550, 557, 44 L. Ed. 583.

**Same—Notice of reassessment proceedings.**—The Minnesota statutes, acts of 1893, ch. 151, providing for the reassessment of property in any county in which it is made to appear to the governor that there has been a gross undervaluation of taxable property by the assessors for such county, does not deny the equal protection of the laws because it fails to provide for notice in the progress of the proceedings for reassessment. *Weyerhaeuser v. Minnesota*, 176 U. S. 550, 558, 44 L. Ed. 583.

**Classification in the collection of back taxes.**—If the state has the power, in the first instance, to classify property for taxation, it has the same right of classification as to property which in past years has escaped taxation. *Florida Cent., etc., R. Co. v. Reynolds*, 183 U. S. 471, 480, 46 L. Ed. 283.

There is nothing in the federal constitution which forbids a state to reach backward and collect taxes from certain kinds of property which were not at the time collected through lack of statutory provisions therefor, or in consequence of a misunderstanding as to the law, or from neglect of administrative officials, without



also making provision for collecting the taxes for the same years on other property. *Florida Cent., etc., R. Co. v. Reynolds*, 183 U. S. 471, 474, 46 L. Ed. 283.

"So far as the federal constitution is concerned, the legislature of Florida had the power to compel the collection of delinquent taxes from the railroad companies for the years 1879, 1880 and 1881, even though it made no provision for the collection of delinquent taxes for those years on other property." *Florida Cent., etc., R. Co. v. Reynolds*, 183 U. S. 471, 481, 46 L. Ed. 283.

"It may well be that the legislature, in view of the probabilities of changes in the title or suits of personal property, might deem it unwise to attempt to charge it with back taxes, while at the same time, by reason of the stationary character of real estate, it might elect to proceed against that. At any rate, if it did so it would violate no provision of the federal constitution, and whether it did so or not was a matter to be determined finally by the supreme court of the state." *Winona, etc., Land Co. v. Minnesota*, 159 U. S. 526, 539, 40 L. Ed. 247.

**Classification of forfeitures according to size of tract.**—The provision of the constitution of West Virginia exempting tracts of less than one thousand acres from forfeiture is not a discrimination against the owners of tracts containing one thousand acres or more, which amounts to a denial of the equal protection of the laws to citizens or landowners of the latter class. The evil intended to be remedied by the constitution and laws of West Virginia was the persistent failure of those who owned or claimed to own large tracts of lands, patented in the last century, or early in the present century, to put them on the land books, so that the extent and boundaries of such tracts could be easily ascertained by the officers charged with the duty of assessing and collecting taxes. Where the fact was a small one, the probability was that it was actually occupied by some one, and its extent or boundary could be readily ascertained for purposes of assessment and taxation. Therefore a policy could be properly adopted as to large tracts which the necessities of the public revenue did not require to be prescribed as to small tracts. *King v. Mullins*, 171 U. S. 404, 43 L. Ed. 214, followed in *King v. Panther Lumber Co.*, 171 U. S. 437, 43 L. Ed. 227.

**Express companies as a separate class.**—There is a clear and valid distinction between express companies who carry on the business of transportation on contracts for hire with railroad or steamboat companies doing business within the state, and other companies engaged in the same business, but which own and employ their means of transportation, since the latter own their own roadbeds, steamboats and other tangible property upon which they pay taxes, as well as generally upon their

franchise, while the former have no tangible property, of any consequence, subject to taxation under the general laws. Therefore a statute which limits its definition of express companies to those which do not own their own means of transportation, but depend upon contracts of hire with railroad and steamboat companies in order to secure transportation of the goods which they engage to carry, and taxes them in a different manner and upon a different basis to what other companies owning their own means of transportation are taxed, does not deny to them the equal protection of the laws of the state in violation of the fourteenth amendment, nor violate a state constitutional provision requiring taxation to be equal and uniform. *Pacific Express Co. v. Seibert*, 142 U. S. 339, 353, 354, 35 L. Ed. 1035.

**Railroads as a separate class.**—The right to classify railroad property, as a separate class for purposes of taxation, grows out of the inherent nature of the property, and the discretion vested by the constitution of the state in its legislature. It necessarily involves the right, on the part of the legislature, to devise and carry into effect a distinct scheme, with different tribunals in the proceeding to value it. If such a scheme is due process of law, the details in which it differs from the mode of valuing other descriptions and classes of property cannot be considered as a denial of the equal protection of the laws. *Kentucky Railroad Tax Cases*, 115 U. S. 321, 337, 339, 29 L. Ed. 414; *Pacific Express Co. v. Seibert*, 142 U. S. 339, 354, 35 L. Ed. 1035.

The constitution of Illinois requires taxation in general to be uniform and equal, but declares in express terms that a large class of persons engaged in special pursuits, including persons or corporations owning franchises and privileges, may be taxed as the legislature shall determine, by a general law, "uniform as to the class upon which it operates." Under this provision a statute which prescribes a different rule of taxation for railroad companies from that for individuals does not violate any provision of the constitution of the United States. *State Railroad Tax Cases*, 92 U. S. 575, 576, 23 L. Ed. 663.

**Classification of railroads using city streets.**—A municipal ordinance which imposes upon a street railway, for the privilege of doing business in the city, and for the use of the streets of the city, a tax at the rate of \$100 per mile or fractions of a mile of track used in the city is not unconstitutional as denying the equal protection of the laws by reason of the fact that a steam railroad company entering the city and which uses the streets of the city and makes an extra charge for transporting freight from its regular station to various side tracks within the city, is not subjected to such tax. The difference between the two railroads is ob-

vious, and warrants a diversity in the method of taxation. *Savannah, etc., Railway v. Savannah*, 198 U. S. 392, 49 L. Ed. 1097.

**Same—Distinguishing between surface and subsurface roads.**—The owners of a surface street railroad cannot complain that they have been deprived of the equal protection of the laws, or of their property without due process of law, because they are subjected to a certain tax to which the owners of a subsurface street railroad do not have to respond. "There is a difference between surface and subsurface street railroads sufficient to justify a diversity in mode and extent of taxation." *New York State v. New York State Board of Tax Comm'rs*, 199 U. S. 53, 54, 50 L. Ed. 87.

**Apportionment of railroad property among counties traversed by road.**—The Georgia act of October 16, 1889 (Laws of Ga., 1889, No. 399, p. 29), having apportioned the transitory and unlocated property of a railroad company, including its rolling stock and intangible personalty, among the several counties through which the road extends, for the purpose of taxation, and having subjected such property to the same rate of taxation imposed upon all other property in the respective counties, the fact that the rate of taxation varies in the different counties, according to their respective wants and necessities, involves no discrimination against the railroad company. The state having the undoubted authority to fix the situs of such property, and having lawfully distributed it proportionately among the several counties traversed by the road, it thereby became subject to the same rate of taxation as other property in the respective counties. This involved no inequality, and violated no provision of either the state or federal constitution. It certainly did not involve a failure to extend to the plaintiff in error the equal protection of the laws. *Columbus Southern R. Co. v. Wright*, 151 U. S. 470, 482, 38 L. Ed. 238.

**Application of unit system to railroad and express companies.**—The classification of express companies with railroad and telegraph companies as subject to the unit rule, does not deny them the equal protection of the laws. *Adams Express Co. v. Ohio*, 165 U. S. 194, 228, 41 L. Ed. 683, followed in *Adams Express Co. v. Indiana*, 165 U. S. 255, 41 L. Ed. 707.

That the state, in determining the value of the property of an express company for purposes of taxation, takes into consideration the franchises and the earning capacity of the company considering its business as a unit, and then fixes its value according to the proportionate amount of property owned or business done within the state, does not render its action obnoxious to the constitution of the United States either as an attempt to tax property situated without the state, or as depriving such companies of their property

without due process of law or as denying them the equal protection of the laws. *Adams Express Co. v. Kentucky*, 166 U. S. 171, 41 L. Ed. 960; *Adams Express Co. v. Ohio* (rehearing), 166 U. S. 185, 41 L. Ed. 965, reaffirming *Adams Express Co. v. Ohio*, 165 U. S. 194, 41 L. Ed. 683, and *Adams Express Co. v. Indiana*, 165 U. S. 255, 41 L. Ed. 707.

**Exempting agricultural lands from municipal taxation.**—An act authorizing cities of a certain class to extend their boundaries by ordinance so as to include lands used for all purposes, except agricultural purposes, is not invalid as making an arbitrary discrimination in favor of agricultural lands. Such discrimination is justified by the character of agricultural lands, the uses to which they are put, and the benefits which they receive from being included within corporate limits, as compared with lands devoted to other purposes. *Clark v. Kansas City*, 176 U. S. 114, 120, 44 L. Ed. 392.

The proviso in the charter of the city of Henderson Kentucky, that "no land embraced within the city limits, and outside of ten acre lots as originally laid off, shall be assessed and taxed by the city council unless the same is divided or laid out into lots of five acres or less, and unless all of the same is actually used and devoted to farming purposes," refers only to lands capable of being cultivated or used and divided into lots upon which buildings may be erected or over which streets and highways may be constructed, and does not apply to a bridge erected over the Ohio river within the city limits. The imposition of a municipal tax upon such bridge does not therefore deny the equal protection of the laws to the owners thereof, in that it subjects to taxation their property, while all other land not divided into lots enjoys an exemption from taxation under this proviso of the city charter. *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 620, 43 L. Ed. 823.

**Fixing situs of mortgages held by non-residents.**—A statute which makes mortgages upon real estate, whether such mortgage security be owned by residents or nonresidents, taxable in the county in which the real estate is situated and in which the mortgage is recorded, is not, as applied to nonresidents, unconstitutional, either as an attempt to tax property not having its situs within the state, or as denying the owner of such mortgage the equal protection of the laws, or as depriving him of his property without process of law. *Savings & Loan Society v. Multnomah County*, 169 U. S. 421, 42 L. Ed. 803, criticising case of the State Tax on Foreign-Held Bonds, 15 Wall. 300, 323, 21 L. Ed. 179, and holding it to be unsustainable on this point.

**Bank shares.**—The Public Statutes of Massachusetts, c. 13, §§ 8, 9, and 10, providing for the taxation of the shares of banks of issue, state and national, at a



rate and in a manner different from that applied to other moneyed capital and personal property, is not repugnant to the fourteenth amendment. *Bank v. Boston*, 125 U. S. 60, 69, 31 L. Ed. 689.

**Corporate bonds.**—An assessment of a tax of three mills upon the nominal or face value of corporate bonds, instead of assessing it upon their actual value, is not a denial of the equal protection of the laws when the law applies alike to all persons and corporations in like situation and there is no unjust discrimination against any persons or corporations. *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 236, 33 L. Ed. 892; *Chester City v. Pennsylvania*, 134 U. S. 240, 33 L. Ed. 896; *Jennings v. Coal Ridge Imp., etc., Co.*, 147 U. S. 147, 37 L. Ed. 117.

**Subjecting foreign corporation to special rule.**—The act of the legislature of New York, approved May 26, 1881 (1 Sess. Laws, 1881, p. 481, c. 361), imposing a tax upon certain corporations doing business within the state, and providing that they should be subject to a tax upon their corporate franchise or business, to be computed by certain percentage upon their capital stock according to the amount of their business or capital without the state, although it imposed a hardship in the manner of estimating the amount of the tax upon a foreign corporation doing business within the state, was not unconstitutional as depriving such a corporation of the equal protection of the laws; since the corporation was not entitled to do business within the state except upon the conditions imposed by the state law, and the conditions with respect to the manner and amount of the tax imposed being solely within the discretion of the state legislature. *Horn Silver Min. Co. v. New York State*, 143 U. S. 305, 317, 36 L. Ed. 164.

Nor was such statute unconstitutional as taking private property without just compensation. *Horn Silver Min. Co. v. New York State*, 143 U. S. 305, 317, 36 L. Ed. 164. See, also, the title DUE PROCESS OF LAW.

**Subjecting nonresident stockholders to special rule.**—Taking into consideration the fact that, under the system of taxation prevailing in Connecticut, the entire revenue for the support of the state government is derived from corporation licenses, etc., and the residents of the state pay no state tax, but only a tax to the municipality in which they reside, it cannot be said that the statute of that state which imposes a state tax upon stock owned by nonresidents in local corporations of that state, assessed at its market value, without any deduction on account of real estate held by the corporation, while the stock of resident stockholders is assessed at its market value less the proportionate value of all real estate held by the corporation upon which it has already paid a tax, is unconstitutional, either as denying the equal protection of the laws

or as infringing paragraph one of § 2, art. 4, of the federal constitution. *Travellers' Ins. Co. v. Connecticut*, 185 U. S. 364, 46 L. Ed. 949.

Under this statute, the rate of state taxation upon the nonresident stockholders was fixed at fifteen mills on the dollar, applying equally to all; while the rate of local tax upon resident stockholders varied in the several cities and towns according to the judgment of their local authorities as to the amount necessary to be raised for carrying on the municipal government. Obviously, therefore, the varying difference in the rate of the tax upon the resident and nonresident stockholders could not be said to impose a discrimination against either the one or the other. *Travellers' Ins. Co. v. Connecticut*, 185 U. S. 364, 367, 46 L. Ed. 949.

**Taxation of agents of nonresident packers.**—The legislature of Georgia passed an act imposing a tax on agents of packing houses for meats, which act was construed by the supreme court of Georgia to refer to the domestic but not the interstate business of such agents, whether they represented state or foreign corporations. It is held that where the agent of a foreign house does a domestic business also, he is subject to the tax, and cannot complain that he is denied the equal protection of the laws. *Kehrer v. Stewart*, 197 U. S. 60, 69, 49 L. Ed. 663.

**Classification of merchants according to amount of sales.**—A town ordinance which divides the merchants into classes determined by the amount of their sales is not obnoxious to the equality clause of the fourteenth amendment. Such a law operates on all alike under the same conditions and cannot be said to be discriminating because the owner of a small business pays tax at a less rate per \$100 than the large dealer. *Clark v. Titusville*, 184 U. S. 329, 333, 46 L. Ed. 569.

**Statute excepting sales to nonresident customers.**—Section 5007 of the Iowa Code, which imposes a tax upon cigarette dealers, contains this provision: "But the provisions of this section shall not apply to the sales by jobbers and wholesale dealers in doing an interstate business with customers outside the state." It was held that this section is not open to the objection of denying to dealers in cigarettes the equal protection of the laws. *Cook v. Marshall County*, 196 U. S. 261, 275, 49 L. Ed. 471.

**Stamp act classifications.**—Stamp acts are necessarily confined to certain classes of transactions and to classes which, considered economically, or from the legal or other possible points of view, are not very different from other classes that escape. *New York v. Reardon*, 204 U. S. 152, 51 L. Ed. 415.

Since you cannot have a stamp act without something that can be stamped conveniently, a stamp act which proceeds upon a classification having reference to those things which can be stamped con-



veniently, as compared with those which cannot, is not condemned by the constitution. *New York v. Reardon*, 204 U. S. 152, 158, 51 L. Ed. 415.

Therefore the New York act of 1905 is not unconstitutional as denying the equal protection of the laws because it imposes a stamp duty upon stock transfers and not upon sales or other kinds of personal property. *New York v. Reardon*, 204 U. S. 152, 155, 51 L. Ed. 415. See, also, as to similar acts enacted by congress, *Nicol v. Ames*, 173 U. S. 509, 43 L. Ed. 786; *Treat v. White*, 181 U. S. 264, 45 L. Ed. 853; *Thomas v. United States*, 192 U. S. 363, 48 L. Ed. 481.

The fact that bonds, in most cases, pass by delivery, and that a stamp tax could not be enforced as to transfers of bonds, is sufficient to warrant a distinction as between transfers of stock and transfers of bonds. *New York v. Reardon*, 204 U. S. 152, 158, 51 L. Ed. 415.

Neither is such statute unconstitutional as denying the equal protection of the laws because based upon the par value instead of the market value of the bonds. *New York v. Reardon*, 204 U. S. 152, 158, 159, 51 L. Ed. 415.

A sale at an exchange forms a proper basis for a classification which excludes all sales made elsewhere from taxation. *Nicol v. Ames*, 173 U. S. 509, 521, 43 L. Ed. 786.

**Inheritance and legacy taxes.**—"The fourteenth amendment does not deprive a state of the power to regulate and burden the right to inherit, but at the most can only be held to restrain such an exercise of power as would exclude the conception of judgment and discretion, and which would be so obviously arbitrary and unreasonable as to be beyond the pale of governmental authority." *Campbell v. California*, 200 U. S. 87, 95, 50 L. Ed. 382. See the title **SUCCESSION TAXES**.

**Same—Applying tax to estates already in course of administration.**—A statute imposing an inheritance tax is not unconstitutional as denying the equal protection of the laws by reason of the fact that it is made to apply to estates still in the course of administration, but not to those estates the administration of which has been finally closed at the time of its enactment. *Cahen v. Brewster*, 203 U. S. 543, 552, 51 L. Ed. 310, affirming the validity of the Louisiana Act of June 28, 1904.

In this case the state court had decided that property of the deceased was subject to taxation so long as the estate was in the course of administration, and it was said by the federal supreme court that it certainly was not an improper classification to make the tax depend upon a fact without which it would have been invalid. In other words, that those who are subject to be taxed cannot complain that they are denied the equal protection of the laws because of the failure to tax those who cannot legally be taxed. *Cahen*

*v. Brewster*, 203 U. S. 543, 552, 51 L. Ed. 310.

**Same—As applied to power of appointment created by will of person already deceased.**—Subdivision 5 of § 220 of the New York statute enacted April 16, 1897, which imposes a tax upon the privilege of exercising powers of appointment accorded by last will and testament, is not unconstitutional as applied to a power of appointment created by the will of a testator who died previous to the enactment of the statute, since it involves no arbitrary or unequal regulation, but applies alike to all property, persons and estates in the same condition. *Orr v. Gilman*, 183 U. S. 278, 287, 46 L. Ed. 196.

**Same—Progressive rate features; distinctions according to degree of kin and amounts received.**—The progressive rate features of the legacy and inheritance taxes imposed by the act of congress of June 13, 1898, which makes the rate of tax to depend upon the nature of the links connecting those taking with the deceased, and which progressively increases the tax according to the amount of the legacy or shares, is not so repugnant to fundamental principles of equality and justice that the law should be held void, even though it transgresses no express limitation of the constitution. *Knowlton v. Moore*, 178 U. S. 41, 109, 44 L. Ed. 969. See, also, *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 293, 42 L. Ed. 1037; *Murdock v. Ward*, 178 U. S. 139, 44 L. Ed. 1009; *Sherman v. United States*, 178 U. S. 150, 44 L. Ed. 1014.

A law imposing an inheritance tax, and which divides the distributees and next of kin to the deceased into three classes, the first and second being based respectively upon lineal and collateral relationship to the deceased, and the third being composed of strangers to his blood and distant relatives, is not invalid as denying the equal protection of the laws. *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 296, 42 L. Ed. 1037, affirming the constitutionality of the Illinois inheritance tax law, Laws of 1895, p. 301.

Neither is such law unconstitutional because the third class above mentioned is again divided into four subclasses according to the amount of the estate received. *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 296, 42 L. Ed. 1037.

The inheritance tax law of the state of Illinois, Rev. Stat. Ill. 1895, ch. 120, par. 308, is not in contravention of the fourteenth amendment to the constitution of the United States of America, in that the classification of life tenants is arbitrary and unreasonable. It does not deny to life tenants the equal protection of the laws, because, as interpreted and enforced by the state courts, it taxes life estates where the remainder is to lineals, but does not tax, and expressly exempts, similar life estates where the remainder is to collaterals or to strangers in blood. *Bill-*

e. *Does Not Forbid Exemptions.*—It is within the power of the state to make exemptions from taxation, and if a plaintiff's own tax is correct, he has no ground of complaint because the property of certain classes of persons or corporations is altogether exempt.<sup>9</sup> Furthermore, if the state may grant a total ex-

ings *v. Illinois*, 188 U. S. 97, 101, 47 L. Ed. 400.

"Undoubtedly, life tenants regarded simply as persons, may be, in legal contemplation, the same; estates for life, regarded simply as estates with their attributes, also, in legal contemplation, may be said to be the same; but that is not all that is to be considered, nor is it determinative. We must regard the power of the state over testate and intestate dispositions of property, its power to create and limit estates, and, as resulting, its power to impose conditions upon their transfer or devolution. It is upon this power that inheritance tax laws are based, and we said, in the *Magoun* case, that the power could be exercised by distinguishing between the lineal and collateral relatives of a testator. There the amount of tax depended upon him who immediately received; here the existence of the tax depends upon him who ultimately receives. That can make no difference with the power of the state. No discrimination being exercised in the creation of the class, equality is observed. Crossing the lines of the classes created by the statute, discriminations may be exhibited, but within the classes there is equality." *Billings v. Illinois*, 188 U. S. 97, 104, 47 L. Ed. 400.

**Same—Interests in remainder.**—A state law imposing an inheritance or succession tax is not unconstitutional as denying the equal protection of the laws, because, as construed by the state courts, it is made to apply to interests in remainders vested in right, but not in possession, where, as so construed, it applies equally to all persons in like situation. *Orr v. Gilman*, 183 U. S. 278, 289, 290, 46 L. Ed. 196.

**Same—Charitable bequests; distinction between domestic and foreign institutions.**—It cannot be said that if a state exempts property bequeathed for charitable or educational purposes from taxation, it is unreasonable or arbitrary to require the charity to be exercised or the education to be bestowed within her borders and for her people, whether exercised through persons or corporations. *Board of Education v. Illinois*, 203 U. S. 553, 563, 51 L. Ed. 314.

Therefore a statute which exempts from the operation of an inheritance tax *l. v.* bequests made to domestic religious and educational institutions, without extending such exemptions to bequests made to similar foreign corporations, is not unconstitutional as depriving foreign corporations of the equal protection of the laws, even though the claim is made that the foreign corporation became a person

within the jurisdiction of the state by going there to probate the will and take title to the property there situated. *Board of Education v. Illinois*, 203 U. S. 553, 51 L. Ed. 314, affirming the validity of the Illinois Statute of June 15, 1895, entitled "an act to tax gifts, legacies and inheritances in certain cases, and to provide for the collection of the same." Laws of 1895, p. 301.

**9. Does not forbid exemptions.**—*Missouri v. Dockery*, 191 U. S. 165, 48 L. Ed. 133; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 293, 295, 42 L. Ed. 1037; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 562, 46 L. Ed. 679.

See *Davidson v. New Orleans*, 96 U. S. 97, 106, 24 L. Ed. 616, where it was said: "It is said that the plaintiff's property had previously been assessed for the same purpose, and the assessment paid. If this be meant to deny the right of the state to tax or assess property twice for the same purpose, we know of no provision in the federal constitution which forbids this, or which forbids unequal taxation by the states." See, also, *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 237, 33 L. Ed. 892; *Chester City v. Pennsylvania*, 134 U. S. 240, 33 L. Ed. 896; *Pacific Express Co. v. Seibert*, 142 U. S. 339, 351, 35 L. Ed. 1035; *Jennings v. Coal Ridge Imp., etc., Co.*, 147 U. S. 147, 37 L. Ed. 117; *Merchants', etc., Bank v. Pennsylvania*, 167 U. S. 461, 464, 42 L. Ed. 236. See, generally, the title TAXATION.

It is not unconstitutional for a state to grant exemptions from taxation, and when made upon equitable considerations in the case of a holder of a certain franchise, such reduction does not entitle every franchise holding corporation to a like reduction on the ground of equal protection of the laws. *New York State v. New York State Board of Tax Comm'rs*, 199 U. S. 53, 50 L. Ed. 87.

Those clauses of the constitution and its amendments commanding due process, equal protection and forbidding the impairment of obligations are not violated by the New York tax laws as amended May 26, 1899, imposing taxes on certain public franchises. *New York State v. New York State Board of Tax Comm'rs*, 199 U. S. 53, 50 L. Ed. 87.

"Suppose, for any fair reason affecting only its internal affairs, the state should see fit to wholly exempt certain named corporations from all taxation. Of course the indirect result would be that all other property might have to pay a little larger rate per cent in order to raise the revenue necessary for the carrying on of the state government, but this would not invalidate the tax on other property, or



emption, it may grant a partial one.<sup>10</sup> The state having the power to grant either a total or a partial exemption, a petitioner cannot complain because the favored companies were relieved of one tax and another substituted therefor.<sup>11</sup> And it is immaterial whether such exemption results from the language of the statutes or from the acts of the officers charged with its administration. It is for the state courts to decide whether the officers acted without authority, and the plaintiff cannot successfully appeal to the United States supreme court upon the allegation that they acted without authority.<sup>12</sup>

*f. Limitations upon Powers of Adjustment and Classification*—(1) *Generally.*—It must not be understood by what has been said that the question of a denial of the equal protection of the laws can never arise under the taxing statutes of a state. On the contrary, the power to tax is so far limited that it cannot be used to impair or destroy rights that are given or secured by the supreme law of the land.<sup>13</sup>

(2) *Classification Not to Be Arbitrary; Hostile Discriminations Forbidden.*—Clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, are obnoxious to the constitutional prohibition.<sup>14</sup> The state cannot select some obnoxious person or class and cast upon their property the sole burden of taxation, or a burden differing from that cast upon others whose property is similarly situated. The law must operate impartially upon all persons and property in similar circumstances.<sup>15</sup> "The question always is, when a classification is made, whether there is any reasonable ground for it, or whether it is purely and simply arbitrary, based upon no real distinction, and entirely unnatural. If the classification be proper and legal, then there is the requisite uniformity in that respect."<sup>16</sup>

give any right to challenge the law as obnoxious to the provisions of the federal constitution." *Merchants', etc., Bank v. Pennsylvania*, 167 U. S. 461, 463, 42 L. Ed. 236.

10. *May make a partial exemption.*—*Missouri v. Dockery*, 191 U. S. 165, 171, 48 L. Ed. 133.

11. *Or substitute one tax for another.*—*Missouri v. Dockery*, 191 U. S. 165, 171, 48 L. Ed. 133.

12. *May result from language of statute or from the administration of the statute; state questions.*—*Missouri v. Dockery*, 191 U. S. 165, 171, 48 L. Ed. 133.

13. *Limitations of powers of adjustment and classification.*—*Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 563, 46 L. Ed. 679.

14. *Arbitrary and hostile discriminations.*—*Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 237, 33 L. Ed. 892; *Chester City v. Pennsylvania*, 134 U. S. 240, 33 L. Ed. 896.

15. *Same.*—*Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 504, 22 L. Ed. 189; *State Railroad Tax Cases*, 92 U. S. 575, 612, 23 L. Ed. 663; *Barbier v. Connolly*, 113 U. S. 27, 28 L. Ed. 923; *Kentucky Railroad Tax Cases*, 115 U. S. 321, 337, 29 L. Ed. 414; *Bank v. Boston*, 125 U. S. 60, 69, 31 L. Ed. 689; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. Ed. 892; *Chester City v. Pennsylvania*, 134 U. S. 240, 33 L. Ed. 896; *Home Ins. Co. v. New York State*, 134 U. S. 594, 606, 33 L. Ed. 1025; *Pacific Express Co. v. Seibert*, 142 U. S. 339, 352, 35 L. Ed. 1035; *Giozza v. Tiernan*, 148 U. S. 657, 662, 37

L. Ed. 599; *Merchants', etc., Bank v. Pennsylvania*, 167 U. S. 461, 464, 42 L. Ed. 236; *Florida Cent., etc., R. Co. v. Reynolds*, 183 U. S. 471, 476, 46 L. Ed. 283; *Travellers' Ins. Co. v. Connecticut*, 185 U. S. 364, 372, 46 L. Ed. 949.

16. *Same.*—*Gulf, etc., R. Co. v. Ellis*, 165 U. S. 150, 155, 41 L. Ed. 66; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 294, 42 L. Ed. 1037; *Nicol v. Ames*, 173 U. S. 509, 521, 43 L. Ed. 786.

*Discrimination on account of race or color.*—See the title CIVIL RIGHTS, vol. 3, p. 833.

*Classification based upon ownership.*—Property of the same kind and under the same condition and used for the same purpose cannot be divided into different classes for purposes of taxation and be taxed by a different rule simply because it belongs to different owners. *McHenry v. Alford*, 168 U. S. 651, 666, 42 L. Ed. 614.

Yet, where the situation and the possible use and the present condition of the ownership of lands are wholly different from ordinary ownership, a classification is not arbitrary nor unreasonable which places such lands outside the class of lands owned in the ordinary way by individuals. *McHenry v. Alford*, 168 U. S. 651, 666, 42 L. Ed. 614.

Chapter 99 of the laws of the territory of Dakota of 1883, taxing lands owned by the Northern Pacific Railroad Company outside of its right of way, by requiring the payment of a percentage on gross earnings of the company in lieu of all other taxes, held not to be in conflict with



(3) *State Permitted a Wide Discretion.*—"The mere fact that such legislation may operate with harshness is not of itself sufficient to justify the court in declaring it unconstitutional. These matters of classification are of state policy, to be determined by the state, and the federal government is not charged with the duty of supervising its action."<sup>17</sup> "The discretion of the state in such matters is very great and should be exercised solely with reference to the general welfare as involved in the necessity of taxation for the support of the state. A state may in its wisdom classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States, so long as the classification does not invade rights secured by the constitution of the United States."<sup>18</sup>

**Greater Discretion in Matters of Taxation than in Other Cases.**—See ante, "Rigid Equality Not Required; Legislature Permitted a Wide Discretion," VII, B, 2, h, (9).

(4) *Statute Not Invalid Because of Mere Inequality of Results.*—Absolute equality in taxation cannot be obtained, and mere inequality in the results of a state tax law is not sufficient to invalidate it.<sup>19</sup> Inequality of burden does not establish the unconstitutionality of the law under which a tax is levied.<sup>20</sup> The

the organic act of the territory (Act of March 2, 1861, c. 86, 12 Stat. 239) forbidding any discrimination to be made in the taxing of different kinds of property in the territory and requiring all taxes to be in proportion to the value of the property taxed. *McHenry v. Alford*, 168 U. S. 651, 42 L. Ed. 614.

**Classification may be justified by nature of business or property.**—It is often more equitable to classify and separate under the taxation laws corporations doing business of such a widely different nature that one uniform method of collecting taxes could only be unequal and unjust. In such case the legislature is justified in placing corporations doing business of one particular nature in a class by themselves and subjecting them to a different method of effecting collection. *Western Union Tel. Co. v. Indiana*, 165 U. S. 304, 309, 41 L. Ed. 725.

An act of a state legislature providing for the collection of taxes from any telegraph company doing business in the state is not unconstitutional because it contains a clause to the effect that, on the failure of the company to "pay any taxes assessed against it in any county or township of the state, in addition to other remedies provided by law for the collection of taxes, an action may be prosecuted in the name of the state of Indiana by the prosecuting attorneys of the different judicial circuits of the state on the relation of the auditors of the different counties of this state, and the judgment in said action shall include a penalty of fifty per cent of the amount of taxes so assessed and unpaid." The addition of the penalty does not amount to an arbitrary discrimination or a deprivation of property without due process of law. *Western Union Tel. Co. v. Indiana*, 165 U. S. 304, 305, 41 L. Ed. 725.

**17. Harsh operation not sufficient to invalidate; questions of state policy.**—

*Florida Cent., etc., R. Co. v. Reynolds*, 183 U. S. 471, 480, 46 L. Ed. 283.

**18. State permitted a wide discretion.**—*Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 562, 46 L. Ed. 679; *Williams v. Parker*, 188 U. S. 491, 503, 47 L. Ed. 560; *Cook v. Marshall County*, 196 U. S. 261, 274, 49 L. Ed. 471.

The judiciary should be very reluctant to interfere with the taxing systems of a state, and should never do so unless that which the state attempts to do is in palpable violation of the constitutional rights of the owners of property. *King v. Mullins*, 171 U. S. 404, 43 L. Ed. 214, followed in *King v. Panther Lumber Co.*, 171 U. S. 437, 43 L. Ed. 227.

**19. Statute not invalid because of mere inequality of results.**—*Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 504, 22 L. Ed. 189; *State Railroad Tax Cases*, 92 U. S. 575, 612, 23 L. Ed. 663; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. Ed. 892; *Merchants', etc., Bank v. Pennsylvania*, 167 U. S. 461, 464, 42 L. Ed. 236; *Travellers' Ins. Co. v. Connecticut*, 185 U. S. 364, 372, 46 L. Ed. 949.

The federal constitution imposes no restraints on the state in regard to unequal taxation. *Davidson v. New Orleans*, 96 U. S. 97, 105, 24 L. Ed. 616; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 295, 42 L. Ed. 1037.

**20. Same.**—*Merchants', etc., Bank v. Pennsylvania*, 167 U. S. 461, 464, 42 L. Ed. 236; *Jennings v. Coal Ridge Imp., etc., Co.*, 147 U. S. 147, 37 L. Ed. 117; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. Ed. 892; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 296, 42 L. Ed. 1037.

**Discounts for prompt payment.**—"It is common practice in the state to offer a discount for payment before the specified time, and impose penalties for non-payment at such time. This, of course, results in inequality of burden, but it

upholding of an act as embodying a principle generally fair and doing as nearly equal justice as can be expected imports that if a particular case of hardship arises under it in its natural and ordinary application, that hardship must be borne as one of the imperfections of human things. And this has been the implication of the cases.<sup>21</sup> "There is, therefore, no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things."<sup>22</sup> It is enough that there is no discrimination in favor of one as against another of the same class.<sup>23</sup>

**Applies to Benefits as Well as Burdens.**—This principle applies to the benefits as well as the burdens of taxation. Taxes otherwise lawful are not invalidated by the allegation, or even the fact, that the resulting benefits are unequally shared.<sup>24</sup>

*g. Special Assessments.*—(1) *Generally as to the Power of the Legislature to Apportion Public Burdens.*—The legislature has undoubted power to apportion a public burden among all the taxpayers of the state, or among those of a particular section. In its judgment, those of a single section may reap the principal benefit from a proposed expenditure, as from the construction of a road, a bridge, an almshouse, or a hospital. It is not unjust, therefore, that they should alone bear the burden.<sup>25</sup> Special burdens are often necessary for general benefits—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are de-

does not invalidate the tax. The inequality of result comes from the election of certain taxpayers to avail themselves of privileges offered to all." *Merchants', etc., Bank v. Pennsylvania*, 167 U. S. 461, 464, 42 L. Ed. 236.

**Statute providing for optional composition or modus.**—The Pennsylvania act of June 8, 1891, Laws Penn. 1891, p. 240, which provides that any bank, state or national, which shall collect from its shareholders and pay to the state a tax of eight mills on the dollar upon the par value of all its shares, shall not be required to pay any further local tax upon its shares or upon so much of the capital and profits as shall not be invested in real estate, but that every national bank which fails to elect to pay such tax of eight mills shall be compelled to pay a tax of four mills upon the actual value of each share issued by it, is not obnoxious to the equal protection clause of the fourteenth amendment, since the privilege which is alleged to produce the inequality, namely that of discharging the tax by the payment of the eight mills, is offered to all alike. *Merchants', etc., Bank v. Pennsylvania*, 167 U. S. 461, 42 L. Ed. 236.

**Requiring municipal corporations to bear special burdens.**—The contention that if the legislature could take away a right for the use of the public, it could not require the city to make compensation for it, but should have provided for the payment of damages from the treasury of the commonwealth, would limit too strictly the power of the legislature in the distribution of public burdens. Very wide discretion is left with the lawmaking power in this particular. The legislature may

change the political subdivisions of the commonwealth by creating, changing, or abolishing particular cities, towns or counties. It may require any of them to bear such share of the public burdens as it deems just and equitable. This right has been exercised in a great variety of ways. *Williams v. Parker*, 188 U. S. 491, 503, 47 L. Ed. 560.

**21. Same.**—*Davidson v. New Orleans*, 96 U. S. 97, 106, 24 L. Ed. 616; *Mattingly v. District of Columbia*, 97 U. S. 687, 692, 24 L. Ed. 1098; *Parsons v. District of Columbia*, 170 U. S. 45, 52, 55, 42 L. Ed. 943; *Detroit v. Parker*, 181 U. S. 399, 400, 45 L. Ed. 917; *Chadwick v. Kelley*, 187 U. S. 540, 544, 47 L. Ed. 293; *Louisville, etc., R. Co. v. Barber Asphalt Paving Co.*, 197 U. S. 430, 434, 49 L. Ed. 819.

**22. No precise application of rule.**—*Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 296, 42 L. Ed. 1037.

**23. Same.**—*Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. Ed. 892; *Home Ins. Co. v. New York State*, 134 U. S. 594, 33 L. Ed. 1025; *Pacific Express Co. v. Seibert*, 142 U. S. 339, 35 L. Ed. 1035; *Giozza v. Tiernan*, 148 U. S. 657, 662, 37 L. Ed. 599.

**24. Applies to benefits as well as burdens.**—*Wagoner v. Evans*, 170 U. S. 588, 592, 42 L. Ed. 1154.

**25. Apportionment of public burdens; powers of legislature.**—*Railroad Co. v. County of Otoe*, 16 Wall. 667, 676, 21 L. Ed. 375; *Charlotte, etc., R. Co. v. Gibbes*, 142 U. S. 386, 35 L. Ed. 1051; *New York, etc., R. Co. v. Bristol*, 151 U. S. 556, 571, 38 L. Ed. 269; *Connecticut v. Woodruff*, 153 U. S. 689, 38 L. Ed. 800.



signed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions.<sup>26</sup>

(2) *Requiring Public Service Companies to Bear Expense Incident to Abolition of Crossings, Removal of Tracks, Pipes, etc.*—It frequently happens that tracks, pipes and other works of railroad, gas and like public service corporations, constructed under authority of law, and remaining in the same condition as they were when constructed, become, owing to changed conditions in their surroundings, the growth of population, march of progress, etc., a menace to public safety or an obstruction to needed public improvements. It is the settled doctrine in such cases, so far as the fourteenth amendment is concerned, that the proprietors of such works must be presumed to have constructed the same with knowledge of the fact that alterations might become necessary, and that in constructing their works, they did so subject to the paramount right of the state to compel such changes as the public safety or the public welfare might demand. In such case it is no denial of the equal protection of the laws, or deprivation of property without due process of law, to compel the owners of such property to not only make the needed alterations, but to bear the entire expense thereof.<sup>28</sup>

**26. Same.**—*Barbier v. Connolly*, 113 U. S. 27, 31, 28 L. Ed. 923.

There are many instances where parties are compelled to perform certain acts and to bear certain expenses when the public is interested in the acts which are performed as much as the parties themselves. Thus, in opening, widening or improving streets, the owners of adjoining property are often compelled to bear the expense, or at least a portion of it, notwithstanding the work done is chiefly for the benefit of the public. So, also, in the draining of marsh lands, the public is directly interested in removing the causes of malaria, and yet the expense of such labor is usually thrown upon the owners of the property. Quarantine regulations are adopted for the protection of the public against the spread of disease, yet the requirement that the vessel examined shall pay for the examination is a part of all quarantine systems. *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455, 466, 30 L. Ed. 237.

So, the expense of a compulsory examination of a railroad engineer, to ascertain whether he is free from color blindness, has been held to be properly chargeable against the railroad company. *Nashville, etc., Railway v. Alabama*, 128 U. S. 96, 101, 32 L. Ed. 352.

So where work is done in a particular county for the benefit of the public, the cost is oftentimes cast upon the county itself instead of upon the whole state. Thus in *County of Mobile v. Kimball*, 102 U. S. 691, 26 L. Ed. 238, it was held that a provision for the issuing of bonds by a county in Alabama could not be declared invalid, although it imposed upon one county the expense of an improvement in which the whole state was interested. In such instances, where

the interests of the public and of individuals are blended in any work or service imposed by law, whether the cost shall be thrown entirely upon the individuals or upon the state, or be apportioned between them, is matter of legislative discretion. *Charlotte, etc., R. Co. v. Gibbes*, 142 U. S. 386, 395, 35 L. Ed. 1051.

**Special assessments; Kentucky Statute of March 24, 1882.**—Unjust, unequal, or arbitrary burdens are not authorized to be imposed by the terms of the Kentucky statute of March 24, 1882, which authorizes the city of Louisville to assess the cost of street improvements upon the owners of adjoining lots; and opportunity being given to every party interested to be heard in opposition to the enforcement of the liability in the courts, which are specifically authorized to "make all corrections, rules, and orders to do justice to all parties concerned," said act does not deprive said owners of their property without due process of law, nor deny them the equal protection of the laws. *Walston v. Nevin*, 128 U. S. 578, 581, 32 L. Ed. 544.

**Special assessments in the City of Washington.**—See *Willard v. Presbury*, 14 Wall. 676, 20 L. Ed. 719. See, also, the titles DISTRICT OF COLUMBIA; SPECIAL ASSESSMENTS.

**28. Requiring public service companies to bear expense incident to removal of track pipes, abolition of grade crossings, etc.**—*New York, etc., R. Co. v. Bristol*, 151 U. S. 556, 38 L. Ed. 269; *Connecticut v. Woodruff*, 153 U. S. 689, 38 L. Ed. 869. See, also, *Gibson v. United States*, 166 U. S. 269, 41 L. Ed. 996; *Wabash, R. Co. v. Defiance*, 167 U. S. 88, 42 L. Ed. 87; *Chicago, etc., R. Co. v. Nebraska*, 170 U. S. 57, 74, 42 L. Ed. 948; *Bedford v. United States*, 192 U. S. 217, 224, 48 L. Ed. 414; *New Orleans Gas Light Co. v. Drainage*



And not only may the legislature put the entire expense of altering or removing its own tracks upon a railroad company, but it may, if it sees fit, leave the tracks as they are and require the company to bear the expense of constructing and maintaining a viaduct.<sup>29</sup> And what the legislature may itself do, it may do,

Commission, 197 U. S. 453, 49 L. Ed. 831; Chicago, etc., R. Co. v. Illinois, 200 U. S. 561, 582, 593, 595, 50 L. Ed. 596; West Chicago Street R. Co. v. Illinois, 201 U. S. 506, 524, 50 L. Ed. 845; Union Bridge Co. v. United States, 204 U. S. 364, 388, 51 L. Ed. 523.

**Abolition of grade crossings.**—An act enacted for the purpose of abolishing grade crossings, and placing the entire costs of the expense incidental to such abolition upon the respective railroad companies, is a valid exercise of the police powers of the state. New York, etc., R. Co. v. Bristol, 151 U. S. 556, 38 L. Ed. 269; Connecticut v. Woodruff, 153 U. S. 689, 38 L. Ed. 869; Chicago, etc., R. Co. v. Nebraska, 170 U. S. 57, 74, 42 L. Ed. 948.

29. Chicago, etc., R. Co. v. Nebraska, 170 U. S. 57, 74, 42 L. Ed. 948, following New York, etc., R. Co. v. Bristol, 151 U. S. 556, 38 L. Ed. 269. See, also, Wabash R. Co. v. Defiance, 167 U. S. 88, 42 L. Ed. 87.

And where two or more railway companies own and operate tracks crossing a public street at the same place, it is competent for the legislature to apportion the cost among them in such proportion as it may see fit, or it may place the entire burden upon one of the companies. Chicago, etc., R. Co. v. Nebraska, 170 U. S. 57, 76, 42 L. Ed. 948.

This is also true where one or more companies own the tracks and permit other companies to operate trains over the same under contract. It is not a denial of the equal protection of the laws for the legislature to apportion the entire burden, including the cost of constructing and maintaining the viaduct, among the companies actually owning the tracks, in such proportion as it may see fit, without taking any notice of the companies who operate trains thereover under contract with the owners. Chicago, etc., R. Co. v. Nebraska, 170 U. S. 57, 75, 42 L. Ed. 948.

**Obstructions to navigation.**—Alterations or changes required to secure navigation against an unreasonable obstruction is not a taking of private property for public use within the meaning of the constitution; and the cost of such alteration or changes is to be deemed incidental only to the exercise of an undoubted function of the United States when exerting its power to regulate commerce among the states. Requiring the person or corporations maintaining such obstruction to bear the entire expense of the alteration is not, therefore, a denial of the equal protection of the laws. Union Bridge Co. v. United States, 204 U. S. 364, 388, 51 L. Ed. 523.

Therefore, although a bridge, erected

over a navigable river under the authority of a state charter, may have been lawful and not an obstruction to commerce as carried on at the time of its erection, nevertheless the proprietors of such bridge must be held to have constructed it with full knowledge of the paramount authority of congress to regulate commerce, and it cannot be said that they are denied the equal protection of the laws nor deprived of their property without just compensation when they are made to bear the expenses incident to the alterations required by congress in the exercise of its power to regulate commerce. Union Bridge Co. v. United States, 204 U. S. 364, 51 L. Ed. 523.

In the case of West Chicago Street R. Co. v. Illinois, 201 U. S. 506, 524, 50 L. Ed. 845, the principal question related to the duty of a street railroad company, which had lawfully constructed a tunnel under the Chicago River, to obey an ordinance of the city, requiring the company, at its own cost and expense, to lower its tunnel, so as to provide for a certain depth over it, which had been ascertained by competent federal and local authority to be necessary for the increased demands of navigation. The federal court held, upon the adjudged cases, that the rights of the company, as the owner of the fee of the land, on either side of the river or in its bed, were subject to the paramount right of navigation over the waters of the river. It said: "In the case before us the public demands nothing to be done by the railroad company except to remove the obstruction which itself placed and maintained in the river under the condition that navigation should not at any time be thereby interrupted. The removal of such obstruction is all that is needed to protect navigation. So that whatever cost attends the removal of the obstruction must be borne by the railroad company. The condition under which the company placed its tunnel in the river being met by the company, the public has no further demands upon it. This cannot be deemed a taking of private property for public use or a denial of the equal protection of laws within the meaning of the constitution, but is only the result of the lawful exercise of a governmental power for the common good." See, also, Chicago, etc., R. Co. v. Illinois, 200 U. S. 561, 582, 593, 595, 50 L. Ed. 596, and authorities cited.

**Bridge over non-navigable stream.**—In Chicago, etc., R. Co. v. Illinois, 200 U. S. 561, 582, 593, 595, 50 L. Ed. 596, these principles were applied against a railway company owning a bridge that had been lawfully constructed by it over a nonnavigable

through the instrumentality of a city counsel proceeding in the exercise of a legally delegated discretion.<sup>30</sup>

(3) *Petitions, Protests, Remonstrances, etc.*—Where a general drainage law, providing for the drainage of swamp and marshy lands upon the application of a part of the owners, and in the absence of a remonstrance by a majority of the owners of the lands which it is proposed to drain, is applicable to all lands of the same kind, and no person can be assessed under it for the expense of drainage without notice and opportunity to be heard, the proprietors are neither denied the equal protection of the laws nor deprived of their property without due process of law, within the meaning of the fourteenth amendment of the constitution of the United States.<sup>31</sup>

gable creek running through certain swamp or slough lands which the drainage commissioners were required by statute to drain in order to make them tillable and fit for cultivation. The commissioners, in executing the work of draining, found it necessary that the creek over which the railway bridge was constructed should be deepened and enlarged, and a greater opening made under the bridge for the passage of the increased amount of water caused by the deepening and enlarging of the bed of the creek. The railway company was required, at its own cost, to construct such a bridge over the creek as would meet the necessities of the situation as it was or would be under the drainage plan of the commissioners. The company refused to obey the order. The contention of the railway company was that as the bridge was lawfully constructed under its general corporate powers, and as the depth and width of the channel under it were sufficient, at the time, to carry off the water of the creek as it then and subsequently flowed, the foundation of the bridge could not be removed, and its use of the bridge disturbed, unless compensation be first made or secured to the company in such amount as would be sufficient to meet the expense of removing the timbers and stones from the creek and of constructing a new bridge of such length and with such opening under it as the plan of the commissioners would make necessary. The company insisted that to require it to meet these expenses out of its own funds would be, within the meaning of the constitution, a taking of its property for public use without compensation, and, therefore, without due process of law. The court, after a review of authorities said: "Without further discussion we hold it to be the duty of the railway company, at its own expense, to remove from the creek the present bridge, culvert timbers, and stones placed there by it, and also (unless it abandons or surrenders its right to cross the creek at or in the vicinity of the present crossing) to erect at its own expense and maintain a new bridge for crossing that will conform to the regulations established by the drainage commissioners, under the authority of the state; and such a requirement if enforced will not amount to a taking of private property for public use

within the meaning of the constitution, nor to a denial of the equal protection of the laws."

**Gas mains under streets.**—In the case of *New Orleans Gas Light Co. v. Drainage Commission*, 197 U. S. 453, 49 L. Ed. 831, it appeared that a gas company had acquired an exclusive right to supply gas to the city of New Orleans and its inhabitants through pipes and mains laid in the streets. In the exercise of that right it had laid its pipes in the streets. Subsequently a drainage commission, proceeding under statutory authority, devised a system of drainage for the city, and in the execution of its plans it became necessary to change the location in some streets of the mains and pipes laid by the gas company. It was contended by the gas company that it could not be required, at its own cost, to shift its pipes and mains so as to accommodate the drainage system. This contention was rejected by the federal supreme court and it was held that the gas company laid its pipes subject to such future disturbances as might arise incident to changes and improvements in or under the streets, and that it was no denial of the equal protection of the laws or deprivation of property without due process to require the company to bear the entire expense of the change in the location of its pipes.

**30. Same; legislature may delegate power.**—*Chicago, etc., R. Co. v. Nebraska*, 170 U. S. 57, 76, 42 L. Ed. 948.

**31. Petitions, protests, remonstrances, etc.**—*Wurts v. Hoagland*, 114 U. S. 606, 615, 29 L. Ed. 229. See, also, *Barbier v. Connolly*, 113 U. S. 27, 31, 28 L. Ed. 923; *Walker v. Sauvinet*, 92 U. S. 90, 23 L. Ed. 678; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *Hagar v. Reclamation District No. 108*, 111 U. S. 701, 28 L. Ed. 569; *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9, 28 L. Ed. 889.

**Discrimination in the right to remonstrate.**—Where the exact point of objection was that the improvement was not to be made if a majority of the resident owners of the property liable to taxation therefor should file with the city clerk a protest against such improvement, which privilege of protest was not given to non-resident owners, thereby discriminating against them, the court said: "It is well settled, however, that not every discrim-



(4) *Second Assessment for the Same Purpose*.—The fourteenth amendment does not forbid a second assessment for the same improvement where the first has been held to be illegal or insufficient.<sup>32</sup>

6. AS SECURING EQUAL CIVIL RIGHTS.—See the title CIVIL RIGHTS, vol. 3, p. 814, et seq.

7. REMEDIES AGAINST DENIAL OF EQUAL PROTECTION—*a. Generally*.—See the title CIVIL RIGHTS, vol. 3, pp. 818, et seq.; 834, et seq.

*b. Denial of Right as a Judicial Question*.—"It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to divest another party of any rights of person or property."<sup>33</sup> "No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government."<sup>34</sup>

*c. Who May Raise Question of Denial of Equal Protection*.—See ante, "Generally," IV, G, 1, note.

C. Requirement That All Duties, Imposts, and Excises Shall Be Uniform.—See the title REVENUE LAWS.

D. Equal Protection of Foreign Subjects as Guaranteed by the Constitution, Laws and Treaties.—See the titles ALIENS, vol. 1, p. 210; CHINESE EXCLUSION ACTS, vol. 3, p. 769; CIVIL RIGHTS, vol. 3, p. 814; DESCENT AND DISTRIBUTION; TREATIES.

E. Power of Congress to Deny Equal Rights in the Territories.—See ante, "Limitations upon the Power of Congress; Operation of the Constitution within the Territories," VI, D, 2, c, (3), (c), (cc), (bbb), (cccc), (bbbbb).

F. Equal Protection as Guaranteed by State Constitutional Provisions—1. UNIFORMITY AS TO EACH CLASS OF PERSONS.—A state constitutional provision, which requires that "all laws of a general nature shall have a uniform operation," and that the "general assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens," is satisfied if the laws of the state have a uniform operation as to all persons in the like situation; and the fact of their being general and uniform is not affected by the number of persons within the scope of their operation.<sup>35</sup>

ination of this character violates constitutional rights. \* \* \* \* The alleged discrimination is certainly not an arbitrary one; the presence within the city of the resident property owners, their direct interest in the subject matter and their ability to protest promptly if the means employed are objectionable, place them on a distinct footing from the non-residents whom it may be difficult to reach. Furthermore, there is no discrimination among property owners in taxing for the improvement. When the assessment is made it operates upon all alike." *Field v. Barber Asphalt Paving Co.*, 194 U. S. 618, 621, 622, 48 L. Ed. 1142.

It having been held to be within the power of the legislature of Missouri to authorize the council to order the improvement to be made without consulting property owners (*Buchan v. Broadwell*, 88 Missouri 31) the legislature, if it saw fit to give to those most directly interested and whose consent could be most readily obtained, the right to protest, did not, by such action, deprive other persons of rights guaranteed by the constitution.

*Field v. Barber Asphalt Paving Co.*, 194 U. S. 618, 622, 48 L. Ed. 1142.

32. Second assessment for same purpose.—*Spencer v. Merchant*, 125 U. S. 345, 31 L. Ed. 763; *Lombard v. West Chicago Park Comm'rs*, 181 U. S. 33, 45 L. Ed. 731.

33. Denial of right as a judicial question.—*Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 399, 38 L. Ed. 1014, followed and reaffirmed in *Reagan v. Mercantile Trust Co.*, 154 U. S. 413, 38 L. Ed. 1028; *Reagan v. Mercantile Trust Co.*, 154 U. S. 418, 38 L. Ed. 1030; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 420, 38 L. Ed. 1031.

34. Same.—*Gulf, etc., R. Co. v. Ellis*, 165 U. S. 150, 41 L. Ed. 66; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 560, 46 L. Ed. 679. See, also, ante, "Nature and Extent," VI, D, 3, h, (1), (a), (bb). And see the title POLICE POWER.

35. State constitutional guarantees.—*Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155, 163, 24 L. Ed. 94.

Carriers—Regulation of rates.—The act of the general assembly of the state of Iowa, entitled "An act to establish rea-



2. REQUIREMENTS AS TO EQUAL AND UNIFORM TAXATION.—See the title TAXATION.

**G. Special, Private and Local Acts; Class Legislation**—1. SPECIAL, PRIVATE AND LOCAL ACTS.—See, generally, the title STATUTES. As to whether such acts are an exercise of judicial functions, see ante, "Special, Curative and Remedial Legislation," VI, D, 3, d, (3), (b), (bb), (ddd), et seq.

2. SPECIAL AND EXCLUSIVE FRANCHISES, POWERS AND PRIVILEGES—*a. Generally as to the Powers of Legislative Bodies.*—The parliament of Great Britain and the legislative bodies of this country have from time immemorial exercised the power of granting to persons and corporations exclusive rights, privileges and immunities when necessary to effectuate a purpose which had in view the public good. The power to do this has never been questioned or denied, and in the absence of constitutional restriction, it is still possessed by the state legislatures.<sup>36</sup>

sonable maximum rates of charges for the transportation of freight and passengers on the different roads of this state" approved March 23, 1874, and which divides the railroads of the state into classes, according to business, and establishes a maximum of rates for each of the classes, is not in conflict with § 4, art. 1, of the constitution of Iowa, which provides that "all laws of a general nature shall have a uniform operation," and that "the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens;" nor is it a regulation of interstate commerce. *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155, 24 L. Ed. 94.

**Constitution of Pennsylvania; act relating to land titles in certain counties.**—

The controversy between Pennsylvania and Connecticut as to the territorial jurisdiction of certain lands in Northampton and other counties, having been settled in favor of Pennsylvania, the act of April 11, 1795, making it a criminal offense to take possession of said lands, or to convey, possess or settle them, under a title not derived from Pennsylvania, is not unconstitutional as destroying an equality of rights in violation of the Pennsylvania constitution, art. 9, § 1, or as being partial in its operation; the grievance being local, and confined to the counties specified, it is proper that the remedy should be locally applied. (*Sup. Ct. Pa.*) *Commonwealth v. Franklin*, 4 Dall. 255, 1 L. Ed. 823.

**36. Power of legislative bodies to grant special and exclusive franchises.**—*Slaughter-House Cases*, 16 Wall. 36, 66, 21 L. Ed. 394; *United States v. Knight Co.*, 156 U. S. 1, 11, 39 L. Ed. 325; *Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558, 578, 44 L. Ed. 886.

**Exclusive privilege of slaughtering live stock.**—The legislature of Louisiana, on the 8th of March, 1869, passed an act granting to a corporation created by it, the exclusive right, for twenty-five years, to have and maintain slaughter houses, landings for cattle, and yards for enclosing cattle intended for sale or slaughter within

the parishes of Orleans, Jefferson, and St. Bernard, in that state (a territory, which, it was said, contained 1154 square miles, including the city of New Orleans, and a population of between two and three hundred thousand people), and prohibiting all other persons from building, keeping, or having slaughter houses, landings for cattle, or yards for cattle intended for sale or slaughter, within those limits; and requiring that all cattle and other animals intended for sale or slaughter in that district, should be brought to the yards and slaughter houses of the corporation; and authorizing the corporation to exact certain prescribed fees for the use of its wharves and for each animal landed, and certain prescribed fees for each animal slaughtered, besides the head, feet, gore, and entrails, except of swine. Held, that this grant of exclusive right or privilege, guarded by proper limitation of the prices to be charged, and imposing the duty of providing ample conveniences, with permission to all owners of stock to land, and of all butchers to slaughter, at those places, was a police regulation for the health and comfort of the people (the statute locating them where health and comfort required), within the power of the state legislature, unaffected by the constitution of the United States either previous or subsequent to the adoption of the thirteenth and fourteenth articles of amendment. *Slaughter-House Cases*, 16 Wall. 36, 21 L. Ed. 394.

**Pilot laws; half pilotage; disposition of funds.**—A Pennsylvania statute enacted in the year 1803 required all vessels entering and clearing from the port of Philadelphia to employ pilots, under penalty, in case of their refusal to do so, of forfeiting and paying to the master warden a sum equal to the half pilotage of such ship or vessel. In 1832 an amendment of this statute exempted from the operation thereof all vessels engaged in the Pennsylvania coal trade. Held, that such exemption was within the legislative discretion exercised with a view to compelling the employment of pilots by the masters of those vessels who, as a general rule, ought to take a pilot, and was not an

**Power of Municipal Corporations to Grant Special or Exclusive Privileges, Franchises, etc.**—Exclusive franchises may be bestowed upon corporations by municipal authorities, provided the right to do so is given by their charters.<sup>37</sup>

b. *Effect of Thirteenth and Fourteenth Amendments.*—Such power is not forbidden by the thirteenth article of the amendments, nor by the first section of the fourteenth article, unless it is so exercised as to deny the equal protection of the laws. An examination of the history of the causes which led to the adoption of those amendments, and of the amendments themselves, demonstrates that the main purpose of all the three last amendments was the freedom of the African race, the security and perpetuation of that freedom, and their protection

unconstitutional discrimination against the vessels not so exempted. *Cooley v. Board of Wardens*, 12 How. 299, 313, 13 L. Ed. 996.

By the same statute the pilotage fees so collected were devoted to the use of the society for the relief of distressed and decayed pilots, their widows and children. Held, that this provision of the statute, applying the sums so forfeited to the purpose stated, was not unconstitutional. *Cooley v. Board of Wardens*, 12 How. 299, 313, 13 L. Ed. 996.

**Excise destroying oleomargarine industry; implied limitations upon powers of congress.**—Whatever may be the doctrine as to the power of the courts to invalidate acts of congress upon the theory that they transcend the implied limitations upon the powers of that body, and are opposed to inherent and fundamental principles of government which underlie the constitution, it is not controlling and has no application to an act of congress which imposes an excise upon artificially colored oleomargarine, but not upon artificially colored butter, and which is alleged to be so excessive as to destroy the former industry in favor of those persons engaged in the manufacture of the latter. This results from the nature of artificially colored oleomargarine and from the tendency of that article to deceive the public into buying it for butter. *McCray v. United States*, 195 U. S. 27, 49 L. Ed. 78.

**37. Power of municipal corporations to grant special or exclusive privileges, franchises, etc.**—*Detroit, Citizens' St. R. Co. v. Detroit Railway*, 171 U. S. 48, 43 L. Ed. 67; *Walla Walla City v. Walla Walla Water Co.*, 172 U. S. 1, 9, 43 L. Ed. 341; *Freeport Water Co. v. Freeport City*, 180 U. S. 587, 598, 45 L. Ed. 679; *Danville Water Co. v. Danville City*, 180 U. S. 619, 45 L. Ed. 696; *Rogers Park Water Co. v. Fergus*, 180 U. S. 624, 45 L. Ed. 702. See, also, *Wright v. Nagle*, 101 U. S. 791, 25 L. Ed. 921; *Hamilton Gas Light, etc., Co. v. Hamilton City*, 146 U. S. 258, 266, 36 L. Ed. 963; *Bacon v. Texas*, 163 U. S. 207, 216, 41 L. Ed. 132; *New Orleans Waterworks Co. v. New Orleans*, 164 U. S. 471, 41 L. Ed. 518. And see the titles **GAS; MUNICIPAL CORPORATIONS;**

**RAILROADS; STREET RAILWAYS; STREETS AND HIGHWAYS; WATER COMPANIES AND WATERWORKS.**

**Exclusive rights in streets; light, gas, water, etc.**—Legislation granting exclusive franchises to light and water companies in streets is not liable to the objection that it is a mere monopoly, preventing citizens from engaging in an ordinary pursuit or business, open as of common right to all, upon terms of equality; for the right to dig up the streets and other public ways and place therein pipes and mains for the distribution of gas for public and private use, is a franchise, the privilege of exercising which can only be granted by the state, or by the municipal government of the city acting under legislative authority. *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 659, 29 L. Ed. 516; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 682, 29 L. Ed. 525; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683, 29 L. Ed. 510.

The clause of the bill of rights of Kentucky, which declares that "all freemen, when they form a social compact, are equal, and that no man or set of men are entitled to exclusive, separate public emoluments or privileges from the community, but in consideration of public services," *Const. Kentucky*, 1799, Art. 10, § 1; 1850, Art. 13, § 1, did not forbid the general assembly of that commonwealth to grant to a private corporation the exclusive privilege of manufacturing and distributing gas, for public and private use, in the city of Louisville, by means of pipes and mains laid under the streets and other public ways of that municipality. *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683, 691, 692, 29 L. Ed. 510.

That a state legislature, in the absence of state constitutional restrictions, may grant, or may authorize a municipal corporation to grant, special and exclusive rights and privileges to a water company with respect to occupying the streets with its pipes and supplying the inhabitants of a city with water, or that the legislature may ratify and affirm such a grant previously made by a municipal corporation, see *Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558, 578, 44 L. Ed. 886.



from the oppressions of the white men who had formerly held them in slavery.<sup>38</sup> The relief of the citizens of each state from the burden of monopoly and the evils resulting from the restraint of trade among such citizens was left with the states and it is to the state that the citizen must look in so far as he may feel that he is subjected to oppressive or unreasonable discrimination by reason of any exclusive or monopolistic privileges granted by state law.<sup>39</sup>

c. *State Constitutional Restrictions*—(1) *Generally*.—State constitutional provisions forbidding the legislature to grant special or exclusive privileges or immunities to any citizen or class of citizens, inconsistent with the general laws of the land, or to suspend any general law for the benefit of any particular individual, have been held to require, not that the law should operate upon every person in the state, but merely that it should have a uniform operation as to the persons and classes intended to be affected thereby.<sup>40</sup>

**Privileges as Including Exemptions.**—Where the prohibition is against the granting of rights, privileges, immunities, or exemptions, the word “exemptions” does not limit the meaning of the word “privileges” to privileges other than exemptions from taxation, but it still retains its ordinary meaning, including exemptions from taxation.<sup>41</sup>

**38. Effect of thirteenth and fourteenth amendments.**—*Slaughter-House Cases*, 16 Wall. 36, 21 L. Ed. 394.

**39. Question left to the states.**—*United States v. Knight Co.*, 156 U. S. 1, 11, 39 L. Ed. 325.

**40. State constitutional restrictions with respect to special or exclusive privileges.**—*United States v. Memphis*, 97 U. S. 284, 292, 24 L. Ed. 937; *Tipton County v. Locomotive Works*, 103 U. S. 523, 533, 26 L. Ed. 340; *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155, 163, 24 L. Ed. 94.

**Iowa constitutional provision; classification of railroads.**—Section 4, art. 1, of the constitution of Iowa, which provides, in part, that the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens, is not infringed by an act which divides the railroads of the state into classes, according to business, and establishes a maximum of rates for each class. Such an act does not grant to any railroad company privileges or immunities which, upon the same terms, do not equally belong to every other railroad company, since whenever a company comes into any class, it has all the “privileges and immunities” that have been granted by the statute to any other company in that class. *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155, 163, 24 L. Ed. 94.

**Tennessee constitutional provision; county aid to railroads.**—Section 7 of article 11 of the constitution of Tennessee declared that “the legislature shall have no power to suspend any general law for the benefit of any particular individual; nor to pass any law for the benefit of individuals, inconsistent with the general law of the land; nor to pass any law granting to any individual, or individuals, rights, privileges, immunities or exemptions, other than such as may be, by the same law, extended to any member of the community who may be able to bring himself within the provision of such law:

provided, always, the legislature shall have power to grant such charters of incorporation as may be deemed expedient for the public good.” While the general law of the state of Tennessee was in force authorizing county subscriptions of the stock of railroad companies after the vote of the electors in favor thereof, the legislature enacted a special act authorizing counties along the line of a certain railroad company to make subscriptions to its capital stock without a vote of the electors upon the question. Held that such special act was within the proviso of this constitutional provision, as constituting a part of the charter of that company, and therefore was not invalid as suspending a general law. *Tipton County v. Locomotive Works*, 103 U. S. 523, 533, 26 L. Ed. 340.

**Same—Exempting property in annexed territory.**—Where additional territory was added to the city of Memphis after it had entered into a street paving contract, a statute which provided that a tax, levied to pay the indebtedness so incurred, should not be enforced against property in the added territory, was not a law for the benefit of individuals inconsistent with the general laws of the land, in violation of the state constitutional provision upon that subject; nor did it grant immunities or exemptions not extended to all individuals in like condition, in violation of the state constitution. *United States v. Memphis*, 97 U. S. 284, 292, 24 L. Ed. 937.

**Franchises in streets.**—Such a provision has also been held not to forbid the granting of franchises for distributing illuminating gas by means of pipes and mains laid under the streets and other public ways of a municipal corporation. *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683, 691, 692, 29 L. Ed. 510.

**41. Privileges as including exemptions.**—*Tennessee v. Whitworth*, 117 U. S. 139, 146, 29 L. Ed. 833, construing the constitution of Tennessee, Art. 11, § 7.



(2) *Prohibition of Special Acts Conferring Corporate Powers and Privileges.*  
—See the title CORPORATIONS.

### VIII. Vested Rights and Retrospective Legislation.

**A. What Rights Are Vested—**1. DEFINITIONS AND GENERAL PRINCIPLES.—The term vested right is nowhere used in the constitution, neither in the original instrument nor in any of the amendments. Rights are understood to be vested, however, in contradistinction to being expectant or contingent.<sup>42</sup> They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest.<sup>43</sup> To say that a right is vested in a citizen is to say that he has the right to do certain acts or to possess certain things, according to the law of the land.<sup>44</sup> In its application as a shield of protection, the term “vested rights” is not used in any narrow sense, but as implying a vested interest of which the individual cannot be deprived arbitrarily without injustice. The general welfare and public policy must be regarded and the equal and impartial protection of the interests of all.<sup>45</sup>

**Rights are expectant** when they depend upon the continued existence of a present condition of things until the happening of some future event.<sup>46</sup>

**Rights are contingent** when they are only to come into existence on an event or condition which may not happen or be performed until some other event may prevent their vesting.<sup>47</sup>

**Question to Be Judicially Determined.**—The question whether a right has vested or not is, in its nature, judicial, and must be tried by the judicial authority.<sup>48</sup>

**Statute Protecting Vested Rights Means Rights Lawfully Vested.**—Where a statute speaks of “vested rights” protecting them, it means rights lawfully vested.<sup>49</sup>

2. VESTED RIGHTS OF COUNTIES, MUNICIPAL AND PUBLIC CORPORATIONS.—**As to Their Public and Governmental Character.**—Public corporations which exist only for purposes of government, such as counties, towns, cities, etc., are mere instrumentalities of the state for the convenient administration of gov-

42. **Vested rights; definitions and general principles.**—Cooley, Const. Law, 3d Ed. 351.

43. **Same.**—Cooley, Const. Law, 3d Ed. 351.

44. **Same.**—Calder v. Bull, 3 Dall. 386, 394, 1 L. Ed. 648.

45. **Searl v. School District No. 2**, 133 U. S. 553, 561, 33 L. Ed. 740.

“We understand very well what is meant by a vested right to real estate, to personal property, or to incorporeal hereditaments. But when we get beyond this, although vested rights may exist, they are better described by some more exact term, as the phrase itself is not one found in the language of the constitution.” *Campbell v. Holt*, 115 U. S. 620, 628, 29 L. Ed. 483.

46. **Rights in expectancy.**—Cooley, Const. Law, 3d Ed. 351.

47. **Contingent rights.**—Cooley, Const. Law, 3d Ed. 351.

“A vested right is defined by Fearn, in his work upon Contingent Remainders, as ‘an immediate fixed right of present or future enjoyment;’ and by Chancellor Kent as ‘an immediate right of present enjoyment, or a present fixed right of future enjoyment.’ 4 Kent Com. 202. It is

said by Mr. Justice Cooley that ‘rights are vested, in contradistinction to being expectant or contingent. They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. They are expectant, when they depend upon the continued existence of the present condition of things until the happening of some future event. They are contingent, when they are only to come into existence on an event or condition which may not happen or be performed until some other event may prevent their vesting.’ Principles of Const. Law 332.” *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 673, 40 L. Ed. 838.

48. **A judicial question.**—*Marbury v. Madison*, 1 Cranch 137, 167, 2 L. Ed. 60.

49. **Statute protecting vested rights means rights lawfully vested.**—*Morton v. Nebraska*, 21 Wall. 660, 673, 22 L. Ed. 639.

Hence, such a provision does not protect a location made on public lands reserved from sale, because patents for lands which have been previously reserved from sale are void. *Morton v. Nebraska*, 21 Wall. 660, 22 L. Ed. 639. And see *Campbell v. Wade*, 132 U. S. 34, 33 L. Ed. 240.

ernment, and their powers may be qualified, enlarged, or withdrawn at the pleasure of the legislature.<sup>50</sup>

**As to Right of Taxation and Disposition of Taxes.**—There is no element of private property in the right of taxation conferred upon a municipal corporation. The conferring of such right is an exercise by the legislature of a public and governmental power, and from the very character of the power, it cannot be imparted in perpetuity, but is always subject to revocation, modification and control by the legislative authority of the state.<sup>51</sup> Unless restrained by the provisions of its constitution, the legislature of a state possesses the power to direct a restitution to taxpayers of a county or other municipal corporation, of property exacted from them by taxation, into whatever form the property may be changed, so long as it remains in the possession of the municipality; and the exercise of this power infringes upon no provision of the federal constitution.<sup>52</sup>

**Right to Offset Taxes against Demands upon the Municipality.**—The right of a municipal corporation to pay for its water supply in taxes, that is, by using its demand against the company for taxes as an offset against the demand of the company for water dues, if property at all, is not such a vested right as to be beyond the control of the legislature.<sup>53</sup>

**As to Property Held in a Proprietary Capacity.**—In general it may be said that a municipal corporation can own private property, not of a public or governmental nature, and that such property may be entitled, as is said, "to constitutional protection." Property which is held by these corporations upon conditions or terms contained in a grant, and for a special use, may not be diverted by the legislature.<sup>54</sup> If a municipal corporation be capable of holding devises and legacies to charitable uses, the legislature does not possess the authority to take away such private property, or to seize upon those funds and appropriate them to other uses, at its own arbitrary pleasure against the will of the donors and donees. From the very nature of our governments the public faith is pledged the other way; and that pledge constitutes a valid compact, and that compact is subject only to judicial inquiry, construction and abrogation.<sup>55</sup> Upon the alteration or abolition of such corporations, therefore, property held in a private and proprietary capacity should be secured to those for whom, or at whose expense, it was originally purchased.<sup>56</sup>

**50. Vested rights of counties, municipal corporations, etc., as to their public and governmental character.**—*Terrett v. Taylor*, 9 Cranch 43, 52, 3 L. Ed. 650; *Dartmouth College v. Woodward*, 4 Wheat. 518, 627, 661, 693, 694, 4 L. Ed. 629; *East Hartford v. Hartford Bridge Co.*, 10 How. 511, 533, 534, 13 L. Ed. 518; *Aspinwall v. Board of Commissioners*, 22 How. 364, 16 L. Ed. 296; *Commissioners v. Commissioners*, 92 U. S. 307, 311, 23 L. Ed. 552; *Board of Commissioners v. Lucas*, 93 U. S. 108, 114, 23 L. Ed. 822; *New Orleans v. Clark*, 95 U. S. 644, 24 L. Ed. 521; *Read v. Plattsmouth*, 107 U. S. 568, 27 L. Ed. 414; *Williamson v. New Jersey*, 130 U. S. 189, 199, 32 L. Ed. 915; *New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79, 35 L. Ed. 943; *Covington v. Kentucky*, 173 U. S. 231, 242, 43 L. Ed. 679; *Guthrie Nat. Bank v. Guthrie*, 173 U. S. 528, 536, 43 L. Ed. 796; *Williams v. Parker*, 188 U. S. 491, 503, 47 L. Ed. 560; *Worcester v. Worcester Consol. R. Co.*, 196 U. S. 539, 550, 49 L. Ed. 591.

**51. Same; as to right of taxation and disposition of taxes.**—*East Hartford v. Hartford Bridge Co.*, 10 How. 511, 534, 13 L. Ed. 518; *State Bank v. Knoop*, 16 How.

369, 380, 14 L. Ed. 977; *United States v. Railroad Co.*, 17 Wall. 322, 329, 21 L. Ed. 597; *New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79, 90, 35 L. Ed. 943; *Williamson v. New Jersey*, 130 U. S. 189, 199, 32 L. Ed. 915.

**52. Same.**—*Essex Public Road Board v. Skinkle*, 140 U. S. 334, 343, 35 L. Ed. 446; *Board of Commissioners v. Lucas*, 93 U. S. 108, 23 L. Ed. 822.

**53. Same.**—**Right to offset taxes against demands upon municipality.**—*New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79, 90, 35 L. Ed. 943.

**54. As to property held in a proprietary capacity.**—*Board of Commissioners v. Lucas*, 93 U. S. 108, 115, 23 L. Ed. 822; *New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79, 35 L. Ed. 943; *Covington v. Kentucky*, 173 U. S. 231, 242, 43 L. Ed. 679; *Worcester v. Worcester Consol. St. R. Co.*, 196 U. S. 539, 551, 49 L. Ed. 591.

**55. Same.**—*Dartmouth College v. Woodward* (opinion of Story, J.), 4 Wheat. 518, 694, 695, 4 L. Ed. 629.

**56. Same.**—*Terrett v. Taylor*, 9 Cranch 43, 52, 3 L. Ed. 650.

A valid legislative grant to the various towns of the state of the glebe property



3. **INDIVIDUAL INTERESTS IN PUBLIC PROPERTY AND CONTRACTS.**—Resident taxpayers have the right to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county or city or the illegal creation of a debt which they, in common with other property holders of the county, may otherwise be compelled to pay.<sup>57</sup>

**As to State Contracts; Constitutional Requirements.**—But a constitutional provision requiring the state legislature, when contracting an indebtedness upon behalf of the state, to provide adequate ways and means for its payment, while it affects the public generally, does not affect any particular individual in such manner as to give him a legal remedy in case the legislature should disregard it.<sup>58</sup>

**Same—Amount of State Debt.**—And so it is said, that, as the amount of the state debt is a matter of eminently public concern, and the enactment of laws on the subject cannot be controlled by the judiciary, it may admit of doubt, whether, in any case, the courts, at the instance of an individual citizen, even a taxpayer, would undertake to restrain the state officers in the execution of such laws, and that, at all events, the case should be a very clear one to induce them to interpose by injunction or mandamus.<sup>59</sup> And where a person is neither a citizen nor a taxpayer, but is a citizen of another state, and presents himself simply in the character of a creditor of the state, the courts would hardly be justified in interfering on his behalf to prevent a supposed violation of the state constitution by an increase of the state debt. His interest is too remote to give him a standing in court for any such purpose.<sup>60</sup>

**Compacts between States; Rights of Individuals.**—In the case of *Georgetown v. Alexandria Canal Co.*, 12 Pet. 91, 96, 9 L. Ed. 1012. it was held that neither the citizens of Maryland, as such individually, nor the corporation of Georgetown, had any standing to enjoin a nuisance in the shape of an aqueduct across the Potomac River, which they alleged was being erected in violation of the compact of 1785, between Maryland and Virginia, securing and guaranteeing the free navigation of the Potomac River to the citizens of those states; that the states, in their character as states, were the parties to said compact, and had the power to modify or annul it at their joint pleasure; and that after the cession of the District of Columbia to the federal government, congress succeeded to the powers of both states, as to that portion of the river and its banks within the limits of the district, except so far as it was restrained by the act of cession; and that the act of congress authorizing the construction of the aqueduct was no violation of the compact.

**Contract between State and United States.**—Persons who have bought property or invested money in factories or other enterprises upon the faith of a contract entered into between the state and the United States that certain public lands granted to the state should be used in the construction of canals which were to be maintained as public highways, have no vested right in such contract and cannot maintain an action at law to prevent or redress the breach thereof by the state.<sup>61</sup>

therein situated, under the Vermont act of October 30. 1794. vested such property in the towns, and it is not competent for the state to repeal the grant. *Pawlet v. Clark*, 9 Cranch 292, 3 L. Ed. 735.

**57. Individual interests in public property and contracts.**—*Crampton v. Zabriske*, 101 U. S. 601, 609, 25 L. Ed. 1070. See, also, the title **MUNICIPAL CORPORATIONS**.

**58. As to state contracts; constitutional requirements.**—*Board of Liquidation v. McComb*, 92 U. S. 531, 536, 23 L. Ed. 623.

**59. Same—Amount of state debt.**—*Board of Liquidation v. McComb*, 92 U. S. 531, 536, 23 L. Ed. 623.

**60. Same.**—*Board of Liquidation v. McComb*, 92 U. S. 531, 23 L. Ed. 623. See, also, ante, "Who May Raise Constitutional Questions," IV, G, 1.

**61. Contract between state and United States.**—*Walsh v. Columbus, etc., R. Co.*, 176 U. S. 469, 44 L. Ed. 548; *Vought v. Columbus, etc., R. Co.*, 176 U. S. 481, 44 L. Ed. 554; *Wright v. Columbus, etc., R. Co.*, 176 U. S. 481, 44 L. Ed. 554. See, also, ante, "Who May Raise Constitutional Questions," IV, G, 1.



**Public Places and Property.**—The fourteenth amendment does not have the effect of creating a particular personal right in the citizen to use public property in defiance of the constitution and laws of the state.<sup>62</sup> “When no proprietary right interferes, the legislature may end the right of the public to enter upon the public place by putting an end to the dedication to public uses. So it may take the less step of limiting the public use to certain purposes.”<sup>63</sup>

4. **TITLE TO PUBLIC OFFICE AND THE EMOLUMENTS THEREOF.**—See, generally, the titles **IMPAIRMENT OF OBLIGATION OF CONTRACTS; PUBLIC OFFICERS.**

5. **VESTED RIGHTS UNDER TREATIES.**—Congress is bound to regard the public treaties in so far as vested rights of property have been acquired thereunder. Rights of this description are not affected by the abrogation or termination of the treaty by war or otherwise.<sup>64</sup> Thus congress has no power to organize a

**62. Individual interests in public places and property.**—*Davis v. Massachusetts*, 167 U. S. 43, 47, 42 L. Ed. 71.

**63. Same.**—*Davis v. Massachusetts*, 167 U. S. 43, 47, 42 L. Ed. 71.

**Right of individual to deliver address in a public place.**—“For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house.” *Davis v. Massachusetts*, 167 U. S. 43, 47, 42 L. Ed. 71.

An ordinance of the city of Boston forbidding the delivery of public addresses upon Boston Common except in accordance with a permit from the mayor, does not deprive a person desiring to make a public address thereon of any vested right in or to such common. *Davis v. Massachusetts*, 167 U. S. 43, 48, 42 L. Ed. 71.

**64. Vested rights under treaties; property rights.**—*Society for the Propagation of the Gospel v. New Haven*, 8 Wheat. 464, 5 L. Ed. 662; *Scott v. Sandford* (opinion of Catron, J.), 19 How. 393, 524, 15 L. Ed. 691; *Reichart v. Felps*, 6 Wall. 160, 165, 166, 18 L. Ed. 849; *Jones v. Meehan*, 175 U. S. 1, 32, 44 L. Ed. 49.

Thus in the *Head Money Cases*, 112 U. S. 580, 598, 28 L. Ed. 798, the court speaks of certain rights being in some instances conferred upon the citizens or subjects of one nation residing in the territorial limits of the other, which are “capable of enforcement as between private parties in the courts of the country.” “An illustration of this character,” it adds, “is found in treaties which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance when the individuals concerned are aliens.” Cited in *The Chinese Exclusion Case*, 130 U. S. 581, 609, 32 L. Ed. 1068.

The language of Mr. Justice Washington, in *Society for the Propagation of the Gospel v. New Haven*, 8 Wheat. 464, 493, 5 L. Ed. 662, also illustrates this doctrine. There the learned justice observes that “if real estate be purchased or secured under a treaty, it would be most mischievous to admit that the extinguish-

ment of the treaty extinguished the right to such estate. In truth, it no more affects such rights than the repeal of a municipal law affects rights acquired under it.” Cited in *The Chinese Exclusion Case*, 130 U. S. 581, 610, 32 L. Ed. 1068.

**The stipulations of the treaty ceding Louisiana** to the United States, affording protection and security to claims under the French or Spanish government, are in the first, second and third articles; they extended to all property, until Louisiana became a member of the Union; into which the inhabitants were to be incorporated as soon as possible, “and admitted to all the rights, advantages and immunities of citizens of the United States.” The perfect inviolability and security of property is among these rights. *Delassus v. United States*, 9 Pet. 117, 9 L. Ed. 71; *Les Bois v. Bramell*, 4 How. 449, 459, 11 L. Ed. 1051.

“And how does the power of congress stand west of the Mississippi river? The country there was acquired from France, by treaty in 1803. It declares, that the first consul, in the name of the French Republic, doth hereby cede to the United States, in full sovereignty, the colony or province of Louisiana, with all the rights and appurtenances of the said territory. And, by article third, that ‘the inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the federal constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; and, in the meantime, they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess.’ Louisiana was a province where slavery was not only lawful, but where property in slaves was the most valuable of all personal property. The province was ceded as a unit, with an equal right pertaining to all its inhabitants, in every part thereof, to own slaves. It was, to a great extent, a vacant country, having in it few civilized inhabitants. No one portion of the colony, of a proper size for a state of the Union, had a sufficient number of inhabitants to claim admission into the Union. To enable the

board of revision and empower it to nullify titles which have been confirmed to

United States to fulfill the treaty, additional population was indispensable, and obviously desired with anxiety by both sides, so that the whole country should, as soon as possible, become states of the Union. And for this contemplated future population, the treaty has expressly provided as it did for the inhabitants residing in the province when the treaty was made. All these were to be protected in the meantime; that is to say, at all times, between the date of the treaty, and the time when the portion of the territory where the inhabitants resided was admitted into the Union as a state. At the date of the treaty, each inhabitant had the right to the free enjoyment of his property, alike with his liberty and his religion, in every part of Louisiana; the province then being one country, he might go everywhere in it, and carry his liberty, property, and religion with him, and in which he was to be maintained and protected, until he became a citizen of a state of the Union of the United States. This cannot be denied to the original inhabitants and their descendants. And if it be true that immigrants were equally protected, it must follow that they can also stand on the treaty. The settled doctrine in the state courts of Louisiana is, that a French subject coming to the Orleans territory, after the treaty of 1803 was made, and before Louisiana was admitted into the Union, and being an inhabitant at the time of the admission, became a citizen of the United States by that act; that he was one of the inhabitants contemplated by the third article of the treaty, which referred to all the inhabitants embraced within the new state on its admission. That this is the true construction, I have no doubt. If power existed to draw a line at thirty-six degrees thirty minutes north, so congress had equal power to draw the line on the thirtieth degree—that is, due west from the city of New Orleans—and to declare that north of that line slavery should never exist. Suppose this had been done before 1812, when Louisiana came into the Union, and the question of infraction of the treaty had then been presented on the present assumption of power to prohibit slavery, who doubts what the decision of this court would have been on such an act of congress; yet, the difference between the supposed line, and that on thirty-six degrees thirty minutes north, is only in the degree of grossness presented by the lower line. The Missouri compromise line of 1820 was very aggressive; it declared that slavery was abolished forever throughout a country reaching from the Mississippi river to the Pacific ocean, stretching over thirty-two degrees of longitude, and twelve and a half degrees of latitude on its eastern side, sweeping over four-fifths, to say no more, of the original province of Louisi-

ana. That the United States government stipulated in favor of the inhabitants to the extent here contended for, has not been seriously denied, as far as I know; but the argument is, that congress had authority to repeal the third article of the treaty of 1803, in so far as it secured the right to hold slave property, in a portion of the ceded territory, leaving the right to exist in other parts. In other words, that congress could repeal the third article entirely, at its pleasure. This I deny." (Opinion of Catron, J.) *Scott v. Sandford*, 19 How. 393, 524, 526, 15 L. Ed. 691.

**Same—Inchoate title to land.**—An inchoate title to lands is property within the protection of the stipulations of this treaty. *Delassus v. United States*, 9 Pet. 117, 9 L. Ed. 71.

**Treaty with France of 1853; ten per cent. inheritance tax.**—By the laws of Louisiana a tax of 10 per cent. was imposed upon the value of all property inherited in that state by any person not domiciled there, and not being a citizen of any state or territory of the United States. The constitutionality of this law was not questioned, the same having been decided affirmatively in the case of *Mager v. Grima*, 8 How. 490, 12 L. Ed. 1168; but it was contended by the plaintiff that it was a violation of his rights under a treaty made between the United States and France in 1853, and by which Frenchmen were placed, as regards the right to take, hold and dispose of property, real and personal, upon the same footing as citizens of the United States in all the states of the Union whose laws permit it. Held, first, that this treaty had no retrospective operation, and could not divest the right of a state to this tax in a case where it had already vested; therefore it had no effect upon the succession of a person who died in 1848. Secondly, that the obligation of the treaty and its operation in the state, was, by the laws thereof, dependent upon the laws of Louisiana; that the treaty did not claim for the United States the right of controlling the succession to real or personal property in a state, but that its operation was expressly limited "to the states of the Union whose laws permit it, so long and to the same extent as those laws shall remain in force. *Prevost v. Greneaux*, 19 How. 1, 7, 15 L. Ed. 572.

**Title in fee may be created by a treaty.**—A title in fee may pass by a treaty without the aid of an act of congress, as where in a treaty with an Indian tribe, and as part of the consideration for the cession by the tribe of its lands to the United States, a reservation is made to a chief or other member of the tribe of a specified number of sections of land. In such case the treaty itself converts the reserved section into individual property, which property is to be protected by the



private individuals many years before, pursuant to the stipulations of a treaty or compact, by the duly-authorized agents of the government.<sup>65</sup>

**Embraces Only Rights of Property.**—But the rights and interests created by a treaty, which have become so vested that its expiration or abrogation will not destroy or impair them, are only such as are connected with and lie in property, capable of sale and transfer or other disposition, not such as are personal or political and untransferable in their character.<sup>66</sup>

6. **VESTED RIGHTS IN RULE OR POLICY OF LAW.**—No individual has a vested right in any general rule of law or policy of legislation which entitles him to insist that it shall remain unchanged for his benefit.<sup>67</sup> But when a law is in

courts the same as property derived from any other source. *Buttz v. Northern Pac. Railroad*, 119 U. S. 55, 67, 30 L. Ed. 330; *Jones v. Meehan*, 175 U. S. 1, 8, 21, 44 L. Ed. 49; *Francis v. Francis*, 203 U. S. 233, 238, 241, 51 L. Ed. 165.

See, also, *Johnson v. McIntosh*, 8 Wheat. 543, 5 L. Ed. 681; *Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L. Ed. 25; *Worcester v. Georgia*, 6 Pet. 515, 544, 8 L. Ed. 483; *Doe v. Wilson*, 23 How. 457, 463, 16 L. Ed. 584; *United States v. Cook*, 19 Wall. 591, 22 L. Ed. 210; *United States v. Kagama*, 118 U. S. 375, 381, 20 L. Ed. 228.

In such a case neither congress nor the executive department has any power to divest such person or his lessees of their interest in the land. *Jones v. Meehan*, 175 U. S. 1, 32, 44 L. Ed. 49.

65. **Congress no power to divest titles acquired pursuant to treaty.**—*Reichart v. Felps*, 6 Wall. 160, 165, 166, 18 L. Ed. 849.

Where the state of Virginia, in ceding to the United States the Northwest Territory, stipulated that the French and Canadian settlers in certain localities therein who had professed themselves citizens of Virginia, should have their possessions and titles confirmed to them, which was afterwards done by the duly-authorized agents of the federal government, it was held that congress had no power to organize a board of revision to nullify the titles so confirmed. *Reichart v. Felps*, 6 Wall. 160, 165, 166, 18 L. Ed. 849.

66. **Embraces only rights of property.**—*The Chinese Exclusion Case*, 130 U. S. 581, 609, 32 L. Ed. 1068; *Fong Yue Ting v. United States*, 149 U. S. 698, 722, 37 L. Ed. 905.

"A right conferred upon a Chinese laborer, by a certificate issued in pursuance of previous laws and treaties, to return to the United States can be taken away by a subsequent act of congress." *Chew Heong v. United States*, 112 U. S. 536, 539, 559, 28 L. Ed. 770; *The Chinese Exclusion Case*, 130 U. S. 581, 600, 32 L. Ed. 1068; *Lem Moon Sing v. United States*, 158 U. S. 538, 549, 39 L. Ed. 1082; *Wong Wing v. United States*, 163 U. S. 228, 230, 41 L. Ed. 140.

Thus a Chinese laborer to whom a certificate had been issued under the act of May 6, 1882, 22 Stat. 58, ch. 126, as amended by the act of July 5, 1884, 23

Stat. 115, ch. 220, to enable him to return to the United States, acquired no vested right thereunder, either by virtue of the act of congress, or by virtue of the treaty between the United States and China, expressly stipulating that he should have the right to return; and in such case it was immaterial that he had departed out of the country before the act of exclusion was enacted. *The Chinese Exclusion Case*, 130 U. S. 581, 32 L. Ed. 1068. See, also, *Fong Yue Ting v. United States*, 149 U. S. 698, 722, 37 L. Ed. 905.

**Citizenship in an Indian nation** having the right, under treaty with the United States, to enact its own laws and maintain a separate tribal government, said citizenship having been conferred by a tribal statute making citizens of the tribe persons who were not such before, is not a vested right under the federal constitution; and a subsequent tribal statute, revoking the citizenship so conferred, interferes with no constitutional right. *Roff v. Burney*, 168 U. S. 218, 42 L. Ed. 442.

67. **Vested right in rule or policy of law.**—*Munn v. Illinois*, 94 U. S. 113, 134, 24 L. Ed. 77; *Hurtado v. California*, 110 U. S. 516, 532, 28 L. Ed. 232; *Cooley*, Const. Law, 3d Ed. 351.

"A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will or even at the whim of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." *Hurtado v. California*, 110 U. S. 516, 532, 28 L. Ed. 232; *Munn v. Illinois*, 94 U. S. 113, 134, 24 L. Ed. 77.

**Policy as to trade with foreign countries.**—"No individual has a vested right to trade with foreign nations which is so broad in character as to limit and restrict the power of congress to determine what articles of merchandise may be imported into this country and the terms upon which a right to import may be exercised. This being true, it results that a statute which restrains the introduction



its nature a contract, and absolute rights have vested under that contract, a repeal of the law cannot divest those rights.<sup>68</sup> So the repeal of a law cannot affect contract or property rights acquired under its authority previous to the repeal.<sup>69</sup> But where a law which confers the right or privilege to enter into contracts of a certain kind is repealed by a subsequent statute or constitutional amendment which forbids the execution of contracts of that description, all negotiations looking to the execution of such contracts, but under which no contract rights have actually been acquired, fall with it.<sup>70</sup> When a right has arisen upon a transaction in the nature of a contract authorized by statute, and has been so far

of particular goods into the United States from considerations of public policy does not violate the due process clause of the constitution." *Buttfield v. Stranahan*, 192 U. S. 470, 493, 48 L. Ed. 525.

**Rule or policy as to recovery of damages in certain cases.**—A statute which classifies postal clerks on trains with employees and others not passengers and prevents them from recovering damages for accidents, except in cases where employees and others not passengers would be permitted to recover, is not unconstitutional as depriving a postal clerk thereafter injured of any vested or property right, since the rule or policy of law concerning the recovery of damages in such cases is a matter within the control of the state. *Martin v. Pittsburg, etc., R. Co.*, 203 U. S. 284, 51 L. Ed. 184; *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 48 L. Ed. 268.

**Changing rule or policy relating to mortgages to foreign corporations to the detriment of subsequent incumbrancers.**—Where under the law of the state, as it existed at the time of the execution of a mortgage or conveyance to a foreign corporation, such mortgage or conveyance was invalid and unenforceable, subsequent purchasers or mortgagees of such property have no vested right in the rule or policy of law which renders void the previous mortgage or conveyance to a foreign corporation, and they are not deprived of any property or vested interest by a subsequent change which validates mortgages and conveyances to foreign corporations and thereby depreciates or renders worthless their own deed or other security. *Gross v. United States Mortgage Co.*, 108 U. S. 477, 488, 27 L. Ed. 795.

**68. Where law is in its nature a contract.**—*Fletcher v. Peck*, 6 Cranch 87, 3 L. Ed. 162; *Virginia Coupon Cases*, 114 U. S. 269, 270, 29 L. Ed. 185.

**69. Repeal of law not to affect property or contract rights.**—*Steamship Co. v. Joliffe*, 2 Wall. 450, 17 L. Ed. 805; *Munn v. Illinois*, 94 U. S. 113, 134, 24 L. Ed. 77; *Hurtado v. California*, 110 U. S. 516, 532, 28 L. Ed. 232. See, also, the title IMPAIRMENT OF OBLIGATION OF CONTRACTS.

**County subscription in aid of railroad.**—Where a county by its proper officers, duly authorized thereto by law, enters into a contract whereby, with the con-

sent of all parties concerned, a county subscription in aid of one railroad company is transferred to another company, the right of such other company, under such contract, to demand and receive the bonds of the county in payment of its original subscription is a vested right, and is not affected by a subsequent constitutional provision forbidding such subscriptions. *County of Ray v. Vansycle*, 96 U. S. 675, 684, 24 L. Ed. 800.

**Pennsylvania statute providing for confirmation of Connecticut land claims; when rights become vested.**—By the Pennsylvania statute, March 28, 1787, entitled "An act ascertaining and confirming to certain persons, called Connecticut claimants, the land by them claimed within the county of Lucerne," etc., it was provided, among other things, that Connecticut settlers should present their claims to the commissioners; that they should support them by reasonable proof; that the commissioners should adjudicate said claims; that the lands claimed should be surveyed, etc. Held, that the mere presentation of claims by the Connecticut settlers to the commissioners, who received and entered them, conferred no vested rights; hence the suspension or repeal of the act, after such presentation had been made, was not unconstitutional as a retrospective or ex post facto law. *Vanhorne v. Dorrance*, 2 Dall. 304, 319, 1 L. Ed. 391.

**70. Same; repeal of law authorizing certain contracts.**—*Aspinwall v. Board of Commissioners*, 22 How. 364, 16 L. Ed. 296.

**Incomplete county subscription defeated by repeal of statute.**—The charter of the Ohio and Mississippi Railroad Company, granted by the Legislature of Indiana in 1848, and a supplement in 1849, authorized the county commissioners of counties through which the road passed to subscribe for stock and issue bonds, provided that a majority of the voters of the county voted at an election on the first day of March, 1849, that this should be done. An election was held and carried by the requisite majority. Before the subscription was actually made the state adopted a new constitution which went into effect November 1, 1851, and which prohibited such subscriptions unless paid in cash. Held, that the company acquired no vested right to the bonds by virtue of the charter and supplement and the election held pursuant thereto, and that the

perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right, which stands independent of the statute.<sup>71</sup>

7. **RIGHT OF INFORMER TO STATUTORY PENALTIES AND FORFEITURES.**—Previous to final decree or judgment, an informer has no vested right to a penalty or forfeiture, nor in an action to recover the same, under statutes providing for penalties and forfeitures in certain cases with one-half or some other proportion to the officer or person giving the information.<sup>72</sup> Nor has an informer, nor any officer, who might otherwise be entitled to a share of the penalty or thing forfeited, any vested right even after final judgment or decree where the law confers power upon certain officials to remit the same.<sup>73</sup> So the repeal of a statute, imposing a penalty or forfeiture, without a saving clause preserving the right to enforce them, operates as a remission and as a bar to any action to enforce them.<sup>74</sup> This is true even as to an action pending at the time of the repeal.<sup>75</sup>

8. **VESTED RIGHTS UNDER EXECUTIVE PARDON.**—A pardon extended by the president of the United States and accepted by the person or persons for whose

commissioners had no authority to make the subscription and issue the bonds after the new constitution became effective. *Asphinnwall v. Board of Commissioners*, 22 How. 364, 16 L. Ed. 296.

71. **Same; where rights have become vested pursuant to authority conferred by statute.**—*Steamship Co. v. Joliffe*, 2 Wall. 450, 17 L. Ed. 805. (Three justices dissenting.)

**Right to half pilotage; effect of repeal of statute.**—Where a pilot, licensed under a statute, had tendered his services to pilot a vessel out of port, and such services were refused, his claim to the half-pilotage fees, allowed by the statute in such cases, became perfect; and the subsequent repeal of the statute did not affect a judgment rendered in an action brought to recover the claim, or the jurisdiction of the federal supreme court to review the judgment on writ of error. *Steamship Co. v. Joliffe*, 2 Wall. 450, 17 L. Ed. 805. (Three justices dissenting.)

72. **Rights of informer to statutory penalties and forfeitures.**—*United States v. Morris*, 10 Wheat. 246, 281, 6 L. Ed. 314; *Maryland v. Baltimore*, etc., R. Co., 3 How. 534, 11 L. Ed. 714; *Confiscation Cases*, 7 Wall. 454, 19 L. Ed. 196; *The Laura*, 11 U. S. 417, 29 L. Ed. 147. See, also, the title **PENALTIES AND FORFEITURES**.

An informer, in prosecutions under the act of August 6th, 1861, which subjected to confiscation, upon libel filed, property whose owner used or consented to its use in aiding the rebellion, had no vested interests in the subject matter of the suits; and this, notwithstanding that the act declared that where any person filed an information with the attorney of the United States (as the act allowed any person to do), the proceedings should be "for the use of such informer and the United States in equal parts." *Confiscation Cases*, 7 Wall. 454, 19 L. Ed. 196.

Hence, the attorney general could properly, and against the interest and objection of the informer, ask a dismissal of an

appeal in cases where the decree below, having been against it, the government had appealed; and in the same way ask, upon agreement to that effect with the counsel of the claimants, for a reversal of a decree, where, on decree against them, the appeal had been by the other side, and for a remand of the cause to the court below, with directions to it to dismiss the libel. *Confiscation Cases*, 7 Wall. 454, 19 L. Ed. 196.

73. **Same; rights after judgment or decree.**—*United States v. Morris*, 10 Wheat. 246, 281, 6 L. Ed. 314.

Merchandise was imported into the United States in violation of the nonintercourse act then in force, and the vessel and cargo were seized on that account; and were afterwards condemned as forfeited. Subsequent to the decree of condemnation, the secretary of the treasury remitted the whole forfeiture, and the United States supreme court held that he did not exceed his authority; that neither the rights of the informer, nor the rights of the collector, or other officers of the customs, were violated in the case; that their rights were conditional, and subordinate to the power of remission; and that the secretary had authority, under that act, to remit a forfeiture at any time before or after a final decree or judgment, until the money was actually paid over to the collector for distribution, and that the power to remit extended not only to the interest of the United States in the forfeiture, but also to the share of the informer and that of the officers of the customs. *United States v. Morris*, 10 Wheat. 246, 281, 6 L. Ed. 314.

74. **Same—Repeal of statute operates as a remission.**—*The Irresistible*, 7 Wheat. 551, 5 L. Ed. 520; *Maryland v. Baltimore*, etc., R. Co., 3 How. 534, 11 L. Ed. 714; *Norris v. Crocker*, 13 How. 429, 14 L. Ed. 210; *The Reform*, 3 Wall. 617, 18 L. Ed. 105.

75. **Same—Pending actions.**—*Norris v. Crocker*, 13 How. 429, 14 L. Ed. 210.



benefit it is intended confers vested rights upon those persons, which congress cannot impair by a statute which purports to adjust such pardon or prevent its being pleaded as a defense or as the basis of a cause of action.<sup>76</sup>

9. **RIGHTS OF SETTLERS UPON PUBLIC LANDS.**—As to when the rights of an occupant or claimant under the public land laws becomes vested, see the title **PUBLIC LANDS**.

10. **RIGHTS CONFERRED BY GRANT OR PATENT.**—A grant or patent from the state or United States confers a vested right to the land granted, which cannot be revoked by the state.<sup>77</sup>

11. **RIGHTS UNDER CORPORATE CHARTERS.**—a. *Generally; Charter a Contract.*—"The whole doctrine of vested rights, as applied to the charters of corporations, is based upon *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629, in which the broad proposition was laid down that such charters were contracts within the meaning of the constitution, and hence that an act of the state legislature altering a charter in any material respect was unconstitutional and void. The doctrine of this case has been subjected to more or less criticism by the courts and the profession, but has been reaffirmed and applied so often as to have become firmly established as a canon of American jurisprudence."<sup>78</sup>

b. *Charter Rights Subject to Police Powers.*—The condition is implied in every grant of corporate existence that the corporation shall be subject to such reasonable regulations, in respect to the general conduct of its affairs, as the legislature may, from time to time, prescribe, which do not materially interfere with or obstruct the substantial enjoyment of the privileges the state has granted, and which serve only to secure the ends for which the corporation was created.<sup>79</sup> "In other words, the legislature may not destroy vested rights, whether they are expressly prohibited from doing so or not, but otherwise may legislate with respect to corporations, whether expressly permitted to do so or not."<sup>80</sup>

76. **Vested rights under executive pardon.**—Ex parte Garland, 4 Wall. 333, 18 L. Ed. 366; United States v. Klein, 13 Wall. 128, 20 L. Ed. 519.

77. **Rights under grant or patent.**—*Fletcher v. Peck*, 6 Cranch 87, 3 L. Ed. 162; *Pawlet v. Clark*, 9 Cranch 292, 3 L. Ed. 735; *Terrett v. Taylor*, 9 Cranch 43, 52, 3 L. Ed. 650; *Rice v. Railroad Co.*, 1 Black 358, 373, 17 L. Ed. 147; *Noble v. Union River Logging R. Co.*, 147 U. S. 165, 176, 37 L. Ed. 123. See, also, the titles **IMPAIRMENT OF OBLIGATION OF CONTRACTS**; **PUBLIC LANDS**.

A grant to the church of such a place is good at common law, and vested the fee in the parson and his successors. Such a grant cannot be resumed at the pleasure of the crown. *Pawlet v. Clark*, 9 Cranch 292, 3 L. Ed. 735.

78. **Vested rights under corporate charters.**—*Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 660, 40 L. Ed. 838. See, generally, upon this point, the titles **CORPORATIONS**; **IMPAIRMENT OF OBLIGATION OF CONTRACTS**.

79. **Charter rights are subject to police powers.**—*Chicago Life Ins. Co. v. Needles*, 113 U. S. 574, 580, 28 L. Ed. 1084; *Hill v. Merchants' Mut. Ins. Co.*, 134 U. S. 515, 526, 33 L. Ed. 994. See, generally, the title **CORPORATIONS**; **POLICE POWER**.

"Under its police power the people, in their sovereign capacity, or the legislature, as their representatives, may deal

with the charter of a railway corporation, so far as is necessary for the protection of the lives, health and safety of its passengers or the public, or for the security of property or the conservation of the public interest, provided, of course, that no vested rights are thereby impaired." *Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677, 695, 40 L. Ed. 849; *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 40 L. Ed. 838.

**Act enforcing prompt payment of railway employees.**—The Arkansas act of March 25, 1889, Acts Ark. 1889, 76, providing for the enforcement of the prompt payment without abatement or deduction, of the wages of railway employees, under penalty of having the wages continued for a certain length of time in case of failure to pay promptly upon the employee's discharge from service, was within the reserved power of amendment, and did not interfere with vested rights. *St. Louis, etc., R. Co. v. Paul*, 173 U. S. 404, 409, 43 L. Ed. 746, reaffirmed in *Minneapolis, etc., R. Co. v. Gano*, 190 U. S. 557, 47 L. Ed. 1183.

80. **May legislate without reserving power; but may not destroy vested rights.**—*Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677, 695, 40 L. Ed. 849.

Rights vesting under corporate charters are no more subject to legislative control than other vested rights. *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. Ed. 773; *Vincennes University v. Indiana*, 14 How. 268, 14 L. Ed. 416.



*c. Neither Express nor Implied Powers of Legislature to Be Used to Impair Vested Rights.*—The proposition just stated, that the implied power of the legislature, to subject corporate bodies to a reasonable control in the interest of public safety and the general welfare, cannot be so exercised as to impair the vested rights of such bodies, is equally true of power expressly reserved to alter or amend corporate charters. In neither instance can the legislative power be used to take away property conferred by the charter or subsequently acquired under the operation of the charter or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made.<sup>81</sup>

**81. Neither express nor implied power of control to be used to the impairment of vested rights.**—*Dartmouth College v. Woodward*, 4 Wheat. 518, 629, 4 L. Ed. 629; *Society for the Propagation of the Gospel v. New Haven*, 8 Wheat. 464, 5 L. Ed. 662; *Fletcher v. Peck*, 6 Cranch 87, 137, 3 L. Ed. 162; *Terrett v. Taylor*, 9 Cranch 43, 3 L. Ed. 650; *Pawlet v. Clark*, 9 Cranch 292, 3 L. Ed. 735; *West River Bridge Co. v. Dix*, 6 How. 507, 12 L. Ed. 535; *Vincennes University v. Indiana*, 14 How. 268, 14 L. Ed. 416; *Rice v. Railroad Co.*, 1 Black 358, 373, 17 L. Ed. 147; *Pennsylvania College Cases*, 13 Wall. 190, 218, 20 L. Ed. 550; *Holyoke Co. v. Lyman*, 15 Wall. 500, 519, 21 L. Ed. 133; *Davis v. Gray*, 16 Wall. 203, 21 L. Ed. 447; *Shields v. Ohio*, 95 U. S. 319, 324, 24 L. Ed. 357; *Moore v. Robbins*, 96 U. S. 530, 24 L. Ed. 848; *Sinking-Fund Cases*, 99 U. S. 700, 720, 25 L. Ed. 496; *Railway Co. v. Philadelphia*, 101 U. S. 528, 540, 29 L. Ed. 912; *United States v. Schurz*, 102 U. S. 378, 26 L. Ed. 167; *Noble v. Union River Logging R. Co.*, 147 U. S. 165, 37 L. Ed. 123; *United States v. Union Pac. R. Co.*, 160 U. S. 1, 33, 40 L. Ed. 319; *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 661, 40 L. Ed. 838; *Adirondack R. Co. v. New York State*, 176 U. S. 335, 344, 44 L. Ed. 492. And see, generally, the title CORPORATIONS.

"The power of alteration and amendment is not without limit. The alterations must be reasonable; they must be made in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration. Beyond the sphere of the reserved powers, the vested rights of property of corporations, in such cases, are surrounded by the same sanctions and are as inviolable as in other cases." *Shields v. Ohio*, 95 U. S. 319, 324, 24 L. Ed. 357.

"Vested rights, it is conceded, cannot be impaired under such a reserved power, but it is clear that the power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant and to protect the rights of the public and of the corporations or to promote the due administration of the affairs of the corporation. *Pennsylvania College Cases*, 13 Wall. 190, 218, 20 L. Ed. 550." *Railway Co. v. Philadelphia*, 101

U. S. 528, 540, 29 L. Ed. 912; *Holyoke Co. v. Lyman*, 15 Wall. 500, 519, 21 L. Ed. 133.

"Even before the *Dartmouth College* case was decided, it was held by this court that grants of land made by the crown to colonial churches were irrevocable, and that property purchased by, or devised to them, prior to the adoption of the constitution, could not be diverted to other purposes by the states which succeeded to the sovereign power of the colonies. *Terrett v. Taylor*, 9 Cranch 43, 3 L. Ed. 650; *Pawlet v. Clark*, 9 Cranch 292, 3 L. Ed. 735; *Society for the Propagation of the Gospel v. New Haven*, 8 Wheat. 464, 5 L. Ed. 662. Indeed, the sanctity of charters vesting in grantees the title to lands or other property has been vindicated in a large number of cases. *Davis v. Gray*, 16 Wall. 203, 21 L. Ed. 447; *Fletcher v. Peck*, 6 Cranch 87, 137, 3 L. Ed. 162; *Moore v. Robbins*, 96 U. S. 530, 24 L. Ed. 848; *United States v. Schurz*, 102 U. S. 378, 26 L. Ed. 167; *Noble v. Union River Logging R. Co.*, 147 U. S. 165, 37 L. Ed. 123." *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 661, 40 L. Ed. 838.

The legislature cannot repeal statutes creating private corporations, or confirming to them property already acquired under the faith of previous laws, and by such repeal vest the property of the corporation exclusively in the state, or dispose of the same to such purposes as it may please, without the consent or default of the corporators. *Terrett v. Taylor*, 9 Cranch 43, 52, 3 L. Ed. 650; *Rice v. Railroad Co.*, 1 Black 358, 373, 17 L. Ed. 147.

"If the defendants acquired such a right, title, or interest in the lands, under their original charter, then it is clear that it became a vested interest as soon as the act of congress went into effect; and on that state of the case it would be true, as contended by the defendants, that the repealing act set up in the replication of the plaintiff is void, and of no effect. *Terrett v. Taylor*, 9 Cranch 43, 3 L. Ed. 650; *Pawlet v. Clark*, 9 Cranch 292, 3 L. Ed. 735." *Rice v. Railroad Co.*, 1 Black 358, 373, 17 L. Ed. 147.

The Virginia acts of 1798 and 1801, so far as they go to divest the Episcopal church of the property acquired previous to the revolution by purchase or donation,

d. *What Rights Are Vested*—(1) *Property and Contract Rights*.—See ante, “Neither Express nor Implied Powers of Legislature to Be Used to Impair Vested Rights,” VIII, A, 11, c.

(2) *Rights Necessary to Full and Complete Enjoyment of the Main Object of the Grant; Unexecuted Powers*.—Rights necessary to the full and complete enjoyment of the main object of the grant are contracts and beyond the reach of destructive legislation.<sup>82</sup>

**Rights of Railroad Corporations.**—“If, for example, the legislature should authorize the construction of a certain railroad, and by a subsequent act should take away the power to raise funds for the construction of the road in the usual manner by a mortgage, or the power to purchase rolling stock or equipment, such acts might perhaps be treated as so far destructive of the original grant as to render it valueless, although there might in neither case be an express repeal of any of its provisions.”<sup>83</sup> “But where the charter authorizes the company in sweeping terms to do certain things which are unnecessary to the main object of the grant, and not directly and immediately within the contemplation of the par-

are unconstitutional and inoperative. *Territt v. Taylor*, 9 Cranch 43, 3 L. Ed. 650.

An incorporated institution of learning, which is not a public corporation, has a vested interest in its property which cannot be defeated by the state. *Dartmouth College v. Woodward*, 4 Wheat. 518, 629, 4 L. Ed. 629; *Vincennes University v. Indiana*, 14 How. 268, 14 L. Ed. 416.

The board of trustees for the Vincennes University, incorporated by the territory of Indiana for the purpose of receiving lands granted by congress for educational purposes and for the purpose of carrying out the design of congress to establish a seminary of learning, was not a public corporation, holding the property so acquired subject to the will of the state, but a private eleemosynary corporation in which the state had no property and could exercise no power to defeat the trust. *Vincennes University v. Indiana*, 14 How. 268, 277, 14 L. Ed. 416.

**As applied to railroad corporations**, it may reasonably be conceded that the term vested rights extends to all rights of property acquired by executed contracts, as well as to all such rights as are necessary to the full and complete enjoyment of the original grant, or of property legally acquired subsequent to such grant. *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 673, 40 L. Ed. 838.

The reservation, contained in the act of July 1, 1862, c. 120, 12 Stat. 489, and in the amendatory act of July 2nd, 1864, c. 216, 13 Stat. 356, granting a subsidy to aid in the construction of a railroad and a telegraph line from the Missouri River to the Pacific Ocean, of the power to add to, alter or amend those acts, did not authorize congress to impose upon the railroad company duties wholly foreign to the objects for which it was created or for which governmental aid was given. Neither could it, by such alteration or amendment, destroy rights actually vested,

nor disturb transactions fully consummated. *United States v. Union Pac. R. Co.*, 160 U. S. 1, 33, 40 L. Ed. 319.

The provisions of the above-mentioned acts and those of the act of July 2nd, 1864, c. 220, authorizing the railroad company to enter into “arrangements” with certain telegraph companies for the transfer of their telegraph lines to the right of way of the railroad company, and for the construction of telegraph lines upon its right of way, considered, together with the circumstances under which such transfer was made and under which the arrangements, contracts, and agreements, alleged to have been made in pursuance thereof, were entered into, and it is held that the act of August 7, 1888, c. 772, 25 Stat. 382, requiring all railroad and telegraph companies, to which government subsidies had been granted, to themselves construct, operate and maintain, by and through their own proper corporate agencies and employees, the telegraph lines which they were authorized and required to construct, and to themselves exercise the telegraph franchises which had been conferred upon them, was a valid exercise of the reserved power to add to, alter or amend the acts in question and did not impair any vested or contract right of the company or of those with whom it had entered into said contracts and “arrangements.” *United States v. Union Pac. R. Co.*, 160 U. S. 1, 53, 40 L. Ed. 319.

**82. Rights necessary to full and complete enjoyment of powers granted.**—*Chicago Life Ins. Co. v. Needles*, 113 U. S. 574, 580, 28 L. Ed. 1084; *Hill v. Merchants’ Mut. Ins. Co.*, 134 U. S. 515, 526, 33 L. Ed. 994; *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 661, 40 L. Ed. 838.

**83. Same—Rights of railroad corporations.**—*Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 673, 40 L. Ed. 838. See, also, the titles CORPORATIONS; RAILROADS.

ties thereto, the power so conferred, so long as it is unexecuted, is within the control of the legislature and may be treated as a license, and may be revoked, if a possible exercise of such power is found in conflict with the interests of the public."<sup>84</sup>

**Unexecuted Power of Consolidation.**—A bare unexecuted power to consolidate with other corporations, so long as it remains unexecuted, is not a vested right, but is within the control of, and subject to revocation by, the legislature.<sup>85</sup> Where there is only a general authority to consolidate, the legislature may, by another act, declare that it shall not apply to cases manifestly not within its original intent.<sup>86</sup> "The general doctrine, requiring grants to corporations to be construed favorably to the public, where there is a reasonable doubt as to the extent of the privilege conferred, may properly be invoked to declare that such privileges shall not be used to the detriment of the public."<sup>87</sup>

**Unexecuted Power of Eminent Domain.**—The right of eminent domain attending the charter of a railroad corporation does not become vested by merely filing a map of the route proposed so that it will survive the existence of the franchise.<sup>88</sup>

12. SAME—FRANCHISES AND PRIVILEGES.—Corporate franchises are property; often very valuable and productive property, and generally speaking, subject to taxation as any other property.<sup>89</sup> They are, properly speaking, legal estates, vested in the corporation itself, as soon as it is in esse. They are not mere naked powers, granted to the corporation; but powers coupled with an interest. The property of the corporation rests upon the possession of its franchises; and whatever may be thought, as to the corporators, it cannot be denied that the corporation itself has a legal interest in them. It may sue and be sued for them.<sup>90</sup>

84. Same.—*Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 673, 40 L. Ed. 838. See, also, the titles CORPORATIONS; RAILROADS.

85. Unexecuted power of consolidation.—*Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 672, 40 L. Ed. 838; *Bank v. Tennessee*, 163 U. S. 416, 425, 41 L. Ed. 211; *Galveston, etc., R. Co. v. Texas*, 170 U. S. 226, 240, 42 L. Ed. 1017.

The principle of these cases applies to the power of the legislature to forbid the consolidation of parallel or competing lines, whenever, in its opinion, such consolidation is calculated to affect injuriously the public interests. *Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677, 697, 40 L. Ed. 849.

"Where, by a railway charter, a general power is given to consolidate with, purchase, lease or acquire the stock of other roads, which has remained unexecuted, it is within the competency of the legislature to declare, by subsequent acts, that this power shall not extend to the purchase, lease or consolidation with parallel or competing lines." *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 677, 40 L. Ed. 838.

"It was competent for the legislature to declare that the power it had conferred upon the Minneapolis and St. Cloud Railway Company to consolidate its interest with those of other similar corporations should not be exercised, so far as applicable to parallel and competing lines, inasmuch as it is for the interest of the public that there should be competition between parallel roads." *Pearsall v. Great*

*Northern R. Co.*, 161 U. S. 646, 674, 40 L. Ed. 838.

"It was competent for the legislature, out of due regard for the public welfare, to declare that its charter should not be used for the purpose of stifling competition and building up monopolies. In short, we cannot recognize a vested right to do a manifest wrong." *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 675, 40 L. Ed. 838.

86. Same.—*Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 676, 40 L. Ed. 838.

87. Same.—*Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 676, 40 L. Ed. 838.

88. Unexecuted power of eminent domain.—*Adirondack R. Co. v. New York State*, 176 U. S. 335, 344, 44 L. Ed. 492.

89. Franchises are property.—*Veazie Bank v. Fenno*, 8 Wall. 533, 547, 19 L. Ed. 482. See, generally, the title CORPORATIONS.

Property held by an incorporated company stands upon the same footing with that held by an individual, and a franchise cannot be distinguished from other property. *West River Bridge Co. v. Dix*, 6 How. 507, 12 L. Ed. 535.

90. Same.—*Dartmouth College v. Woodward*, 4 Wheat. 518, 700, 4 L. Ed. 629.

The franchise to construct locks and dams upon a navigable river and take tolls for the use thereof is a vested right. The state has power to grant it. It may retake it, as it may take other private property, for public uses, upon the payment of just compensation. A like, though a superior, power exists in the national government. It may take it for public purposes, and take it even against the will



**Special and Exclusive Privileges Inviolable.**—A special or exclusive privilege, whether conferred by charter, contract, or valid ordinance, constitutes an inviolable contract right, which cannot be destroyed either by direct revocation or by the grant of a rival franchise or privilege rendering the former worthless.<sup>91</sup>

of the state; but it can no more take the franchise which the state has given than it can any private property belonging to an individual. *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 341, 37 L. Ed. 463.

Such a franchise is as much a vested right of property as the ownership of the tangible property; and the fifth amendment requires the federal government to make just compensation for the franchise to take tolls, as well as for the value of the tangible property. *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 345, 37 L. Ed. 463.

**Franchise of being a corporation.**—The right and privilege, or the franchise, as it may be termed, of being a corporation, is of great value to its members, and is considered as property separate and distinct from the property which the corporation itself may acquire. *Deleware Railroad Tax*, 18 Wall. 206, 231, 21 L. Ed. 888; *Horn Silver Min. Co. v. New York State*, 143 U. S. 305, 313, 36 L. Ed. 164.

**Right to corporate name.**—See the title CORPORATIONS.

**91. Special and exclusive franchises inviolable.**—The *Binghamton Bridge*, 3 Wall. 51, 18 L. Ed. 137; *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 664, 665, 40 L. Ed. 838. See, generally, the titles CORPORATIONS; MUNICIPAL CORPORATIONS.

"Within the same principle are grants of an exclusive right to supply gas or water to a municipality, or to occupy its streets for railway purposes. *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 29 L. Ed. 516; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. Ed. 525; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683, 29 L. Ed. 510; *St. Tammany Waterworks v. New Orleans Waterworks*, 120 U. S. 64, 30 L. Ed. 563." *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 663, 40 L. Ed. 838.

"The grant of a right to supply gas or water to a municipality and its inhabitants through pipes and mains laid in the streets, upon condition of the performance of its service by the grantee, is the grant of a franchise vested in the state, in consideration of the performance of a public service, and after performance by the grantee, is a contract protected by the constitution of the United States against state legislation to impair it. *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 660, 29 L. Ed. 516; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. Ed. 525; *St. Tammany Waterworks v. New Orleans Waterworks*, 120 U. S. 64, 30 L. Ed. 563; *Crescent City Gas Light Co. v. New Orleans Gas Light Co.*, 27 La. Ann. 138, 147." *Walla Walla v. Walla*

*Walla Water Co.*, 172 U. S. 1, 9, 43 L. Ed. 341.

The right to dig up and use the streets and alleys of New Orleans for the purpose of placing pipes and mains to supply the city and its inhabitants with water is a franchise belonging to the state, which she could grant to such persons or corporations, and upon such terms, as she deemed best for the public interests. Such not being at the time prohibited by the constitution of the state, was a contract, the obligation of which cannot be impaired by subsequent legislation, or by a change in her organic law. *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 680, 681, 29 L. Ed. 525.

The permission given by the city council to an individual property owner to lay pipes in the streets for the purpose of conveying water to his hotel is plainly in derogation of the state's exclusive grant to the appellant; for, if that body can accord such a use of the public ways to him, it may grant a like use to all other citizens and to corporations of every kind, thereby materially diminishing, if not destroying, the value of the plaintiff's contract, upon the faith of which it has expended large sums of money, and rendered services to the public which might otherwise have been performed by the state or city at the public expense. *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 682, 29 L. Ed. 525.

The city of Los Angeles having by its solemn contract and for various considerations therein named, given to the party under whom the defendant water company claimed the privilege of introducing, distributing and selling the water to the inhabitants of that city on certain terms and conditions, with which the defendant water company has complied, it was not within the power of the city authorities, by ordinance or otherwise, afterwards to impose additional burdens as a condition to the exercise of the rights and privileges granted. *Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558, 578, 44 L. Ed. 886.

The right of way for its tracks over certain designated streets and public grounds granted to a railway company by a valid ordinance is a franchise of which it cannot be divested by a subsequent grant of a similar right over the same streets and public places to another company. *New Orleans, etc., R. Co. v. Delamore*, 114 U. S. 501, 29 L. Ed. 244.

Although the franchise to be a corporation comes from the state, the consent of a city to the laying down of the rails and the operation of its road through the streets of the city, when given, becomes a privilege or franchise granted to the cor-

**Special or Exclusive Right Must Be Clearly Made Out; Not to Extend beyond the Express Terms of the Grant.**—The exclusive right set up must be clearly expressed or necessarily inferred, and is not to be construed as extending beyond the express terms of the grant.<sup>92</sup>

poration, and is property belonging to it. *Detroit v. Detroit Citizens' St. R. Co.*, 184 U. S. 368, 394, 46 L. Ed. 592.

"So, if a company be chartered with power to construct and maintain a turnpike, erect toll gates and collect tolls, such franchise is protected by the constitution. *Turnpike Co. v. Illinois*, 96 U. S. 63, 24 L. Ed. 651; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. Ed. 463." *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 663, 40 L. Ed. 838.

A license to establish a ferry which does not extend across the river may be less valuable for that reason, but it is none the less valuable as a contract as far as it goes. *Conway v. Taylor*, 1 Black 603, 17 L. Ed. 191.

**92. Special or exclusive right must be clearly made out; not to extend beyond the express terms of the grant.**—*Fanning v. Gregoire*, 16 How. 524, 534, 14 L. Ed. 1043. See, generally, the titles CORPORATIONS; IMPAIRMENT OF OBLIGATION OF CONTRACTS; MUNICIPAL CORPORATIONS; STATUTES.

A contract by a city corporation with an existing gas company, by which the corporation conferred upon the company the exclusive privilege for a term of years, and till notified to the contrary, of lighting the city with such public lamps as might be agreed on, and also the right to lay down its pipes and extend its apparatus through all the streets, alleys, lanes, or squares of the city, and which declared that "still further to encourage the company, it would take fifty lamps to begin with, to be extended hereafter as the public wants and increase of the city might demand, and such as might be agreed upon by the company and the city corporation," the company, in consideration of these grants, concessions, and privileges binding itself to furnish to the city gas at half the price they charged their private consumers, does not give a right to the gas company exclusive of the city corporation's right to subscribe to the stock of a new gas company, whose object was to introduce gas into the same city. *Memphis City v. Dean*, 8 Wall. 64, 19 L. Ed. 326.

A grant to a municipal corporation, by its charter, of the power to establish and regulate ferries within the corporate limits of the town, without more, is not a power to grant exclusive franchises; it is not a case where the state has aliened to a municipal corporation its whole power to establish and regulate ferries within its limits. Under such grant the municipality does not possess power to confer exclusive ferry privileges upon others. *Min-turn v. Larue*, 23 How. 435, 437, 16 L. Ed. 574.

In the *Charles River Bridge* Case it was held that as the franchise of the ferry, and that of the bridge, were different in their natures, and were each established by separate grants which had no words to connect the privileges of the one with the privileges of the other, there was no rule of legal interpretation which could authorize the court to associate those grants together, and to infer that any privilege was intended to be given to the bridge company, merely because it had been conferred on the other; that the charter of the bridge company was a written instrument, and must speak for itself and be interpreted by its own terms; that the ferry right which was owned by Harvard College was extinguished by the building of the *Charles River Bridge*; and that the ferry, with all its privileges, was then at an end forever. *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. Ed. 773.

The Virginia act of March 5, 1840, providing that it should not be lawful for the court of any county to grant leave to establish a ferry over any watercourse within one-half mile, in a direct line of any other ferry legally established over the same watercourse, did not confer any vested right upon the proprietors of ferries, or tie the hands of the legislature. Such act was merely one of general legislation prescribing a rule of conduct for the county courts in the establishment of ferries, and did not confer any vested or contract right upon the proprietors of ferries. *Williams v. Wingo*, 177 U. S. 601, 44 L. Ed. 905.

In 1838, the legislature of the Territory of Iowa authorized Fanning, his heirs and assigns, to establish and keep a ferry across the Mississippi River, at the town of Dubuque, for the term of twenty years; and enacted further, that no court or board of county commissioners should authorize any person to keep a ferry within the limits of the town of Dubuque. In 1840, Fanning was authorized to keep a horse ferry boat instead of a steamboat. In 1847, the general assembly of the state of Iowa passed an act to incorporate the city of Dubuque, the fifteenth section of which enacted that the city council should have power to license and establish ferries across the Mississippi River from said city to the opposite shore and to fix the rates of the same. In 1851 the mayor of Dubuque, acting by the authority of the city council, granted a license to Gregoire to keep a ferry for six years from the 1st of April, 1852, upon certain payments and conditions. The right granted to Fanning was not exclusive of such a license as this. The prohibition to license another ferry did not extend to the legislature, nor to the city council, to whom the



**Franchises May Be Lost by Nonuser or Misuser.**—A private corporation created by the legislature may lose its franchises by a misuser or nonuser of them, and they may be resumed by the government under a judicial judgment upon a quo warranto to ascertain and enforce the forfeiture. This is the common law of the land, and is a tacit condition annexed to the creation of every corporation.<sup>93</sup>

**Abolition of Exclusive Privileges upon Change of Government.**—Upon a change of government, such exclusive privileges, attached to a private corporation, as are inconsistent with the new government may be abolished.<sup>94</sup>

13. **RIGHTS OF TRUSTEES, GUARDIANS, PERSONAL REPRESENTATIVES, ETC.**—As to corporate property vested in trustees in their corporate capacity, each trustee has a vested right, and legal interest, in his office, and it cannot be divested but by due course of law.<sup>95</sup> As to the rights of a personal representative, the lands of an intestate descend, not to the administrator, but to the heir; they vest in the heir subject to sale for the payment of the ancestor's debts. The administrator has no estate in the land, but may have a power to sell under the state law. This power to sell is not a vested interest of the administrator or of trustees for the creditors; the repeal of the law empowering the court to order a sole divests no vested estate, since the mode of subjecting the property of the debtor to the demands of the creditor must always depend on the wisdom of the legislature.<sup>96</sup>

legislature had delegated its power. *Fanning v. Gregoire*, 16 How. 524, 14 L. Ed. 1043.

In the year 1819, the legislature of Illinois authorized Samuel Wiggins, his heirs and assigns, to establish a ferry on the east bank of the Mississippi River, near the town of Illionis, and to run the same from lands "that may belong to him," provided the ferry should be put into actual operation within eighteen months. At this time Wiggins had no land, but within the eighteen months acquired an interest in a tract of one hundred acres: In 1821, another act was passed, authorizing him to remove the ferry "on any land that may belong to him" on the said Mississippi River, under the same privileges as were prescribed by the former act. Held, that the words of this act, "on any land that may belong to him," must be construed to apply to the lands which then belonged to him, and not to such as he obtained after the passage of the act in 1822; and a rival ferry having been established in 1839, it was held that Wiggins and those claiming under him could not claim an exclusive franchise to maintain a ferry at that place. *Mills v. St. Clair County*, 8 How. 569, 583, 12 L. Ed. 1201.

"But even in such cases, if the second charter be for a similar franchise, but to be exercised in a substantially different manner, the exclusive right conferred by the first charter is held not to be violated; as, for instance, if the first charter be for an ordinary bridge, and the second for a railway viaduct, impossible for man or beast to cross, except in railway cars. *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 116, 17 L. Ed. 571, so, if the first franchise be for the sole privilege of supplying a city with water from a designated source, it is not impaired by a grant to another party of the privilege to supply it

with water from a different source. *Stein v. Bienville Water Supply Co.*, 141 U. S. 67, 35 L. Ed. 622." *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 664, 665, 40 L. Ed. 838.

A statute conferring upon an individual the exclusive privilege of establishing and conducting a ferry at a certain place, but which reserves to the state the right to repeal so much of the law as confers an exclusive privilege, can only mean that rival ferries may be established at the discretion of the legislature; and a statute authorizing the establishment of a rival ferry is not obnoxious as impairing the obligation of a contract with the original grantee. *Mills v. St. Clair County*, 8 How. 569, 583, 12 L. Ed. 1201.

**93. Franchises may be lost by nonuser or misuser.**—*Terrett v. Taylor*, 9 Cranch 43, 51, 3 L. Ed. 650.

**94. Abolition of exclusive privileges upon change of government.**—*Terrett v. Taylor*, 9 Cranch 43, 51, 3 L. Ed. 650.

Thus the change of government incident to the revolution and the separation from the British crown was sufficient to authorize the legislature of Virginia to take away the public patronage, the exclusive cure of souls, and the compulsory taxation for the support of the established church; but it could not authorize the appropriation or confiscation of property owned by the church. *Terrett v. Taylor*, 9 Cranch 43, 50, 3 L. Ed. 650.

**95. Rights of trustees.**—*Dartmouth College v. Woodward*, 4 Wheat. 518, 705, 4 L. Ed. 629. See, generally, the title **TRUSTS AND TRUSTEES**.

**96. Rights of personal representatives.**—*Bank v. Dudley*, 2 Pet. 492, 7 L. Ed. 496. See, generally, the title **EXECUTORS AND ADMINISTRATORS**.

**Rights of guardians.**—See the title **GUARDIAN AND WARD**.



14. **RIGHTS OF DONORS AND BENEFICIARIES UNDER CHARITABLE TRUSTS.**—Persons contributing land, money or other property to the establishment of a public charity, as for example, a college for the education of youth, having parted with the property bestowed upon such charity, are without interest therein so long as the corporation shall exist; nor have their representatives any interest therein.<sup>97</sup> The donors, or claimants of the bounty, if they can appear in court at all, can appear only to complain of the trustees. In all other situations they are identified with and personated by the trustees; and their rights are to be defended and maintained by them.<sup>98</sup> There is an implied contract, however, that the founder of a private charity, or his heirs, or other persons appointed by him for that purpose, shall have the right to visit and to govern the corporation, of which he is the acknowledged founder and patron; and also, that in case of its dissolution, the reversionary rights of the founder to the property, with which he has endowed it, shall be preserved inviolate.<sup>99</sup>

15. **SUBSTITUTION OF TRUSTEES; RIGHTS OF BENEFICIARIES.**—A statute authorizing a chancellor to discharge trustees named in a will and to appoint new ones, is valid if passed at the request of the trustees discharged. The cestuis que trustent cannot complain, since the discharge of one trustee and the substitution of another does not defeat the trust nor deprive them of any vested right.<sup>1</sup>

16. **RIGHTS OF SHERIFF OR OTHER OFFICER UNDER ATTACHMENTS, EXECUTIONS, ETC.**—See the titles **EXECUTIONS; SHERIFFS AND CONSTABLES; SHERIFFS', CONSTABLES' AND MARSHALS' SALES; UNITED STATES MARSHALS.**

17. **RIGHTS UNDER CONDEMNATION PROCEEDINGS.**—As to when the right of the state, or the right of a corporation authorized to condemn property, becomes vested as to property condemned, see the title **EMINENT DOMAIN**. See, also, post, "Statutes Awarding New Trial, Right of Appeal, etc.," VIII, C, 13, h.

18. **PROPERTY RIGHTS JURE MARITIM.**—During the life of the husband the right of dower is a mere expectancy or possibility. In that condition of things, the lawmaking power may deal with it as may be deemed proper. It is not a natural right. It is wholly given by law, and the power that gave it may increase, diminish, or otherwise alter it, or wholly take it away. It is upon the same footing with the expectancy of heirs, apparent or presumptive, before the death of the ancestor.<sup>2</sup> The same doctrine prevails with respect to the husband's curtesy. In the absence of statutory provision to the contrary, marriage, actual seisin of the wife, birth of issue, and the death of the wife are all requisite to create an estate by the curtesy.<sup>3</sup> This being true, marriage and the birth of is-

97. **Rights of donor in charitable trust.**—*Dartmouth College v. Woodward*, 4 Wheat. 518, 641, 645, 646, 4 L. Ed. 629. See, also, the title **CHARITIES**, vol. 3, pp. 690, 695.

98. **Same—Rights of beneficiaries under trust.**—*Dartmouth College v. Woodward*, 4 Wheat. 518, 645, 646, 4 L. Ed. 629. See, also, the title **CHARITIES**, vol. 3, p. 695.

Where property and funds are given to establish a public institution of learning for the benefit of the youth of the country, or of any particular portion thereof, no individual youth has a vested interest therein. *Dartmouth College v. Woodward*, 4 Wheat. 518, 641, 4 L. Ed. 629.

Where such charity is incorporated, the rights of those persons entitled to become students in such institution are collectively and in the aggregate to be exercised, asserted and protected by the corporation. *Dartmouth College v. Woodward*, 4 Wheat. 518, 643, 4 L. Ed. 629.

Where no corporation capable of taking under the grant.—Where there was no duly and legally constituted church ca-

pable of taking under a grant (and in this case a voluntary society of Episcopalians was held not to be such church) the grant of a glebe by the crown remained as an *hereditas jacens*, and the state, which succeeded to the rights of the crown, might, with the assent of the town, alien or encumber it; or might erect an Episcopal church thereon, and collate its parson. *Pawlet v. Clark*, 9 Cranch 292, 3 L. Ed. 735.

99. **Visitorial rights of founder, his heirs, or appointees.**—*Dartmouth College v. Woodward*, 4 Wheat. 518, 568, 4 L. Ed. 629. And see *United States v. Des Moines, etc.*, R. Co., 142 U. S. 510, 538, 35 L. Ed. 1099. See, also, the title **CHARITIES**, vol. 3, p. 690.

1. **Substitution of trustees.**—*Williamson v. Suydam*, 6 Wall. 723, 18 L. Ed. 967. See, also, the title **TRUSTS AND TRUSTEES**.

2. **Rights jure maritii; dower.**—*Randall v. Kreiger*, 23 Wall. 137, 148, 23 L. Ed. 124. See, generally, the title **DOWER**.

3. *Davis v. Mason*, 1 Pet. 503, 507, 7 L.

sue confers no vested rights upon the husband in lands which the wife has not then acquired, and it is competent for the state to provide, by constitutional adoption, that all property thereafter acquired by the wife shall constitute her sole and separate estate free from any claim or interest therein by the husband.<sup>4</sup>

**Peculiar State Law.**—If under the law of any particular state or locality, however, the husband acquires a vested interest in the wife's property by virtue of the marriage or birth of issue, the state cannot, by the adoption of a new constitution, deprive him of such right.<sup>5</sup>

**19. RIGHT TO DISPOSE OF PROPERTY BY WILL; RIGHTS OF HEIRS, DEVISEES, ETC.**—The right of the owner of property to dispose of the same by will is not a vested right, but is entirely subject to the control of the state. The state may regulate its descent, distribution or transfer by will, subject to such conditions as it may see fit to impose.<sup>6</sup> Similarly the right to take property by devise or descent is a creature of the law, and not a natural right—a privilege—and therefore the authority which confers it may impose conditions upon it.<sup>7</sup> The living have no heirs, and there can be no vested right in laws providing who shall be heirs and distributees, while the owner of the estate is still living. The expectation which one may have under existing laws is nothing more than an expectancy. It is not until the moment of death that there is any vested or property right in the persons designated as heirs and distributees; and until that event occurs, the laws regulating the descent and distribution of estates may be moulded according to the legislative discretion.<sup>8</sup>

**When Law Takes Effect; Rights after Death.**—Laws upon those subjects take effect at once, in all respects as if they had preceded the birth of such persons then living. Upon the death of the husband and ancestor the rights of the widow and the heirs become fixed and vested. Thereafter their titles respectively rest upon the same foundation, and are protected by the same sanctions as other rights of property.<sup>9</sup>

**Vested Interest Only in Surplus.**—But while it is true, in a general sense, that the titles of an heir by descent, in the real estate of his ancestor, and of a devisee to an estate unconditionally devised to him, are, upon the death of the party under whom they claim, immediately devolved upon them, and they acquire vested estates, each takes his title encumbered with all the liens which have been created by the decedent during his life, or by law at his decease. The interest of the heir or devisee, therefore, while it is vested by death, attaches only to the surplus which remains after the liens are discharged.<sup>10</sup>

**Inheritance and Legacy Taxes.**—As the right to take property by devise is

Ed. 239; *Mercer v. Selden*, 1 How. 37, 54, 11 L. Ed. 38; *Allen v. Hanks*, 136 U. S. 300, 310, 34 L. Ed. 414. See, also, the title CURTESY.

4. *Allen v. Hanks*, 136 U. S. 300, 34 L. Ed. 414.

5. *Same.*—*Allen v. Hanks*, 136 U. S. 300, 34 L. Ed. 414.

But under a law which entitles a husband, and through him his creditors, to appropriate the rents and profits of his wife's realty, neither the husband nor his creditors have any vested right to future rents and profits not in existence; and it is competent for the state, even as against existing judgments against the husband, to enact a statute providing that the husband, and of course his creditors, shall not be entitled to appropriate or subject the rents and profits thereafter accruing. *Baker v. Kilgore*, 145 U. S. 487, 36 L. Ed. 786.

6. **Right to dispose of property by will.**—*United States v. Fox*, 94 U. S. 315, 24 L. Ed. 192; *United States v. Perkins*, 163 U.

S. 625, 41 L. Ed. 287; *Plummer v. Coler*, 178 U. S. 115, 44 L. Ed. 998; *Murdock v. Ward*, 178 U. S. 139, 44 L. Ed. 1009; *Sherman v. United States*, 178 U. S. 150, 44 L. Ed. 1014.

7. **Right to take by devise or descent, etc.**—*Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. Ed. 1037; *Knowlton v. Moore*, 178 U. S. 41, 55, 44 L. Ed. 969; *Plummer v. Coler*, 178 U. S. 115, 44 L. Ed. 998; *Murdock v. Ward*, 178 U. S. 139, 44 L. Ed. 1009; *Sherman v. United States*, 178 U. S. 150, 44 L. Ed. 1014; *Orr v. Gilman*, 183 U. S. 278, 46 L. Ed. 196.

8. **Same—The living have no heirs.**—*Randall v. Kreiger*, 23 Wall. 137, 148, 23 L. Ed. 124; *Cooley, Const. Law*, 3d Ed. 352.

9. **Same—When laws take effect.**—*Randall v. Kreiger*, 23 Wall. 137, 148, 23 L. Ed. 124.

10. **Vested interest in surplus only.**—*Wilkinson v. Leland*, 2 Pet. 627, 7 L. Ed. 542. See the titles EXECUTORS AND ADMINISTRATORS; WILLS.



not an inherent or natural right, but a privilege accorded by the state, it may impose a tax or charge thereon.<sup>11</sup> Upon this principle inheritance and legacy taxes have been held not to divest any vested right but to be constitutional and valid.<sup>12</sup>

**Same—May Be Applied to Estates Already in Course of Administration.**—While the supreme court of the United States has defined the nature of an inheritance tax it has not attempted to prescribe the time of its imposition. The time at which a tax should be imposed is a question for the legislative department of the state. It may select the moment of death, or it may exercise its power during any of the time it holds the property from the legatee.<sup>13</sup> It is not until it has yielded its contribution to the state that it becomes the property of the legatee.<sup>14</sup> A statute enacted after the death of a testator, imposing an inheritance tax, and having a retroactive effect making it apply to his estate still in the course of administration, is not unconstitutional as depriving his heirs or legatees of any vested or property right or of property without due process of law.<sup>15</sup>

**Vested Rights under Powers of Appointment.**—Likewise the right to take property by virtue of the exercise of a power of appointment created by last will and testament is not a vested right, and it is competent for the state, by a stat-

**11. Inheritance and legacy taxes.**—Orr v. Gilman, 183 U. S. 278, 46 L. Ed. 196.

**12. Same.**—Mager v. Grima, 8 How. 490, 12 L. Ed. 1168; United States v. Perkins, 163 U. S. 625, 41 L. Ed. 287; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. Ed. 1037; Knowlton v. Moore, 178 U. S. 41, 55, 44 L. Ed. 969; Plummer v. Coler, 178 U. S. 115, 44 L. Ed. 998; Murdock v. Ward, 178 U. S. 139, 44 L. Ed. 1009; Sherman v. United States, 178 U. S. 150, 44 L. Ed. 1014. See, also, ante, "Permits Classification and Diversity in Taxation," VII, B, 5, d, note.

**13. Same—May be applied to estates already in course of administration.**—See Cahen v. Brewster, 203 U. S. 543, 551, 51 L. Ed. 310, in which it is said that there is nothing in the cases of United States v. Perkins, 163 U. S. 625, 41 L. Ed. 287; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. Ed. 1037, or in Knowlton v. Moore, 178 U. S. 41, 44 L. Ed. 969, which restrains the power of the state as to the time of the imposition of the tax.

**14. Same.**—Cahen v. Brewster, 203 U. S. 543, 551, 51 L. Ed. 310; United States v. Perkins, 163 U. S. 625, 41 L. Ed. 287. See, also, Carpenter v. Pennsylvania, 17 How. 456, 15 L. Ed. 127.

**15. Same.**—Cahen v. Brewster, 203 U. S. 543, 51 L. Ed. 310, affirming the validity of the Louisiana Act of June 28, 1904; Carpenter v. Pennsylvania, 17 How. 456, 15 L. Ed. 127.

So a statute imposing an inheritance tax in certain cases may, by amendment, be made to apply to estates already in the process of administration and which would not otherwise be subject to such tax. Carpenter v. Pennsylvania, 17 How. 456, 15 L. Ed. 127.

The state of Pennsylvania, in 1826, passed a law by which all inheritances, being within that commonwealth, and which, by the intestacy or the will of any dece-

dent, should devolve upon any other than the father, mother, wife, children, or lineal descendants of such person, should be subject to a tax. In 1850 an explanatory act was passed, declaring that the words "being within this commonwealth," should be so construed as to relate to all persons who were then or at the time of their decease, domiciled within this commonwealth, as well as to estates. In 1849, a citizen of Pennsylvania died, and his will was proved by a resident executor in December, 1849. The executor represented that a portion of the estate, consisting of securities, stocks, loans, and evidences of debt and property, was not within the commonwealth. The claimants under the will contended that the application of the act of 1826, by that of 1850, to a succession already in the course of settlement, and which had been appropriated by the last will of the decedent, involved an arbitrary change in the existing laws of inheritance to the extent of this tax and operated as a sequestration of that amount for the use of the state in violation of the constitutional rights of legatees under the will, which rights, they claimed, became vested at the death of the testator. The supreme court of Pennsylvania decided that the property described as being without the state was subject to the tax. Held, that while it is true that in some respects the rights of legatees under a will become vested by the death of a testator, yet, until the period of distribution arrives, the law of the decedent's domicile attaches to the property; that there is nothing in the constitution of the United States which prevent a state from extending its tax laws so as to include property in the process of administration, and that the state law did nothing more in this instance; and that no constitutional right of the legatees had been violated. Carpenter v. Pennsylvania, 17 How. 456, 15 L. Ed. 127.



ute enacted after the creation of the power, to impose an inheritance or transfer tax upon the privilege of exercising the same.<sup>16</sup>

20. **POLICE BENEFIT FUNDS; RIGHTS OF INDIVIDUAL MEMBERS.**—The individual members of a police force and their legal representatives have no vested right or interest in a police life and health insurance fund, created pursuant to a law requiring the reservation of a certain sum per month from the salary of each policeman for that purpose, until the happening of the event upon which the money or a part thereof is payable. Until that event, the fund is entirely under the control of the state, and it may, if it sees fit, transfer it to a different fund and devote it to purposes entirely different from those for which it was first created.<sup>17</sup> Neither has any policeman the right, in such case, to question the action of the state in reserving the monthly stipend from his salary, since as to the amount reserved, it is, properly speaking, no part of his salary, and it is entirely competent for the state to do with it as it may see fit.<sup>18</sup>

21. **INTEREST OR ESTATE IN PROFESSION OR OCCUPATION.**—The interest or estate acquired by one in his profession, that is, the right to continue its prosecution, is often of great value to its possessor, and cannot arbitrarily be taken away any more than real or personal property can be so taken.<sup>19</sup> Thus parties are admitted to practice law only upon satisfactory evidence that they possess fair private character and sufficient legal learning to conduct cases in courts for suitors. The order of admission is the judgment of the court that they possess the requisite qualifications both in character and in learning. By such admission they become officers of the court, and they hold their office during good behavior and can only be deprived of it by misconduct ascertained and declared by the judgment of the court after opportunity to be heard has been afforded.<sup>20</sup> Like-

**16. Vested rights under powers of appointment.**—*Orr v. Gilman*, 183 U. S. 278, 283, 46 L. Ed. 196.

A state law which imposes an inheritance or transfer tax upon a testamentary transfer of property under a power of appointment is not unconstitutional as impairing a vested right of the legatees named in the will executed under the power of appointment, since the right of such legatees become vested only upon the execution of the power and not upon the death of the testator whose will conferred the power. *Orr v. Gilman*, 183 U. S. 278, 46 L. Ed. 196.

Thus where a testator residing in New York died in 1890, leaving a will containing a power of appointment to his son, said power to be exercised by the son only by last will and testament, it was held that a subsequent act, enacted before the death of the son, and imposing an inheritance or transfer tax upon property disposed of under powers of appointment, was not unconstitutional as impairing any vested right of the beneficiary receiving the property from the son under the exercise of the power. *Orr v. Gilman*, 183 U. S. 278, 46 L. Ed. 196.

**17. Police benefit funds; rights of individual members.**—*Pennie v. Reis*, 132 U. S. 464, 33 L. Ed. 426.

An act of the legislature of the state of California provided that the treasurer of the city and county of San Francisco should reserve the sum of two dollars per month out of the salary of each police officer in that city, said amounts to be applied to the creation of a police life and

health insurance fund, out of which fund the sum of one thousand dollars should be paid, upon the death of a policeman, to his legal representatives. It was held that the fund so created was a public fund entirely under the control and disposal of the government, and that no policeman, whose salary had gone in part to help create the same, could acquire any vested right or interest therein during his lifetime; that until the happening of the contingency upon which the benefits thereunder were payable, his greatest interest therein amounted to nothing more than an expectancy or contingency, and that it was competent for the state, during his life, to transfer the fund, so created, to a different fund known as "the police relief and pension fund," which had been created under a repealing act and made subject to new and different dispositions and conditions. Therefore the administrator of a policeman who died subsequently to the new act could not claim the one thousand dollars provided to be paid by the first act. *Pennie v. Reis*, 132 U. S. 464, 33 L. Ed. 426.

**18. Same—Diversion of funds.**—*Pennie v. Reis*, 132 U. S. 464, 33 L. Ed. 426.

**19. Interest or estate in profession or occupation.**—*Dent v. West Virginia*, 129 U. S. 114, 121, 122, 32 L. Ed. 623.

**20. Same—Legal profession.**—*Ex parte Garland*, 4 Wall. 333, 378, 18 L. Ed. 366; *Bradley v. Fisher*, 13 Wall. 335, 355, 20 L. Ed. 646; *Ex parte Robinson*, 19 Wall. 505, 512, 22 L. Ed. 205; *Ex parte Wall*, 107 U. S. 265, 27 L. Ed. 552.

wise the right of a priest or minister of a regularly established church to preach and teach the Christian religion, and to exercise the functions pertaining to his office and calling, are rights of which he cannot be arbitrarily deprived.<sup>21</sup>

**Exclusion by Means of Test Oath.**—Neither priests nor lawyers can be deprived of the right to continue in the exercise of their respective professions by exacting from them an oath as to their past conduct respecting matters which have no connection with and no bearing upon their qualification or fitness to exercise the duties of their calling or profession.<sup>22</sup>

**Regulations Touching Qualifications and Fitness May Be Made Applicable to Existing Practitioners.**—But there is no arbitrary deprivation of the right to pursue any particular vocation where its exercise is not permitted because of a failure to comply with conditions imposed by the state for the protection of society. The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud.<sup>23</sup> A license from the governing authority of any municipality or state, to pursue any business or occupation, can be invoked for the protection of one in the pursuit of such business or occupation only so long as the same continues unaffected by existing or new conditions.<sup>24</sup>

**Right to Regulate Cannot Be Bargained Away.**—The responsibility of the legal authorities, municipal or state, so far as it relates to the power and duty to enact proper police regulations for the regulation of trades, businesses, and professions, and to prescribe from time to time new and additional requirements and qualifications for those seeking to enter, or for those desiring to continue in, any particular business, trade, occupation or profession, cannot be bargained or stipulated away.<sup>25</sup> It is competent, therefore, for the state to prescribe the qualifications, and the evidence thereof, to be possessed, not only by those seeking for the first time to enter any business or profession which affects the public and which requires special preparation and skill for its successful pursuit, but to prescribe, as knowledge advances along particular lines and as new and successful methods come into use in the practice of any particular profession, new and additional qualifications for those already engaged therein under a license from the state. And the revocation of an existing license and the denial of the right to continue in the practice or pursuit of a profession or occupation, by reason of failure or inability to comply with the new requirements, is not an arbitrary deprivation of any vested or constitutional right.<sup>26</sup>

**21. Same—Rights of clergy.**—*Cummings v. Missouri*, 4 Wall. 277, 18 L. Ed. 356.

**22. Same—Test oaths.**—*Cummings v. Missouri*, 4 Wall. 277, 18 L. Ed. 356; *Ex parte Garland*, 4 Wall. 333, 18 L. Ed. 366; *Hawker v. New York*, 170 U. S. 189, 198, 42 L. Ed. 1002.

**23. Same—Retroactive regulations touching, quality, fitness, etc.**—*Dent v. West Virginia*, 129 U. S. 114, 122, 32 L. Ed. 623; *Hawker v. New York*, 170 U. S. 189, 42 L. Ed. 1002; *Reetz v. Michigan*, 188 U. S. 505, 510, 47 L. Ed. 563.

**24. Same.**—*Gray v. Connecticut*, 159 U. S. 74, 77, 40 L. Ed. 80.

Thus a license to pursue the occupation or profession of a pharmacist does not confer upon the licensee any vested or contract right of which he is deprived by an additional regulation of such business requiring all persons engaged therein to take out of a druggist's license as a prerequisite to the right to use intoxicating liquors in compounding prescriptions.

*Gray v. Connecticut*, 159 U. S. 74, 77, 40 L. Ed. 80.

**25. Right to regulate cannot be bargained away.**—*Dent v. West Virginia*, 129 U. S. 114, 32 L. Ed. 623; *Gray v. Connecticut*, 159 U. S. 74, 77, 40 L. Ed. 80; *Hawker v. New York*, 170 U. S. 189, 42 L. Ed. 1002; *Reetz v. Michigan*, 188 U. S. 505, 510, 47 L. Ed. 563.

**26. Same—State may prescribe further regulations.**—*Dent v. West Virginia*, 129 U. S. 114, 122, 32 L. Ed. 623; *Hawker v. New York*, 170 U. S. 189, 42 L. Ed. 1002; *Reetz v. Michigan*, 188 U. S. 505, 510, 47 L. Ed. 563.

A statute which requires every practitioner of medicine to obtain a certificate from the state board of health that he is a graduate of a reputable medical college, and which prohibits, under pains and penalties, the practice of the art of healing by those who fail to obtain such certificate, is not unconstitutional as applied to an existing practitioner who is not a graduate of any school of medicine and



**Regulations May Extend to Moral as Well as Educational Qualifications.**—So the legislature has the power to require, as a condition of the right to practice in the first instance, or to continue in the practice of a particular profession, not only that the practitioner shall be possessed of the necessary learning and skill, but that he shall be possessed of the qualification of honor and good moral character, and may, with equal propriety, prescribe the evidence which shall furnish the test of the requisite honor and good moral character.<sup>27</sup>

**Regulations Having No Relation to Qualification or Fitness.**—It is only when the qualifications or regulations prescribed have no relation to the calling or profession to which they apply, or are unattainable by reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation.<sup>28</sup>

**22. INCHOATE TITLES TO REAL ESTATE.**—No principle is better settled in this country than that an inchoate title to lands is property.<sup>29</sup>

**23. PROFITS OF REAL ESTATE.**—A right to land implies a right to the profits accruing from it, since, without the latter, the former can be of no value; therefore a statute which impairs the right of the owner to recover the profits, impairs his right to the property itself.<sup>30</sup>

**24. PENSIONS.**—A pension granted by the government is a matter of bounty. No pensioner has a vested legal right to his pension. Pensions are the bounties of the government, which congress has the right to give, withhold, distribute or recall at its discretion.<sup>31</sup>

**25. LICENSES.**—See the titles **IMPAIRMENT OF OBLIGATION OF CONTRACTS; LICENSES.**

**26. RIPARIAN RIGHTS.**—See the titles **NAVIGABLE WATERS; WATERS AND WATERCOURSES.**

## **B. Power to Enact Retrospective Laws or Impair Vested Rights—**

**1. RETROSPECTIVE LAWS DEFINED.**—"Upon principle, every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, must be deemed retrospective."<sup>32</sup>

who is denied the right to continue in the practice of his profession by reason of his inability to obtain such certificate. *Dent v. West Virginia*, 129 U. S. 114, 32 L. Ed. 623.

**27. Regulations may extend to moral as well as educational qualifications.**—*Hawker v. New York*, 170 U. S. 189, 194, 42 L. Ed. 1002.

Thus a law which prohibits any person who has been convicted of a felony from practicing medicine within the state, is not unconstitutional as applied to the case of a physician who had not only been licensed to practice, but who had been convicted of felony before the enactment of such law. *Hawker v. New York*, 170 U. S. 189, 42 L. Ed. 1002.

**28. Regulations having no relation to qualification or fitness.**—*Dent v. West Virginia*, 129 U. S. 114, 121, 122. 32 L. Ed. 623; *Hawker v. New York*, 170 U. S. 189, 42 L. Ed. 1002; *Reetz v. Michigan*, 188 U. S. 505, 510, 47 L. Ed. 563.

**29. Inchoate title to real estate.**—*Sims v. Irvine*, 3 Dall. 425, 456, 1 L. Ed. 663; *Delassus v. United States*, 9 Pet. 117, 9 L. Ed. 71; *Mitchel v. United States*, 9 Pet. 711, 9 L. Ed. 283.

In *Chouteau v. United States*, 9 Pet. 137, 9 L. Ed. 78, the court said: "The

transfer of the power to make concessions of lands belonging to the royal domain of Spain, from the governor general to the intendent general, did not affect the power of the subdelegate, who made this concession. The order in this case is the foundation of title, and is, according to the act of congress on the subject of confirming titles to lands, in Missouri, etc., and the general understanding and usages of Louisiana and Missouri, capable of being perfected into a complete title; it is property, capable of being aliened, of being subjected to debts; and is, as such, to be held as sacred and inviolate as other property."

**30. Profits of real estate.**—*Green v. Bidle*, 8 Wheat. 1, 76, 5 L. Ed. 547.

**Vested right of husband in future profits of wife's realty.**—See ante, "Property Rights *Jure Maritii*," VIII, A, 18.

**31. Pensions.**—*Walton v. Cotton*, 19 How. 355, 15 L. Ed. 658; *United States v. Teller*, 107 U. S. 64, 68, 27 L. Ed. 352; *Frisbie v. United States*, 157 U. S. 160, 166, 39 L. Ed. 657.

**32. Retrospective laws defined.**—*Calder v. Bull*, 3 Dall. 386, 391, 1 L. Ed. 648; *Sturges v. Carter*, 114 U. S. 511, 519, 29 L. Ed. 240.



2. **VALIDITY; POWER TO DIVEST VESTED RIGHTS**—a. *Generally*.—A retrospective law which takes away or impairs rights vested agreeable to existing laws, is generally unjust, and may be oppressive; and it is a general rule that a law should not operate retrospectively; but there are cases in which laws may justly and for the benefit of the community and also of individuals, relate to a time antecedent to their commencement; as statutes of oblivion or of pardon.<sup>33</sup> The federal constitution contains no prohibition in terms against retrospective laws; and previous to the adoption of the fourteenth amendment, it was well settled that there existed in the state governments a general power to enact such laws; the only limit upon such power being that they should not be such as were technically *ex post facto* or such as impaired the obligation of contracts. If a law was not obnoxious to either of these provisions, the federal courts had no right to pronounce it void from the mere fact that it divested antecedently vested rights of property.<sup>34</sup> Since the adoption of the fourteenth amendment, however, retrospective

**33. Power to divest vested rights.**—*Calder v. Bull* (opinion of Chase, J.), 3 Dall. 386, 391, 1 L. Ed. 648.

**34. Same—Under the federal constitution prior to the fourteenth amendment.**—*Calder v. Bull*, 3 Dall. 386, 391, 1 L. Ed. 648; *Satterlee v. Matthewson*, 2 Pet. 380, 413, 7 L. Ed. 458 (distinguishing *Vanhorne v. Dorrance*, 2 Dall. 304, 1 L. Ed. 391, and *Society for the Propagation of the Gospel v. New Haven*, 8 Wheat. 464, 5 L. Ed. 662, upon the ground that the decisions in those cases were founded expressly upon constitutional provisions). *Wilkinson v. Leland*, 2 Pet. 627, 7 L. Ed. 542; *Jackson v. Lamphire*, 3 Pet. 280, 289, 7 L. Ed. 679; *Society for the Propagation of the Gospel v. Pawlet*, 4 Pet. 480, 7 L. Ed. 927; *Watson v. Mercer*, 8 Pet. 88, 110, 8 L. Ed. 876; *Briscoe v. Bank*, 11 Pet. 257, 3280, 9 L. Ed. 709; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. Ed. 773; *Baltimore, etc., R. Co. v. Nesbit*, 10 How. 395, 401, 13 L. Ed. 469; *Kearney v. Taylor*, 15 How. 494, 14 L. Ed. 787; *Locke v. New Orleans*, 4 Wall. 172, 173, 18 L. Ed. 334; *Curtis v. Whitney*, 13 Wall. 68, 70, 20 L. Ed. 513; *Osborn v. Nicholson*, 13 Wall. 654, 662, 20 L. Ed. 689; *Randall v. Kreiger*, 23 Wall. 137, 23 L. Ed. 124; *Blount v. Windley*, 95 U. S. 173, 180, 24 L. Ed. 424.

There is no constitutional inhibition against retrospective laws. Though generally distrusted, they are often beneficial, and sometimes necessary. Where they violate no provision of the constitution of the United States, there exists no power in the federal courts to declare them void. *Blount v. Windley*, 95 U. S. 173, 180, 24 L. Ed. 424.

There is no part of the constitution of the United States which applies to a state law which divests rights vested by law in an individual, provided its effect be not to impair the obligation of a contract. "In the case of *Fletcher v. Peck*, 6 Cranch 87, 3 L. Ed. 162, it was stated by the chief justice, that it might well be doubted, whether the nature of society and of the government do not prescribe some limits to the legislative power; and he asks, 'if any be prescribed, where are they to be

found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?' It is nowhere intimated in that opinion that a state statute which divests a vested right is repugnant to the constitution of the United States." *Satterlee v. Matthewson*, 2 Pet. 380, 413, 414, 7 L. Ed. 458, distinguishing *Vanhorne v. Dorrance*, 2 Dall. 304, 1 L. Ed. 391; *Society for the Propagation of the Gospel v. New Haven*, 8 Wheat. 464, 5 L. Ed. 662.

"No exposition of the constitution is better settled, or commands more universal assent, than that the prohibition does not extend to the passage of retrospective, unjust, oppressive laws, or those which divest rights, antecedently vested, if they do not directly impair the obligation of a contract (*Satterlee v. Matthewson*, 2 Pet. 380, 411, 7 L. Ed. 458; *Jackson v. Lamphire*, 3 Pet. 280, 289, 7 L. Ed. 679; *Watson v. Mercer*, 8 Pet. 88, 110, 8 L. Ed. 876); and that 'the interest, wisdom and justice of the representative body and its relations with its constituents furnish the only security, where there is no express contract, against unjust and excessive taxation, as well as against unwise legislation generally.' *Providence Bank v. Billings*, 4 Pet. 514, 563, 7 L. Ed. 939." *Briscoe v. Bank* (opinion of Baldwin, J.), 11 Pet. 257, 3280, 9 L. Ed. 709.

"In *Baltimore, etc., R. Co. v. Nesbit*, 10 How. 395, 401, 13 L. Ed. 469, it was said: 'That there exists a general power in the state governments to enact retrospective or retroactive laws, is a point too well settled to admit of question at this day. The only limit upon this power in the states by the federal constitution, and therefore the only source of cognizance or control with respect to that power existing in this court, is the provision that these retrospective laws shall not be such as are technically *ex post facto*, or such as impair the obligation of contracts. Thus, in the case of *Watson v. Mercer*, 8 Pet. 88, 110, 8 L. Ed. 876, the court say: 'It is clear that this court has no right to pronounce an act of the state legislature void, as contrary to the constitution of the United States, from the mere fact that

laws which work a deprivation of property without due process of law are also inhibited.<sup>35</sup> But even since the adoption of the fourteenth amendment a statute of a state is not brought into conflict with the federal constitution by the mere fact that it is retroactive in its operation.<sup>36</sup>

**As Regards the Power of Congress.**—"The United States cannot, any more than a state, interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents states from passing laws impairing the obligation of contracts, but equally with the states they are prohibited from depriving persons or corporations of property without due process of law."<sup>37</sup>

b. *Presumption as to Existence of Power.*—The power of a legislative body to violate and disregard the rights of personal liberty and private property is a right repugnant to the principles of justice and civil liberty, and is not to be presumed or implied from any general grant of legislative authority. The people ought not to be presumed to part with rights so vital to their security and well-

it divests antecedent vested rights of property. The constitution of the United States does not prohibit the states from passing retrospective laws generally, but only ex post facto laws. Now, it has been solemnly settled by this court that the phrase ex post facto is not applicable to civil laws, but to penal and criminal laws." For this position is cited the case of *Calder v. Bull*, already mentioned; of *Fletcher v. Peck*, 6 Cranch 87, 138, 3 L. Ed. 162; *Ogden v. Saunders*, 12 Wheat 213, 266, 6 L. Ed. 606, and *Satterlee v. Matthewson*, 2 Pet. 380, 7 L. Ed. 458." *League v. Texas*, 184 U. S. 156, 161, 46 L. Ed. 478.

"The true distinction is between ex post facto laws and retrospective laws. Every ex post facto law must necessarily be retrospective; every retrospective law is not an ex post facto law; the former only are prohibited." (Opinion of Chase, J.) *Calder v. Bull*, 3 Dall. 386, 391, 1 L. Ed. 648.

**35. Same—Since the adoption of the fourteenth amendment.**—*Freeland v. Williams*, 131 U. S. 405, 420, 33 L. Ed. 193; *Farrington v. Tennessee*, 95 U. S. 679, 683, 24 L. Ed. 558.

The protection of vested rights of property is a supreme duty of the courts. *Chicago, etc., R. Co. v. Wellman*, 143 U. S. 339, 346, 36 L. Ed. 176.

"Where the police power is invoked in good faith for the prohibition of a practice which the legislature has declared to be detrimental to the public interests, it will be sustained, wherever it can be done without the impairment of vested rights." *Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677, 700, 40 L. Ed. 849.

**36. Statute not invalid merely because it is retroactive.**—*League v. Texas*, 184 U. S. 156, 161, 46 L. Ed. 478.

Speaking of the decision in *Baltimore, etc., R. Co. v. Nesbit*, 10 How. 395, 401, 13 L. Ed. 469, the court says: "This decision, it is true, was before the fourteenth amendment, and the restrictions

placed by that amendment upon state action apply to retrospective as well as prospective legislation. But it contains no prohibition of retrospective legislation as such, and therefore now, as before, the mere fact that a statute is retroactive in its operation does not make it repugnant to the federal constitution." *League v. Texas*, 184 U. S. 156, 161, 46 L. Ed. 478.

**37. As regards the power of congress.**—*Sinking-Fund Cases*, 99 U. S. 700, 25 L. Ed. 496; *United States v. Union Pac. R. Co.*, 160 U. S. 1, 34, 40 L. Ed. 319.

The United States cannot legislate back to themselves, without making compensation, the land they have given to a corporation to aid in the construction of its railroad. *Sinking-Fund Cases*, 99 U. S. 700, 25 L. Ed. 496; *United States v. Union Pac. R. Co.*, 160 U. S. 1, 34, 40 L. Ed. 319.

Neither can they by legislation compel a corporation to discharge its obligations in respect to subsidy bonds otherwise than according to the terms of the contract already made in that connection. *Sinking-Fund Cases*, 99 U. S. 700, 25 L. Ed. 496; *United States v. Union Pac. R. Co.*, 160 U. S. 1, 34, 40 L. Ed. 319.

"The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a state or a municipality or a citizen. No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation." *Sinking-Fund Cases*, 99 U. S. 700, 25 L. Ed. 496; *United States v. Union Pac. R. Co.*, 160 U. S. 1, 34, 40 L. Ed. 319.

"But congress had the power, wholly irrespective of prior legislation, retroactively to fix the salary payable to a justice of the supreme court of the District of Columbia for an antecedent year." *James v. United States*, 202 U. S. 401, 407, 50 L. Ed. 1074.



being without very strong and direct expressions of such an intention.<sup>38</sup>

**C. What Constitutes Impairment of Vested Rights**—1. CONSTRUCTION; IMPAIRMENT BY IMPLICATION NOT FAVORED.—The doctrines of the repeal of statutes and the destruction of vested rights by implication, are alike unfavored in the law. Neither is to be admitted unless the implication is so clear as to be equivalent to an explicit declaration. Every doubt should be resolved against a construction so fraught with mischief.<sup>39</sup> There is a presumption against retrospective operation, and words in a statute ought not to have such operation "unless they are so clear, strong, and imperative, that no other meaning can be annexed to them, or unless the intention of the legislator cannot be otherwise satisfied."<sup>40</sup>

2. IMPAIRMENT BY LEGISLATIVE CONSTRUCTION OF STATUTES.—In our system of government the lawmaking power is vested in congress and in the several state legislatures, and the power to construe laws in the course of their administration between citizens, in the courts. Congress cannot, therefore, under cover of giving a construction to an existing, or expired statute, invade private rights with which it could not interfere by a new or affirmative statute.<sup>41</sup> But a legislative body may by statute declare the construction of previous statutes so as to bind the courts in reference to all transactions occurring after the passage of the law, and

**38. Presumptions as to existence of power.**—*Wilkinson v. Leland*, 2 Pet. 627, 657, 7 L. Ed. 542.

**39. Impairment by implication not favored.**—*Calder v. Bull*, 3 Dall. 386, 395, 1 L. Ed. 648; *Osborn v. Nicholson*, 13 Wall. 654, 662, 20 L. Ed. 689; *United States v. Burr*, 159 U. S. 78, 40 L. Ed. 82; *De Lima v. Bidwell*, 182 U. S. 1, 200, 45 L. Ed. 1041; *Southwestern Coal Co. v. McBride*, 185 U. S. 499, 503, 46 L. Ed. 1010; *Lincoln v. United States*, 202 U. S. 484, 498, 50 L. Ed. 1117; *United States v. American Sugar Refin. Co.*, 202 U. S. 563, 577, 50 L. Ed. 1149; *United States v. Heinszen & Co.*, 206 U. S. 370, 390, 51 L. Ed. 1098.

"The doctrine of the sacredness of vested rights has its root deep in the common law of England, whence so much of our own has been transplanted. Kent, then chief justice, said: It is a principle of that law, 'as old as the law itself, that a statute even of its omnipotent parliament is not to have a retrospective effect.'" *Farrington v. Tennessee*, 95 U. S. 679, 683, 24 L. Ed. 558.

**40. Same—Presumption.**—*United States v. American Sugar Refin. Co.*, 202 U. S. 563, 577, 50 L. Ed. 1149; *United States v. Burr*, 159 U. S. 78, 40 L. Ed. 82.

"The function of the legislature is to prescribe rules to operate upon the actions and rights of citizens in the future. While, in the absence of a constitutional inhibition, the legislature may give to some of its acts a retrospective operation, the intention to do so must be clearly expressed, or necessarily implied from what is expressed; and, assuming the legislature to possess the power, its act will not be construed to impair or destroy a vested right under a valid contract unless it is so framed as to preclude any other interpretation." *Southwestern Coal Co. v. McBride*, 185 U. S. 499, 503, 46 L. Ed. 1010.

Even if congress could deprive plain-

tiffs of their vested rights in process of being asserted, *Hamilton v. Dillin*, 21 Wall. 73, 22 L. Ed. 528, still it is not to be presumed to do so on language which, literally taken, has a narrower sense. *Lincoln v. United States*, 202 U. S. 484, 498, 50 L. Ed. 1117; *United States v. Heinszen & Co.*, 206 U. S. 370, 390, 51 L. Ed. 1098.

Where an act claimed to be retrospective is expressed in the simple future tense, this must be given weight. *United States v. Goldenberg*, 168 U. S. 95, 102, 42 L. Ed. 394; *United States v. American Sugar Refin. Co.*, 202 U. S. 563, 578, 50 L. Ed. 1149.

The act of congress passed March 24, 1900, ch. 339, 31 Stat. 151, applying to the benefit of Porto Rico the amount of customs revenue received on importations from that island previous to its enactment, should not be so interpreted as to make it retroactive, or as destroying a right of action already brought for the purpose of recovering such duties paid under protest. *DeLima v. Bidwell*, 182 U. S. 1, 200, 45 L. Ed. 1041.

Congress, by the Curtis act, approved June 28, 1898, neither attempted nor intended to interfere with the rights of lessors to royalties due them under their leases at the date of the passage of the act. *Southwestern Coal Co. v. McBride*, 185 U. S. 499, 504, 46 L. Ed. 1010.

**Effect of thirteenth amendment.**—The vested rights of neither buyer nor seller under a contract for the sale of a slave, valid under the law as it existed when made, were impaired by the thirteenth amendment. *Boyce v. Tabb*, 18 Wall. 546, 21 L. Ed. 757, following *Osborn v. Nicholson*, 13 Wall. 654, 655, 20 L. Ed. 689; *White v. Hart*, 13 Wall. 646, 647, 20 L. Ed. 685.

**41. Impairment by construction of existing or expired statute.**—*Stockdale v. Insurance Companies*, 20 Wall. 323, 332, 22 L. Ed. 348.



may in many cases thus furnish the rule to govern the courts in transactions which are past, provided no constitutional right of the parties concerned is violated.<sup>42</sup> Where it can exercise a power by passing a new statute, which may be retroactive in its effect, the form of words it may use to put this power in operation cannot be material if the purpose is clear, and that purpose is within the power.<sup>43</sup>

3. **EFFECT OF CHANGE OF GOVERNMENT OR DIVISION OF TERRITORY.**—The division of a country and the maintenance of independent governments over its different parts do not of themselves divest the rights which the citizens of either have to property situate within the territory of the other.<sup>44</sup> The sovereign who acquires an inhabited country acquires full dominion over it; but this dominion is never supposed to divest the vested rights of individuals to property.<sup>45</sup>

4. **APPROPRIATION OF PRIVATE PROPERTY TO PUBLIC USE.**—By the common law, if not by the universal law of all free governments, private property may be taken for public use, upon making to the individual a just compensation.<sup>47</sup>

5. **CONFISCATION ACTS.**—The confiscation acts enacted during the Civil War were held to be constitutional as an exercise of the war powers of the government.<sup>48</sup>

42. **Same.**—*Stockdale v. Insurance Companies*, 20 Wall. 323, 331, 22 L. Ed. 348. See, also, *Pennsylvania v. Wheeling, etc., Bridge Co.*, 18 How. 421, 15 L. Ed. 435; *The Clinton Bridge*, 10 Wall. 454, 19 L. Ed. 969.

43. **Form of statute immaterial.**—*Stockdale v. Insurance Companies*, 20 Wall. 323, 332, 22 L. Ed. 348.

Congress may pass a law to reimpose a tax retrospectively, and it may provide that a statute imposing a tax shall be construed as having extended to a time beyond the limitation fixed upon its operation by its own terms. *Stockdale v. Insurance Companies*, 20 Wall. 323, 22 L. Ed. 348.

Thus where it was a mooted question whether certain sections of the internal revenue law of 1864 expired and became inoperative, *ex vi termini*, in the year 1869, or in the year 1870, congress having the power to revive or renew the tax by a new statute, operating retrospectively for the year 1870, it was held that § 17 of the act of July 14, 1870, which provided that the sections in question "shall be construed to impose the taxes therein mentioned to the first day of August, 1870," etc., was valid, because it was not an attempt to exercise judicial power by construing a statute for the court, but was a mode of continuing or reviving the tax which might have been supposed to have expired. *Stockdale v. Insurance Companies*, 20 Wall. 323, 332, 22 L. Ed. 348.

44. **Effect of change of government or division of territory.**—*Airhart v. Massieu*, 98 U. S. 491, 25 L. Ed. 213.

45. **Same.**—*Delassus v. United States*, 9 Pet. 117, 9 L. Ed. 71. See, also, ante, "Usage as to Conquered or Ceded Territory," VI, D, 2, c, (3), (c), (bb), et seq.; "Vested Rights under Treaties," VIII, A, 5. And see generally the title INTERNATIONAL LAW.

Rights acquired from, or under the

authority of, the British government.—All contract and property rights acquired by corporations or individuals from or under the authority of the British government prior to the separation of the colonies from the mother country were held to remain, subsist, and be protected by the constitution of the United States and of the respective states. *Dawson v. Godfrey*, 4 Cranch 321, 323, 2 L. Ed. 634; *Territt v. Taylor*, 9 Cranch 43, 500, 3 L. Ed. 650; *Dartmouth College v. Woodward*, 4 Wheat. 518, 651, 707, 4 L. Ed. 629; *Society for the Propagation of the Gospel v. New Haven*, 8 Wheat. 464, 5 L. Ed. 662.

47. **Appropriation of private property to public use.**—*Green v. Biddle* (opinion of Washington, J.), 8 Wheat. 1, 89, 5 L. Ed. 547. See, generally, the titles DUE PROCESS OF LAW; EMINENT DOMAIN.

48. **Confiscation acts.**—*Miller v. United States*, 11 Wall. 268, 304, 20 L. Ed. 135.

The confiscation acts of August 6, 1861, and July 17, 1862, were constitutional. Excepting the first four sections of the latter act, they were an exercise of the war powers of the government, and not an exercise of its sovereign or municipal power. Consequently they were not within the contemplation of, and not in conflict with, the restrictions of the fifth and sixth amendments of the federal constitution, in so far as those amendments provide that no person shall be held to answer for a capital or otherwise infamous crime unless on the presentment or indictment of a grand jury, and that no person shall be deprived of his property without due process of law, and that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed. *Miller v. United States*, 11 Wall. 268, 304, 20 L. Ed. 135.

6. **LEGISLATIVE TRANSFERS; APPROPRIATION OF PRIVATE PROPERTY TO OTHER THAN PUBLIC USE.**—The taking of the property of one man for the benefit of another is not a constitutional exercise of the right of eminent domain since the state cannot authorize the appropriation of private property for the benefit of private persons.<sup>49</sup> An act which undertakes in express terms, or which so operates, as to transfer the property of A to B, without his consent, impairs the vested right of A to hold and enjoy his property in accordance with the law of the land, and is unconstitutional, null and void.<sup>50</sup>

**Same—Where Excess of Property Is Taken.**—But if, in the construction of a public improvement, as, for example, a public dam, for a recognized public purpose, there is necessarily produced a surplus of water, which may properly be used for manufacturing purposes, the state may retain to itself the power of controlling or disposing of such surplus water as an incident of its right to make such improvement. And as there is no need of such surplus running to waste, there is nothing objectionable in permitting the state to let out the use of it to private parties and thus reimburse itself for the expense of the improvement.<sup>51</sup> The true distinction seems to be between cases where the dam is erected for the ex-

49. **Legislative transfers; taking of private property for other than public purpose.**—*Kaukauna Water Power Co. v. Green Bay, etc., Canal Co.*, 142 U. S. 254, 273, 35 L. Ed. 1004.

50. **Same.**—*Terrett v. Taylor*, 9 Cranch 43, 3 L. Ed. 650; *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629; *Society for the Propagation of the Gospel v. New Haven*, 8 Wheat. 464, 5 L. Ed. 662; *Wilkinson v. Leland*, 2 Pet. 627, 657, 658, 7 L. Ed. 542; *Webster v. Cooper*, 14 How. 488, 14 L. Ed. 510; *Loan Ass'n v. Topeka*, 20 Wall. 655, 22 L. Ed. 455. And see *Calder v. Bull*, 3 Dall. 386, 388, 1 L. Ed. 648; *Fletcher v. Peck*, 6 Cranch 87, 3 L. Ed. 162; *Pawlet v. Clark*, 9 Cranch 292, 3 L. Ed. 735. See, also, ante, "Implied Limitations upon Legislative Powers; Statutes Opposed to Natural Justice, etc.," VI, D, 3, d, (4), (b), (dd); "Implied Limitations upon State Legislative Powers," VI, D, 3, f, (2), (b), (ee). See the titles **DUE PROCESS OF LAW; IMPAIRMENT OF OBLIGATION OF CONTRACTS.**

"We know of no case in which a legislative act to transfer the property of A to B, without his consent, has ever been held a constitutional exercise of legislative power, in any state in the Union. On the contrary, it has been constantly resisted, as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced. We are not prepared, therefore, to admit that the people of Rhode Island have ever delegated to their legislature the power to divest the vested rights of property, and transfer them without the assent of the parties. The counsel for the plaintiffs have themselves admitted that they cannot contend for any such doctrine." *Story, J.*, delivering the opinion in *Wilkinson v. Leland*, 2 Pet. 627, 657, 658, 7 L. Ed. 542.

The act of the legislature of Vermont of the 30th of October, 1794, granting the lands in that state belonging to "The

Society for Propagating the Gospel in Foreign Parts" to the respective towns in which the lands lie, is void, and conveys no title under it. *Society for the Propagation of the Gospel v. New Haven*, 8 Wheat. 464, 5 L. Ed. 662. Accord: *Terrett v. Taylor*, 9 Cranch 43, 3 L. Ed. 650.

**Maine constitutional provision.**—The constitution of the state of Maine secures to every citizen the right of "acquiring, possessing, and enjoying property." By the settled rules of decision in the highest courts of the state of Maine, the true intent and meaning of this section is held to be that property cannot, by a mere act of the legislature, be taken from one man and vested in another directly; nor can it, by the retrospective operation of law, be indirectly transferred from one person to another, or be subjected to the operation of principles in a court of justice which must necessarily produce that effect. The federal supreme court follows the construction placed by the Maine court upon this provision of their constitution. *Webster v. Cooper*, 14 How. 488, 504, 14 L. Ed. 510.

An act which declares that no action to recover land shall be brought against an occupant who has been in adverse possession for forty years, and which is made applicable to existing titles and pending suits, and which operates to make the seisin of the occupant during the life of the life tenant adverse to the remainderman, who has no right of entry during the life of the life tenant, operates to take away the property of the remainderman and vest it in the occupant, and is contrary to the constitution of the state of Maine as expounded by the highest courts of that state. *Webster v. Cooper*, 14 How. 488, 14 L. Ed. 510.

51. **Where excess of property is taken.**—*Kaukauna Water Power Co. v. Green Bay, etc., Canal Co.*, 142 U. S. 254, 273, 35 L. Ed. 1004. And see *Fox v. Cincinnati*, 104 U. S. 783, 26 L. Ed. 928.

press or apparent purpose of obtaining a water power to lease to private individuals, or where in building a dam for a public improvement, a wholly unnecessary excess of water is created, and cases where the surplus is a mere incident to the public improvement and a reasonable provision for securing an adequate supply of water at all times for such improvement.<sup>52</sup> So long as the dam is erected for the bona fide purpose of furnishing an adequate water supply for the public purpose, and not a colorable device for erecting a water power, the agents of the state are entitled to great latitude of discretion in regard to the height of the dam and the head of water to be created. Courts will not scan too jealously their conduct nor undertake to measure with nicety the exact amount of water required for the purpose of the public improvement, if there be no reason to doubt that they were animated solely by a desire to promote the public interests.<sup>53</sup>

7. **STATUTES AFFECTING THE RIGHTS OF CREDITORS OF MUNICIPAL CORPORATIONS.**—Where additional territory is annexed to a municipal corporation after it has entered into a street paving contract, a statute providing that a tax, levied to pay the indebtedness so incurred, shall not be enforced against any property in the annexed territory, does not violate a state constitutional provision which declares that no retrospective law or law impairing the obligation of contracts shall be passed.<sup>54</sup> And so where the stock of a water company whose immunity from taxation is subject to legislative revocation, is acquired by a municipal corporation and added to its sinking fund, the subsequent revocation of the immunity from taxation does not impair any vested right of municipal creditors whose debts are charged upon the sinking fund, because such rights, whenever acquired, were subject to the power to amend or repeal the statute granting to the water company immunity from taxation.<sup>55</sup>

8. **RETROSPECTIVE TAX LAWS; COLLECTION OF BACK TAXES.**—There can be no question as to the validity of a statute providing generally for the collection of back taxes upon land or other property that has improperly escaped taxation in prior years.<sup>56</sup> The principle that the legislature has power to provide for the assessment of property which has escaped taxation in particular years extends also to the case where there has been a gross under-valuation of property. It is entirely competent for the legislature to provide for a revaluation in such case, and in so doing it does not deprive any person of a vested right.<sup>57</sup>

#### **Act Reviving and Giving Retrospective Construction to Expired Law.**

—Where a tax imposed has expired by the terms of the statute, congress may constitutionally pass a law to revive the expired act and reimpose the tax retrospectively; and it may do this either by reviving or re-enacting the expired act, or by providing that such act shall be "construed" as extending the tax thereby imposed to a specified date. Such a case differs from an effort to invade private rights by construing a law affecting those rights, over which congress had no power whatever.<sup>58</sup>

52. *Same.*—Kaukauna Water Power Co. v. Green Bay, etc., Canal Co., 142 U. S. 254, 275, 35 L. Ed. 1004.

53. *Same.*—Kaukauna Water Power Co. v. Green Bay, etc., Canal Co., 142 U. S. 254, 277, 35 L. Ed. 1004.

54. *Statutes affecting rights of municipal creditors.*—United States v. Memphis, 97 U. S. 284, 291, 24 L. Ed. 937. See, also, the titles **IMPAIRMENT OF OBLIGATION OF CONTRACTS; MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.**

55. *Same.*—Louisville Water Co. v. Clark, 143 U. S. 1, 17, 36 L. Ed. 55.

56. *Collection of back taxes.*—Winona, etc., Land Co. v. Minnesota, 159 U. S. 526, 528, 40 L. Ed. 247; *Sturges v. Carter*,

114 U. S. 511, 518, 29 L. Ed. 240.

A statute which authorizes an inquiry into settlements made between taxpayers and the tax collectors of the state for four years back, and the collection of back taxes for that length of time upon property which the taxpayer has omitted to return for taxation, is no violation of a state constitutional provision which declares that the general assembly shall have no power to pass retroactive laws. *Sturges v. Carter*, 114 U. S. 511, 518, 29 L. Ed. 240.

57. *Same.*—Weyerhaeuser v. Minnesota, 176 U. S. 550, 558, 44 L. Ed. 583.

58. *Retrospective tax laws.*—Stockdale v. Insurance Companies, 20 Wall. 323, 333, 22 L. Ed. 348.



**Statute Imposing Inheritance Tax upon Property in Course of Administration.**—See ante, "Right to Dispose of Property by Will; Rights of Heirs, Devisees, etc.," VIII, A, 19.

**Statutes Imposing Taxes According to Previous Assessment.**—A statute which simply authorizes the imposition of a tax according to a previous assessment is not subject to the imputation of being retrospective. It does not operate upon the past nor deprive the party of any vested rights.<sup>59</sup> Even if such law were strictly retrospective, it would not be within the constitutional inhibition against ex post facto laws, since ex post facto laws, within the meaning of the constitution, embrace only such as impose or effect penalties or forfeitures.<sup>60</sup>

**Interest upon Back Taxes.**—"As the state may, in the first instance, enact that taxes shall bear interest from the time they become due, so, without conflicting with any provision of the federal constitution, it may in like manner provide that taxes which have become delinquent shall bear interest from the time the delinquency commenced. This is adding no novel or extraordinary penalty, for interest is the ordinary incident to the nonpayment of obligations."<sup>61</sup>

**Creation of New and Additional Remedies for Collection of Back Taxes.**—See post, "Creation of New or Additional Remedies," VIII, C, 13, b.

9. STATUTES AFFECTING ENTAILS, CONTINGENT REMAINDERS, AND REVERSIONS.—See the titles ESTATES; REMAINDERS REVERSIONS AND EXECUTORY INTERESTS.

10. ACTS RELATING TO BETTERMENTS, IMPROVEMENTS, OCCUPYING CLAIMANTS, ETC.—See the titles IMPAIRMENT OF OBLIGATION OF CONTRACTS; IMPROVEMENTS.

11. LAWS AFFECTING RIGHTS OF ACTION AND DEFENSES—a *Rights of Action*.—A vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law, it is not competent for the legislature to take it away.<sup>62</sup> Thus the right of an owner of land to recover the possession thereof, when withheld by any person, however innocently he may have obtained it, or to recover the profits received from it by the occupant, is a vested right of which he cannot be arbitrarily deprived.<sup>63</sup>

**Where Action Depends upon the Obstruction of a Public Right.**—But where a private suit is brought to enjoin or abate a public nuisance which is such only because it is an obstruction or violation of some rule or policy of law, it is competent for congress, even after action begun and prosecuted to a decree awarding an injunction, to destroy such right of action, in so far as it depends

59. Imposing tax according to previous assessment.—*Locke v. New Orleans*, 4 Wall. 172, 173, 18 L. Ed. 334.

60. Same.—Not an ex post facto law.—*Locke v. New Orleans*, 4 Wall. 172, 173, 18 L. Ed. 334.

61. Interest upon back taxes.—*League v. Texas*, 184 U. S. 156, 161, 46 L. Ed. 478.

62. Laws affecting rights of action.—*Osborn v. Nicholson*, 13 Wall. 654, 20 L. Ed. 689; *Pritchard v. Norton*, 106 U. S. 124, 132, 27 L. Ed. 104; *Angle v. Chicago*, etc., R. Co., 151 U. S. 1, 19, 38 L. Ed. 55.

"A right of action to recover damages for an injury is property, and has a legislature the power to destroy such property? An executive may pardon and thus relieve a wrongdoer from the punishment the public exacts for the wrong, but neither executive nor legislature can par-

don a private wrong or relieve the wrongdoer from civil liability to the individual he has wronged." *Angle v. Chicago*, etc., R. Co., 151 U. S. 1, 19, 38 L. Ed. 55.

63. Same.—*Green v. Biddle*, 8 Wheat. 1, 76, 5 L. Ed. 547.

In the case of *Calder v. Bull*, 3 Dall. 386, 394, 1 L. Ed. 648, Mr. Justice Chase, delivering the opinion of the court, said, in substance, that a right to recover property only was not a perfect and exclusive right, and therefore was not a vested right. The point involved there, however, was, whether or not the legislature had the power to set aside a judgment or decree of a probate court upon an issue of *devisavit vel non*, the alleged cause of action being based upon said judgment or decree. As to vested rights under judgments and decrees, see post, "Vested Rights under Judgments and Decrees," VIII, C, 12.

upon the obstruction of the public right, by so changing the law as to make the obstruction no longer a nuisance.<sup>64</sup>

**Same—Right to Costs.**—The judgment for costs or damages awarded in such action, however, is a matter of private right of which the plaintiff cannot be deprived.<sup>65</sup>

**Effect of Curative and Validating Acts.**—See post, "Curative and Validating Acts," VIII, C, 14 et seq.

**Creation of New Defense; Statute of Limitations.**—See post, "Retrospective Statutes of Limitations," VIII, C, 13, e.

b. *Defenses.*—The right to an existing defense which goes to bar the other party's right of action is a vested property right which it is incompetent for the legislature to take away.<sup>66</sup> This is not true, however, of those defenses which are based on informalities not affecting substantial rights, or which do not touch the subject of the contract, or which are not based on equity and justice.<sup>67</sup>

12. **VESTED RIGHTS UNDER JUDGMENTS AND DECREES.**—"It is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, or may under some circumstances, abate actions pending, but when those actions have passed into judgment, the power of the legislature to disturb the rights created thereby ceases."<sup>68</sup>

64. **Where right of action depends upon the obstruction of a public right.**—*Pennsylvania v. Wheeling, etc., Bridge Co.*, 18 How. 421, 429, 15 L. Ed. 435; *The Clinton Bridge*, 10 Wall. 454, 19 L. Ed. 969.

A suit in chancery praying an injunction against the building of a bridge as a nuisance, and begun previous to the passage of an act of congress which declares that such bridge shall be a lawful structure and shall be recognized and known as a post route, is abated by such act; though pleas and replication had been filed, proofs taken, and the case was ready for hearing. Such act is not unconstitutional. *The Clinton Bridge*, 10 Wall. 454, 19 L. Ed. 969.

65. **Same—Right to costs.**—*Pennsylvania v. Wheeling, etc., Bridge Co.*, 18 How. 421, 431, 15 L. Ed. 435; *The Clinton Bridge*, 10 Wall. 454, 463, 19 L. Ed. 969.

66. **Vested right in defense to action.**—*Pritchard v. Norton*, 106 U. S. 124, 132, 27 L. Ed. 104.

67. **Same—Technical and inequitable defenses, etc.**—*Pritchard v. Norton*, 106 U. S. 124, 132, 27 L. Ed. 104.

**Changing law so as to estop tenant from denying landlord's title.**—In a case arising in the state of Pennsylvania, in which a landlord sought to recover possession from his tenant who had bought in and was resisting recovery under a title based upon a Pennsylvania patent, the tenant raised the point, that the landlord's title being founded upon a Connecticut grant, was not sufficient to create the relation of landlord and tenant, and therefore he was not estopped to deny his landlord's title. This contention was upheld by the supreme court of Pennsylvania, and a new trial ordered. Pending the new trial the legislature enacted a statute declaring that titles based upon Connecticut grants should be deemed sufficient to create the relation of landlord and tenant, and made it applicable

to pending cases. Held, that if the statute was not unconstitutional as an impairment of the obligation of contracts, there was nothing in the federal constitution prohibiting the impairment of vested rights; and that the statute was not invalid as impairing the obligation of any contract. *Satterlee v. Matthewson*, 2 Pet. 380, 7 L. Ed. 458, distinguishing *Vanhorne v. Dorrance*, 2 Dall. 304, 1 L. Ed. 391; *Society for the Propagation of the Gospel v. New Haven*, 8 Wheat. 464, 5 L. Ed. 662, upon the ground that the decisions in those cases were based upon provisions found in the state constitution.

**Right to plead usury.**—The right to recover or set off usury is not a vested right, and therefore may be taken away by legislation. *Ewell v. Daggs*, 108 U. S. 143, 27 L. Ed. 682.

**Right to set off valid certificates against action to recover lands located under void certificates.**—Where certificates which a railroad company has located upon public lands are void because the state legislature was constitutionally forbidden to grant the lands and issue the certificates, the company is not deprived of any vested right because, in a suit by the state to recover the lands so located, it is denied the right to use other valid certificates by way of counterclaim or set-off, and which it cannot locate upon other lands by reason of the public lands within the state having become exhausted. *Galveston, etc., R. Co. v. Texas*, 170 U. S. 226, 242, 42 L. Ed. 1017.

**Vested right in plea of statute of limitations.**—See post, "Removing Bar of Statute; Tolling Statute of Limitations," VIII, C, 13, e, (2).

68. **Vested rights under judgments and decrees.**—*McCullough v. Virginia*, 172 U. S. 102, 123, 124, 43 L. Ed. 382.

The repeal, after judgment in the trial court and pending an appeal in the supreme court of appeals, of the Virginia

As a legal proposition it is true, therefore, that an act of congress cannot amend a judgment of the supreme court of the United States, or impair the rights determined thereby, especially as respects adjudications upon the private rights of parties, which, when they have passed into judgment, become absolute; and it is the duty of the court to enforce its judgment without regard to the act.<sup>69</sup> But such a proposition is wholly inapplicable to measures of public policy falling appropriately within the legislative competency; as, for example, where the private rights claimed depend upon the obstruction of the enjoyment of a public right, as in the case of one seeking to abate or enjoin a nuisance caused by the obstruction of navigation upon a public navigable river.<sup>70</sup>

**Judgments upon Causes Arising Ex Delicto Not Contracts.**—Judgments upon causes of actions arising ex delicto are held not to be contracts within the contract clause of the federal constitution.<sup>71</sup>

**Judgments upon Contracts.**—And even as to judgments based upon contracts, in deciding how far they may be affected by subsequent legislation, we must look mainly to the original contract.<sup>72</sup>

**Destruction of Remedy to Enforce Judgment.**—See post, "Destruction or Impairment of Remedy," VIII, C, 13, c. See, also, the title IMPAIRMENT OF OBLIGATION OF CONTRACTS.

**Statutes Awarding New Trial, Right of Appeal, etc.**—See post, "Statute Awarding New Trial, Right of Appeal, etc.," VIII, C, 13, h.

act of 1882 providing for the bringing of a suit to test the genuineness of coupons tendered in payment of taxes, could not affect rights acquired by such judgment, and did not operate to abate the proceeding and dismiss the appeal. *McCullough v. Virginia*, 172 U. S. 102, 123, 43 L. Ed. 382.

**Judgment upon issue of devisavit vel non.**—In *Calder v. Bull*, 3 Dall. 386, 394, 1 L. Ed. 648, it was said by Mr. Justice Chase that a right to recover property, based upon the judgment of a probate court, rendered upon an issue of *devisavit vel non*, was not a vested right. The only point involved, however, was the power of the state legislature to set aside the judgment and award a new trial.

**69. Same—Legislative amendment of judgments.**—*Pennsylvania v. Wheeling, etc.*, Bridge Co., 18 How. 421, 431, 457, 15 L. Ed. 435.

**70. Same—Where right is based upon obstruction of a public right.**—*Pennsylvania v. Wheeling, etc.*, Bridge Co., 18 How. 421, 431, 15 L. Ed. 435, four justices dissenting.

Thus the provisions of the act of congress passed August 31, 1852 (10 Stat. at Large 112), declaring the bridges over the Ohio River at Wheeling and Bridgeport, at their then height and position, to be lawful structures, and declaring said bridges to be post roads of the United States, thereby annulling that portion of the decree of the supreme court of the United States in the case of *Pennsylvania v. Wheeling, etc.*, Bridge Co., 18 How. 421, 518, 15 L. Ed. 435, which enjoined further obstruction of commerce by the continued maintenance of said bridges, are not unconstitutional as an unwarranted coercion of the judiciary, or as an

encroachment upon its constitutional prerogatives, or as impairing the rights of the private parties to that controversy, as determined by the decree rendered therein. (Four justices dissenting.) *Pennsylvania v. Wheeling, etc.*, Bridge Co., 18 How. 421, 431, 15 L. Ed. 435.

The ground of the decree was the unlawful obstruction and interference with commerce. The act of congress merely changed the law regulating commerce so as to render such obstruction and interference no longer unlawful. The decree of the court was no longer enforceable, therefore, since there was no longer any unlawful obstruction or interference with the enjoyment of the public rights of navigation and commerce. (Four justices dissenting.) *Pennsylvania v. Wheeling, etc.*, Bridge Co., 18 How. 421, 431, 15 L. Ed. 435.

**Otherwise as to costs.**—But that portion of the decree relating to the costs adjudged to the complainant was a matter affecting the private rights of the parties, which became vested and absolute upon the rendition of the decree. Therefore, the decree, in so far as it related to such costs, was not affected by the subsequent act of congress. *Pennsylvania v. Wheeling, etc.*, Bridge Co., 18 How. 421, 431, 15 L. Ed. 435.

**71. Judgment upon cause arising ex delicto not a contract.**—*Garrison v. New York City*, 21 Wall. 196, 22 L. Ed. 612; *Louisiana v. New Orleans*, 109 U. S. 285, 27 L. Ed. 936; *Louisiana v. Police Jury*, 111 U. S. 716, 720, 28 L. Ed. 574; *Freeland v. Williams*, 131 U. S. 405, 414, 33 L. Ed. 193.

**72. Judgments upon contracts.**—*Blount v. Windley*, 95 U. S. 173, 175, 176, 24 L. Ed. 424.



13. **LAWS TOUCHING REMEDIES AND PROCEDURE**—a. *General Powers of the Legislature with Respect to Remedies.*—It is well settled that, where there is no direct constitutional prohibition, a state may pass retrospective laws which may affect pending suits, and give to one party a remedy which he did not previously possess, or modify an existing remedy or remove impediments in the way of legal proceedings;<sup>73</sup> that an act which does not undertake to destroy the right, but only to modify modes of procedure, the form of remedies, and the rules of evidence is a constitutional exercise of legislative power, even as applied to debts contracted before its passage.<sup>74</sup> Subject to these qualifications, the whole range of remedies and procedure lies within legislative control.<sup>75</sup> "Statutes of this character, if not so common as to be called ordinary legislation, are yet frequent enough to justify us in saying that they are well-recognized acts of legislative power uniformly sustained by the courts. It may be said, that such statutes, when they have been held to be valid by the courts, do not infringe the substantial rights of property or of contract of the parties affected, but are intended to supply defects of power in the courts, or to give them improved methods of procedure in dealing with existing rights."<sup>76</sup>

**Same—Construction Not beyond Change.**—And the fact that one construction has been placed upon a statute by the highest court of the state does not make that construction beyond change.<sup>77</sup>

**73. General power of legislature with respect to remedies.**—*Freeborn v. Smith*, 2 Wall. 160, 174, 17 L. Ed. 922.

**74. Same.**—*Ogden v. Saunders*, 12 Wheat. 213, 262, 349, 6 L. Ed. 606; *Webb v. Den*, 17 How. 576, 15 L. Ed. 35; *Hawthorne v. Calef*, 2 Wall. 10, 17 L. Ed. 776; *Curtis v. Whitney*, 13 Wall. 68, 20 L. Ed. 513; *Tennessee v. Sneed*, 96 U. S. 69, 24 L. Ed. 610; *Penniman's Case*, 103 U. S. 714, 26 L. Ed. 602; *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 748, 755, 30 L. Ed. 825.

**75. Same.**—*Young v. Bank*, 4 Cranch 384, 397, 2 L. Ed. 655; *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. Ed. 529; *Bank v. Okely*, 4 Wheat. 235, 4 L. Ed. 559; *Watkins v. Holman*, 16 Pet. 25, 63, 10 L. Ed. 873; *United States v. Union Pac. R. Co.*, 98 U. S. 569, 605, 25 L. Ed. 143; *Backus v. Fort St. Union Depot Co.*, 169 U. S. 557, 570, 42 L. Ed. 853; *League v. Texas*, 184 U. S. 156, 158, 46 L. Ed. 478; *Wilson v. Standefer*, 184 U. S. 399, 416, 46 L. Ed. 612; *Bradley v. Lightcap*, 195 U. S. 1, 19, 20, 49 L. Ed. 65. See, also, the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**.

"The distinction between the obligation of a contract and a remedy given by the legislature to enforce that obligation exists in the nature of things, and without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation may direct. *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. Ed. 529." *Wilson v. Standefer*, 184 U. S. 399, 416, 46 L. Ed. 612.

It was said in *Bank v. Okely*, 4 Wheat. 235, 4 L. Ed. 559, in speaking of a summary proceeding given by the charter of the bank for the collection of its debts: "It is the remedy, and not the right, and as such we have no doubt of its being subject to the will of congress. The

forms of administering justice, and the duties and powers of courts as incident to the exercise of a branch of sovereign power, must ever be subject to legislative will, and the power over them is unalienable, so as to bind subsequent legislatures." And in *Young v. Bank*, 4 Cranch 384, 397, 2 L. Ed. 655, Mr. Chief Justice Marshall says: "There is a difference between those rights on which the validity of the transactions of the corporation depends, which must adhere to those transactions everywhere, and those peculiar remedies which may be bestowed on it. The first are of general obligation; the last, from their nature, can only be exercised in those courts which the power making the grant can regulate." Quoted in *United States v. Union Pac. R. Co.*, 98 U. S. 569, 605, 25 L. Ed. 143.

There is no vested right in a mode of procedure. Each succeeding legislature may establish a different one, providing only that in each are preserved the essential elements of protection. *Backus v. Fort St. Union Depot Co.*, 169 U. S. 557, 570, 42 L. Ed. 853.

"Generally speaking, a party has no vested right in a mere matter of remedy; that is subject to legislative change. And a new remedy may be resorted to unless in some of its special provisions a constitutional right of the debtor or obligor is infringed. 'There is no vested right in a mode of procedure. Each succeeding legislature may establish a different one, providing only that in each are preserved the essential elements of protection.' *Backus v. Fort St. Union Depot Co.*, 169 U. S. 557, 570, 42 L. Ed. 853." *League v. Texas*, 184 U. S. 156, 158, 46 L. Ed. 478.

**76. Same.**—*United States v. Union Pac. R. Co.*, 98 U. S. 569, 606, 25 L. Ed. 143.

**77. Construction of statute not beyond change.**—*Backus v. Fort St. Union Depot Co.*, 169 U. S. 557, 570, 42 L. Ed. 853.

b. *Creation of New or Additional Remedies.*—The power which one individual may possess to withhold from another that which is justly his due, or to inflict wrong or injury upon the person, property, or reputation of another and go unscathed, because such other person, under existing laws and modes of procedure, has no remedy whereby he may recover the right withheld or redress the wrong inflicted, is not a vested right. Therefore it is within the constitutional powers of a state legislature to create new or additional remedies to recover existing rights or to redress existing wrongs; the limitation upon such power being that the legislature may not give to a statute creating new rights and making that actionable which did not confer a right of action before, a retrospective operation.<sup>78</sup>

**Where Contract Unenforcible for Want of a Remedy.**—There are numerous cases where a contract incapable of enforcement for want of a remedy, or because there is some obstruction to the remedy, can be so aided by legislation as to become the proper ground of a valid action. In this class of cases the ground taken is that there exists a contract, but, by reason of no remedy having

**78. Creation of new or additional remedies.**—*Sampeyreac v. United States*, 7 Pet. 222, 239, 8 L. Ed. 665; *Freeborn v. Smith*, 2 Wall. 160, 175, 17 L. Ed. 922; *Sturges v. Carter*, 114 U. S. 511, 518, 29 L. Ed. 240; *Campbell v. Holt*, 115 U. S. 620, 627, 29 L. Ed. 483; *Backus v. Fort St. Union Depot Co.*, 169 U. S. 557, 570, 42 L. Ed. 853; *League v. Texas*, 184 U. S. 156, 158, 46 L. Ed. 478.

There is no such thing as a vested right to do wrong, and the legislature which, in its acts, not expressly authorized by the constitution, limits itself to correcting mistakes and to providing remedies for the furtherance of justice, cannot be charged with violating its duty, or exceeding its authority. Such acts are of a remedial character, and are the peculiar subjects of legislation. They are not liable to the imputation of being assumptions of judicial power. *Freeborn v. Smith*, 2 Wall. 160, 175, 17 L. Ed. 922.

**Additional remedies for the collection of back taxes.**—"That a state may adopt new remedies for the collection of taxes and apply those remedies to taxes already delinquent, without any violation of the federal constitution, is not a matter of doubt. A delinquent taxpayer has no vested right in an existing mode of collecting taxes. There is no contract between him and the state that the latter will not vary the mode of collection." *League v. Texas*, 184 U. S. 156, 158, 46 L. Ed. 478.

Where the remedy provided for the collection of taxes by means of an administrative sale by the tax collector and the buying in of the property by the state has proved ineffectual for the purpose, it is competent for the state to provide a new remedy by means of a judicial proceeding in which the delinquent taxpayer is taxed with all the ordinary costs of the proceeding, and to make the same retroactive as to taxes already delinquent; and in so doing it does not deprive the taxpayer of any vested right or of his property without due process of law. *League*

*v. Texas*, 184 U. S. 156, 46 L. Ed. 478, affirming the constitutionality of the Texas act of 1897, *Texas Gen. Laws*, 1897, ch. 103, p. 132.

Statutes authorizing an inquiry into tax returns for four years last past and the opening of settlements made between the taxpayers and the tax collectors within that time, and the collection of taxes upon property which they have omitted to return for taxation, merely create a new remedy, and are not obnoxious to a constitutional provision which declares that the legislature shall have no power to enact retrospective laws. *Sturges v. Carter*, 114 U. S. 511, 518, 29 L. Ed. 240.

**Alteration of remedy for enforcement of mechanic's lien; rights of mortgagees.**—

A mortgage taken at a time when a mechanic's lien law is in existence is taken subject to the right of the legislature, in its discretion, to alter that law, so long as the alterations only affect the means of enforcing an existing lien, while not in substance enlarging its extent or unduly extending the remedy to the injury of vested rights. So long as those rights remain thus unaffected, the subsequent statute must be held valid, although the remedy be thereby to some extent altered and enlarged. *Red River Valley Bank v. Craig*, 181 U. S. 548, 553, 45 L. Ed. 994.

Thus, where, under a mechanic's lien law, as it existed at the time a mortgage was given, the holder of a mechanic's lien had the right to sell the building separate from the land upon which situated, with a right to the purchaser to remove the same, it was held that no vested right of the mortgagee was impaired by a subsequent amendment of the mechanic's lien law which permitted a sale of both building and land with a distribution of the proceeds among the mortgagees and the holders of mechanic's liens as their several rights and priorities might appear. *Red River Valley Bank v. Craig*, 181 U. S. 548, 45 L. Ed. 994.



been provided for its enforcement, or the remedy ordinarily applicable to that class having, for reasons of public policy, been forbidden or withheld, the legislature, by providing a remedy where none exists, or removing the statutory obstruction to the use of the remedy, enables the party to enforce a contract otherwise unobjectionable.<sup>79</sup>

**Constitutional Provision Creating New Remedy or Removing Obstructions to Old.**—And a state constitutional provision which declares existing rights and creates a remedy to enforce them, or which merely removes obstructions to the remedy for the enforcement of existing rights, does not deprive the defendant in a proceeding to enforce such remedies of any vested rights.<sup>80</sup>

*c. Destruction or Impairment of Remedy.*—There is no vested right to any particular remedy. The legislature may at its discretion take away those which exist and substitute others which shall apply to existing rights and wrongs as well as to those arising thereafter.<sup>81</sup>

**Exceptions to Rule.**—The exceptions to this general rule are that the legislature cannot so legislate concerning remedies as to destroy existing rights of property and contract,<sup>82</sup> and that the remedy substituted in place of the one repealed or modified must be calculated to give substantial relief, and be not merely colorable.<sup>83</sup> If the remedy afforded for the recovery of property or the profits thereof be qualified and restrained by conditions of any kind, the right of the owner may subsist, and be acknowledged, but it is impaired and rendered insecure according to the nature and extent of such restrictions.<sup>84</sup>

**79. Where contract unenforceable for want of a remedy.**—*Campbell v. Holt*, 115 U. S. 620, 627, 29 L. Ed. 483.

**80. Constitutional provision creating new remedy or removing obstructions to old.**—*Freeland v. Williams*, 131 U. S. 405, 419, 33 L. Ed. 193.

**Removal of obstructions to bill to set aside judgments.**—Thus the provisions in the constitution and statutes of the state of West Virginia which remove obstructions to the remedy by bill in equity for setting aside judgments recovered upon torts committed during the civil war, and as public acts of war, do not deprive the holders of judgments recovered previous to such enactment, and which were subsequently set aside, of any vested right. *Freeland v. Williams*, 131 U. S. 405, 419, 33 L. Ed. 193.

**81. Destruction or impairment of remedy.**—*Bank v. Dudley*, 2 Pet. 492, 7 L. Ed. 496; *Freeborn v. Smith*, 2 Wall. 160, 174, 17 L. Ed. 922; *The Collector v. Hubbard*, 12 Wall. 1, 14, 16, 20 L. Ed. 272; *Railroad Co. v. Hecht*, 95 U. S. 168, 24 L. Ed. 423; *Tennessee v. Sneed*, 96 U. S. 69, 24 L. Ed. 610; *New Orleans, etc., R. Co. v. New Orleans*, 157 U. S. 219, 39 L. Ed. 679.

**Repeal of statute authorizing courts to order summary sale of decedent's real estate.**—If the law which authorizes the courts to make an order for the summary sale of a decedent's real estate for the payment of his debts be repealed, the power to sell can never come into existence. The repeal of such a law divests no vested estate or right, but it is the exercise of a legislative power which every legislature possesses; the mode of subjecting the property of a debtor to the demands of a creditor must always de-

pend on the wisdom of the legislature. *Bank v. Dudley*, 2 Pet. 492, 7 L. Ed. 496.

**82. Exceptions to rule.**—*Bronson v. Kinzie*, 1 How. 311, 11 L. Ed. 143; *McCracken v. Hayward*, 2 How. 608, 11 L. Ed. 397; *Gantly v. Ewing*, 3 How. 707, 11 L. Ed. 794; *Green v. Biddle*, 8 Wheat. 1, 76, 5 L. Ed. 547; *Bradley v. Lightcap*, 195 U. S. 1, 19, 20, 49 L. Ed. 65.

A law which denies to the owner of land a remedy to recover the possession of it when withheld by any person, however innocently he may have obtained it, or to recover the profits received from it by the occupant, or which clogs his recovery of such possession and profits, by conditions and restrictions tending to diminish the value and amount of the thing recovered, impairs his right to, and interest in, the property. (Opinion of Washington, J.) *Green v. Biddle*, 8 Wheat. 1, 76, 5 L. Ed. 547.

Acts which so change the nature and extent of existing remedies as materially to impair the rights and interests of the owners of property acquired under the laws of Virginia before the separation of Kentucky from that state, but situated within the limits of the latter state, are as much a violation of the compact between Virginia and Kentucky in regard to the rights of such individuals in the property so acquired, as if they directly overturned his rights and interests. *Green v. Biddle*, 8 Wheat. 1, 17, 5 L. Ed. 547.

**83. Same; substitute must not be merely colorable.**—*Walker v. Whitehead*, 16 Wall. 314, 21 L. Ed. 357.

**84. Same.—New remedy not to be burdened with qualifications and conditions.**—*Green v. Biddle* (opinion of Washington, J.), 8 Wheat. 1, 76, 5 L. Ed. 547.



**Where Creditor Has Acquired Vested Rights under Remedy.**—Vested rights acquired by a creditor under and by virtue of a statute of a state granting new remedies, or enlarging those which existed when the debt was contracted, are beyond the reach of the legislature, and the repeal of the statute will not affect them.<sup>85</sup>

**Judgments in Causes Ex Delicto.**—Judgments rendered in favor of a plaintiff in a cause of action arising ex delicto are held not to confer vested rights within the contract clause of the federal constitution.<sup>86</sup> There being no vested right in the judgment itself, in such case, there can be none in the remedy to enforce it.<sup>87</sup>

**Destruction of Remedy by Abolishing the Jurisdiction.**—If a law conferring jurisdiction is repealed without any reservation as to pending cases, all such cases fall with the law.<sup>88</sup>

**85. Where a creditor has acquired vested rights under a remedy.**—*Memphis v. United States*, 97 U. S. 293, 24 L. Ed. 920.

Section 9 of the Code of Tennessee, declaratory of the law of that state respecting the effect of repealing statutes, is in accord with this doctrine. *Memphis v. United States*, 97 U. S. 293, 24 L. Ed. 920.

On March 16, 1875, A. obtained a decree against Memphis for the payment to him of \$292,133.47 for materials furnished and work done under contracts entered into with that city in 1867 for paving certain streets. Execution having been issued and returned unsatisfied, the court, on the 22d of that month, awarded an alternative writ of mandamus, to compel the city to exercise the power conferred by an act of the legislature passed March 18, 1873, to levy "a tax, in addition to all taxes allowed by law," sufficient to pay the decree. The city answered that said act had been repealed by one passed March 20, 1875, and that the tax which, by the act of February 13, 1854, it was authorized to levy for all purposes had been levied, and that its powers were therefore exhausted. A. demurred to the answer; the demurrer was sustained, and the writ made peremptory March 30, 1875. The act passed March 20, 1875, was approved by the governor of the state on the twenty-third day of that month. Held: 1. That the repealing act did not become a law until its approval by the governor. 2. That prior thereto, A., by his decree and the alternative mandamus, which was a proceeding commenced by virtue of the act of March 18, 1873, had acquired a vested right, which was not defeated by the repealing act, to have a tax, payable in lawful money, levied sufficient to pay him, although it required the levy of a tax beyond the rate mentioned in the act of 1854. *Memphis v. United States*, 97 U. S. 293, 24 L. Ed. 920.

**86. Judgments in causes ex delicto.**—See ante, "Vested Rights under Judgment or Decree," VIII. C. 12.

**87. Same—Remedies to enforce.**—*Louisiana v. New Orleans*, 109 U. S. 285, 27 L. Ed. 936; *Freeland v. Williams*, 131 U. S. 405, 33 L. Ed. 193.

**88. Law destroying jurisdiction; effect on pending cases.**—*United States v. Boisdore*, 8 How. 113, 12 L. Ed. 1009; *McNulty v. Batty*, 1 How. 72, 13 L. Ed. 303; *Norris v. Crocker*, 13 How. 429, 14 L. Ed. 210; *Insurance Co. v. Ritchie*, 5 Wall. 541, 18 L. Ed. 540; *Ex parte McCordle*, 7 Wall. 506, 514, 19 L. Ed. 264; *The Assessors v. Osbornes*, 9 Wall. 567, 19 L. Ed. 748; *United States v. Tynen*, 11 Wall. 88, 20 L. Ed. 153; *Railroad Co. v. Grant*, 93 U. S. 398, 401, 25 L. Ed. 231.

The decision in the case of *Chisholm v. Georgia*, 2 Dall. 419, 1 L. Ed. 440, gave rise to the eleventh amendment, providing that the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of any foreign state. This amendment being constitutionally adopted, operated to deprive the supreme court of all jurisdiction in those cases, both past and future, in which a state was sued by the citizens of another state, or by citizens or subjects of a foreign state, and prevented further prosecution of such actions then pending. *Hollingsworth v. Virginia*, 3 Dall. 378, 1 L. Ed. 644.

The joint resolution of congress of June 1, 1860, referring a claim against the government to an officer of one of the executive departments, to examine and adjust, merely gave the claimant a tribunal before which his claims might be invested. The repeal of that resolution only deprived him of that tribunal. It was competent for congress to abolish the tribunal it had created for the adjustment of his claims, or it might have committed them to some other authority. In either event the claimant's right would not have been violated, only his remedy for the enforcement of those rights would have been taken away or changed. The power that created this tribunal might rightfully destroy it, unless some rights had accrued which were the result of the creation of such tribunal and inseparable from it. *Gordon v. United States*, 7 Wall. 188, 195, 19 L. Ed. 35.

The fact that the claimant and the government had acted under the statute, re-

**Remedy to Recover Taxes Illegally Assessed.**—A taxpayer cannot have any vested right in a remedy granted by congress for the correction of an error in taxation. Remedies of the kind, given by congress, may be changed or modified, or they may be withdrawn altogether at the pleasure of the lawmaker.<sup>89</sup>

**Other Actions against State.**—See the title STATES.

d. *Remedies to Enforce Foreign Judgments.*—There is no clause in the constitution which restrains the right in each state to legislate upon the remedy in suits on judgments of other states, exclusive of all interference with their merits.<sup>90</sup>

e. *Retrospective Statutes of Limitations*—(1) *Statutes Limiting Time for Bringing Action.*—Statutes prescribing the time within which actions may be brought relate to the remedy, and it is no objection if they are made to operate retrospectively as to existing rights of action, provided the prescribed period within which action may be brought is not so short as to amount to a destruction of the right itself.<sup>91</sup> But where the plain intent and effect of the stat-

ferring the claim against the government, and that the amount had been examined and adjusted, did not make the case one of arbitrament and award in the technical sense of those words, and so as to bind either party as a submission of award. Hence, the repealing act, the claim remaining unpaid at the time of the repeal, impaired no right of the claimant, and was valid. After the repeal, the claimant was left where the joint resolution referring his claim found him. His right to importune congress for more was not at all impaired by its repeal. *Gordon v. United States*, 7 Wall. 188, 195, 19 L. Ed. 35, affirming *De Grout v. United States*, 5 Wall. 419, 432, 18 L. Ed. 700.

89. **Remedy to recover taxes illegally assessed.**—The *Collector v. Hubbard*, 12 Wall. 1, 14, 16, 20 L. Ed. 272.

Acts enacted prior to the act of July 13, 1866, giving persons the right to sue to recover taxes illegally assessed, but without imposing similar conditions, did not confer on them any vested right so to sue in regard to transactions occurring before the passage of the act of 1866, as that they still could sue, after it became effective, irrespective of the conditions imposed by it. *The Collector v. Hubbard*, 12 Wall. 1, 20 L. Ed. 272.

90. **Remedies to enforce foreign judgments.**—*McElmoyle v. Cohen*, 13 Pet. 312, 10 L. Ed. 177; *Bacon v. Howard*, 20 How. 22, 25, 15 L. Ed. 811; *Christmas v. Russell*, 5 Wall. 290, 300, 18 L. Ed. 475.

Consequently, it was held in the case of *McElmoyle v. Cohen*, 13 Pet. 312, 10 L. Ed. 177, that the statute of limitations of Georgia might be pleaded to an action in that state founded upon a judgment rendered in a state court of South Carolina. *Christmas v. Russell*, 5 Wall. 290, 300, 18 L. Ed. 475. See, also, post, "Statutes Limiting Time for Bringing Action," VIII, C, 13, e. (1).

91. **Retrospective statute of limitation; limiting time for bringing action.**—*Bell v. Morrison*, 1 Pet. 351, 7 L. Ed. 174; *Jackson v. Lamphire*, 3 Pet. 280, 7 L. Ed. 679; *Hawkins v. Barney*, 5 Pet. 457, 8 L. Ed. 190; *Ross v. Duval*, 13 Pet. 45, 10

L. Ed. 51; *Christmas v. Russell*, 5 Wall. 290, 300, 18 L. Ed. 475; *Sohn v. Waterson*, 17 Wall. 596, 21 L. Ed. 737; *Terry v. Anderson*, 95 U. S. 628, 24 L. Ed. 365; *Koshkonong v. Burton*, 104 U. S. 668, 675, 675, 26 L. Ed. 886; *Mitchell v. Clark*, 110 U. S. 633, 643, 28 L. Ed. 279; *McGahey v. Virginia*, 135 U. S. 662, 34 L. Ed. 304; *Wheeler v. Jackson*, 137 U. S. 245, 34 L. Ed. 659; *McFarland v. Jackson*, 137 U. S. 258, 34 L. Ed. 664; *Saranac Land, etc., Co. v. Comptroller of New York*, 177 U. S. 318, 44 L. Ed. 786; *Wilson v. Iseminger*, 185 U. S. 53, 63, 46 L. Ed. 804; *Turner v. New York*, 168 U. S. 90, 94, 42 L. Ed. 392.

"Notwithstanding the protection which the law gives to vested rights, it is possible for a party to debar himself of the right to assert the same in the courts by his own negligence or laches. If one who is dispossessed be negligent for a long and unreasonable time, the law refuses afterwards to lend him any assistance to recover the possession merely, both to punish his neglect, and also because it is presumed that the supposed wrongdoer has in such a length of time procured a legal title, otherwise he would sooner have been sued. Statutes of limitation are passed which fix upon a reasonable time within which a party is permitted to bring suit for the recovery of his rights, and which, on failure to do so, establish a legal presumption against him that he has no legal rights in the premises. Such a statute is a statute of repose. Every government is under obligation to its citizens to afford them all needful legal remedies; but it is not bound to keep its courts open indefinitely for one who neglects or refuses to apply for redress until it may fairly be presumed that the means by which the other party might disprove his claim are lost in the lapse of time." *Cooley on Limitations*, 6th Ed. 44; *Bell v. Morrison*, 1 Pet. 351, 7 L. Ed. 174; *Lefingwell v. Warren*, 2 Black 599, 606, 17 L. Ed. 261." *Wilson v. Iseminger*, 185 U. S. 55, 61, 46 L. Ed. 804.

May be applied to claims for ground rents.—There is no sound distinction be-



ute is to deny the right of the creditor to sue at all, under such circumstances, and wholly irrespective of any lapse of time whatever, whether longer or shorter, such statute goes beyond the regulation of the remedy, and amounts to an absolute denial of the right, and cannot be sustained as a statute of limitation.<sup>92</sup> In all such cases, the question is one of reasonableness, and the court has only to consider whether the time allowed in the statute is, under all the circumstances, reasonable. Of that the legislature is primarily the judge, and the courts cannot overrule the decision of that department of the government, unless a palpable error has been committed.<sup>93</sup>

tween claims arising out of ground rent deeds and other kinds of debts and claims, which would exempt the former from the same legislative control that is conceded to lawfully extend to the latter. *Wilson v. Iseminger*, 185 U. S. 55, 62, 46 L. Ed. 804.

"There is nothing peculiar in ground rents that withdraw them from the reach of statutes of limitation." *Wilson v. Iseminger*, 185 U. S. 55, 62, 46 L. Ed. 804.

**92. Where statute destroys right of action.**—*Christmas v. Russell*, 5 Wall. 290, 300, 18 L. Ed. 475. See, also, the titles IMPAIRMENT OF OBLIGATION OF CONTRACTS; LIMITATION OF ACTIONS AND ADVERSE POSSESSIONS.

**Statute destroying pending action.**—In 1848 the legislature of Maine passed an act declaring that no real or mixed action should be commenced or maintained against any person in possession of lands, where such person had been in actual possession for more than 40 years, claiming to hold the same in his own right, and which possession had been adverse, open, peaceable, notorious and exclusive. This act was passed two years after a pending suit was commenced, and was, by its terms, applicable thereto. This act having been held unconstitutional by the highest courts of law in the state of Maine as an act which operated to take away property from one man and vest it in another, contrary to the constitution of the state of Maine, it was likewise held to be contrary to said constitution by the supreme court of the United States. *Webster v. Cooper*, 14 How. 488, 504, 14 L. Ed. 510.

**93. Question one of reasonableness.**—*Turner v. New York*, 168 U. S. 90, 42 L. Ed. 392; *Saranac Land, etc., Co. v. Comptroller of New York*, 177 U. S. 318, 44 L. Ed. 786; *Wilson v. Iseminger*, 185 U. S. 55, 63, 46 L. Ed. 804.

**Reasonable time to sue on foreign judgment.**—By the laws of the republic of Texas, no action would lie on a foreign judgment, and all actions of debt were prescribed in four years. When about to form a constitution, for the purpose of becoming a state of the Union, the legislature passed a law permitting suits to be brought on foreign judgments, but limiting them to sixty days when the judgment was of four years' standing and upward. The plaintiffs' bill attempted to avoid the

effect of the last limitation as to their judgment, which was more than four years' old, on the ground that they lived more than two thousand miles distant, and could not know of the passage of the last act within time to prosecute their action. Held, that the last-mentioned statute conferred a favor, and was not retrospective; and that plaintiffs' action was barred, whether he knew of the act or not. The constitution of the United States does not restrain the right of each state to legislate as to the remedy on suits on judgments in other states. *Bacon v. Howard*, 20 How. 22, 15 L. Ed. 811.

But a statute of Mississippi, which enacted, that "no action shall be maintained on any judgment or decree rendered by any court without this state against any person who, at the time of the commencement of the action in which such judgment or decree was or shall be rendered, was or shall be a resident of this state, in any case where the cause of action would have been barred by any act of limitation of this state, if such suit had been brought therein,"—was held to be unconstitutional, since it operated to prevent the creditor from suing at all upon his judgment irrespective of any lapse of time whatever, and for the further reason that it violated the full faith and credit clause of the constitution. *Christmas v. Russell*, 5 Wall. 290, 300, 301, 18 L. Ed. 475.

**Statute limiting time for setting aside tax deeds.**—A statute which declares that tax deeds which have been recorded for two years shall be conclusive evidence of the regularity of the proceedings, save as to actions instituted within six months after its enactment, is a statute of limitations which, in effect, forbids any action attacking such deeds to be brought later than six months after its enactment. So considered, it does not deprive any one of a vested right, or of his property without due process of law. *Turner v. New York*, 168 U. S. 90, 42 L. Ed. 392; *Saranac Land, etc., Co. v. Comptroller of New York*, 177 U. S. 318, 44 L. Ed. 786.

**Recovery of ground rents.**—The Pennsylvania act of April 27, 1855, § 7, conclusively presumes the release and extinguishment of irredeemable ground rents in all cases in which it is shown that there has been no payment upon or acknowledgment of the same, and no demand of payment, for twenty one years, and declares that the rent shall be there-



(2) *Removing Bar of Statute; Tolling Statute of Limitations.*—Where the running of the time prescribed by the statute of limitations has vested title to real or personal property, the owner of property acquired in such manner has a vested right in the bar created by the running of the statute of which he cannot be divested by its repeal.<sup>94</sup> But as to actions on personal debts which are already barred, the debtor has no such vested right in the bar of the statute, and the legislature may constitutionally remove the bar of the statute and thus revive his liability to suit on the previously barred claim.<sup>95</sup>

**Tolling Statute Where Bar Has Not Fallen.**—Where the bar of the statute has not fallen, a statute extending the time in which actions to enforce existing rights may be brought affects no vested rights whatever.<sup>96</sup>

f. *Laws Affecting the Rules of Evidence.*—"A right to have one's controversies determined by existing rules of evidence is not a vested right. These rules pertain to the remedies which the state provides for its citizens; and, generally, in legal contemplation, they neither enter into nor constitute a part of any contract, nor can they be regarded as being of the essence of any right which a party may seek to enforce. Like other rules affecting the remedy, they must, therefore, at all times be subject to modification and control by the legislature; and the changes which are enacted may lawfully be made applicable to existing causes of action, even in those states in which retrospective laws are forbidden."<sup>97</sup> Thus the burden of proof may be shifted from one party to the other,<sup>98</sup> and defectively acknowledged or recorded conveyances not previously admissible in evidence may be validated and rendered admissible.<sup>99</sup> So it is competent to make less or different testimony admissible to establish a given fact.<sup>1</sup>

after irrecoverable. It was provided in the enactment of this statute that this section should not become operative until three years after its passage. Held, that said statute was not unconstitutional as impairing vested rights or the obligation of contracts, since the provision that it should not take effect for three years after its passage afforded a reasonable opportunity to the owners of unextinguished ground rents to establish the same before the statute should go into operation. *Wilson v. Iseminger*, 185 U. S. 55, 65, 46 L. Ed. 804.

**94. Removing bar of statute; where same has vested title.**—*Campbell v. Holt*, 115 U. S. 620, 628, 29 L. Ed. 483. See, also, *Brent v. Chapman*, 5 Cranch 358, 3 L. Ed. 125.

**95. Same; where statute has merely barred remedy.**—*Campbell v. Holt*, 115 U. S. 620, 628, 29 L. Ed. 483.

**96. Tolling statute where bar has not fallen.**—*Stewart v. Kahn*, 11 Wall. 493, 504, 20 L. Ed. 176; *United States v. Wiley*, 11 Wall. 508, 20 L. Ed. 211.

The act of congress of June 11, 1864, "in relation to the limitation of actions in existing cases," provides, in the second section thereof, that "whenever after such action, civil or criminal, shall have accrued, and such person cannot, by reason of such resistance of the laws or such interruption of judicial proceedings, be arrested or served with process for the commencement of the action, the time during which such person shall be beyond the reach of legal process shall not be deemed or taken as any part of the time limited by law for the commencement of such action." Held, that this

statute was not prospective alone in its operation, but that under it, the time which elapsed while the plaintiff could not prosecute this suit by reason of the rebellion, whether before or after the passage of the act, was to be deducted from the operation of any state statute of limitations; that the act applied to cases in the state courts as well as to those in federal courts; and that thus construed it was constitutional. *Stewart v. Kahn*, 11 Wall. 493, 504, 20 L. Ed. 176; *United States v. Wiley*, 11 Wall. 508, 20 L. Ed. 211.

**97. Laws affecting the rules of evidence.**—*Williams v. Norris*, 12 Wheat. 117, 128, 6 L. Ed. 571; *Ogden v. Saunders*, 12 Wheat. 213, 249, 6 L. Ed. 606; *Webb v. Den*, 17 How. 576, 577, 15 L. Ed. 35; *Callanan v. Hurley*, 93 U. S. 387, 23 L. Ed. 931; *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 748, 755, 30 L. Ed. 825; *Marx v. Hanthorn*, 148 U. S. 172, 181, 37 L. Ed. 410.

The legislature may establish new rules of evidence, in derogation of the common law, but the judicial power is limited to the rule laid down. *Smith v. United States*, 5 Pet. 292, 300, 8 L. Ed. 130.

**98. May shift burden of proof.**—*Callanan v. Hurley*, 93 U. S. 387, 23 L. Ed. 931.

**99. Defectively acknowledged or recorded papers may be made admissible.**—*Webb v. Den*, 17 How. 576, 577, 15 L. Ed. 35.

**1. May make less or different testimony sufficient to establish a given fact.**—*Williams v. Norris*, 12 Wheat. 117, 128, 6 L. Ed. 571.

Where, under the general statute of North Carolina, the only admissible proof

But the legislature cannot, under the pretense of prescribing rules of evidence, preclude a party from making proof of his right by arbitrarily and unreasonably declaring that on some particular circumstance being shown by the other party the controversy is closed by a conclusive presumption in favor of the latter."<sup>2</sup>

**Rules of Evidence in Criminal Cases; Ex Post Facto Laws.**—See post, "Changing Rules of Evidence, Competency of Witnesses, etc.," XIX, I, 5, f, et seq.

g. *Retrospective Acts Relating to Transfer or Removal of Causes.*—Congress has constitutional authority to establish from time to time such inferior tribunals as they may think proper, and to transfer any pending case from one such tribunal to another. There are no words in the constitution to prohibit or restrain such an exercise of legislative power.<sup>3</sup>

**Upon Admission of Territory as a State.**—When congress has passed an act admitting a territory into the Union as a state, but omitting to provide by such act for the disposal of cases pending in the federal supreme court on appeal or writ of error, it may constitutionally and properly pass a subsequent act making such provision for them and providing that the mandate of execution or of further proceedings shall issue to supreme court of the state or to the United States district court for the district of that state, in lieu of the territorial supreme and district courts which ceased to exist upon the admission of the territory as a state.<sup>4</sup> Such act is not unconstitutional as impairing judgments which at the time of its passage were final and absolute; nor as being an exercise of judicial functions on the part of congress.<sup>5</sup>

**Removal of Causes to Federal Courts.**—So a statute providing for the removal of causes from state to federal courts does not work a deprivation of vested rights as applied to existing causes of action.<sup>6</sup>

**Crimes; No Vested Right in Place of Trial.**—A statute which directs that a crime committed in an unorganized portion of a state or territory shall

for the purpose of validating land entries, voidable for nonpayment of purchase money at the time of the entry, was a certificate of payment from the comptroller of North Carolina, a special act permitting the validation of a particular entry upon the adducing of "sufficient evidence" was not invalid as impairing the contract or vested rights of the person acquiring a patent to such land subsequent to its original entry and before the enactment of such special statute. *Williams v. Norris*, 12 Wheat. 117, 128, 6 L. Ed. 571.

2. But cannot arbitrarily preclude introduction of evidence, nor make particular circumstance conclusive.—*Marx v. Hanthorne*, 148 U. S. 172, 182, 37 L. Ed. 410.

It is competent for the legislature to declare that a tax deed shall be prima facie evidence not only of the regularity of the sale, but of all prior proceedings, and of title in the purchaser, but the legislature cannot deprive one of his property by making his adversary's claim to it, whatever that claim may be, conclusive of its own validity, and it cannot, therefore, make the tax deed conclusive evidence of the holder's title to the land. *Marx v. Hanthorne*, 148 U. S. 172, 182, 37 L. Ed. 410.

3. Retrospective act relating to transfer or removal of cause.—*Stuart v. Laird*, 1 Cranch 299, 2 L. Ed. 115.

Action on forthcoming bond.—A forth-

coming bond and the right to enforce the same is a component part of the pending case, and upon the transfer of the case to another tribunal, the right of action on the bond goes with it, and the obligor has no vested right to defend the same in the court in which the case originated. *Stuart v. Laird*, 1 Cranch, 299, 2 L. Ed. 115.

4. Upon admission of territory.—*Freeborn v. Smith*, 2 Wall. 160, 174, 17 L. Ed. 922.

5. Same.—*Freeborn v. Smith*, 2 Wall. 160, 173, 17 L. Ed. 922.

6. Removal of causes to federal courts.—*The Mayor v. Cooper*, 6 Wall. 247, 18 L. Ed. 851; *Mitchell v. Clark*, 110 U. S. 633, 640, 28 L. Ed. 279.

By §§ 5, 6, of the act of March 3, 1863, and the amendatory act of 1866, it was enacted that the person sued for any of this class of acts, performed or omitted under orders of officers of the government, even when there was only color of authority, could, instead of having his case tried in a state court where both court and jury might be prejudiced against him, remove his case into a court of the United States for trial. That this act is constitutional, so far as it authorizes this removal, was settled in the cases of *The Mayor v. Cooper*, 6 Wall. 247, 18 L. Ed. 851, and *Mitchell v. Clark*, 110 U. S. 633, 640, 28 L. Ed. 279.



be tried in the county to which such unorganized territory is attached, refers to the county to which it is attached at the time of the trial, and not necessarily to the county to which it is attached at the time of the offense. It does not give the offender a vested right to be tried in the county to which such unorganized territory was attached at the time of the offense.<sup>7</sup>

h. *Statute Awarding New Trial, Right of Appeal, etc.*—Statutes granting a right of appeal in existing causes, or even in cases where final judgment has been rendered, relate to the remedy and are not obnoxious as depriving any party of his vested rights.<sup>8</sup> So it is competent for the legislature to provide for the setting aside of judgments and decrees previously rendered and the awarding of a new trial or rehearing.<sup>9</sup>

**Setting Aside Condemnation Proceedings.**—In a proceeding to condemn property for public use, there is nothing in the nature of a contract between the owner and the state, or the corporation which the state, in virtue of her right of eminent domain, authorizes to take the property. All that the constitution of the state or of the United States or justice requires in such cases is that a just compensation shall be made to the owner; his property can then be taken without his assent.<sup>10</sup> The proceeding to ascertain the compensation to be made to the owner of property taken for public use is in the nature of an inquest on the part of the state and is under her control; and to secure a just estimate of the compensation to be made, she can vacate or authorize the vacation of any inquest taken by her direction where the proceeding has been irregularly or fraudulently conducted, or in which error has intervened, and order a new inquest, provided such methods of procedure be observed as will

**7. Crimes; no vested right in place of trial.**—In the Matter of Moran, 203 U. S. 96, 105, 51 L. Ed. 105.

As to the constitutional guaranty as to place of trial, see post, "Place of Trial," XVIII, H, et seq.

**8. Statutes awarding new trial, right of appeal, etc.**—Calder v. Bull, 3 Dall. 386, 1 L. Ed. 648; Sampeyreac v. United States, 7 Pet. 222, 240, 8 L. Ed. 665; Freeborn v. Smith, 2 Wall. 160, 17 L. Ed. 922; Garrison v. New York City, 21 Wall. 196, 22 L. Ed. 612; Freeland v. Williams, 131 U. S. 405, 33 L. Ed. 193; Essex Public Road Board v. Skinkle, 140 U. S. 334, 35 L. Ed. 446; Stephens v. Cherokee Nation, 174 U. S. 445, 478, 43 L. Ed. 1041.

The act of 1803, amending the judicial system of the United States, declares that from all final judgments and decrees rendered, or to be rendered in a circuit court, etc., an appeal shall be allowed to the supreme court, etc. It is no objection to such a law that the cause of action existed, or that the judgment from which the appeal was taken, was rendered, antecedent to this statute, so far as it applies to the remedy, and does not affect the right. Sampeyreac v. United States, 7 Pet. 222, 240, 8 L. Ed. 665.

Congress may provide for the review of the action of a commission or board created by it, and exercised only quasi judicial powers, by the transfer of their proceedings and decisions to judicial tribunals for examination and determination de novo. And it may, in such case, make provision, by means of a retrospective act, for a final review by the United States supreme court in cases in which

an appeal did not previously lie. Stephens v. Cherokee Nation, 174 U. S. 445, 477, 43 L. Ed. 1041.

The act of July 1, 1898, extending the remedy by appeal to the United States supreme court, was not invalid because retrospective and destructive of vested rights, or as an invasion of the judicial domain. Stephens v. Cherokee Nation, 174 U. S. 445, 477, 43 L. Ed. 1041.

"In its enactment congress has not attempted to interfere in any way with the judicial department of the government, nor can the act be properly regarded as destroying any vested right, since the right asserted to be vested is only the exemption of these judgments from review; and the mere expectation of a share in the public lands and moneys of these tribes, if hereafter distributed, if the applicants are admitted to citizenship, cannot be held to amount to such an absolute right of property that the original cause of action, which is citizenship or not, is placed by the judgment of a lower court beyond the power of re-examination by a higher court though subsequently authorized by general law to exercise jurisdiction." Stephens v. Cherokee Nation, 174 U. S. 445, 478, 43 L. Ed. 1041.

**9. Statutes providing for new trials.**—Calder v. Bull, 3 Dall. 386, 1 L. Ed. 648; Sampeyreac v. United States, 7 Pet. 222, 239, 8 L. Ed. 665; Baltimore, etc., R. Co. v. Nesbit, 10 How. 395, 401, 13 L. Ed. 469; Garrison v. New York City, 21 Wall. 196, 22 L. Ed. 612.

**10. Same.—In condemnation proceedings.**—Garrison v. New York City, 21 Wall. 196, 22 L. Ed. 612.



secure a fair hearing from the parties interested in the property. Until the property is actually taken and the compensation is made or provided, the power of the state over the matter is not ended.<sup>11</sup>

**Same—Judgment for Damages.**—So a legislative enactment setting aside a judicial determination of the damages adjudged upon condemnation of land for the use of a railroad company, and directing the court to order a new inquisition, is not unconstitutional as divesting vested rights or impairing the obligations of contracts.<sup>12</sup>

**Bill of Review.**—A statute providing a remedy by bill of review after the time in which an appeal might have been taken has elapsed is not unconstitutional as impairing vested rights. The retrospective operation of such a law forms no objection to it.<sup>13</sup>

**Allowing State to Appeal in Criminal Cases.**—See post, "Laws Respecting Right of Appeal," XIX, I, 5, i.

i. *Power to Destroy or Impede Right of Appeal, Writ of Error, etc.*—A party to a suit has no vested right to an appeal or writ of error from one court to another. Such a privilege once granted may be taken away, and if taken away, pending proceedings in the appellate court stop where the rescinding act finds them, unless special provision is made to the contrary.<sup>14</sup> The power

**11. Same.**—*Garrison v. New York City*, 21 Wall. 196, 22 L. Ed. 612; *Baltimore, etc., R. Co. v. Nesbit*, 10 How. 395, 401, 13 L. Ed. 469.

An act of the legislature of the state of New York, passed in 1871, in relation to the widening and straightening of Broadway in the city of New York, and authorizing the supreme court of the state to vacate an order made in 1870 confirming the report of the commissioners of estimate and assessment respecting the property taken, and to refer the matter to new commissioners to amend or correct the report, or to make new assessments and estimates, was held not to impair any vested right. *Garrison v. New York City*, 21 Wall. 196, 22 L. Ed. 612.

**12. Same—Judgment for damages.**—*Baltimore, etc., R. Co. v. Nesbit*, 10 How. 395, 401, 13 L. Ed. 469, following *Calder v. Bull*, 3 Dall. 386, 1 L. Ed. 648.

The state of Maryland granted a charter to a railroad corporation, in which charter provision was made for the condemnation of land. The charter provided that a jury should be summoned to assess the damages, and that the award should be confirmed by the county court, unless cause to the contrary was shown. The charter further provided that upon the payment or tender of payment of such valuation, the company should have title to the estate as fully as if it had been conveyed. Held, that the company had no vested or contract right to the condemned property until after such tender had been made. Therefore, a statute which directed the court to set aside the inquisition and condemnation and order a new one, the company not having tendered the damages assessed, was not unconstitutional as impairing the obligations of a contract; that it neither changed the contract between the company and the state, nor did it divest the company of a vested title to

the land. *Baltimore, etc., R. Co. v. Nesbit*, 10 How. 395, 13 L. Ed. 469.

**13. As to bill of review.**—*Sampeyreac v. United States*, 7 Pet. 222, 239, 8 L. Ed. 665.

A judgment establishing the right of the plaintiff to certain land under title from the crown of Spain, such pretended title having originated while the territory of Louisiana was under the dominion of the Spanish crown, was admittedly obtained by fraud, forgery and perjury. The plaintiff, and pretended original grantee, was admittedly a fictitious person; there was never any such grant; and the judgment was obtained upon forged and perjured evidence. After such judgment was rendered, a third person, purchasing for value and without notice of the fraud, obtained title to the land, the title of his vendor being founded on a forged deed from the pretended and fictitious original grantee. Held, that such third person had no standing to question the constitutionality of a statute granting a remedy to the government by bill of review after the time had elapsed in which an appeal from such judgment might have been taken. *Sampeyreac v. United States*, 7 Pet. 222, 239, 8 L. Ed. 665.

**14. Power to destroy or impede right of appeal, writ of error, etc.**—*United States v. Boisdore*, 8 How. 113, 12 L. Ed. 1000; *McNulty v. Batty*, 10 How. 72, 13 L. Ed. 303; *Norris v. Crocker*, 13 How. 429, 14 L. Ed. 210; *Freeborn v. Smith*, 2 Wall. 160, 173, 17 L. Ed. 922; *Insurance Co. v. Ritchie*, 5 Wall. 541, 18 L. Ed. 540; *Ex parte McCardle*, 7 Wall. 506, 514, 19 L. Ed. 264; *United States v. Tynen*, 11 Wall. 88, 20 L. Ed. 153; *United States v. Klein*, 13 Wall. 128, 20 L. Ed. 519; *Railroad Co. v. Grant*, 98 U. S. 398, 402, 25 L. Ed. 231; *Sherman v. Grinnell*, 123 U. S. 679, 31 L. Ed. 278.

Congress may constitutionally repeal

to take away the right of review by appeal or writ of error altogether includes, of course, the power to impose new conditions upon the exercise of such a right.<sup>15</sup>

14. **CURATIVE AND VALIDATING ACTS**—a. *General Rules and Principles*.—In the absence of any constitutional provision to the contrary, a legislature has the power to enact retrospective laws for the purpose of curing irregularities in the execution of contracts, or in the proceedings of municipal and judicial bodies, or for the purpose of supplying defects and omissions in statutes. It may lawfully ratify and validate any act or proceeding which it might have authorized in the first instance or excuse the non-observance of any formality which it might have omitted in the beginning. As applied to contracts, such acts do not impair the obligation thereof, but confirm and carry out the intention of the parties thereto; and as to the objection that such laws violate vested rights of property, it has been forcibly answered that there can be no vested right to do wrong. Claims contrary to justice and equity cannot be regarded as of that character.<sup>16</sup>

b. *Acts of Indemnity*.—An act passed after the event, which in effect ratifies an act authorizing appeals to the federal supreme court in certain classes of cases, pending appeals provided for by such act. The effect of such repeal without a saving clause is to destroy the appellate jurisdiction as to pending cases and operate as a dismissal of the appeal. *Ex parte McCordle*, 7 Wall. 506, 19 L. Ed. 264; *Norris v. Crocker*, 13 How. 429, 14 L. Ed. 210; *Insurance Co. v. Ritchie*, 5 Wall. 541, 18 L. Ed. 540.

15. **Includes power to impose new conditions**.—The *Collector v. Hubbard*, 12 Wall. 1, 14, 15, 20 L. Ed. 272.

Where an appeal to the commissioner of internal revenue is made a condition precedent to the right to bring a suit to recover taxes illegally assessed, and the right of appeal and the right of action are conferred by the same statute, it is entirely competent for congress to add new conditions to the exercise of the right of appeal in such cases whenever in its discretion the public interest may require. *The Collector v. Hubbard*, 12 Wall. 1, 14, 15, 20 L. Ed. 272.

16. **Curative and validating acts; general principles**.—*Satterlee v. Matthewson*, 2 Pet. 380, 7 L. Ed. 458; *Wilkinson v. Leland*, 2 Pet. 627, 662, 7 L. Ed. 542; *Watson v. Mercer*, 8 Pet. 88, 110, 8 L. Ed. 876; *Leland v. Wilkinson*, 10 Pet. 294, 9 L. Ed. 430; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. Ed. 773; *Thomson v. Lee County*, 3 Wall. 327, 18 L. Ed. 177; *Stanley v. Colt*, 5 Wall. 119, 18 L. Ed. 502; *Croxall v. Shererd*, 5 Wall. 268, 18 L. Ed. 572; *Beloit v. Morgan*, 7 Wall. 619, 19 L. Ed. 205; *Randall v. Kreiger*, 23 Wall. 137, 149, 23 L. Ed. 124; *Mattingly v. District of Columbia*, 97 U. S. 687, 24 L. Ed. 1098; *Mitchell v. Clark*, 110 U. S. 633, 640, 28 L. Ed. 279; *Grenada County Supervisors v. Brogden*, 112 U. S. 261, 262, 28 L. Ed. 704; *Anderson v. Santa Anna*, 116 U. S. 356, 364, 29 L. Ed. 633; *Bolles v. Brimfield*, 120 U. S. 759, 761, 30 L. Ed. 786; *Turpin v. Lemon*, 187 U. S. 51, 57, 47 L. Ed. 70; *United States*

*v. Heinszen & Co.*, 206 U. S. 370, 382, 51 L. Ed. 1098. See, also, the titles **IMPAIRMENT OF OBLIGATION OF CONTRACTS**; **STATUTES**.

"It cannot be doubted that an act of parliament may, by terms of confirmation, make valid a void thing, if such is its intent." Story, J., delivering the opinion in *Wilkinson v. Leland*, 2 Pet. 627, 662, 7 L. Ed. 542.

That the power of ratification as to matters within their authority may be exercised by congress, state governments or municipal corporations, is elementary. *Mattingly v. District of Columbia*, 97 U. S. 687, 24 L. Ed. 1098; *United States v. Heinszen & Co.*, 206 U. S. 370, 382, 51 L. Ed. 1098.

"If the thing wanting, or which failed to be done, and which constitutes the defect in the proceeding, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute. And if the irregularity consists in doing some act, or in the mode or manner of doing some act, which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law." *Mattingly v. District of Columbia*, 97 U. S. 687, 24 L. Ed. 1098.

**Such acts do not impair the obligation of contracts**.—*Satterlee v. Matthewson*, 2 Pet. 380, 7 L. Ed. 458; *Watson v. Mercer*, 8 Pet. 88, 110, 8 L. Ed. 876; *Randall v. Kreiger*, 23 Wall. 137, 147, 23 L. Ed. 124; And see the other cases cited above. See, also, the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**.

The only right taken away is the right to dishonestly repudiate an honest contract or conveyance to the injury of the other party. Even where no remedy could be had in the courts, the vested right is usually unattended with the slightest equity. *Randall v. Kreiger*, 23 Wall. 137, 149, 23 L. Ed. 124.

fies what has been done, and declares that no suit shall be sustained against the party acting under color of authority, is valid, so far as congress or the legislature could have conferred such authority before. These are ordinary acts of indemnity passed by all governments when the occasion requires it.<sup>17</sup>

*c. Irregularities in Judicial Proceedings.*—The legislature can never, by retrospective proceedings, cure a defect of jurisdiction in the proceedings of courts, for the reason that such proceedings being utterly void, they would acquire vitality as judicial acts, if at all, by the legislative acts, which would render it equivalent to a legislative judgment.<sup>18</sup> But mere irregularities in judicial proceedings may always be cured retrospectively.<sup>19</sup>

*d. Acts of Executors, Administrators, etc.*—Since an heir or devisee takes under the law a vested and absolute right only to the surplus real estate over and above what is required to discharge the debts of his ancestor, a legislative act which validates and confirms an absolutely void sale, made by the personal representative for the purpose of paying the debts of the deceased, is not unconstitutional as divesting the vested rights of such heir or devisee nor as impairing the original grant of the land by the state.<sup>20</sup>

*e. Defective Executions and Acknowledgments.*—The legislature has power to correct, by retrospective legislation, errors and defects in conveyances; and to validate deeds, mortgages and leases which could not have been sustained under existing laws as judicially construed. Such legislation is not unconstitutional as impairing vested rights or the obligation of contracts.<sup>21</sup>

**Defective Conveyances of Married Women.**—Thus the legislature may constitutionally enact a statute curing the defective acknowledgments of married women to deeds intended to pass title to their own lands or their dower interests in their husbands' lands.<sup>22</sup>

**17. Indemnity statutes.**—*Mitchell v. Clark*, 110 U. S. 633, 640, 28 L. Ed. 279.

**18. Irregularities in judicial proceedings; want of jurisdiction.**—*Cooley Const. Law*, 3d Ed., p. 357.

**19. Same—Mere irregularities.**—*Cooley, Const. Law*, 3d Ed. 357.

It is no objection to the constitutionality of a statute providing a remedy by bill of review after the expiration of the time within which an appeal might have been taken, that it was made to operate retrospectively and cure the irregularity of a case in which the bill of review was filed after the expiration of the time within which an appeal might have been taken, but before the enactment of the statute. *Sampeyreac v. United States*, 7 Pet. 222, 239, 8 L. Ed. 665.

**Irregularities in judicial sales.**—Lands were sold in New Jersey by order of the orphans' court in one of the counties, and a conveyance was made, not to the actual bidders, but to a person whom they appointed to represent them. Afterwards, the supreme court of the state having decided that such a practice was irregular, the legislature passed a law which enacted that, upon proof of the absence of fraud, and that the deed was executed in good faith and for a sufficient consideration, and with the consent of the persons reported as purchasers, it should have the same effect, and be as valid, as though it had been made to the purchaser direct. Held, that this act was unobjectionable and cured the defect in the deed. *Kearney v. Taylor*, 15 How. 494, 517, 14 L. Ed. 787.

**20. Acts of executors, administrators, etc.**—*Wilkinson v. Leland*, 2 Pet. 627, 660, 7 L. Ed. 542; *Leland v. Wilkinson*, 10 Pet. 294, 9 L. Ed. 430. In the case last cited, it was held that the legislature had the power to ratify and confirm a sale made by an executrix, the only authority for which was the order of a probate court of a sister state.

**21. Defective executions and acknowledgments.**—*Satterlee v. Matthewson*, 2 Pet. 380, 414, 7 L. Ed. 458; *Watson v. Mercer*, 8 Pet. 88, 110, 8 L. Ed. 876; *Randall v. Kreiger*, 23 Wall. 137, 23 L. Ed. 124; *Terry v. Anderson*, 95 U. S. 628, 24 L. Ed. 365; *Gross v. United States Mortgage Co.*, 108 U. S. 477, 488, 27 L. Ed. 795; *Louisiana v. New Orleans*, 109 U. S. 285, 27 L. Ed. 936; *Freeland v. Williams*, 131 U. S. 405, 33 L. Ed. 193; *Baker v. Kilgore*, 145 U. S. 487, 36 L. Ed. 786; *McFaddin v. Evans-Snider-Buel Co.*, 185 U. S. 505, 514, 46 L. Ed. 1012.

"The power of a legislature to pass laws giving validity to past deeds which were before ineffectual is well settled." *McFaddin v. Evans-Snider-Buel Co.*, 185 U. S. 505, 513, 46 L. Ed. 1012.

**22. Defective conveyances of married women.**—*Randall v. Kreiger*, 23 Wall. 137, 23 L. Ed. 124; *Watson v. Mercer*, 8 Pet. 88, 110, 8 L. Ed. 876.

The Pennsylvania act of 1826, the purpose and effect of which was to cure all defective and irregular acknowledgments of deeds executed by *femes covert*, did not operate to impair the obligation of the grant under which such *femes covert*



**Immaterial That Statute Enacted after Heirs Have Recovered Land from the Grantees.**—It is immaterial that such statute is enacted after the heirs at law of a feme covert have recovered the land, by action of ejectment, from her grantees.<sup>23</sup>

**Rights of Lessees.**—And so where a title has been held to be void because founded upon a grant by a sister state of disputed territory, the legislature may validate the same as against a tenant who has bought in and is seeking to set up an opposing title.<sup>24</sup>

**Validation of Mortgages.**—Curative acts validating mortgages of real property to foreign corporations, which mortgages were otherwise invalid as being opposed to the state law and policy respecting the mortgaging of real property to foreign corporations, are not invalid as impairing vested rights or the obligations of contracts, provided they do not impair the rights of third persons.<sup>25</sup>

**Limitations of Rule; Rights of Third Persons.**—In validating defective mortgages and other conveyances, the legislature cannot, of course, impair the rights of third persons occupying the position of bona fide purchasers for value and without notice, since their equities are equal to those of the first pur-

deraigned title, nor to impair the contract of the femes covert to convey the land; on the other hand, it recognized the validity of the original grant, and operated to confirm and give effect to the contract of conveyance. *Watson v. Mercer*, 8 Pet. 88, 110, 111, 8 L. Ed. 876.

In *Randall v. Kreiger*, 23 Wall. 137, 23 L. Ed. 124, it was held that it was competent for the legislature to validate a defective power of attorney to convey land. In that case a husband and wife, residing in New York, executed a power of attorney, valid under the laws of that state, to convey the wife's dower in the husband's lands in that state, but void in Minnesota, the state in which the lands named in the power were located. It was held that a subsequent act of the legislature of the latter state, validating conveyances made under the authority of such powers, was valid.

**23. Statute enacted after recovery of land by heirs.**—*Watson v. Mercer*, 8 Pet. 88, 110, 8 L. Ed. 876.

"Thus in *Watson v. Mercer*, 8 Pet. 88, 100, 8 L. Ed. 876, the title to land in controversy was originally in Margaret Mercer, the wife of James Mercer. For the purpose of transferring the title to the husband, they conveyed to a third person, who immediately conveyed to James Mercer. The deed of Mercer and wife bore date of May 30, 1785. It was fatally defective as to the wife, in not having been acknowledged by her in conformity with the provisions of the statute of Pennsylvania of 1770, touching the conveyance of real estate by femes covert. She died without issue. James Mercer died leaving children by a former marriage. After the death of both parties, her heirs sued his heirs in ejectment for the premises, and recovered. The supreme court of the state affirmed the judgment. In 1826 the legislature passed an act which cured the defective acknowledg-

ment of Margaret Mercer, and gave the same validity to the deed as if it had been well executed originally on her part. The heirs of James Mercer thereupon sued her heirs and recovered back the same premises. This judgment was also affirmed by the supreme court of the state, and that judgment of affirmance was affirmed by the United States supreme court." *McFaddin v. Evans-Snyder-Buel Co.*, 185 U. S. 505, 513, 46 L. Ed. 1012.

**24. Rights of lessees.**—*Satterlee v. Matthewson*, 2 Pet. 380, 414, 7 L. Ed. 458.

In this case, arising in the state of Pennsylvania, the supreme court of that state held that a title founded on a Connecticut grant was not sufficient to create the relation of landlord and tenant, and therefore a tenant who had bought in the title founded on the Pennsylvania patent was not estopped to deny his landlord's title founded on a Connecticut grant. Pending a new trial, the Pennsylvania legislature enacted a statute declaring that titles based on Connecticut grants should be deemed sufficient to create the relation of landlord and tenant, and made it applicable to pending cases. Upon a writ of error to the supreme court of the United States, it was held that as the statute was not invalid as impairing the obligation of contracts, and as there was no provision in the federal constitution prohibiting the impairment of vested rights, the objections against the constitutionality of the statute were without merit. (Distinguishing *Vanhorne v. Dorrance*, 2 Dall. 304, 1 L. Ed. 391; *Society for the Propagation of the Gospel v. New Haven*, 8 Wheat. 464, 5 L. Ed. 662, upon the ground that the decisions in those cases were based upon the provisions contained in the state constitution.) *Satterlee v. Matthewson*, 2 Pet. 380, 414, 7 L. Ed. 458.

**25. Validation of mortgages.**—*Gross v. United States Mortgage Co.*, 108 U. S. 477, 488, 27 L. Ed. 795.

chaser; and having obtained the legal title in addition, their position has become unassailable.<sup>26</sup> But where a third person takes property expressly subject to a mortgage which at the time of its execution was invalid as being opposed to the statutes and public policy of the state prohibiting mortgages upon real property in favor of foreign corporations, neither he nor any person claiming under him can object to a statute validating such mortgage, upon the ground that it impairs the obligation of his contract or deprives him of his property without due process of law.<sup>27</sup>

f. *Defective Recordations; Postponing Elder Grant for Failure to Record.*—An attachment creditor has no vested or property right of which he is deprived by a statute enacted subsequent to the levy of an attachment and validating a previous defective recordation of a mortgage upon the same property.<sup>28</sup> Neither does the constitutional prohibition against the impairment of the obligation of contracts forbid the enactment of recording acts whereby an elder grantee shall be postponed to a younger, if the elder grant be not recorded within a limited time; and this, whether the deed be dated before or after the act.<sup>29</sup>

g. *Taxation; Irregular Assessments; etc.*—"The mode in which the property shall be appraised, by whom its appraisement shall be made, the time within which it shall be done, what certificate of their action shall be furnished, and when parties shall be heard for the correction of errors, are matters resting in the legislative discretion. Where directions upon the subject might originally have been dispensed with, or executed at another time, irregularities arising from neglect to follow them may be remedied by the legislature, unless its action in this respect is restrained by constitutional provisions prohibiting retrospective legislation. It is only necessary, therefore, in any case to consider whether the assessment could have been ordered originally without requiring the proceedings, the omission or defective performance of which is complained of, or without requiring them within the time designated. If they were not essential to any valid assessment, and therefore might have been omitted or performed at another time, their omission or defective performance may be cured by the same authority which directed them, provided, always, that intervening rights are not impaired."<sup>30</sup>

**26. Limitations of rule; rights of third persons.**—*Les Bois v. Bramell*, 4 How. 449, 11 L. Ed. 1051; *Gross v. United States Mortgage Co.*, 108 U. S. 477, 27 L. Ed. 795; *Cooley Const. Law*, 3d Ed. 365.

**27. Same—Where third person purchased subject to mortgage which is afterwards validated.**—*Gross v. United States Mortgage Co.*, 108 U. S. 477, 27 L. Ed. 795.

**28. Defective recordations.**—*McFaddin v. Evans-Snider-Buel Co.*, 185 U. S. 505, 46 L. Ed. 1012.

An act of congress, enacted for one of the territories, subsequent to the levy of an attachment upon property covered by chattel mortgages held by a nonresident, and validating prior defective recordations of such mortgages, is not unconstitutional as depriving the attachment creditors of any vested or property right. The attachment creditor has no just ground in constitutional law to complain of the act of congress in giving legal effect to the equitable lien of the mortgage. *McFaddin v. Evans-Snider-Buel Co.*, 185 U. S. 505, 46 L. Ed. 1012.

Thus, where the attaching creditor had recovered judgment in Texas in May, 1887, and sued out an attachment on that judgment on property situated in the

northern district of the Indian Territory upon June 17, 1896, it was held that the act of February 3, 1897, which provided that "Section 4742 of Mansfield Dig. of the Laws of Arkansas, heretofore put in force in the Indian Territory, is hereby amended by adding to said section the following: provided that if the mortgagor is a nonresident of the Indian Territory, the mortgage shall be recorded in the judicial district in which the property is situated at the time the mortgage is executed. All mortgages of personal property in the Indian territory heretofore executed and recorded in the judicial district thereof in which the property was situated at the time they were executed are hereby validated,"—was a constitutional and valid enactment as to a mortgage which had been recorded in said district previous to the levy of the attachment. *McFaddin v. Evans-Snider-Buel Co.*, 185 U. S. 505, 46 L. Ed. 1012.

**29. Statute postponing elder grant for failure to record.**—*Jackson v. Lamphire*, 3 Pet. 280, 290, 7 L. Ed. 679; *McCracken v. Hayward*, 2 How. 608, 613, 11 L. Ed. 397; *Phalen v. Virginia*, 8 How. 163, 168, 12 L. Ed. 1030.

**30. Taxation; irregular assessments; etc.**—*Sturges v. Carter*, 114 U. S. 511, 29



**Validation of Tax Sales.**—"That it is competent for the legislature to provide by curative statutes that irregularities in the sales of lands shall not prejudice the purchaser after a certain time has elapsed, and a deed has been given, is entirely clear, although as observed by Judge Cooley in his work upon Taxation, chapter 10, such defective proceedings cannot be cured where there is a lack of jurisdiction to take them. 'Curative laws may heal irregularities in action, but they cannot cure want of authority to act at all,' and that 'whatever the legislature could not have authorized originally it cannot confirm.'"<sup>31</sup>

**Destruction of Existing Action to Recover Illegal Exactions.**—As regards the right to recover taxes illegally exacted, it seems that where congress might have constitutionally authorized the exaction in the first instance, but failed to do so, it may subsequently ratify and validate the unlawful action of the officials charged with the collection of the revenue, even to the destruction of existing or pending rights of action to recover the moneys unlawfully exacted.<sup>32</sup> It is only lately, however, that this doctrine has obtained a foothold in the decisions of the federal supreme court, for not long previous to the rendering of the decision cited in the note to the preceding sentence, it was distinctly ruled that an action already brought to recover duties paid under protest upon imports from the Island of Porto Rico, prior to the enactment of the act of congress of March 24, 1900, ch. 339, 31 Stat. 151, applying for the benefit of Porto Rico the amount of the customs revenue received on imports from that island previous to its enactment, was not and could not be affected thereby; that congress had no power to deprive the plaintiffs of their right to prosecute such action.<sup>33</sup>

L. Ed. 240; *Williams v. Supervisors*, 122 U. S. 154, 164, 30 L. Ed. 1088; *Castillo v. McConico*, 168 U. S. 674, 682, 42 L. Ed. 622. See, also, the title TAXATION.

If the omitted proceedings were not essential to any valid assessment, and therefore might have been omitted or performed at another time, their omission or defective performance may be cured by the same authority which directed them, provided always that intervening rights are not impaired. *Mattingly v. District of Columbia*, 97 U. S. 687, 690, 24 L. Ed. 1098; *Williams v. Supervisors*, 122 U. S. 154, 164, 30 L. Ed. 1088.

**31. Validation of tax sales.**—*Turpin v. Lemon*, 187 U. S. 51, 57, 47 L. Ed. 70. See, also, the title TAXATION.

It may not be altogether easy in a particular case to determine whether the defect be jurisdictional or not, but certainly irregularities in the personal conduct of the officer making the sale would not be so regarded; and it is at least exceedingly doubtful whether the failure to preserve the auditor's list of delinquent lands or the evidence of the publication and posting of the statutory notices would vitiate a deed made by the clerk, after a lapse of twelve years. *Turpin v. Lemon*, 187 U. S. 51, 57, 47 L. Ed. 70.

**32. Destruction of existing action to recover illegal exactions.**—*United States v. Heinszen & Co.*, 206 U. S. 370, 390, 51 L. Ed. 1098.

"Nor does the mere fact that at the time the ratifying statute (validating certain payments to the United States) was enacted, this action was pending for the recovery of the sums paid, cause the statute to be repugnant to the constitu-

tion. The mere commencement of the suit did not change the nature of the right. Hence again if it be conceded that the capacity to prosecute the pending suit to judgment was in a sense a vested right, certainly also the power of the United States to ratify was, to say the least, a right of as high a character. To arrogate to themselves the authority to divest the right of the United States to ratify is then in reason the assumption upon which the asserted right of the claimants to recover must rest." *White, J.*, delivering the majority opinion in *United States v. Heinszen & Co.*, 206 U. S. 370, 387, 51 L. Ed. 1098.

The ratifying statute, it was said, could be given effect without violating the fifth amendment of the constitution, since to give efficacy to the act would not deprive the claimants of their property without due process of law, nor would it appropriate the same for public use without just compensation. *United States v. Heinszen & Co.*, 206 U. S. 370, 386, 51 L. Ed. 1098.

**33. Same.**—*De Lima v. Bidwell*, 182 U. S. 1, 182, 199, 200, 45 L. Ed. 1041. See, also, *Lincoln v. United States*, 202 U. S. 484, 498, 50 L. Ed. 1117.

In *Hamilton v. Dillin*, 21 Wall. 73, 22 L. Ed. 528, the action was to recover a large amount in fees, or charges, which the plaintiffs had paid at the rate of four cents per pound upon several million pounds of cotton which they had purchased in hostile territory during the war between the states, the obtaining of permits from the president of the United States to carry on such trade having been made conditional upon the payment of



**Special Assessments; Powers of Congress.**—Congress, in exercising its power to legislate over property and persons in the District of Columbia, may confirm the proceedings of an officer in the district, or of a subordinate municipality, or other authority therein, which, without such confirmation, would be void, provided it had the power in the first instance to authorize such officer, board of municipal subdivision to make the improvements and levy the assessments in the manner in which they were made.<sup>34</sup>

*h. Irregularities Affecting County and Municipal Securities*—(1) *General Rule.*—If the legislature possesses the power to authorize an act to be done, it can, by a retrospective act, cure the evils arising from an irregular exercise of the power conferred. In the case of bonds issued by a county or municipal corporation, ratification by the legislature is equivalent to original authority, and cures not only an irregular exercise of power, but the want of power as well. Counties and cities being mere political subdivisions of the state created for the more convenient administration of government, their rights, powers, and liabilities may be restricted or enlarged as public interests may require; therefore, a statute which validates and requires a municipal corporation to pay a demand which is without legal obligation, but which is equitable and just, is no more retrospective, in a constitutional sense, than an act which requires the appropriation of funds for the payment of existing obligations, the legislature only exercising through its subordinate agent a power which it could exercise directly.<sup>35</sup>

such charge in accordance with the regulations of the treasury department. The plaintiffs based their claim to recover upon the ground that this charge was illegal and void; that it was essentially a tax and not authorized by congress, which alone had the power to impose taxes. The question whether or not congress had the power to destroy an existing right of recovery was not distinctly passed upon, since the court was of opinion that the charge was legally authorized without any ratification by congress; but in the course of the opinion it was said: "We are also of opinion that the act of July 2, 1864, recognized and confirmed the regulations in question." And again: "It will be observed that the law was prospective relating to moneys thereafter to be received, as well as to those already received. This was clearly an implied recognition and ratification of the regulations, so far as any ratification on the part of congress may have been necessary to their validity."

**34. Special assessments in District of Columbia.**—*Mattingly v. District of Columbia*, 97 U. S. 687, 690, 24 L. Ed. 1098. See, generally, the title SPECIAL ASSESSMENTS.

**35. Irregularities affecting county and municipal securities.**—*Gelpcke v. Dubuque*, 1 Wall. 175, 220, 17 L. Ed. 520; *Thomson v. Lee County*, 3 Wall. 327, 18 L. Ed. 177; *Campbell v. Kenosha*, 5 Wall. 194, 18 L. Ed. 610; *Supervisors v. Schenck*, 5 Wall. 772, 776, 789, 18 L. Ed. 556; *Beloit v. Morgan*, 7 Wall. 619, 624, 19 L. Ed. 205; *The City v. Lamson*, 9 Wall. 477, 485, 19 L. Ed. 725; *St. Joseph Township v. Rogers*, 16 Wall. 644, 663, 21 L. Ed. 328; *Ritchie v. Franklin County*, 22 Wall. 67, 22 L. Ed. 825; *New Orleans v. Clark*,

95 U. S. 644, 654, 24 L. Ed. 521; *Thompson v. Perrine*, 103 U. S. 806, 815, 26 L. Ed. 612; *Read v. Plattsmouth*, 107 U. S. 568, 575, 27 L. Ed. 414; *Jonesboro City v. Cairo, etc., R. Co.*, 110 U. S. 192, 28 L. Ed. 116; *Otoe County v. Baldwin*, 111 U. S. 1, 15, 28 L. Ed. 331; *Grenada County Supervisors v. Brogden*, 112 U. S. 261, 262, 271, 28 L. Ed. 704; *Anderson v. Santa Anna*, 116 U. S. 356, 29 L. Ed. 633; *Bolles v. Brimfield*, 120 U. S. 759, 761, 30 L. Ed. 786; *Utter v. Franklin*, 172 U. S. 416, 423, 43 L. Ed. 498. See, also, the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

Where the only defect in bonds was that they were issued in excess of the powers conferred upon such municipalities by the act of congress, it is competent for congress, having full legislative power over the territories, and having power to authorize the issuance of the bonds in the first instance, to remedy the defect by a curative act supplying the want of power. *Rogers v. Keokuk*, 154 U. S., appx., 546, 13 L. Ed. 74; *Rogers v. Lee County*, 154 U. S., appx., 547, 18 L. Ed. 75; *Utter v. Franklin*, 172 U. S. 416, 423, 43 L. Ed. 498.

The right of the state as the sovereign of itself to recognize or to compel any of its political subdivisions to recognize those obligations which, while not cognizable in any court of law, are yet based upon considerations so thoroughly equitable and moral as to deserve and compel legislative recognition, is a jurisdiction which has been customarily exercised ever since the foundation of the government, and in its exercise over municipal corporations by the state or by the territorial legislature, no constitutional principle is violated. *New Orleans v. Clark*, 95 U. S.

(2) *Illustrations.*—See the footnotes.<sup>36</sup>

(3) *Limitations of Rule; Effect of Subsequent Constitutional Prohibition.*—Where a constitutional amendment has been adopted forbidding the issuance of bonds or the creation of indebtedness for certain purposes, the legislature cannot validate an unauthorized bond issue or other indebtedness incurred previous to the amendment and which would be invalid if attempted subsequent to the amendment. The measure of the power of the legislature is the constitutional provision in force at the time the retrospective validating act is pro-

644, 24 L. Ed. 521; *Read v. Plattsburgh*, 107 U. S. 568, 27 L. Ed. 414; *Guthrie Nat. Bank v. Guthrie*, 173 U. S. 528, 537, 43 L. Ed. 796.

See, also, *United States v. Realty Co.*, 163 U. S. 427, 439, 41 L. Ed. 215, in which the court upheld the power of congress to recognize a moral obligation on the part of the nation and to pay claims (arising under the sugar bounty acts) which, while they were not of a legal character, were nevertheless meritorious and equitable in their nature.

**36. Failure of act to limit amount of indebtedness.**—A debt for a specific sum contracted by a city, and invalid because a statute which authorized the city to contract a debt did not also limit the extent of it, is made valid by a subsequent statute recognizing the validity of the debt as contracted. *The City v. Lamson*, 9 Wall. 477, 19 L. Ed. 725, followed in *Kenosha v. Lamson*, 15 U. S., appx., 573, 19 L. Ed. 725.

Where the legislature of a state passes two acts, one (which by the constitution it had the power to pass) authorizing a city to subscribe a limited amount (\$150,000) of stock to a railroad, another (which, by the constitution, it had no power to pass) authorizing it to subscribe an unlimited amount, and the city, professing to act under the one which authorized the unlimited amount, subscribes the limited amount (\$150,000), a subsequent recognition by the legislature of the subscription as legal validates the subscription. *Campbell v. Kenosha*, 5 Wall. 194, 18 L. Ed. 610.

**Bonds exchanged instead of sold.**—Where a municipal corporation authorized to sell its bonds at not less than par and apply the proceeds to the purchase of stock in aid of a railroad enterprise disregards the directions of the statute and exchanges the bonds directly for the stock, the legislature having the power to authorize the direct exchange of the bonds for the stock, has power to validate the bonds so exchanged by a subsequent curative act. *Thompson v. Perrine*, 103 U. S. 806, 26 L. Ed. 612.

**Invalid or irregular elections.**—Mistakes and irregularities are of frequent occurrence in municipal elections, and the state legislatures have often had occasion to pass laws to obviate such difficulties. Such laws, when they do not impair any contract or injuriously affect the rights of third persons, are never regarded as objectionable, and certainly are within

the competency of the legislative authority. *St. Joseph Township v. Rogers*, 16 Wall. 644, 21 L. Ed. 328. See, also, the authorities cited ante under "General Rule," VIII, C, 14, h, (1).

**Failure to hold any election.**—Although a statute may require that no bonds be issued by counties to make roads unless the voters have approved the expenditure, if there is nothing in the state constitution which requires such approval, the legislature can confer the power to borrow money to pay debts already contracted for this purpose without such consent. *Ritchie v. Franklin County*, 22 Wall. 67, 22 L. Ed. 825.

The act of the legislature of Missouri of March 21st, 1868, to authorize county courts to issue bonds for the purpose of paying for the building of bridges and macadamized roads theretofore contracted to be built, is valid under the constitution of the state whether the act be considered as an original act or as one merely curative. *Ritchie v. Franklin County*, 22 Wall. 67, 22 L. Ed. 825.

**Election held without legislative authority.**—Where what was done by the constitutional majority of qualified electors and by the board of supervisors of the county would have been legal and binding upon the county had it been done under legislative authority previously conferred, subsequent legislative ratification is, in the absence of constitutional restrictions upon such legislation, equivalent to original authority. *Thomson v. Lee County*, 3 Wall. 327, 18 L. Ed. 177; *Campbell v. Kenosha*, 5 Wall. 194, 18 L. Ed. 610; *The City v. Lamson*, 9 Wall. 477, 19 L. Ed. 725; *Ritchie v. Franklin County*, 22 Wall. 67, 22 L. Ed. 825; *Thompson v. Perrine*, 103 U. S. 806, 815, 26 L. Ed. 612; *Otoe County v. Baldwin*, 111 U. S. 1, 15, 28 L. Ed. 331; *Grenada County Supervisors v. Brogden*, 112 U. S. 261, 271, 28 L. Ed. 704; *Anderson v. Santa Anna*, 116 U. S. 356, 364, 29 L. Ed. 633.

**Bonds issued under defective county organization.**—A state legislature which is vested with full power under the state constitution over the matter of the organization of new counties, may ratify and validate the defective organization of a de facto county, no matter how fraudulent the proceedings were, and thereby validate county bonds issued by the county under its former fraudulent organization which has since been abandoned. *Comanche County v. Lewis*, 133 U. S. 198, 33 L. Ed. 604.



posed to be enacted. It cannot ratify an act previously done if at the date it professed to do so it could not confer the power in the first instance.<sup>37</sup>

(4) *Ratification May Be by Implication.*—The legislative recognition may be made by implication.<sup>38</sup>

(5) *State Constitutional Provisions Prohibiting Retrospective Laws.*—A state constitutional provision which declares that no retrospective law shall be passed does not forbid legislation of this character. Such a provision does not apply to legislation recognizing or affirming the obligations of the state or of any of its subordinate agencies with respect to past transactions. It is designed to prevent retrospective legislation injuriously affecting individuals, and thus protect vested rights from invasion.<sup>39</sup>

## IX. Due Process of Law.

See the title DUE PROCESS OF LAW.

## X. Impairment of the Obligation of Contracts.

See the title IMPAIRMENT OF OBLIGATION OF CONTRACTS.

## XI. The Rights of Life, Liberty, Private Property and the Pursuit of Happiness.

**A. Generally as to Life, Liberty and the Pursuit of Happiness.**—The theory upon which our political institutions rest is that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law.<sup>40</sup>

**"Liberty" as Guaranteed by the Fifth and Fourteenth Amendments.**—As to the meaning of the term liberty, as used in the fifth and fourteenth amendments, see the title DUE PROCESS OF LAW.

**Right of Personal Liberty a Civil Right.**—The constitutional right of personal liberty is a civil right, and a habeas corpus proceeding, instituted by one imprisoned upon a criminal charge to recover his personal liberty, is a civil proceeding.<sup>41</sup>

**Rights of Liberty and Citizenship Subject to Reasonable Restraints.**—See the titles DUE PROCESS OF LAW; POLICE POWER.

**B. The Right of Private Property.**—"The right of acquiring and possessing property, and having it protected, is one of the natural, inherent and inalienable rights of man."<sup>42</sup> The possession of property of which a person cannot

**37. Limitations of rule; effect of subsequent constitutional prohibition.**—*Katzenberger v. Aberdeen*, 121 U. S. 172, 178, 30 L. Ed. 911; *Grenada County Supervisors v. Brogden*, 112 U. S. 261, 271, 28 L. Ed. 704.

**38. Ratification may be by implication.**—*Campbell v. Kenosha*, 5 Wall. 194, 18 L. Ed. 610.

A statute which, in the case of such an issue, creates as part of the municipal government an officer whose duty it is to attend to the city's interests and concerns, in regard to the railroad subscribed to, and who, the act declares, "shall redeem all scrip which has been issued for it," constitutes a ratification of the originally irregular issue. *Campbell v. Kenosha*, 5 Wall. 194, 18 L. Ed. 610.

**39. State constitutional provisions prohibiting retrospective laws.**—*Ritchie v. Franklin County*, 22 Wall. 67, 22 L. Ed.

825; *New Orleans v. Clark*, 95 U. S. 644, 655, 24 L. Ed. 521; *Read v. Plattsouth*, 107 U. S. 568, 575, 27 L. Ed. 414.

**40. The right to life, liberty and the pursuit of happiness.**—*Field, J.*, delivering the majority opinion in *Cummings v. Missouri*, 4 Wall. 277, 321, 18 L. Ed. 356. *Accord: Paul v. Virginia*, 8 Wall. 168, 180, 19 L. Ed. 357; *Soon Hing v. Crowley*, 113 U. S. 703, 708, 28 L. Ed. 1145; *Powell v. Pennsylvania*, 127 U. S. 678, 684, 32 L. Ed. 253; *Dent v. West Virginia*, 129 U. S. 114, 121, 32 L. Ed. 623; *Crowley v. Christensen*, 137 U. S. 86, 89, 34 L. Ed. 620; *Allgeyer v. Louisiana*, 165 U. S. 578, 590, 41 L. Ed. 832.

**41. The right of personal liberty a civil right.**—*Ex parte Tom Tong*, 108 U. S. 556, 27 L. Ed. 826, followed in *Ex parte Clodomiro Cota*, 110 U. S. 385, 28 L. Ed. 172.

**42. The right of private property.**—*Van-horne v. Dorrance*, 2 Dall. 304, 310, 1 L. Ed. 391.



be deprived implies that such property may be acquired. Therefore the enjoyment upon terms of equality with all others in similar circumstances of the right to acquire, hold and dispose of property is an essential part of the rights of liberty and property as guaranteed by the fourteenth amendment, and a law which undertook to deprive any class of persons of the general power to acquire property would be obnoxious to that amendment.<sup>43</sup>

**C. Right of the Citizen to Protection in His Rights of Life, Liberty, Property, etc.**—In all controversies, civil or criminal, between the government and individual, the latter is entitled to reasonable protection in the enjoyment of his rights of life, liberty and property, personal security and the pursuit of happiness.<sup>44</sup>

**D. The Constitutional Guaranties of Life, Liberty and Property, Personal Security, etc.**—1. **GENERALLY.**—See ante, "Equal Protection of the Laws; Class Legislation," VII, et seq.; post, "Religious Liberty, and Freedom of Conscience," XII; "Justice without Denial, Purchase or Delay," XIV; "Protection to Persons Accused of Crime," XVIII, et seq. See, also, the titles **CIVIL RIGHTS**, vol. 3, p. 814; **DUE PROCESS OF LAW**; **IMPAIRMENT OF OBLIGATION OF CONTRACTS**; **HABEAS CORPUS**; **SEARCHES AND SEIZURES**; **SLAVERY AND INVOLUNTARY SERVITUDE**.

2. **AS CONTAINED IN THE FIRST TEN AMENDMENTS.**—"The first ten amendments to the constitution, adopted as they were soon after the adoption of the constitution, are in the nature of a bill of rights, and were adopted in order to quiet the apprehension of many, that without some such declaration of rights the government would assume, and might be held to possess, the power to trespass upon those rights of persons and property which by the Declaration of Independence were affirmed to be inalienable rights."<sup>45</sup>

3. **AS TO THE DEPRIVATION OF LIFE, LIBERTY OR PROPERTY WITHOUT DUE PROCESS OF LAW.**—See the title **DUE PROCESS OF LAW**.

**43. Same—Includes the right to acquire upon terms of equality.**—*Butchers' Union Slaughter-House, etc., Co. v. Crescent City, etc., Slaughter-House Co.*, 111 U. S. 746, 764, 28 L. Ed. 585; *Powell v. Pennsylvania*, 127 U. S. 678, 684, 32 L. Ed. 253; *Allgeyer v. Louisiana*, 165 U. S. 578, 590, 591, 41 L. Ed. 832; *Holden v. Hardy*, 169 U. S. 366, 391, 42 L. Ed. 780; *Orient Ins. Co. v. Dags*, 172 U. S. 557, 564, 43 L. Ed. 552; *New York Life Ins. Co. v. Cravens*, 178 U. S. 389, 44 L. Ed. 1116; *Hancock Mut. Life Ins. Co. v. Warren*, 181 U. S. 73, 45 L. Ed. 755. See, also, ante, "Right to Pursue Lawful Occupation, Acquire and Dispose of Property, without Discrimination," VII, B, 3, b.

**Constitution of Pennsylvania; rights based upon Connecticut titles.**—The first section of the ninth article of the Pennsylvania constitution declared "that all men are born equally free and independent and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." Held, that the act of April 11, 1795, declaring the taking possession of lands, or conspiring to convey, possess or settle them, in the counties of North Hampton, etc., under any title not derived from Pennsylvania, was not unconstitutional, as violating the foregoing provision; the defendant's claim

being based upon a title derived from the state of Connecticut, and the contention between the states of Pennsylvania and Connecticut as to said lands having been previously decided in favor of the state of Pennsylvania. (*Sup. Ct. Pa.*) *Commonwealth v. Franklin*, 4 Dall. 255, 1 L. Ed. 823.

**44. Right of citizen to protection in his rights of life, liberty, property, etc.**—*Beavers v. Henkel*, 194 U. S. 73, 83, 48 L. Ed. 882; *Kessler v. Treat*, 205 U. S. 33, 51 L. Ed. 695. See, also, the title **CITIZENSHIP**, vol. 3, p. 805.

"That, generally speaking, a citizen may be protected against wrongful acts of the government affecting him or his property, may be conceded." *Wilson v. Shaw*, 204 U. S. 24, 31, 51 L. Ed. 351.

"In all controversies, civil or criminal, between the government and an individual, the latter is entitled to reasonable protection. Such seems to have been the purpose of congress in enacting § 1014, Rev. Stat., which requires that the order of removal be issued by the judge of the district in which the defendant is arrested. In other words, the removal is made a judicial rather than a mere ministerial act." *Beavers v. Henkel*, 194 U. S. 73, 83, 48 L. Ed. 882.

**45. As contained in the first ten amendments.**—*Monongahela Nav. Co. v. United States*, 148 U. S. 312, 324, 37 L. Ed. 463.

4. AS TO TAKING PRIVATE PROPERTY FOR PUBLIC USE WITHOUT COMPENSATION.—See the titles DUE PROCESS OF LAW; EMINENT DOMAIN.

5. THE HABEAS CORPUS.—See the title HABEAS CORPUS.

6. AS TO UNREASONABLE SEARCHES AND SEIZURES.—See the title SEARCHES AND SEIZURES.

7. AS TO SLAVERY AND INVOLUNTARY SERVITUDE.—See the title SLAVERY AND INVOLUNTARY SERVITUDE.

**E. Who May Invoke Protection of the Constitutional Guaranties**

—1. GENERALLY.—See ante, "Who May Raise Constitutional Questions," IV, G, et seq.; "Persons Protected," VII, B, 1, et seq.; post, "Persons Entitled to Invoke the Protection of Art. 4, § 2," XVII, A, 2, a, et seq.; "Privileges and Immunities Clause Protects Only the Privileges and Immunities Pertaining to Citizenship of the United States," XVII, A, 3, b, (2), (f); "Persons Protected," XVIII, A, et seq.; "Persons Protected," XVIII, D, 4, et seq. See, also, the titles ALIENS, vol. 1, p. 210, et seq.; CIVIL RIGHTS, vol. 3, p. 814, 824, 829, 845; CORPORATIONS; DUE PROCESS OF LAW; FOREIGN CORPORATIONS.

2. NATURAL AND ARTIFICIAL PERSONS.—The liberty referred to in the fourteenth amendment is the liberty of natural and not artificial persons.<sup>46</sup>

3. ALIENS.—"The fourteenth amendment to the constitution is not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.' These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, or color, or nationality."<sup>47</sup>

46. Natural and artificial persons.—*Northwestern Nat. Life Ins. Co. v. Riggs*, 203 U. S. 243, 51 L. Ed. 168. See, also, ante, "Corporations," VII, B, 1, b; post, "Corporations," XVII, A, 2, a, (6). And see, generally, the titles CORPORATIONS; DUE PROCESS OF LAW; FOREIGN CORPORATIONS.

47. Aliens.—*Carlisle v. United States*, 16 Wall. 147, 21 L. Ed. 426; *Yick Wo v. Hopkins*, 118 U. S. 356, 371, 30 L. Ed. 220; *Lau Ow Bew v. United States*, 144 U. S. 47, 61, 36 L. Ed. 340; *Fong Yue Ting v. United States*, 149 U. S. 698, 724, 37 L. Ed. 905; *Lem Moon Sing v. United States*, 158 U. S. 538, 547, 39 L. Ed. 1082; *Wong Wing v. United States*, 163 U. S. 228, 239, 41 L. Ed. 140; *United States v. Wong Kim Ark*, 169 U. S. 649, 694, 42 L. Ed. 890; *Downes v. Bidwell*, 182 U. S. 244, 283, 45 L. Ed. 1088; *Ah Sin v. Wittman*, 198 U. S. 500, 49 L. Ed. 1142. See, also, the titles ALIENS, vol. 1, p. 219; CIVIL RIGHTS, vol. 3, pp. 845, 846. And see ante, "Citizens and Aliens," VII, B, 1, a.

While an alien lawfully remains here he is entitled to the benefit of the guaranties of life, liberty, and property, secured by the constitution to all persons, of whatever race, within the jurisdiction of the United States. His personal rights when he is in this country and such of his property as is here during his absence, are as fully protected by the supreme law of the land as if he were a native or naturalized citizen of the United States. But when he has voluntarily gone from the country, and is beyond its jurisdiction, being an alien, he cannot re-enter the United States in violation of the will of the government as expressed in enactments of the law-

making power. *Lem Moon Sing v. United States*, 158 U. S. 538, 548, 39 L. Ed. 1082.

"Chinese persons, born out of the United States, remaining subjects of the Emperor of China, and not having become citizens of the United States, are entitled to the protection of, and owe allegiance to, the United States so long as they are permitted by the United States to reside here; and are subject to the jurisdiction thereof, in the same sense as all other aliens residing in the United States. *Yick Wo v. Hopkins* (1886), 118 U. S. 356, 30 L. Ed. 220; *Lau Ow Bew v. United States* (1892), 144 U. S. 47, 61, 62, 36 L. Ed. 340; *Fong Yue Ting v. United States* (1893), 149 U. S. 698, 724, 37 L. Ed. 905; *Lem Moon Sing v. United States* (1895), 158 U. S. 538, 547, 39 L. Ed. 1082; *Wong Wing v. United States* (1896), 163 U. S. 228, 238, 41 L. Ed. 140." *United States v. Wong Kim Ark*, 169 U. S. 649, 694, 42 L. Ed. 890.

"Chinese laborers, therefore, like all other aliens, residing in the United States for a shorter or longer time, are entitled, so long as they are permitted by the government of the United States to remain in the country, to the safeguards of the constitution, and to the protection of the laws, in regard to their rights of person and of property, and to their civil and criminal responsibility. But they continue to be aliens, having taken no steps towards becoming citizens, and incapable of becoming such under the naturalization laws; and therefore remain subject to the power of congress to expel them, or to order them to be removed and deported from the country, whenever in its judg-

4. **CITIZENS OF TERRITORIES.**—The constitutional provisions intended for the protection of life, liberty, and property extend to the protection of persons residing in the territories, or in conquered territory of the United States.<sup>48</sup>

5. **RESIDENTS OF THE DISTRICT OF COLUMBIA AND PLACES UNDER EXCLUSIVE FEDERAL CONTROL.**—See ante, "In the District of Columbia and Places under Exclusive Federal Control," IV, C, 3; "Jurisdiction in the District of Columbia and Places under Exclusive Federal Control, VI, D, 3, c, (3), (b); post, "Residents of the District of Columbia," XVIII, A, 1.

6. **CITIZENS RESIDING OR SOJOURNING ABROAD.**—See ante, "Exterritorial Operation," IV, C, 4; post, "Citizens Residing or Sojourning Abroad," XVIII, A, 3.

**F. Construction of Constitutional Guaranties; Strict or Liberal.**—See ante, "Construction Strict or Liberal, When," III, B, 17.

## XII. Religious Liberty and Freedom of Conscience.

**A. Religion Defined.**—The term "religion" has reference to one's views of his relations to his creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the cultus or form of worship of a particular sect, but is distinguishable from the latter.<sup>49</sup>

**B. Right of Government to Control or Direct Religious Belief.**—With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people are not interfered with.<sup>50</sup>

**C. The Federal Constitutional Guaranty**—1. **GENERAL OBJECT AND PURPOSE.**—The first amendment to the federal constitution, in declaring that congress shall make no law respecting the establishment of religion, or forbidding the free exercise thereof, was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect.<sup>51</sup>

2. **OPERATION IN THE TERRITORIES.**—Congress cannot pass a law for the government of the territories which shall prohibit the free exercise of religion. The first amendment to the constitution expressly forbids such legislation. Religious freedom is guaranteed everywhere throughout the United States, so far as congressional interference is concerned.<sup>52</sup>

3. **NOT RESTRICTIVE OF THE STATES.**—The federal constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitution and laws; nor is there any inhibition imposed by the constitution of the United States in this respect on the states.<sup>53</sup>

ment their removal is necessary or expedient for the public interest." *Fong Yue Ting v. United States*, 149 U. S. 698, 724, 37 L. Ed. 905.

48. **Citizens of territories.**—Downes v. Bidwell, 182 U. S. 244, 283, 45 L. Ed. 1088. See, generally, ante, "Limitation upon the Power of Congress: Operation of the Constitution within the Territories," VI, D, 2, c, (3), (c), (cc), (bbb), (cccc), (bbbbb).

49. **Religion defined.**—*Davis v. Beason*, 133 U. S. 333, 342, 33 L. Ed. 637.

50. **Right of government to control or direct religious belief.**—*Davis v. Beason*, 133 U. S. 333, 342, 33 L. Ed. 637.

51. **The federal constitutional guaranty; general object and purpose.**—*Davis v. Beason*, 133 U. S. 333, 342, 33 L. Ed. 637.

52. **Same—Operation in the territories.**—*Reynolds v. United States*, 98 U. S. 145, 162, 25 L. Ed. 244.

53. **Same—Not restrictive of the states.**—*Permoli v. First Municipality*, 3 How. 589, 609, 11 L. Ed. 739.



**D. Protection Afforded to Freedom of Opinion.—By the Federal Constitution.**—By the first amendment to the constitution, congress is deprived of all legislative power over mere opinion in religious matters.<sup>54</sup>

**By the Virginia Constitution.**—Consistently with the constitution of Virginia, the legislature of that state cannot compel citizens to worship under a stipulated form or discipline or to pay taxes to those whose creed they cannot conscientiously believe.<sup>55</sup>

**E. Adoption of Common-Law Doctrines.**—The common law, so far as it related to the erection of churches of the Episcopal persuasion of England, the right to present or collate to such churches, and the corporate capacity of the parsons thereof to take in succession, was recognized and adopted in New Hampshire.<sup>56</sup> And the religious establishment of England was adopted by the colony of Virginia, together with the common law upon that subject, so far as it was applicable to the circumstances of the colony.<sup>57</sup>

**The Pennsylvania constitution of 1790 declared,** “that all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience; and no preference shall ever be given by law to any religious establishment or modes of worship.” Upon a contention that Christianity was a part of the common law of Pennsylvania, it was held that under the foregoing constitutional provisions it could be so only in the qualified sense that its divine origin and truth are admitted, and therefore it is not to be maliciously and openly reviled and blasphemed against to the annoyance of believers or the injury of the public; that this provision extends complete protection to every variety of religious opinion, and to all sects, whether Christians, Jews or Infidels.<sup>58</sup>

**Religion Recognized and Protected by the Constitutions and Laws.**—No purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people. This is historically true. From the discovery of this continent to the present hour, there is a single voice making this affirmation.<sup>59</sup>

**Ordinance of 1787 superseded by state constitution.**—The ordinance of 1787, which by the act of 1805, ch. 83, was extended to inhabitants of Orleans territory, and the acts of congress organizing the territorial government of Orleans, and standing in connection with the ordinance of 1787, so far as that conferred political rights and secured civil and religious liberties (which are political rights) was superseded by the state constitution of Louisiana, and no part of them continued in force after the adoption of the state constitution unless they were adopted thereby. *Permoli v. First Municipality*, 3 How. 589, 610, 11 L. Ed. 739.

**Ordinance forbidding funeral services in church raises no federal question.**—The federal supreme court has no jurisdiction, therefore, under § 25 of the judiciary act, of the question whether an ordinance of the corporate authorities of the city of New Orleans, making it unlawful to carry to, and expose in, any of the Catholic churches of the municipality, any corpse, and requiring all funerals to be conducted from a specified mortuary chapel, does or does not impair religious liberty. *Permoli*

*v. First Municipality*, 3 How. 589, 11 L. Ed. 739.

**54. Freedom of opinion; protection afforded by the federal constitution.**—*Reynolds v. United States*, 98 U. S. 145, 164, 25 L. Ed. 244.

**55. By the Virginia constitution.**—*Terrett v. Taylor*, 9 Cranch 43, 49, 3 L. Ed. 650.

**56. Adoption of common-law doctrines, in New Hampshire.**—*Pawlet v. Clark*, 9 Cranch 292, 3 L. Ed. 735.

**57. Same—In Virginia.**—*Terrett v. Taylor*, 9 Cranch 43, 3 L. Ed. 650.

**58. Same—In Pennsylvania.**—*Vidal v. Girard*, 2 How. 126, 198, 11 L. Ed. 205. And see *Holy Trinity Church v. United States*, 143 U. S. 457, 471, 36 L. Ed. 226, approving the doctrine of *Vidal v. Girard*, 2 How. 126, 198, 11 L. Ed. 205, wherein it is stated that the Christian religion is a part of the common law of Pennsylvania.

**59. Unfriendly attitude toward religion not to be presumed.**—*Holy Trinity Church v. United States*, 143 U. S. 457, 465, 36 L. Ed. 226.

**Religion recognized and protected by the constitution and laws.**—The Declaration of Independence recognizes the pres-

**F. Equality of Religions and Sects; Exclusive Rights and Prerogatives.—Under the Virginia Constitution.**—Consistently with the constitution of Virginia, the legislature could not create or continue a religious establishment which should have exclusive rights and prerogatives.<sup>60</sup>

**Same—Religious Corporations.**—But neither public nor constitutional principles required the abolition of all religious corporations after the Revolution.<sup>61</sup>

**Appropriations by Congress for Erection of Buildings on Grounds of Sectarian Hospital.**—The provision of article one of the amendments to the constitution, that congress shall make no law respecting an establishment of religion, does not prohibit congress from appropriating money to be expended in the erection of buildings and in the care of patients upon the grounds of a private hospital corporation composed entirely of Roman Catholic sisters of charity and managed under the auspices of the Roman Catholic church.<sup>62</sup>

**What Constitutes a Sectarian Corporation.**—That the influence of any particular church may be powerful over the members of a nonsectarian and secular corporation, incorporated for a certain defined purpose and with clearly stated powers, is not sufficient to convert such a corporation into a religious or sectarian body. That fact does not alter the legal character of a corporation which is incorporated under an act of congress; its powers, duties and character are to be solely measured by the charter under which alone it has any legal existence.<sup>63</sup>

**Free Exercise of Religion Not Restrained by Equal Aid to All Sects.**—The free exercise of religion cannot be justly deemed to be restrained by aiding with equal attention the votaries of every sect to perform their own religious duties or by establishing funds for the support of ministers, for public charities, for the endowment of churches, or for the sepulture of the dead.<sup>64</sup>

ence of the Divine in human affairs. *Holy Trinity Church v. United States*, 143 U. S. 457, 467, 36 L. Ed. 226.

If we examine the constitutions of the various states we find in them a constant recognition of religious obligations. Every constitution of every one of the forty-four states contains language which either directly or by clear implication recognizes a profound reverence for religion and an assumption that its influence in all human affairs is essential to the well being of the community. *Holy Trinity Church v. United States*, 143 U. S. 457, 468, 36 L. Ed. 226.

Even the constitution of the United States, which is supposed to have little touch upon the private life of the individual, contains in the first amendment a declaration common to the constitutions of all the states, as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," etc. *Holy Trinity Church v. United States*, 143 U. S. 457, 470, 36 L. Ed. 226.

There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning; they affirm and reaffirm that this is a religious nation. These are not individual sayings, declarations of private persons; they are organic utterances; they speak the voice of the entire people. *Holy Trinity Church v. United States*, 143 U. S. 457, 470, 36 L. Ed. 226.

60. Equality of sects; under the Vir-

ginia constitution.—*Terrett v. Taylor*, 9 Cranch 43, 49, 3 L. Ed. 650.

**Acts confirming property to church.**—The act of Virginia of 1776 confirming to the church its right to lands, was not inconsistent with the constitution or bill of rights of Virginia; nor did the act of 1784-1785 infringe any of the rights, intended to be secured under the constitution, either civil, political or religious. *Terrett v. Taylor*, 9 Cranch 43, 3 L. Ed. 650.

61. Religious corporations.—*Terrett v. Taylor*, 9 Cranch 43, 49, 3 L. Ed. 650.

The provisions of the Virginia constitution that "religion can be directed only by reason and conviction, not by force or violence," and that "all men are equally entitled to the free exercise of religion, according to the dictates of the conscience," does not prohibit the legislature from enacting laws to more effectually enable all sects to accomplish the great object of religion by giving them corporate rights for the management of their property, and the regulation of their temporal as well as spiritual concerns. *Terrett v. Taylor*, 9 Cranch 43, 49, 3 L. Ed. 650.

62. Congressional appropriation for hospital upon grounds owned by Roman Catholic Church.—*Bradfield v. Roberts*, 175 U. S. 291, 44 L. Ed. 168.

63. What constitutes a sectarian corporation.—*Bradfield v. Roberts*, 175 U. S. 291, 298, 44 L. Ed. 168.

64. Equal aid to all sects.—*Terrett v. Taylor*, 9 Cranch 43, 49, 3 L. Ed. 650.



**G. Blasphemy; Bequests Opposed to Religious Policy of State, etc.—**

The question, what is the public policy of a state, and what is contrary to it, especially as concerns the topic of religious policy, is to be determined, not by general considerations of supposed public interests and policy, but from the constitution, laws and judicial opinions of the state.<sup>65</sup>

**Blasphemy; Bequests Opposed to Religious Policy of State.**—Remote inferences, or possible results, or speculative tendencies, are not to be drawn or adopted for the purpose of making a devise for the foundation of a college void as being blasphemous, or derogatory and hostile to the Christian religion; there must be plain, positive, and express provisions, demonstrating not only that Christianity is not to be taught, but that it is to be impugned or repudiated.<sup>66</sup>

**H. Religious Belief as a Defense to Prosecution from Crime.**—Whilst legislation for the establishment of a religion is forbidden, and its free exercise permitted, it does not follow that everything which may be so called can be tolerated.<sup>67</sup> By the first amendment to the constitution, congress was deprived of all legislative power over mere opinion,<sup>68</sup> but it was never intended or supposed that the amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society.<sup>69</sup> The exercise of religion must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation.<sup>70</sup> A party's religious belief cannot be accepted as a justification for his committing an overt act made criminal by the laws of the land.<sup>71</sup> Crime is not the less odious because sanctioned by what any particular sect may designate as religion.<sup>72</sup>

**Bigamy and polygamy** are crimes by the laws of all civilized and Christian countries, and the state has a perfect right to prohibit them and all other open offenses against the enlightened sentiment of mankind, notwithstanding the pretense of religious conviction by which they may be advocated and practiced.<sup>73</sup>

**65. Religious policy of state; how determined.**—*Vidal v. Girard*, 2 How. 126, 197, 11 L. Ed. 205.

**66. Blasphemy; bequests opposed to religious policy of state.**—*Vidal v. Girard*, 2 How. 126, 199, 11 L. Ed. 205.

**The will of Stephen Girard, providing for the establishment of Girard College,** contained, among other provisions, the following: "Secondly, I enjoin and require that no ecclesiastic, missionary, or minister, of any sect whatsoever, shall ever hold or exercise any station or duty whatever in the said college; nor shall any such person ever be admitted for any purpose, or as a visitor, within the premises appropriated to the purposes of the said college. In making this restriction, I do not mean to cast any reflection upon any sect or person whatsoever; but, as there is such a multitude of sects and such a diversity of opinion amongst them, I desire to keep the tender minds of the orphans, who are to derive advantage from this bequest, free from the excitement which clashing doctrines and sectarian controversy are so apt to produce; my desire is, that all the instructors and teachers in the college shall take pains to instill into the minds of the scholars the purest principles of morality, so that, on their entrance into active life, they may, from inclination and habit, evince benevolence towards their fellow creatures,

and a love of truth, sobriety, and industry, adopting at the same time such religious tenets as their natural reason may enable them to prefer." Held, that this provision was not so derogatory and hostile to the Christian religion as to make the devise for the foundation of the college void, according to the constitution and laws of Pennsylvania. *Vidal v. Girard*, 2 How. 126, 11 L. Ed. 205.

**67. Religious belief as a defense to prosecution for crime.**—*Davis v. Beason*, 133 U. S. 333, 345, 33 L. Ed. 637.

**68. Same; no control over mere opinion.**—*Reynolds v. United States*, 98 U. S. 145, 164, 25 L. Ed. 244.

**69. Same; otherwise as to acts inimical to peace, good order and morals of society.**—*Reynolds v. United States*, 98 U. S. 145, 164, 25 L. Ed. 244; *Davis v. Beason*, 133 U. S. 333, 342, 33 L. Ed. 637.

**70. Same; exercise of religion must be subordinate to criminal laws.**—*Davis v. Beason*, 133 U. S. 333, 342, 33 L. Ed. 637.

**71. Same.**—*Reynolds v. United States*, 98 U. S. 145, 25 L. Ed. 244; *Mormon Church v. United States*, 136 U. S. 1, 34 L. Ed. 481.

**72. Same.**—*Davis v. Beason*, 133 U. S. 333, 345, 33 L. Ed. 637.

**73. Bigamy and polygamy.**—*Murphy v. Ramsey*, 114 U. S. 15, 29 L. Ed. 47; *Davis v. Beason*, 133 U. S. 333, 341, 33 L.



**I. As Enlarging or Diminishing Civil Capacities.**—As to the constitutionality of legislation excluding bigamists and polygamists from the right to vote and to hold office; see the titles **ELECTIONS**; **TERRITORIES**.

### **XIII. Freedom of Speech and of the Press.**

Without deciding whether there is to be found in the fourteenth amendment a prohibition upon the states similar to that upon the United States in the first amendment, it was held in the case of *Patterson v. Colorado*, 205 U. S. 454, 462, 51 L. Ed. 879, that the main purpose of such constitutional provisions is to prevent all such previous restraints upon publications as had been practiced by other governments, and that they do not prevent the punishment of such as may be deemed contrary to the public welfare.<sup>74</sup>

**As Restricting the Power to Punish Libels and Contempts.**—Accordingly it is held that such provisions afford no protection to persons guilty of criminal libels and contempts.<sup>75</sup>

**As Affected by Postal Regulations; Exclusion of Offensive Matters from the Mails.**—In excluding various articles from the mail, the object of congress has not been to interfere with the freedom of the press, or with any other rights of the people, but to refuse its facilities for the distribution of matter deemed injurious to the public morals. Congress may constitutionally provide that corrupting publications and articles shall not be transferred through the United States mails, and that any one who attempts to use the mail for such purpose shall be punished.<sup>76</sup> But regulations against transporting in the mail printed matter, which is open to examination, cannot be enforced so as to interfere in any manner with the freedom of the press. Liberty of circulating is essential to that freedom. When, therefore, printed matter is excluded from the mail, its transportation in any other way as merchandise cannot be forbidden by congress.<sup>77</sup>

**Addresses in Public Places.**—The fourteenth amendment to the constitution does not destroy the power of the states to make police regulations concerning the use of parks, highways, and other public places; therefore an ordinance which prohibits the delivery of public addresses in the public grounds or commons without a permit from the mayor of the city is not unconstitutional.<sup>78</sup>

Ed. 637; *Mormon Church v. United States*, 136 U. S. 1, 50, 34 L. Ed. 481.

**Section 5352 of the Revised Statutes of the United States, prohibiting plural marriages in the territories and in other places over which the United States have exclusive jurisdiction, and providing for the punishment thereof, is in all respects constitutional and valid.** *Reynolds v. United States*, 98 U. S. 145, 25 L. Ed. 244.

Where, a citizen, knowing that his wife was living, married again in Utah, and, when indicted and tried therefor, set up that the church whereto he belonged enjoined upon its male members to practice polygamy, and that he, with the sanction of the recognized authorities of the church, and by a ceremony performed pursuant to its doctrines, did marry again, held, that the court properly refused to charge the jury that he was entitled to an acquittal, although they should find that he had contracted such second marriage pursuant to, and in conformity with, what he believed at the time to be a religious duty. *Reynolds v. United States*, 98 U. S. 145, 25 L. Ed. 244.

**74. Freedom of speech and of the press.**—Accord: *Republica v. Oswald*, 1 Dall.

319, 325, 1 L. Ed. 155.

**75. Libels and contempts.**—*Republica v. Oswald*, 1 Dall. 319, 321, 325, 1 L. Ed. 155; *Patterson v. Colorado*, 205 U. S. 454, 462, 51 L. Ed. 879.

**76. Postal regulations excluding offensive matter from the mails.**—*Ex parte Jackson*, 96 U. S. 727, 736, 24 L. Ed. 877; *In re Rapier*, 143 U. S. 110, 36 L. Ed. 93; *Horner v. United States*, 143 U. S. 570, 578, 36 L. Ed. 266.

**Literature concerning lotteries, gift enterprises, etc.**—Section 3894 of the Revised Statutes of the United States, and the amendments thereto, excluding from the United States mails all lottery tickets and all letters, postal cards, circulars and newspapers concerning, or advertising lotteries and gift enterprises and drawings therein, is not in violation of that provision of the first amendment of the federal constitution respecting the freedom of speech and of the press. *In re Rapier*, 143 U. S. 110, 36 L. Ed. 93; *Horner v. United States*, 143 U. S. 570, 578, 36 L. Ed. 266.

**77. Limitations of doctrine.**—*Ex parte Jackson*, 96 U. S. 727, 24 L. Ed. 877; *In re Rapier*, 143 U. S. 110, 36 L. Ed. 93.

**78. Addresses in public places.**—*Davis*

**Exclusion of Alien Anarchists.**—The exclusion of alien anarchists, and the summary deportation of those of that class who have illegally acquired entrance into the country, is not an abridgment of the freedom of speech or of the press within the meaning of the first amendment to the constitution.<sup>79</sup>

#### XIV. Justice without Denial, Purchase or Delay.

Every man is entitled to resort to all the courts of his country and to invoke the protection which all the laws and all the courts may afford him; and this is one of his constitutional rights which he cannot barter away.<sup>80</sup>

**Laws Restricting Right to Remove Causes to the Federal Courts.**—See the title REMOVAL OF CAUSES.

#### XV. Searches and Seizures.

See the title SEARCHES AND SEIZURES.

#### XVI. Civil Rights.

See the title CIVIL RIGHTS, vol. 3, p. 814.

#### XVII. Political Rights and Privileges and Their Protection.

##### A. Of the General Rights and Privileges Pertaining to Citizenship.—

1. GENERALLY.—See, generally, the title CITIZENSHIP, vol. 3, p. 788.

2. CITIZENSHIP IN THE STATES AND THE PROTECTION AFFORDED BY ART. 4, § 2, OF THE UNITED STATES CONSTITUTION—*a. Persons Entitled to Invoke the Protection of Art. 4, § 2—*(1) *Generally.*—As to who are citizens, see, generally, the title CITIZENSHIP, vol. 3, p. 788.

(2) *Indians.*—See the title INDIANS.

(3) *Persons of African Descent.*—Previous to the adoption of the fourteenth amendment a free negro of the African race, whose ancestors were brought to this country and sold as slaves, was not a citizen within the meaning of the constitution of the United States.<sup>81</sup> Consequently, the special rights and immunities guaranteed to citizens did not apply to such a one. And not being "citizens" within the meaning of the constitution, they were not entitled to sue in that character in a court of the United States; therefore a federal circuit court had no jurisdiction in such a suit.<sup>82</sup> The first section of the fourteenth amendment, however, abolishes the doctrine of the Dred Scott case and makes all persons, including those of African descent, born or naturalized in the United States

*v. Massachusetts*, 167 U. S. 43, 42 L. Ed. 71.

79. **Exclusion of alien anarchists.**—*United States v. Williams*, 194 U. S. 279, 48 L. Ed. 979, upholding the Alien Immigration Act of March 1903, 32 Stats. 1213.

80. **Justice without denial, purchase or delay.**—*Insurance Co. v. Morse*, 20 Wall. 445, 451, 22 L. Ed. 365; *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 536, 24 L. Ed. 148.

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain, the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court." *Marshall, C. J.*, delivering the opinion of the court in *Marbury v. Madison*, 1 Cranch 137, 163, 2 L. Ed. 60.

"Under our system the people, who are

there called subjects, are the sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of a monarch. The citizen here knows no person, however near to those in power, or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right." *Mr. Justice Miller* delivering the opinion in *United States v. Lee*, 106 U. S. 196, 208, 27 L. Ed. 171.

81. **Persons of African descent.**—*Scott v. Sandford*, 19 How. 393, 15 L. Ed. 691.

82. **Same.**—*Scott v. Sandford*, 19 How. 393, 15 L. Ed. 691.



and subject to the jurisdiction thereof, citizens of the United States and of the state wherein they reside.<sup>83</sup>

(4) *Persons Not Permitted to Share in Political Privileges.*—A person may be a citizen within the meaning of this section although he exercises no share of the political power and is incapacitated from holding particular offices. Women and minors, who form a part of the political family, cannot vote; and when a property qualification is required to vote or hold a particular office, those who have not the necessary qualification cannot vote or hold the office, yet, they are citizens.<sup>84</sup>

(5) *Persons Not Citizens but Permitted to Enjoy Certain Privileges under State Laws.*—It is competent for any state to put foreigners and others, not citizens of the United States, upon a footing with its own citizens as to all the rights and privileges enjoyed by them within its dominion and under its laws. But they cannot make such persons citizens of the United States, nor entitle them to sue in its courts, nor to any of the privileges and immunities of a citizen in another state.<sup>85</sup>

(6) *Corporations.*—The term "citizen" as used in that provision of the federal constitution declaring that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states, refers to natural persons only, members of the body politic owing allegiance to the state, not to artificial persons created by the legislature and possessing only such attributes as the legislature has prescribed.<sup>86</sup>

**83. Same; under the fourteenth amendment.**—Slaughter-House Cases, 16 Wall. 36, 73, 21 L. Ed. 394.

**84. Persons not permitted to share in political privileges.**—Scott v. Sandford, 19 How. 393, 422, 15 L. Ed. 691; Boyd v. Nebraska, 143 U. S. 135, 158, 36 L. Ed. 103. See, also, the title CITIZENSHIP, vol. 3, pp. 788, 789.

**85. Persons permitted to share some of the privileges of citizenship.**—Scott v. Sandford, 19 How. 393, 422, 15 L. Ed. 691; Boyd v. Nebraska, 143 U. S. 135, 159, 160, 36 L. Ed. 103.

**86. Corporations.**—United States Bank v. Deveaux, 5 Cranch 61, 3 L. Ed. 38; Bank v. Earle, 13 Pet. 519, 10 L. Ed. 274; Runyan v. Coster, 14 Pet. 122, 129, 10 L. Ed. 382; Lafayette Ins. Co. v. French, 18 How. 404, 15 L. Ed. 451; Ohio, etc., R. Co. v. Wheeler, 1 Black 286, 17 L. Ed. 130; Society for Savings v. Coite, 6 Wall. 594, 18 L. Ed. 897; Provident Institution v. Massachusetts, 6 Wall. 611, 18 L. Ed. 907; Hamilton Co. v. Massachusetts, 6 Wall. 632, 18 L. Ed. 904; Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357; Ducat v. Chicago, 10 Wall. 410, 19 L. Ed. 972; Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566, 573, 19 L. Ed. 1029; Railway Co. v. Whitton, 13 Wall. 270, 20 L. Ed. 571; State Tax on Railway Gross Receipts, 15 Wall. 284, 21 L. Ed. 164; Railroad Co. v. Peniston, 18 Wall. 5, 21 L. Ed. 787; Delaware Railroad Tax, 18 Wall. 206, 21 L. Ed. 888; Insurance Co. v. Morse, 20 Wall. 445, 22 L. Ed. 365; Railroad Co. v. Maryland, 21 Wall. 456, 472, 22 L. Ed. 678; Welton v. Missouri, 91 U. S. 275, 23 L. Ed. 347; State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663; Doyle v. Continental Ins. Co., 94 U. S. 535, 24 L. Ed. 148; Pensacola Tel. Co. v. Western Union Tel.

Co., 96 U. S. 1, 12, 24 L. Ed. 708; Mobile County v. Kimball, 102 U. S. 691, 26 L. Ed. 238; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 732, 28 L. Ed. 1137; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 204, 29 L. Ed. 158; Philadelphia Fire Ass'n v. New York, 119 U. S. 110, 117, 30 L. Ed. 342; Philadelphia, etc., Steamship Co. v. Pennsylvania, 122 U. S. 326, 30 L. Ed. 1200; Pembina, etc., Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 187, 31 L. Ed. 650; California v. Central Pac. R. Co., 127 U. S. 1, 32 L. Ed. 150; Fritts v. Palmer, 132 U. S. 282, 288, 33 L. Ed. 317; Home Ins. Co. v. New York State, 134 U. S. 594, 33 L. Ed. 1025; Maine v. Grand Trunk R. Co., 142 U. S. 217, 35 L. Ed. 994; Horn Silver Min. Co. v. New York State, 143 U. S. 305, 314, 36 L. Ed. 164; Ashley v. Ryan, 153 U. S. 436, 445, 38 L. Ed. 773; Hooper v. California, 155 U. S. 648, 39 L. Ed. 297; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. Ed. 832; New York State v. Roberts, 171 U. S. 658, 43 L. Ed. 323; Blake v. McClung, 172 U. S. 239, 259, 43 L. Ed. 432; Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 44 L. Ed. 657; Bedford v. Eastern Building & Loan Ass'n, 181 U. S. 227, 241, 45 L. Ed. 834; Diamond Glue Co. v. United States Glue Co., 187 U. S. 611, 617, 47 L. Ed. 328; Anglo American Prov. Co. v. Davis, Prov. Co., 191 U. S. 373, 374, 48 L. Ed. 225; Western Turf Ass'n v. Greenberg, 204 U. S. 359, 363, 51 L. Ed. 520. See, also, ante, "Corporations," VII, B, 1, b. And see the titles CORPORATIONS; FOREIGN CORPORATIONS; REMOVAL OF CAUSES.

A foreign corporation is not a citizen within the meaning of this section of the constitution and may be denied the right to do business within the state, or



**Limitations of Rule.**—To the general rule that corporations are not citizens within the meaning of the privileges and immunities clause of the constitution, and that a state may exclude them from doing business within its borders, or admit them subject to discriminatory restrictions, there are certain exceptions with reference to corporations engaged in interstate commerce, corporations created for federal purposes, the right to institute or remove causes into the federal courts, etc. As to all of these matters, see the appropriate titles, such as CORPORATIONS; FOREIGN CORPORATIONS; INTERSTATE AND FOREIGN COMMERCE; REMOVAL OF CAUSES; ETC.

*b. Purpose and Object of Art. 4, § 2*—(1) *Prohibits Discriminating Legislation.*—It was undoubtedly the object of § 2, art. 4, to place the citizens of each state upon the same footing with citizens of other states, so far as the advantages resulting from citizenship in those states are concerned. It relieves them from the disabilities of alienage in other states, prohibits discriminating legislation by one state against the citizens of another state, and secures to them the equal protection of the laws.<sup>87</sup>

(2) *Directed against State Action.*—This section does not confer on congress the power to enact a law which would punish a private citizen for any invasion of the rights of his fellow citizen, conferred by the state of which they were both residents, on all its citizens alike.<sup>88</sup> Like the fourteenth amendment, it is directed against state action. Its object is to place the citizens of each state upon the same footing with citizens of other states and inhibit discriminating legislation against them by other states.<sup>89</sup>

(3) *Forbids the Enforcement of Any Enactment Violating Its Terms.*—This section prohibits a state from enforcing as a law any enactment which violates its terms from whatever source originating.<sup>90</sup>

(4) *Article 4, § 2, Did Not Create the Rights Protected.*—The second section of the fourth article of the constitution did not create the rights which are designated as privileges and immunities of citizens of the states.<sup>91</sup>

(5) *Affords Citizen No Protection against the Action of His Own State.*—Neither does this section profess to control the power of the state governments over the rights of their own citizens. It does not protect or secure the privileges or immunities of citizens against the power of the state in which they reside, but merely guaranties privileges and immunities to citizens of other states.<sup>92</sup>

may be excluded after having been once admitted. *Security Mut. Life Ins. Co. v. Prewitt*, 202 U. S. 246, 50 L. Ed. 1013; *National Council v. State Council*, 203 U. S. 151, 163, 51 L. Ed. 132.

**87. Art. 4, § 2, prohibits discriminating legislation.**—*Paul v. Virginia*, 8 Wall. 168, 180, 19 L. Ed. 357; *Ward v. Maryland*, 12 Wall. 418, 430, 20 L. Ed. 449; *Williams v. Bruffy*, 96 U. S. 176, 183, 24 L. Ed. 716; *Vance v. Vandercook Co.*, 170 U. S. 438, 42 L. Ed. 1100; *Blake v. McClung*, 172 U. S. 239, 252, 43 L. Ed. 432.

**88. Art. 4, § 2, directed against state action.**—*United States v. Harris*, 106 U. S. 629, 644, 27 L. Ed. 290.

**89. Same.**—*Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357; *United States v. Harris*, 106 U. S. 629, 643, 27 L. Ed. 290.

**90. Forbids the enforcement of any enactment in violation of its terms.**—*Williams v. Bruffy*, 96 U. S. 176, 184, 24 L. Ed. 716.

The enactment of the Confederate States congress, sequestering all debts owing by citizens of the Confederate States to citi-

zens of the United States, which enactment, by and with the consent of the state of Virginia, was enforced as a law in that commonwealth, discriminated against the citizens of other states and denied them the equal protection of the laws and the right to acquire and enjoy property in the state of Virginia, secured to them by § 2, art. 4, of the federal constitution. *Williams v. Bruffy*, 96 U. S. 176, 183, 24 L. Ed. 716.

**91. Article 4, § 2, did not create the rights protected.**—*Slaughter-House Cases*, 16 Wall. 36, 77, 21 L. Ed. 394.

**92. Does not protect the citizen against the action of his own state.**—*Scott v. Sandford*, 19 How. 393, 422, 15 L. Ed. 691; *Slaughter-House Cases*, 16 Wall. 36, 77, 21 L. Ed. 394; *Bradwell v. The State*, 16 Wall. 130, 21 L. Ed. 442; *McKane v. Durston*, 153 U. S. 684, 687, 38 L. Ed. 867.

**Right to practice law; powers of state not limited by this section.**—Thus a woman who is denied admission to practice as an attorney and counselor at law

**Powers of State Not Measured by Privileges and Immunities Enjoyed by Citizens of Other States.**—Whatever may be the scope of § 2, art. 4, the constitution of the United States does not make the privileges, and immunities enjoyed by the citizens of one state under the constitution and laws of that state, the measure of the privileges and immunities to be enjoyed, as of right, by a citizen of another state under its constitution and laws.<sup>93</sup>

**Change of Residence; Persons No Longer Citizens of Another State.**—From the statement made in the preceding paragraph, it necessarily follows that this section has no application to the case of one who has given up his residence in one state and become a citizen of the state of whose action he complains. He is no longer a citizen of the state from which he removed, but of the state in which he resides, and, so far as this section is concerned, that state has full power to determine his status and to legislate upon his privileges and rights as a citizen.<sup>94</sup>

(6) *Confers No Greater Privilege or Immunity than Is Enjoyed by Resident Citizens.*—That portion of § 2, art. 4, of the constitution relating to the privileges and immunities of the citizens of the several states does not give non-resident citizens any greater privileges and immunities within a state than are enjoyed there by its own citizens. It does not profess to control the power of the state governments over their own citizens, and it simply declares to the several states that whatever those rights may be, that as they grant or establish them to their own citizens, or that as they limit or qualify, or impose restrictions upon their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within their jurisdiction.<sup>95</sup>

under the laws of the state in which she resides, cannot complain that the state has abridged her rights, privileges and immunities in violation of this section. *Bradwell v. The State*, 16 Wall. 130, 21 L. Ed. 442.

**93. Powers of state not measured by the privileges and immunities enjoyed by citizens of other states.**—*McKane v. Durston*, 153 U. S. 684, 687, 38 L. Ed. 867.

The fact, therefore, that in most of the states of the Union a defendant convicted of a criminal charge other than murder has the right, as a matter of law, upon the granting of an appeal from the judgment of conviction, to give bail pending such appeal, does not render unconstitutional a state law which denies the right to give bail in such cases. *McKane v. Durston*, 153 U. S. 684, 687, 38 L. Ed. 867.

**94. As to persons no longer citizens of another state.**—*Scott v. Sandford*, 19 How. 393, 422, 15 L. Ed. 691; *Bradwell v. The State*, 16 Wall. 130, 138, 21 L. Ed. 442.

In the case last cited, the court held it to be immaterial that the plaintiff alleged that she was born in the state of Vermont while the record showed that she resided in and was a citizen of the state of Illinois, the state of whose action she complained. The fourteenth amendment declares that citizens of the United States are citizens of the state within which they reside, and while there may be a temporary residence in one state, with intent to return to another which will not create citizenship in the former, yet an allegation that the plaintiff was born in the state of Vermont but had resided for

many years in the city of Chicago in the state of Illinois, states nothing to take her case out of the definition of citizenship of a state as defined by the first section of the fourteenth amendment." *Bradwell v. The State*, 16 Wall. 130, 138, 21 L. Ed. 442.

**95. Confers no greater privilege or immunity than is enjoyed by resident citizens.**—*Bank v. Earle*, 13 Pet. 519, 586, 10 L. Ed. 274; *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357; *Downham v. Alexandria Council*, 10 Wall. 173, 175, 19 L. Ed. 829; *Ducat v. Chicago*, 10 Wall. 410, 19 L. Ed. 972; *Slaughter-House Cases*, 16 Wall. 36, 77, 21 L. Ed. 394; *Williams v. Bruffy*, 96 U. S. 176, 183, 24 L. Ed. 716; *Kimmish v. Ball*, 129 U. S. 217, 222, 32 L. Ed. 695; *Detroit v. Osborne*, 135 U. S. 492, 498, 34 L. Ed. 260; *Missouri, etc., R. Co. v. Haber*, 169 U. S. 613, 631, 42 L. Ed. 878.

"A citizen of another state going into Michigan may be entitled under the federal constitution to all the privileges and immunities of citizens of that state; but under that constitution he can claim no more. He walks the streets and highways in that state, entitled to the same rights and protection, but none other, than those accorded by its laws to its own citizens." *Detroit v. Osborne*, 135 U. S. 492, 498, 34 L. Ed. 260.

If, therefore, under the local law of the state, no action lies in favor of a citizen who sustains injury by reason of a defective sidewalk, neither can a citizen of another state who has sustained an injury from like cause maintain an action therefor in the federal courts. *Detroit v. Osborne*, 135 U. S. 492, 498, 34 L. Ed. 260.



**Citizen Not Entitled to Claim in Another State Special Privileges Enjoyed under the Laws of His Own.**—This rule implies, of course, that a citizen going into another state leaves behind him any special privilege or immunity which he may enjoy under the laws of his own; or if he is permitted to claim it at all, it is only upon a basis of comity.<sup>96</sup>

**Nonresident Cannot Claim Benefits and Reject Burdens.**—Neither was this section intended to give to the citizens of each state the privileges of citizens in the several states, and at the same time to exempt them from the liabilities which the exercise of such privilege would bring upon individuals who are citizens of the state, since this would be to give the citizens of other states far higher and greater privileges than are enjoyed by the citizens of the state itself.<sup>97</sup>

**Statute Not Invalid Where It Applies Alike to Citizens of All the States.**—A statute of a state cannot be inconsistent with this clause of the constitution where it is equally applicable to citizens of all the states, and no discrimination is shown. In such case no privileges are granted to citizens of that state that are denied to citizens of other states.<sup>98</sup>

*c. Privileges and Immunities Secured to Citizen by Art. 4, § 2—(1) Generally.*—The first occurrence of the words "privileges and immunities" in our constitutional history is to be found in the fourth of the articles of the confederation; it is there provided "that the better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this Union, the free inhabitants of each of these states, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several states; and the people of each state shall be entitled to all the privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively." The corresponding provision in the constitution of the United States, as originally adopted, is found in § 2 of the fourth article, which declares: "That citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states." The purpose of both these provisions is the same, and the privileges and immunities embraced in the latter are the same as those in the first.<sup>99</sup> In attempting to classify these privileges and immunities, Mr. Justice Washington said in *Corfield v. Coryell*, 4 Wash. Cir. Ct. 371, 380: "The inquiry is, what are the privileges and immunities of citizens of the several

96. **Citizen not entitled to claim in another state special privileges enjoyed under the laws of his own.**—*Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357; *Ducat v. Chicago*, 10 Wall. 410, 19 L. Ed. 972; *Bank v. Earle*, 13 Pet. 519, 586, 587, 10 L. Ed. 274.

97. **Nonresident cannot claim benefits and reject the burdens.**—*Bank v. Earle*, 13 Pet. 519, 586, 10 L. Ed. 274.

**Foreign corporations not entitled to special exemptions.**—Thus the individuals composing a foreign corporation cannot demand as a constitutional right the privilege for their corporation of transacting business and entering into contracts within a state upon the ground that they are citizens of one of the states of the Union, and at the same time claim their exemption from personal liability upon the contracts of the corporation, as well as the benefit of other privileges conferred upon it by the laws of the state in which it was created. *Bank v. Earle*, 13 Pet. 519, 586, 587, 10 L. Ed. 274.

**Right of foreign citizen to exemption**

**from license tax.**—An ordinance of the city of Alexandria which imposed a license tax of \$200 upon dealers in beer or ale which was not manufactured in that city but brought there for sale, it not appearing but that the beer and ale in which the defendant's dealt might not have been manufactured in other parts of the same state, was held not to impair any privileges or immunities of citizens of other states, who, equally with citizens of Virginia, and upon the same terms, could deal in the city of Alexandria in similar goods. *Downham v. Alexandria Council*, 10 Wall. 173, 175, 19 L. Ed. 829.

98. **Statute valid if applicable alike to citizens of all the states.**—*Kimmish v. Ball*, 129 U. S. 217, 222, 32 L. Ed. 695; *Reid v. Colorado*, 187 U. S. 137, 152, 47 L. Ed. 108.

99. **Privileges and immunities as used in art. 4, § 2, and in the articles of confederation.**—*Slaughter-House Cases*, 16 Wall. 36, 75, 21 L. Ed. 394; *Lottery Case*, 188 U. S. 321, 373, 47 L. Ed. 492.



states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by citizens of the several states which compose this union, from the time of their becoming free, independent and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: protection by the government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject nevertheless, to such restraints as the government may prescribe for the general good of the whole." This language has been repeatedly approved by the federal supreme court.<sup>1</sup> This classification, as shown by others given in the notes, is not to be considered as exhaustive. Indeed, the court has more than once refused to attempt any definition or classification designed to embrace every case that may arise, but has left the meaning to be determined in each case upon a view of the particular rights asserted or denied therein.<sup>2</sup>

**Citizens of Other States Not Entitled to Enjoy Every Privilege Accorded to Resident Citizens.**—In view of these principles, it must not be understood that a citizen of one state is entitled to enjoy in another state every privilege that may be given in the latter to its own citizens. There are privileges that may be accorded by a state to its own people in which citizens of other states may not participate except in conformity to such reasonable regulations as may be established by the state.<sup>3</sup> "The constitution forbids only such legis-

**1. Privileges and immunities as defined and classified by Mr. Justice Washington in *Corfield v. Coryell*.**—See *Ward v. Maryland*, 12 Wall. 418, 430, 20 L. Ed. 449; *Slaughter-House Cases*, 16 Wall. 36, 76, 21 L. Ed. 394; *Boyd v. Nebraska*, 143 U. S. 135, 160, 36 L. Ed. 103; *Maxwell v. Dow*, 176 U. S. 581, 588, 589, 44 L. Ed. 597; *Hodges v. United States*, 203 U. S. 1, 15, 51 L. Ed. 65.

**Other attempts to define or classify privileges and immunities.**—Mr. Justice Curtis, in *Scott v. Sanford*, 19 How. 393, 580, 15 L. Ed. 691, described them as such "as belonged to general citizenship."

In the *Slaughter-House Cases*, 16 Wall. 36, 21 L. Ed. 394, the classifications of Mr. Justice Washington in *Corfield v. Coryell*, 4 Wash. C. C. 371, and of the supreme court in *Ward v. Maryland*, 12 Wall. 418, 430, 20 L. Ed. 449, were said to embrace generally those fundamental civil rights for the security and establishment of which organized society is instituted. See, also, *Boyd v. Nebraska*, 143 U. S. 135, 160, 36 L. Ed. 103; *McPherson v. Blacker*, 146 U. S. 1, 37, 36 L. Ed. 869.

The intention of § 2 of article 4 was to confer on the citizens of the several states all the privileges and immunities to which the citizens of the same state would be entitled under like circumstance. *Cole v. Cunningham*, 133 U. S. 107, 113, 33 L. Ed. 538.

If he ranks as a citizen in the state to which he belongs, within the meaning of the constitution of the United States, then, whenever he goes into another state, the constitution clothes him, as to rights of persons, with all the privileges and immunities which belong to citizens of the

state. (Opinion of Taney, C. J.) *Scott v. Sanford*, 19 How. 393, 422, 15 L. Ed. 691.

**2. Classification not exhaustive.**—*Conner v. Elliott*, 18 How. 591, 593, 15 L. Ed. 497; *McCreedy v. Virginia*, 94 U. S. 391, 395, 24 L. Ed. 248.

"This court has never undertaken to give any exact or comprehensive definition of the words 'privileges and immunities' in art. 4 of the constitution of the United States. Referring to this clause, Mr. Justice Curtis, speaking for the court in *Conner v. Elliott*, 18 How. 591, 593, 15 L. Ed. 497, said: 'We do not deem it needful to attempt to define the meaning of the word privileges in this clause of the constitution. It is safer, and more in accordance with the duty of a judicial tribunal, to leave its meaning to be determined, in each case, upon a view of the particular rights asserted and denied therein. And especially is this true when we are dealing with so broad a provision, involving matters not only of great delicacy and importance, but which are of such a character that any merely abstract definition could scarcely be correct; and a failure to make it so would certainly produce mischief.'" *Blake v. McClung*, 172 U. S. 239, 248, 43 L. Ed. 432.

**3. Citizens of other states not entitled to enjoy every privilege of resident citizens.**—*Blake v. McClung*, 172 U. S. 239, 256, 43 L. Ed. 432.

The privileges and immunities secured to citizens of each state in the several states, by this clause, are those privileges and immunities which are common to the their constitution and laws by their citizens in the latter states under

lation affecting citizens of the respective states as will substantially or practically put a citizen of one state in a condition of alienage when he is within or when he removes to another state, or when asserting in another state the rights that commonly appertain to those who are part of the political community known as the people of the United States, by and for whom the government of the Union was ordained and established."<sup>4</sup>

(2) *Rights Attached by Law to Contracts*.—According to the express words and clear meaning of this clause, no privileges are secured by it except those which belong to citizenship. Rights attached by the law to contracts, by reason of the place where such contracts are made or executed, wholly irrespective of the citizenship of the parties to those contracts, cannot be deemed "privileges of a citizen," within the meaning of the constitution.<sup>5</sup>

(3) *Right to Vote and Hold Office*.—The constitutional provision giving privileges and immunities in other states does not give, to persons who are temporarily in another state, without taking up their residence there, any political right as to voting or holding office, or in any other respect: for a citizen of one state has no right to participate in the government of another.<sup>6</sup> "So, a state may, by rule uniform in its operation as to citizens of the several states, require residence within its limits for a given time before a citizen of another state who becomes a resident thereof shall exercise the right of suffrage or become eligible to office. It has never been supposed that regulations of that character materially interfered with the enjoyment by citizens of each state of the privileges and immunities secured by the constitution to citizens of the several states."<sup>7</sup>

(4) *Right to Fish or Foxel in Public Waters of Another State*.—The second section of the fourth article of the constitution, which declares that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states, does not vest the citizens of one state with any

tue of their being citizens. Special privileges enjoyed by citizens in their own states (as for example corporate privileges and immunities) are not secured by it in other states. *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357, followed in *Ducat v. Chicago*, 10 Wall. 410, 19 L. Ed. 972.

4. *Same*.—*Blake v. McClung*, 172 U. S. 239, 256, 43 L. Ed. 432.

5. *Rights attached by law to contracts*.—*Conner v. Elliott*, 18 How. 591, 593, 15 L. Ed. 497.

*Rights attached by law to contract of marriage*.—The law of Louisiana gives a community of acquets or gains between married persons, where the marriage is contracted within the state, or where the marriage is contracted out of the state and the parties afterwards go to Louisiana to live. Held, that the privilege thus conferred upon the wife does not extend, by virtue of this provision of the constitution, to a native-born citizen of Louisiana who was married while under age, in the state of Mississippi, and in which state she was domiciled together with her husband during the continuance of the marriage. Land in Louisiana, acquired by the husband during the marriage, was not subject to the Louisiana law in respect to the community of acquets or gains. The right was one which attached to the contract of marriage, which the state of Louisiana had a right to regulate, and was not one of the personal rights of a citizen, within the mean-

ing of the constitution. *Conner v. Elliott*, 18 How. 591, 594, 15 L. Ed. 497.

6. *Right to vote and hold office*.—*Scott v. Sandford* (opinion of Taney, C. J.), 19 How. 393, 422, 15 L. Ed. 691.

7. *Same; residence requirements*.—*Blake v. McClung*, 172 U. S. 239, 256, 259, 43 L. Ed. 432.

"We are unable to see any violation of the federal constitution in the provision of the state statute for the declaration of the intent of a person coming into the state before he can claim the right to be registered as a voter. The statute, so far as it provides conditions precedent to the exercise of the elective franchise within the state, by persons coming therein to reside (and that is as far as it is necessary to consider it in this case), is neither an unlawful discrimination against any one in the situation of the plaintiff in error nor does it deny to him the equal protection of the laws, nor is it repugnant to any fundamental or inalienable rights of citizens of the United States, nor a violation of any implied guaranties of the federal constitution." *Pope v. Williams*, 193 U. S. 621, 633, 48 L. Ed. 817.

"The right of a state to legislate upon the subject of the elective franchise as to it may seem good, subject to the conditions already stated, being, as we believe, unassailable, we think it plain that the statute in question violates no right protected by the federal constitution." *Pope v. Williams*, 193 U. S. 621, 633, 48 L. Ed. 817.



interest in the common property of the citizens of another state.<sup>8</sup> Subject to the paramount right of navigation, the regulation of which in relation to foreign and interstate commerce has been granted to the United States, each state owns the beds of all tide waters within its jurisdiction, and may appropriate them to be used by its citizens as a common for taking and cultivating fish, if navigation be not thereby obstructed. The right which the citizens of the state thus acquire is a property right, and not a mere privilege or immunity of citizenship.<sup>9</sup>

(5) *Equal Protection of the Laws*.—See ante, "Prohibits Discriminating Legislation," XVII, A, 2, b, (1); "Equal Protection of the Laws; Class Legislation," VII, et seq. See, also, the title CIVIL RIGHTS, vol. 3, p. 814, et seq.

(6) *The Right of Free Ingress and Egress*.—The provision that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states was taken from the fourth article of confederation, which provided that "the free inhabitants of each of these states \* \* \* shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and egress to and from any other state, and shall enjoy therein all the privileges of trade and commerce;" while other parts of the same article were also brought forward in article 4 of the constitution.<sup>10</sup> There can be but little question that the purpose of the fourth article of the confederation, and of this particular clause of the constitution, is the same, and that the privileges and immunities intended are the same in each.<sup>11</sup> Thus it is seen that the right of passage of persons and property from one state to another cannot be prohibited by congress.<sup>12</sup> Neither can any state deny to the citizens of other states the right of free ingress into and egress therefrom.<sup>13</sup>

**Does Not Include the Right to Recover Damages Sustained While Traveling in State.**—The right of a citizen of the United States to travel from one state to another does not include the right to recover damages for injuries sustained while traveling within a state when under the circumstances a recovery is not permitted by the laws of the state. The one right is not an incident of the other. The right to recover damages for personal injuries and the circumstances under which it may be recovered are matters entirely within the state control.<sup>14</sup> And this is true even though the action is brought in a state in which an action would lie under the same circumstances.<sup>15</sup>

(7) *The Right to Engage in Trade, Commerce or Lawful Business*.—This section secures to the citizens of each state the right to engage in lawful commerce, trade, or business in every other state without molestation and without

**8. Right to fish or fowl in public waters of another state.**—McCready v. Virginia, 94 U. S. 391, 24 L. Ed. 248.

**9. Same.**—McCready v. Virginia, 94 U. S. 391, 24 L. Ed. 248.

**Statute forbidding nonresidents to plant oysters.**—A law of Virginia, by which persons not citizens of that state are prohibited from planting oysters in the soil covered by her tide waters, is neither a regulation of commerce nor a violation of any privilege or immunity of interstate citizenship. McCready v. Virginia, 94 U. S. 391, 24 L. Ed. 248.

**10. The right of free ingress and egress.**—Lottery Case, 188 U. S. 321, 373, 47 L. Ed. 492, per Fuller, C. J.

**11. Same.**—Slaughter-House Cases, 16 Wall. 36, 75, 21 L. Ed. 394; Lottery Case, 188 U. S. 321, 374, 47 L. Ed. 492.

**12. Same.**—Lottery Case, 188 U. S. 321, 374, 47 L. Ed. 492, per Fuller, C. J.

**13. Same.**—Crandall v. Nevada, 6 Wall. 35, 36, 18 L. Ed. 745; Paul v. Virginia, 8

Wall. 168, 180, 19 L. Ed. 357; Ward v. Maryland, 12 Wall. 418, 430, 20 L. Ed. 449; Slaughter-House Cases, 16 Wall. 36, 79, 21 L. Ed. 394.

**14. As to the right to recover damages sustained while traveling in state.**—Martin v. Pittsburg, etc., R. Co., 203 U. S. 284, 295, 51 L. Ed. 184; Detroit v. Osborne, 135 U. S. 492, 498, 34 L. Ed. 260.

**15. Same.**—Martin v. Pittsburg, etc., R. Co., 203 U. S. 284, 51 L. Ed. 184.

The Pennsylvania statute of April 4, 1868, P. L. 58, which places postal clerks in the same class as employees of railroads and others who are subjected to greater risks than passengers, and prohibits a recovery for injuries sustained by accident, except in those cases in which employees and others not passengers would be entitled to recover, is not unconstitutional as abridging the privileges or immunities of the citizens of the United States. Martin v. Pittsburg, etc., R. Co., 203 U. S. 284, 296, 51 L. Ed. 184.



discrimination in the matter of taxes, fees, or excises.<sup>16</sup> But the exaction of a

**16. Right to engage in trade, commerce, or lawful business.**—*Downham v. Alexandria Council*, 10 Wall. 173, 175, 19 L. Ed. 829; *Passenger Cases*, 7 How. 283, 383, 12 L. Ed. 702; *Woodruff v. Parham*, 8 Wall. 123, 140, 19 L. Ed. 382; *Hinson v. Lott*, 8 Wall. 148, 153, 19 L. Ed. 389; *Ward v. Maryland*, 12 Wall. 418, 430, 20 L. Ed. 449; *Welton v. Missouri*, 91 U. S. 275, 23 L. Ed. 347; *Cook v. Pennsylvania*, 97 U. S. 566, 24 L. Ed. 1015; *Machine Co. v. Gage*, 100 U. S. 676, 25 L. Ed. 754; *Webber v. Virginia*, 103 U. S. 344, 347, 26 L. Ed. 565; *Walling v. Michigan*, 116 U. S. 446, 29 L. Ed. 691; *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 493, 494, 30 L. Ed. 694; *Stoutenburgh v. Hennick*, 129 U. S. 141, 32 L. Ed. 637; *Emert v. Missouri*, 156 U. S. 296, 39 L. Ed. 430; *Blake v. McClung*, 172 U. S. 239, 252, 256, 43 L. Ed. 432; *Blake v. McClung*, 176 U. S. 59, 64, 44 L. Ed. 371; *Austin v. Tennessee*, 179 U. S. 343, 344, 45 L. Ed. 224.

It is not in the power of one state, when establishing regulations for the the conduct of private business of a particular kind, to give its own citizens essential privileges connected with that business which it denies to citizens of other states. *Blake v. McClung*, 172 U. S. 239, 252, 43 L. Ed. 432, reaffirmed in *Blake v. McClung*, 176 U. S. 59, 64, 44 L. Ed. 371.

While a state may reserve to its own citizens certain privileges connected with the conducting of a particular business by a private corporation, it cannot by legislation put a citizen of another state practically in a condition of alienage by denying him the right which all citizens of the United States possess in common. *Blake v. McClung*, 172 U. S. 239, 256, 43 L. Ed. 432, reaffirmed in *Blake v. McClung*, 176 U. S. 59, 64, 44 L. Ed. 371.

The states cannot, under the guise of inspection or revenue laws, or police regulations, create discriminations in favor of home producers or manufacturers against the producers or manufacturers of other states. *Passenger Cases*, 7 How. 283, 383, 12 L. Ed. 702; *Ward v. Maryland*, 12 Wall. 418, 20 L. Ed. 449; *Welton v. Missouri*, 91 U. S. 275, 23 L. Ed. 347; *Austin v. Tennessee*, 179 U. S. 343, 344, 45 L. Ed. 224.

A state has no power to impose a higher license tax upon a nonresident engaged in business within the state than it has upon a resident of the state under like circumstances. *Kehrer v. Stewart*, 197 U. S. 60, 70, 49 L. Ed. 663.

A statute of Maryland required all traders resident within the state to take out licenses and to pay therefor certain sums, regulated by a sliding scale, according to the value of their stock in trade. The statute also made it a penal offense for any person, not being a permanent resident in the state, to sell, offer, or ex-

pose for sale, within certain limits in the state, any goods, wares or merchandise whatever, other than agricultural products and articles manufactured in Maryland, within the said limits, either by card, sample, or other specimen, or by any written or printed trade list or catalogue, wh ther such person was the maker or manufacturer thereof or not, without first obtaining a license so to do, said license to be renewed annually, and a license tax of \$300 to be paid therefor. Held, that this statute imposed a discriminating tax upon nonresident traders trading in the limits mentioned, and that it was, pro tanto, repugnant to the second section of the fourth article of the constitution. *Ward v. Maryland*, 12 Wall. 418, 431, 20 L. Ed. 449.

A statute of Missouri which imposed a license tax upon hawkers and peddlers engaged in vending patent or other medicine, goods, wares or merchandise which were not the growth, produce or manufacture of that state, but which did not require a license tax of persons engaged in vending similar articles produced within the state, was held to be unconstitutional because of discrimination. *Welton v. Missouri*, 91 U. S. 275, 23 L. Ed. 347.

A tax upon auctioneers which discriminates against imported as compared with domestic goods held to be unconstitutional. *Cook v. Pennsylvania*, 97 U. S. 566, 24 L. Ed. 1015.

**Foreign corporations.**—"Although, generally speaking, the state has the power to prescribe the conditions upon which foreign corporations may enter its territory for purposes of business, such a power cannot be exerted with the effect of defeating or impairing rights secured to citizens of the several states by the supreme law of the land. Indeed, all the powers possessed by a state must be exercised consistently with the privileges and immunities granted or protected by the constitution of the United States." *Blake v. McClung*, 172 U. S. 239, 255, 43 L. Ed. 432; *Blake v. McClung*, 176 U. S. 59, 64, 44 L. Ed. 371. See *Lafayette Ins. Co. v. French*, 18 How. 404, 407, 15 L. Ed. 451.

**Statutes preferring resident creditors.**—Article four, § 2, of the constitution guarantees to the nonresident creditors of a foreign corporation doing business within a state the right to share in a distribution of its assets upon terms of equality with like creditors of such corporation resident within the state. *Blake v. McClung*, 172 U. S. 239, 258, 43 L. Ed. 432, reaffirmed in *Blake v. McClung*, 176 U. S. 59, 64, 44 L. Ed. 371; *Sully v. American Nat. Bank*, 178 U. S. 289, 44 L. Ed. 1072. See, also, *Lafayette Ins. Co. v. French*, 18 How. 404, 407, 15 L. Ed. 451.

"When the general property and assets of a private corporation, lawfully doing business in a state, are in course of ad-

license fee from all traders, without discrimination as to nonresidents, is not obnoxious to this clause.<sup>17</sup>

ministration by the courts of such state, creditors who are citizens of other states are entitled, under the constitution of the United States, to stand upon the same plane with creditors of like class who are citizens of such state, and cannot be denied equality of right simply because they do not reside in that state, but are citizens residing in other states of the Union." *Blake v. McClung*, 172 U. S. 239, 258, 43 L. Ed. 432, reaffirmed in *Blake v. McClung*, 176 U. S. 59, 64, 44 L. Ed. 371.

When the affairs of an insolvent corporation are in the control of the state courts for administration and distribution of assets, preference cannot be given to citizens of that particular state over creditors who are citizens of other states of the Union. *Blake v. McClung*, 176 U. S. 59, 67, 44 L. Ed. 371, construing and reaffirming *Blake v. McClung*, 172 U. S. 239, 43 L. Ed. 432.

The legislature of Tennessee passed an act entitled "An act to declare the terms on which foreign corporations organized for mining or manufacturing purposes may carry on their business and purchase, hold and convey real and personal property in this state," and it was provided therein, concerning the payment of debts, that creditors residing in that state should have priority over all nonresident creditors, whether simple contract, mortgage or judgment creditors. The court held that the act was unconstitutional because the rights of nonresident creditors were infringed in respect to the provision of § 2, art. 4, of the constitution declaring that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." The evident purpose of the act was to prefer all Tennessee creditors over the foreign creditors whether citizens or merely residents of another state or country. *Blake v. McClung*, 172 U. S. 239, 43 L. Ed. 432.

A state law which prefers the resident unsecured creditors of a foreign corporation over nonresident mortgage creditors whose mortgages were not recorded at the time their debts were created, but which fails to give to such resident creditors a like preference over resident mortgage creditors of the corporation, is unconstitutional as denying the equal privileges and immunities guaranteed by art. 4, § 2. *Sully v. American Nat. Bank*, 178 U. S. 289, 44 L. Ed. 1072.

And it is immaterial that it appears in a particular case that there are no resident mortgage creditors. The absence of resident mortgage creditors does not remedy the discrimination made by the statute nor render the question of discrimination merely an abstract or moot question. *Sully v. American Nat. Bank*, 178 U. S. 289, 44 L. Ed. 1072.

Section five of the Tennessee act of

1877, giving a preference to the unsecured creditors of foreign corporations over mortgage creditors whose mortgages were not recorded prior to the creation of the debts of the unsecured creditors, construed, and held not to discriminate between resident and nonresident mortgage creditors. *Sully v. American Nat. Bank*, 178 U. S. 289, 44 L. Ed. 1072.

But it must not be understood that a state may not, by its courts, retain within its limits the assets of a foreign corporation, in order that justice may be done to its own citizens, and, by appropriate action of its judicial tribunals, see to it that its own citizens are not unjustly discriminated against by reason of the administration in other states of the assets there of an insolvent corporation doing business within its limits. *Blake v. McClung*, 172 U. S. 239, 257, 43 L. Ed. 432.

Beyond question, a state may, through judicial proceedings, take possession of the assets of an insolvent foreign corporation within its limits, and distribute such assets or their proceeds among creditors according to their respective rights. But it may not exclude citizens of other states from such distribution until the claims of its own citizens shall have been first satisfied. In the administration of the property of an insolvent foreign corporation by the courts of the state in which it is doing business, the constitution of the United States will not permit discrimination against individual creditors of such corporations because of their being citizens of other states, and not citizens of the state in which such administration occurs. *Blake v. McClung*, 172 U. S. 239, 247, 248, 43 L. Ed. 432.

As to whether such statutes are unconstitutional as denying the equal protection of the laws to foreign corporations not within the jurisdiction of the state, see ante, "Protects Only Those Persons and Corporations within the Jurisdiction of the State," VII, B, 1, c.

**17. May exact license fee provided there is no discrimination.**—*Downham v. Alexandria Council*, 10 Wall. 173, 175, 19 L. Ed. 829.

A uniform tax, imposed by an ordinance of the city of Mobile, under authority from the legislature of Alabama, on all sales by auction in that city, was constitutional, since it imposed no discrimination upon citizens or products of other states. It did not deprive the citizens of other states of any privileges or immunities possessed by the citizens of Alabama. *Woodruff v. Parham*, 8 Wall. 123, 140, 19 L. Ed. 382.

A statute which imposed a tax of fifty cents per gallon to be paid by the distiller upon all intoxicating liquors manufactured within the state and a like tax to be paid by the importer on all intoxicating liquors



**Requiring Foreign Corporations and Partnerships to File Charter or Article of Association.**—Whether a state statute forbidding foreign corporations and partnerships to transact business in the state until they have filed a copy of their charter with the secretary of state, etc., is not unconstitutional as to partnership under article 4, § 2, of the constitution of the United States, was left undecided in the case of *Diamond Glue Co. v. United States Glue Co.*, 187 U. S. 611, 617, 47 L. Ed. 328, the rights involved being those of a foreign corporation and not those of a foreign partnership, and the court being of opinion that, whatever its validity as applied to partnerships, the statute was severable and valid as applied to corporations.

**Right to Manufacture or Sell Intoxicating Liquors as a Privilege of State Citizenship.**—See the title INTOXICATING LIQUORS.

**Commodities Designed to Deceive or Defraud the Public.**—See the title POLICE POWER.

(8) *The Right to Acquire and Hold Property.*—This section secures to the citizens of each state the right to acquire and enjoy property, real and personal, in other states with the same freedom possessed by the citizens of those states.<sup>18</sup>

(9) *Exemptions from Higher Taxes.*—This clause of the constitution requires equality of burdens and forbids discrimination in state taxation when that power is applied to citizens of other states.<sup>19</sup>

introduced into the state for sale, was held to be constitutional, on the ground that no greater tax was laid on liquors brought into the state than on those manufactured within it. *Hinson v. Lott*, 8 Wall. 148, 153, 19 L. Ed. 389.

The Ohio Statute (92 Ohio Laws, p. 34) known as the Dow law, which imposes a tax upon the traffic in intoxicating liquors, with an exemption in favor of sales in quantities of one gallon or more made by the manufacturer at the manufactory, being applicable alike to all manufacturies within the state, whether owned by residents or nonresidents, cannot be said to impose an unconstitutional discrimination against the owner of a brewery or distillery situated without the state who cannot bring himself within the terms thereof so as to claim the benefit of the exemption respecting sales in quantities of one gallon or more. *Reymann Brewing Co. v. Brister*, 179 U. S. 445, 45 L. Ed. 269.

**18. Right to acquire and hold property.**—*Paul v. Virginia*, 8 Wall. 168, 180, 19 L. Ed. 357; *Ward v. Maryland*, 12 Wall. 418, 430, 20 L. Ed. 449; *Williams v. Bruffy*, 96 U. S. 176, 183, 24 L. Ed. 716.

**Police power; possession of diseased cattle.**—This provision of the federal constitution is not infringed by § 4059 of the Code of Iowa which provides that any person who has in his possession in that state any Texas cattle which have not been wintered north shall be liable for any damages that may accrue from allowing such cattle to run at large and thereby spread the disease known as Texas fever. *Kimmish v. Ball*, 129 U. S. 217, 222, 32 L. Ed. 695.

**19. Exemption from higher taxes.**—*Ward v. Maryland*, 12 Wall. 418, 431, 20 L. Ed. 449. See, also, ante, "The Right to Engage in Trade, Commerce, or Lawful

Business," XVII, A, 2, c, (7).

**Taxation of bonds held by residents against nonresidents.**—A state tax upon bonds held by a resident against a nonresident, even though secured by lien upon real property in another jurisdiction, does not infringe the constitutional guaranty that the citizens of each state shall be entitled to all the privileges of citizens in the several states. *Kirtland v. Hotchkiss*, 100 U. S. 491, 499, 25 L. Ed. 558.

**Same—Privileges and immunities of United States citizenship.**—Neither does such a tax abridge the privileges or immunities of citizens of the United States within the meaning of the fourteenth amendment. *Kirtland v. Hotchkiss*, 100 U. S. 491, 499, 25 L. Ed. 558.

**Discriminating against nonresident owners of stock in domestic corporations.**—Taking into consideration the fact that, under the system of taxation prevailing in Connecticut, the entire revenue for the support of the state government is derived from corporation licenses, etc., and that the residents of the state pay no state tax, but only a tax to the municipality in which they reside, it cannot be said that the statute of that state which imposes a state tax upon stock owned by nonresidents in local corporations of that state, assessed at its market value, without any deduction on account of real estate held by the corporation, while the stock of resident stockholders is assessed at its market value, less the proportionate value of all real estate held by the corporation upon which it has already paid a tax, is unconstitutional, either as denying the equal protection of the laws or as infringing paragraph 1, § 2, art. 4 of the federal constitution. *Travellers' Ins. Co. v. Connecticut*, 185 U. S. 364, 46 L. Ed. 949.

Under this statute the rate of state tax-



(10) *The Right to Bring Actions; Remove Causes.*—The right to resort to all the courts of the country and to invoke the protection which all the laws and all the courts may afford him, is the constitutional right of every citizen and one which he cannot barter away.<sup>20</sup> This includes the right to bring actions in the courts of another state subject to no other restrictions than one imposed upon the citizens of such state.<sup>21</sup>

**But May Require Bond of Nonresident Plaintiff.**—But while a state cannot forbid citizens of other states from suing in its courts, that right being enjoyed by its own people, it may require a nonresident, although a citizen of another state, to give bond for costs, although such bond be not required of a resident. Such a regulation of the internal affairs of a state cannot reasonably be characterized as hostile to the fundamental rights of citizens of other states.<sup>22</sup>

**And May Omit Attachment Bond as against Nonresident Defendants.**—A statute which requires the plaintiff in an attachment to give a bond where the attachment is against the property of a resident, but omits such requirement where the attachment is against the property of a nonresident, does not deprive nonresident defendants of their property without due process of law, nor prescribe any unlawful discrimination as to them.<sup>23</sup>

**Court of Equity May Enjoin Actions in Certain Cases.**—But while § 2 of article 4 of the federal constitution gives the citizens of one state the right to maintain actions in the courts of another, it does not prohibit courts of equity, having jurisdiction of the persons of would-be plaintiffs, from enjoining them, in a proper case, as, for example, where proceedings have been begun under a general insolvent law of the state, from instituting actions in the courts of another state.<sup>24</sup>

**Doctrine Does Not Extend to Foreign Corporations Desiring to Sue in State Courts.**—The doctrine that the privileges and immunities guaranteed by article 4, § 2, include the right to bring actions in the courts of another state subject to no other restrictions than are imposed upon the citizens of such state, does not apply to foreign corporations, since a corporation is not a citizen.<sup>25</sup>

ation upon the nonresident stockholders was fixed at fifteen mills on the dollar, applying equally to all; while the rate of local tax upon resident stockholders varied in the several cities and towns according to the judgment of their local authorities as to the amount necessary to be raised for carrying on the municipal government. Obviously, therefore, the varying difference in the rate of the tax upon the resident and nonresident stockholders could not be said to impose a discrimination against either the one or the other. *Travelers' Ins. Co. v. Connecticut*, 185 U. S. 364, 367, 46 L. Ed. 949.

**20. Right to bring actions.**—*Insurance Co. v. Morse*, 20 Wall. 445, 451, 22 L. Ed. 365; *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 538, 24 L. Ed. 148.

**21. Same.**—*Cole v. Cunningham*, 133 U. S. 107, 113, 33 L. Ed. 538; *Blake v. McClung*, 172 U. S. 230, 256, 43 L. Ed. 432. See, also, *Anglo-American Prov. Co. v. Davis Prov. Co.*, 191 U. S. 373, 374, 48 L. Ed. 225.

**22. May require bond of nonresident.**—*Blake v. McClung*, 172 U. S. 239, 256, 43 L. Ed. 432.

**23. May omit attachment bond as against nonresident defendants.**—*Central Loan,*

*etc.*, *Co. v. Campbell Commission Co.*, 173 U. S. 84, 98, 43 L. Ed. 623.

**24. Court of equity may enjoin action in another state.**—*Cole v. Cunningham*, 133 U. S. 107, 33 L. Ed. 538.

**25. Doctrine not applicable to foreign corporation desiring to sue in courts of state.**—*Anglo-American Prov. Co. v. Davis Prov. Co.*, 191 U. S. 373, 374, 48 L. Ed. 225, affirming the validity of New York Code of Civil Procedure, § 1780, which denies to foreign corporations the right to bring suit against other foreign corporations or nonresidents in the courts of that state except in certain specified cases.

"If the state does provide a court to which its own citizens may resort in a certain class of cases, it may be that citizens of other states of the Union also would have a right to resort to it in cases of the same class. *Blake v. McClung*, 172 U. S. 239, 256, 43 L. Ed. 432. But that right, even when the suit was upon a judgment of another state, would not rest on the first section of article 4, on which alone the plaintiff relies or can rely, but would depend on the second section, entitling the citizens of each state to all privileges and immunities of citizens in the sev-

**Removal of Causes.**—As to the validity of statutes requiring a surrender of the right to remove causes into the federal courts as a condition precedent to the right to do business in the state, and of kindred legislation, see the title **REMOVAL OF CAUSES**.

(11) *Limitation of Actions.*—A provision to the effect that when the defendant is out of the state, the statute of limitations shall not run against the plaintiff, if the latter resides in the state, but shall if he resides out of the state, is not repugnant to the second section of the fourth article of the constitution of the United States.<sup>26</sup>

3. **CITIZENSHIP OF THE UNITED STATES**—a. *Generally.*—As to who are citizens of the United States, and as to their allegiance and duties to the government, and right to protection by the government, see the title **CITIZENSHIP**, vol. 3, p. 788, et seq. As to the general power of congress to protect the rights of citizens, see the title **CIVIL RIGHTS**, vol. 3, p. 816, et seq.

b. *Citizenship under the Fourteenth Amendment, and the Privileges and Immunities of United States Citizenship*—(1) *Who Are Citizens under the Fourteenth Amendment.*—See, generally, the title **CITIZENSHIP**, vol. 3, p. 788.

**Corporations as Citizens.**—While corporations are held to be persons within the equal protection and due process clauses of the fourteenth amendment, they are not citizens within the privilege and immunities clause of that amendment.<sup>27</sup>

eral states. The plaintiff is not a citizen within this section. *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357; *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 45, 44 L. Ed. 657, and did not set it up. The general power of a state to restrict the right of a foreign corporation to sue in its courts is assumed in *Bank v. Earle*, 13 Pet. 519, 589, 591, 10 L. Ed. 274. As to discrimination against nonresidents, see *Chemung Canal Bank v. Lowery*, 93 U. S. 72, 23 L. Ed. 806." *Anglo-American Prov. Co. v. Davis Prov. Co.*, 191 U. S. 373, 374, 48 L. Ed. 225.

26. **Limitation of actions.**—*Chemung Canal Bank v. Lowery*, 93 U. S. 72, 23 L. Ed. 806.

**Statute of limitations discriminating against nonresidents.**—"There is, in fact, a valid reason for the discrimination. If the statute does not run as between non-resident creditors and their debtors, it might often happen that a right of action would be extinguished, perhaps for years, in the state where the parties reside; and yet, if the defendant should be found in Wisconsin—it may be only in a railroad train—a suit could be sprung upon him after the claim had been forgotten. The laws of Wisconsin would thus be used as a trap to catch the unwary defendant, after the laws which had always governed the case had barred any recovery. This would be inequitable and unjust." *Chemung Canal Bank v. Lowery*, 93 U. S. 72, 77, 23 L. Ed. 806.

The case of *Christmas v. Russell*, 5 Wall. 290, 18 L. Ed. 475, was a suit brought in Mississippi on a Kentucky judgment against a citizen of Mississippi upon a promissory note made in Mississippi and payable in New Orleans. A suit upon

the note would have been barred by the Mississippi statute of limitations when the suit in Kentucky was begun, and the defendant set up a statute of Mississippi providing that no action should be maintained upon a judgment rendered in such circumstances without the state against a resident of the state. It was held that the statute was void, and that as the judgment was valid in Kentucky it could not be treated as invalid in Mississippi. It will be observed that this was a suit by a citizen. There was no suggestion that the statute went to the jurisdiction of the court. Obviously it did not. Indeed, the suit was brought in the United States circuit court. The statute made no discrimination in the right to come into court, according to the character of the plaintiff or of the cause of action, but attempted to create a defense against a plaintiff assumed to have a right to come into court and to invoke the jurisdiction. But when the plaintiff was in court and exhibited his judgment, it was too late for the state to interfere. See *Anglo-American Prov. Co. v. Davis Prov. Co.*, 191 U. S. 373, 375, 48 L. Ed. 225.

27. **Corporations not citizens within privileges and immunities clause.**—*Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357; *Blake v. McClung*, 172 U. S. 239, 43 L. Ed. 432; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 561, 43 L. Ed. 552; *New York Life Ins. Co. v. Cravens*, 178 U. S. 389, 44 L. Ed. 1116; *Hancock Mut. Life Ins. Co. v. Warren*, 181 U. S. 73, 45 L. Ed. 755; *Western Turf Ass'n v. Greenberg*, 204 U. S. 359, 363, 51 L. Ed. 520. See, also, the titles **CITIZENSHIP**, vol. 3, p. 788; **CORPORATIONS**; **REMOVAL OF CAUSES**. And see ante, "Corporations," VII, B, 1, b; "Corporations," XVII, A, 2, a, (6).

(2) *Of the General Object and Purpose of the Fourteenth Amendment—*  
 (a) *To Define Citizenship and Confer the Same upon the Negro Race.*—The first clause of the fourteenth amendment was primarily intended to confer citizenship upon the negro race, and secondly to give definitions of citizenship of the United States, and citizenship of the states, and it recognizes the distinction between citizenship of a state and citizenship of the United States by those definitions.<sup>28</sup>

**Benefits Not Confined to the Negro Race.**—"The fourteenth amendment of the constitution is for the benefit of all of every race whose cases are embraced by its provisions, and not alone for the benefit of the African race."<sup>29</sup>

**Negroes Not Made Wards of the Nation.**—Neither the thirteenth, fourteenth nor fifteenth amendment operated to make the members of the negro race wards of the nation; on the other hand, before the laws they are upon the same footing as other citizens, and can apply to the federal courts for the protection of their rights only in cases in which it would be proper for other citizens in like circumstances to apply. So far as the fourteenth and fifteenth amendments are concerned, they are not entitled to resort to the federal courts for protection against individual wrongs; nor is such right given by the thirteenth amendment, unless the wrong of which complaint is made amounts to slavery or involuntary servitude.<sup>30</sup>

**28. General object and purpose; citizenship of the negro race; citizenship of the United States.**—*Slaughter-House Cases*, 16 Wall. 36, 21 L. Ed. 394; *United States v. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588; *In re Kemmler*, 136 U. S. 436, 448, 34 L. Ed. 519; *Boyd v. Nebraska*, 143 U. S. 135, 160, 36 L. Ed. 103; *McPherson v. Blacker*, 146 U. S. 1, 37, 36 L. Ed. 869; *Maxwell v. Dow*, 176 U. S. 581, 593, 44 L. Ed. 597; *Orr v. Gilman*, 183 U. S. 278, 286, 46 L. Ed. 196.\* See, also, as to the general object and purpose of the fourteenth amendment, the title CIVIL RIGHTS, vol. 3, p. 824, et seq.

"Its main purpose doubtless was, as has been often recognized by this court, to establish the citizenship of free negroes, which had been denied in the opinion delivered by Chief Justice Taney in *Scott v. Sandford* (1857), 19 How. 393, 15 L. Ed. 691; and to put it beyond doubt that all blacks, as well as whites, born or naturalized within the jurisdiction of the United States, are citizens of the United States. *Slaughter-House Cases* (1873), 16 Wall. 36, 73, 21 L. Ed. 394; *Strauder v. West Virginia* (1879), 100 U. S. 303, 306, 25 L. Ed. 664; *Ex parte Virginia* (1879), 100 U. S. 339, 345, 25 L. Ed. 676; *Neal v. Delaware* (1880), 103 U. S. 370, 386, 26 L. Ed. 567; *Elk v. Wilkins* (1884), 112 U. S. 94, 101, 28 L. Ed. 643." *United State v. Wong Kim Ark*, 169 U. S. 649, 676, 42 L. Ed. 890.

The distinction between citizenship of the United States and citizenship of a state is clearly recognized and established by the second clause of the fourteenth amendment. Under the definition there given a man may be a citizen of the United States without being a citizen of a state, and an important element is necessary to convert the former into the latter; that is to say, to make him a citizen of a state he must reside within the state,

but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union. It is quite clear then that there is a citizenship of the United States, and a citizenship of a state which are distinct each from the other and which depend upon different characteristics or circumstances in the individual. *Slaughter-House Cases*, 16 Wall. 36, 74, 21 L. Ed. 394; *Minor v. Happersett*, 21 Wall. 162, 22 L. Ed. 627; *United States v. Cruikshank*, 92 U. S. 542, 552, 23 L. Ed. 588; *Presser v. Illinois*, 116 U. S. 252, 266, 29 L. Ed. 615; *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 498, 30 L. Ed. 694; *In re Kemmler*, 136 U. S. 436, 34 L. Ed. 519; *Boyd v. Nebraska*, 143 U. S. 135, 159, 36 L. Ed. 103; *McPherson v. Blacker*, 146 U. S. 1, 39, 36 L. Ed. 869; *Maxwell v. Dow*, 176 U. S. 581, 593, 44 L. Ed. 597; *Orr v. Gilman*, 183 U. S. 278, 286, 46 L. Ed. 196; *Stockard v. Morgan*, 185 U. S. 27, 33, 46 L. Ed. 785.

The people of this country are citizens of the United States, as well as of the individual states, and they have some rights under the constitution and laws of the former independent of the latter, and free from any interference or restraint from them. *Stockard v. Morgan*, 185 U. S. 27, 33, 46 L. Ed. 785; *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 496, 30 L. Ed. 694.

**29. Benefits not confined to the negro race.**—*Kentucky v. Powers*, 201 U. S. 1, 32, 50 L. Ed. 633. See, generally, upon this point, the title CIVIL RIGHTS, vol. 3, pp. 826, 845. See, also, ante, "Persons Protected," VII. B, 1, et seq.; "Who May Invoke Protection of the Constitutional Guaranties," XI, E, et seq.

**30. Negroes not made wards of the nation.**—*Hodges v. United States*, 203 U. S. 1, 51 L. Ed. 65.



The phrase "subject to its jurisdiction" was intended to exclude from the operation of this section the children of ministers, consuls, and citizens or subjects of foreign states born within the United States, but not subject to the jurisdiction thereof.<sup>31</sup>

(b) *No Radical Change in the Theory of Government*.—"The object of the fourteenth amendment in respect of citizenship was to preserve equality of rights and to prevent discrimination as between citizens, but not to radically change the whole theory of the relations of the state and federal governments to each other, and of both governments to the people."<sup>32</sup>

(c) *Police Powers Remain Unrestricted*.—On the other hand, the fourteenth amendment was not designed to interfere with the power of the states to protect the lives, liberty and property of their citizens, and to promote their health, peace, morals, education and good order.<sup>33</sup>

(d) *Protection of Life, Liberty and Property Rests Primarily with the States*.—And the protection of life, liberty and property rests now, as it did before, primarily with the states.<sup>34</sup>

(e) *Provides Additional Security against State Infringement; but against State Infringement Only*.—The fourteenth amendment, however, does provide additional security against state infringement of fundamental rights. It forbids any arbitrary deprivation of life, liberty or property by the states, and secures equal protection to all under like circumstances in the enjoyment of their rights;<sup>35</sup> and, in the administration of criminal justice, requires that no higher or different punishment shall be imposed upon one than is imposed upon all for like offenses.<sup>36</sup>

**But Protects against State Infringement Only**.—The prohibitions contained in the first section of the fourteenth amendment all have reference to state action exclusively, and not to any action of private individuals. In other words, for protection against the wrongful acts of individuals, not representing the power of the state, the citizen must look to the state constitution and laws and to the state courts.<sup>37</sup>

**31. "Subject to its jurisdiction;" purpose and object of phrase**.—*Slaughter-House Cases*, 16 Wall. 36, 73, 21 L. Ed. 394.

**32. No radical change in the theory of government**.—In re Kemmler, 136 U. S. 436, 34 L. Ed. 519; *McPherson v. Blacker*, 146 U. S. 1, 39, 36 L. Ed. 869; *Maxwell v. Dow*, 176 U. S. 581, 593, 44 L. Ed. 597; *Orr v. Gilman*, 183 U. S. 278, 286, 46 L. Ed. 196. See, also, ante, "Limitations Contained in the War Amendments," VI, D, 3, b, (3), (c).

**33. Police powers remain unrestricted**.—*Slaughter-House Cases*, 16 Wall. 36, 21 L. Ed. 394; *Barbier v. Connolly*, 113 U. S. 27, 31, 28 L. Ed. 923; In re Kemmler, 136 U. S. 436, 448, 34 L. Ed. 519; *Maxwell v. Dow*, 176 U. S. 581, 593, 44 L. Ed. 597; *Orr v. Gilman*, 183 U. S. 278, 286, 46 L. Ed. 196. See the title POLICE POWER. And see, also, ante, "As a Limitation upon the Police Power," VII, B, 2, f.

**34. Protection to life, liberty and property still rests primarily with the states**.—*Slaughter-House Cases*, 16 Wall. 36, 21 L. Ed. 394; *Bradwell v. The State*, 16 Wall. 130, 139, 21 L. Ed. 442; *Minor v. Happersett*, 21 Wall. 162, 22 L. Ed. 627; *United States v. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588; *Virginia v. Rives*, 100 U. S. 313, 25 L. Ed. 667; *United States v. Harris*, 106 U. S. 629, 27 L. Ed. 290; *Civil Rights Cases*, 109 U. S. 3, 27 L. Ed.

836; *Barbier v. Connolly*, 113 U. S. 27, 31, 28 L. Ed. 923; *Presser v. Illinois*, 116 U. S. 252, 266, 29 L. Ed. 615; *Baldwin v. Franks*, 120 U. S. 678, 685, 30 L. Ed. 766; In re Kemmler, 136 U. S. 436, 34 L. Ed. 519; In re Rahrer, 140 U. S. 545, 554, 35 L. Ed. 572; *Logan v. United States*, 144 U. S. 263, 36 L. Ed. 429; *McPherson v. Blacker*, 146 U. S. 1, 38, 36 L. Ed. 869; *Maxwell v. Dow*, 176 U. S. 581, 593, 44 L. Ed. 597; *Orr v. Gilman*, 183 U. S. 278, 286, 46 L. Ed. 196; *Hodges v. United States*, 203 U. S. 1, 51 L. Ed. 65. See, also, the title CIVIL RIGHTS, vol. 3, pp. 816, 817.

**35. Provides additional security against state infringement**.—*Slaughter-House Cases*, 16 Wall. 36, 21 L. Ed. 394; *United States v. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588; *Barbier v. Connolly*, 113 U. S. 27, 31, 28 L. Ed. 923; In re Kemmler, 136 U. S. 436, 448, 34 L. Ed. 519; *Maxwell v. Dow*, 176 U. S. 581, 593, 44 L. Ed. 597; *Orr v. Gilman*, 183 U. S. 278, 286, 46 L. Ed. 196; *Hodges v. United States*, 203 U. S. 1, 51 L. Ed. 65. See, also, ante, "Generally," VII, B, 2, a.

**36. Same**.—In re Kemmler, 136 U. S. 436, 448, 34 L. Ed. 519. See, also, ante, "Generally," VII, B, 4, d, (1); "Unequal Punishments," VII, B, 4, d, (8).

**37. Protects against state infringement only**.—*Slaughter-House Cases*, 16 Wall.

(f) *Privileges and Immunities Clause Protects Only the Privileges and Immunities Pertaining to Citizenship of the United States.*—As we have seen, there is a distinction between citizenship in the states and in the United States; that the same person may be a citizen of a state and also a citizen of the United States; and that the fourteenth amendment recognizes this distinction.<sup>38</sup> So far as the privileges and immunities clause of the fourteenth amendment is concerned, it is only the privileges and immunities of citizenship of the United States as such, and in that relation and character, and these alone, which are protected against state abridgment, the language being, “no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”<sup>39</sup> This proposition implies, of course, that the states may legislate with a free hand concerning the privileges and immunities pertaining to state citizenship, except in so far as they are restrained by prohibitions found elsewhere in the constitution and amendments;<sup>40</sup> and that whatever difference there may be between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to a citizen of a state as such, the latter must rest for their security and protection where they rested prior to the adoption of the fourteenth amendment; for they are not embraced by the language of that amendment.<sup>41</sup>

36, 21 L. Ed. 394; *United States v. Reese*, 92 U. S. 214, 217, 23 L. Ed. 563; *Virginia v. Rives*, 100 U. S. 313, 318, 25 L. Ed. 667; *Ex parte Virginia*, 100 U. S. 339, 346, 25 L. Ed. 676; *United States v. Harris*, 106 U. S. 629, 639, 27 L. Ed. 290; *Scott v. McNeal*, 154 U. S. 34, 45, 38 L. Ed. 896; *Chicago, etc., R. Co. v. Chicago*, 166 U. S. 226, 233, 41 L. Ed. 979; *James v. Bowman*, 190 U. S. 127, 136, 47 L. Ed. 979; *Hodges v. United States*, 203 U. S. 1, 51 L. Ed. 65. See the title CIVIL RIGHTS, vol. 3, p. 826. See, also, ante, “Refers to Infringements by States; Not by Individuals,” VII, B, 2, c.

**38. A distinction between state and federal citizenship.**—*Slaughter-House Cases*, 16 Wall. 36, 21 L. Ed. 394; *Bradwell v. The State*, 16 Wall. 130, 138, 21 L. Ed. 442; *United States v. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588; *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 496, 30 L. Ed. 694; *In re Kemmler*, 136 U. S. 436, 34 L. Ed. 519; *Maxwell v. Dow*, 176 U. S. 581, 593, 44 L. Ed. 597; *Orr v. Gilman*, 183 U. S. 278, 286, 46 L. Ed. 196; *Stockard v. Morgan*, 185 U. S. 27, 33, 46 L. Ed. 785. See, also, ante, “To Define Citizenship and Confer the Same upon the Negro Race,” XVII, A, 3, b, (2), (a).

**39. Protects only those privileges and immunities incident to citizenship of the United States.**—*Slaughter-House Cases*, 16 Wall. 36, 79, 21 L. Ed. 394; *Bradwell v. The State*, 16 Wall. 130, 39, 21 L. Ed. 442; *Minor v. Happersett*, 21 Wall. 162, 22 L. Ed. 627; *United States v. Cruikshank*, 92 U. S. 542, 552, 23 L. Ed. 588; *Presser v. Illinois*, 116 U. S. 252, 266, 29 L. Ed. 615; *Boyd v. Nebraska*, 143 U. S. 135, 160, 36 L. Ed. 103; *Maxwell v. Dow*, 176 U. S. 581, 587, 44 L. Ed. 597.

**40. State not restricted as to legislation concerning privileges and immunities of state citizenship.**—*Slaughter-House Cases*, 16 Wall. 36, 21 L. Ed. 394; *Bradwell v. The State*, 16 Wall. 130, 21 L. Ed. 442;

*Minor v. Happersett*, 21 Wall. 162, 22 L. Ed. 627; *United States v. Cruikshank*, 92 U. S. 542, 552, 23 L. Ed. 588; *Presser v. Illinois*, 116 U. S. 252, 266, 29 L. Ed. 615; *Boyd v. Nebraska*, 143 U. S. 135, 36 L. Ed. 103; *McPherson v. Blacker*, 146 U. S. 1, 38, 36 L. Ed. 869; *Hodges v. United States*, 203 U. S. 1, 51 L. Ed. 65.

**41. Privileges of state citizenship still rest with the states for their protection.**—*Slaughter-House Cases*, 16 Wall. 36, 75, 21 L. Ed. 394; *Bradwell v. The State*, 16 Wall. 130, 139, 21 L. Ed. 442; *United States v. Cruikshank*, 92 U. S. 542, 552, 23 L. Ed. 588; *Presser v. Illinois*, 116 U. S. 252, 266, 29 L. Ed. 615; *Boyd v. Nebraska*, 143 U. S. 135, 36 L. Ed. 103; *McPherson v. Blacker*, 146 U. S. 1, 38, 36 L. Ed. 869; *Maxwell v. Dow*, 176 U. S. 581, 587, 44 L. Ed. 597; *Hodges v. United States*, 203 U. S. 1, 51 L. Ed. 65.

The adoption of the war amendments did not have the effect of placing under the protection of the federal government any of the rights, privileges or immunities of the citizens which were not there before. It is true that previous to these amendments certain prohibitions of the constitution against the impairment of the obligation of contracts in the enactment of ex post facto laws, etc., imposed certain limitations upon the states, but otherwise the entire domain of the privileges and immunities of citizens of the state lay within the constitutional and legislative powers of the state, and without that of the federal government. So far as the fourteenth and fifteenth amendments are concerned, a citizen must still look to the state for protection against individual wrongs, since those amendments are prohibitory to the states and not of individual action. *Hodges v. United States*, 203 U. S. 1, 51 L. Ed. 65; *Slaughter-House Cases*, 16 Wall. 36, 21 L. Ed. 394.

**Matters under state control; devolution**



(g) *Confers No Additional Privileges or Immunities.*—The fourteenth amendment created no additional privileges or immunities of citizenship but merely furnishes additional protection to such as the citizen already possessed.<sup>42</sup>

(3) *Privileges and Immunities of United States Citizenship*—(a) *Privileges and Immunities Defined.*—There are certain privileges and immunities which belong to a citizen of the United States as such; otherwise, it would be nonsense for the fourteenth amendment to prohibit a state from abridging them.<sup>43</sup> The constitution, however, does not define the privileges and immunities of citizens. For that definition we must look elsewhere.<sup>44</sup> As defined by the federal supreme court, the privileges and immunities of citizens of the United States, as distinguished from the privileges and immunities of citizens of the states,

**of estates of deceased persons.**—The case of *Carpenter v. Pennsylvania*, 17 How. 456, 15 L. Ed. 127, was decided before the adoption of the fourteenth amendment, but it correctly defines the limits of jurisdiction between the state and federal governments in respect to the control of the estates of decedents, both as they were regarded before and have been regarded since the adoption of the fourteenth amendment. It has never been held that it was the purpose or function of that amendment to change the systems and policies of the states in regard to the devolution of estates, or the extent of the taxing power over them. *Orr v. Gilman*, 183 U. S. 278, 286, 46 L. Ed. 196.

**Same; manner of inflicting death penalty.**—The infliction of the death penalty by causing to be passed through the body a current of electricity of sufficient intensity to produce death does not abridge any privilege or immunity of the condemned person as a citizen of the United States. *In re Kemmler*, 136 U. S. 436, 34 L. Ed. 519; *McElvaine v. Brush*, 142 U. S. 155, 35 L. Ed. 971; *Trezza v. Brush*, 142 U. S. 160, 35 L. Ed. 974.

**Same; monopolies and restraint of trade.**

—“The relief of the citizens of each state from the burden of monopoly and the evils resulting from the restraint of trade among such citizens was left with the states to deal with; and this court has recognized their possession of that power even to the extent of holding that an employment or business carried on by private individuals, when it becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort and by means of which a tribute can be exacted from the community, is subject to regulation by state legislative power.” *United States v. Knight Co.*, 156 U. S. 1, 11, 39 L. Ed. 325.

A statute of the state of Louisiana, which required that all animals, intended to be used for food in the city of New Orleans and in certain parishes of that state, should be landed, inspected and slaughtered upon the premises, and in the slaughter houses of the company created

for that purpose and given the exclusive privilege of maintaining stockyards and slaughter houses within that district, was not unconstitutional as abridging any of the privileges and immunities of citizens of the United States; the privileges and immunities set up being privileges pertaining to state, and not to United States citizenship, within the contemplation of the fourteenth amendment. *Slaughter-House Cases*, 16 Wall. 36, 66, 21 L. Ed. 394. See, also, *United States v. Knight Co.*, 156 U. S. 1, 11, 39 L. Ed. 325.

On the other hand, it has been said that: “If it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him (to a certain extent) of his liberty; for it takes from him the freedom of adopting and following the pursuit which he prefers; which is a material part of the liberty of the citizen.” *Allgeyer v. Louisiana*, 165 U. S. 578, 590, 41 L. Ed. 832; *Butchers’ Union Slaughter-House, etc., Co. v. Crescent City, etc., Slaughter-House Co.*, 111 U. S. 746, 764, 28 L. Ed. 585.

**42. Confers no additional privileges or immunities.**—*Minor v. Happersett*, 21 Wall. 162, 22 L. Ed. 627; *United States v. Cruikshank*, 92 U. S. 542, 553, 554, 23 L. Ed. 588; *Civil Right Cases*, 109 U. S. 3, 13, 27 L. Ed. 836; *Bell’s Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 237, 33 L. Ed. 892; *Home Ins. Co. v. New York State*, 134 U. S. 594, 607, 33 L. Ed. 1025; *McPherson v. Blacker*, 146 U. S. 1, 38, 36 L. Ed. 869; *Mobile, etc., R. Co. v. Tennessee*, 153 U. S. 486, 506, 38 L. Ed. 793; *Hooper v. California*, 155 U. S. 648, 658, 39 L. Ed. 297; *Maxwell v. Dow*, 176 U. S. 581, 596, 44 L. Ed. 597; *James v. Bowman*, 190 U. S. 127, 136, 47 L. Ed. 979. See, also, ante, “Fourteenth Amendment Confers No New or Additional Rights,” VII, B. 2, d. And see the title *CIVIL RIGHTS*, vol. 3, p. 826.

**43. Certain privileges which pertain to federal citizenship.**—*Bradwell v. The State*, 16 Wall. 130, 138, 21 L. Ed. 442.

**44. Privileges and immunities not defined by the constitution.**—*Minor v. Happersett*, 21 Wall. 162, 170, 22 L. Ed. 627.



are those privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the constitution, laws and treaties of the United States.<sup>45</sup>

(b) *Rights Protected by the First Ten Amendments.*—The privileges and immunities which the state are, by the fourteenth amendment, forbidden to abridge, do not necessarily include all the rights secured or protected by the first eight amendments of the constitution so as to make those amendments, since the adoption of the fourteenth amendment, limitations upon the powers of the states as well as upon the powers of the federal government. The rights secured and protected by the first eight amendments are not privileges or immunities granted and belonging to the individual as a citizen of the United States, but they are secured to all persons, as against the federal government, entirely irrespective of such citizenship. As the individual does not enjoy them as a privilege of citizenship of the United States, it is incorrect to say that the fourteenth amendment, in prohibiting the states from abridging the privileges and immunities of citizens of the United States, enlarges the effect of the first eight amendments and makes them limitations upon state as well as federal power.<sup>46</sup>

(c) *Rights Secured by Treaties.*—All rights and privileges secured to our citizens by treaties with foreign nations are dependent upon citizenship of the United States.<sup>47</sup>

**Treaty Rights of Persons in Ceded Territory.**—A treaty stipulation, that persons inhabiting territory ceded to the United States shall be incorporated into the Union of the United States and admitted, as soon as possible, according to the principles of the federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States, ceases to operate when the ceded territory is admitted into the Union as a state, for the inhabitants of the new state are then upon an equal footing with their brethren in their sister states as respects their rights, privileges and immunities as citizens of the United States.<sup>48</sup>

**45. As defined by the federal supreme court.**—Slaughter-House Cases, 16 Wall. 36, 21 L. Ed. 394; United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; In re Kemmler, 136 U. S. 436, 448, 34 L. Ed. 519; Boyd v. Nebraska, 143 U. S. 135, 160, 36 L. Ed. 103; McPherson v. Blacker, 146 U. S. 1, 38, 36 L. Ed. 869; Giozza v. Tierman, 148 U. S. 657, 661, 37 L. Ed. 599; Duncan v. Missouri, 152 U. S. 377, 382, 38 L. Ed. 485; Maxwell v. Dow, 176 U. S. 581, 593, 44 L. Ed. 597; Orr v. Gilman, 183 U. S. 278, 286, 46 L. Ed. 196.

**Fourteenth amendment protects the fundamental rights of citizenship.**—In re Kemmler, 136 U. S. 436, 34 L. Ed. 519, it was stated by the present chief justice that "The fourteenth amendment did not radically change the whole theory of the relations of the state and federal governments to each other, and of both governments to the people. The same person may be at the same time a citizen of the United States and a citizen of a state. Protection to life, liberty, and property rests primarily with the states, and the amendment furnishes an additional guaranty against any encroachment by the states upon those fundamental rights which belong to citizenship, and which the state governments were created to secure. The privileges and immunities of citizens of the United States, as distinguished from the

privileges and immunities of citizens of the states, are indeed protected by it; but those are privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the constitution of the United States." Slaughter-House Cases, 16 Wall. 36, 21 L. Ed. 394; United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588.' Orr v. Gilman, 183 U. S. 278, 286, 46 L. Ed. 196. Accord: Maxwell v. Dow, 176 U. S. 581, 593, 44 L. Ed. 597.

**46. Rights protected by the first ten amendments.**—Maxwell v. Dow, 176 U. S. 581, 593, 44 L. Ed. 597. See full discussion and citation of decisions upon this subject, ante, "Limitations Contained in the First Ten Amendments," VI, D, 3, b, (3), (b).

**47. Rights secured by treaties.**—Slaughter-House Cases, 16 Wall. 36, 79, 21 L. Ed. 394.

**48. Treaty rights of persons in ceded territory.**—New Orleans v. De Armas, 9 Pet. 224, 235, 9 L. Ed. 109. See, generally, the titles CITIZENSHIP, vol. 3, p. 788; TREATIES.

**Privileges and immunities under treaty ceding Louisiana.**—The third article of the treaty ceding Louisiana to the United States stipulates, that "the inhabitants of the ceded territory shall be incorporated into the Union of the United States and

(d) *Protection on High Seas and in Foreign Countries.*—Another privilege of a citizen of the United States is to demand the care and protection of the federal government over his life, liberty, and property while on the high seas and within the jurisdiction of a foreign government. This right depends upon his character as a citizen of the United States.<sup>49</sup>

(e) *Privilege of Citizenship Itself.*—The privilege of citizenship itself, set up by one claiming to have been naturalized in accordance with the naturalization laws, is one of the privileges of United States citizenship, and the action of a state court, denying the right so set up and claimed, involves the denial of a right or privilege under the constitution and laws of the United States.<sup>50</sup>

(f) *Right to Become Citizen of Any State.*—One of the privileges of citizenship in the United States conferred by the fourteenth amendment itself is the right of any citizen of the United States of his own volition to become a citizen of any state within the Union by a bona fide residence therein with the same rights as other citizens of that state.<sup>51</sup>

**Naturalized Citizen Previous to the Fourteenth Amendment.**—Previous to this it had been held that the individual states could not exclude those persons who had been made citizens of the United States by naturalization.<sup>52</sup>

(g) *Access to Seat of Government; to Ports of Entry; to Invoke Protection of Government, etc.*—One of the privileges of citizenship of the United States is the right to come to the seat of government to assert any claim the citizen may have upon that government, transact any business he may have with it, to seek its protection, to share its offices and to engage in administering its functions. He has a right of free access to its seaports, through which all operations of foreign commerce are conducted, to the subtreasury, land offices, and courts of justice of the several states.<sup>53</sup> The taxing power being in its nature unlimited over the subjects within its control, would enable the state governments to destroy the above-mentioned rights of the federal government and of its citizens, if the right of transit through the states by railroad and other ordinary modes of travel were one of the legitimate objects of state taxation. The existence of such a power in the states is, therefore, inconsistent with objects for which the federal government was established and with rights

admitted, as soon as possible, according to the principles of the federal constitution to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the meantime, they shall be maintained and protected in the free enjoyment of their liberty, property and religion which they profess." Held, that this stipulation contemplated, first, that Louisiana should be admitted into the Union as soon as possible, upon equal footing with the other states; and, second, that until such admission, the inhabitants of the ceded territory should be protected in the free enjoyment of their liberty, property and religion; and, third, that the latter stipulation ceased to operate when Louisiana became a member of the Union, and its inhabitants were admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States. *New Orleans v. De Armas*, 9 Pet. 224, 235, 9 L. Ed. 109.

**Same; review of questions of title by United States supreme court.**—The right to bring questions of title, decided by the state court, before the United States supreme court, is not a privilege guaranteed by this section of the treaty, since the inhabitants of Louisiana enjoy all the

privileges of United States citizenship in common with their brethren in their sister states when their titles are decided by the tribunals of the state. *New Orleans v. De Armes*, 9 Pet. 224, 235, 9 L. Ed. 109.

**49. Protection on the high seas and in foreign countries.**—*Murray v. The Charming Betsy*, 2 Cranch 64, 120, 2 L. Ed. 208; *Slaughter-House Cases*, 16 Wall. 36, 79, 21 L. Ed. 394. See, also, the title CITIZENSHIP, vol. 3, p. 806.

**50. Privilege of citizenship itself.**—*Missouri v. Andriano*, 138 U. S. 496, 34 L. Ed. 1012; *Boyd v. Nebraska*, 143 U. S. 135, 161, 36 L. Ed. 103. See, also, the title CITIZENSHIP, vol. 3, p. 805.

**51. Right to become a citizen of any state.**—*Slaughter-House Cases*, 16 Wall. 36, 80, 21 L. Ed. 394.

**52. Same; naturalized citizens previous to adoption of fourteenth amendment.**—*Collet v. Collet*, 2 Dall. 294, 296, 1 L. Ed. 387.

**53. Access to seat of government, ports of entry, to invoke protection of government, etc.**—*Slaughter-House Cases*, 16 Wall. 36, 79, 21 L. Ed. 394, quoting with approval *Crandall v. Nevada*, 6 Wall. 35, 36, 18 L. Ed. 745.



conferred by the constitution on that government and on the people. An exercise of such a power is accordingly void.<sup>54</sup>

(h) *Right to Use Navigable Waters of the United States.*—The right to use the navigable waters of the United States, however they may penetrate the territory of the several states, is dependent upon citizenship of the United States, and not citizenship of a state.<sup>55</sup>

(i) *Access to All the Courts; Removal of Causes.*—See ante, "Justice without Denial, Purchase or Delay," XIV; "The Right to Bring Actions; Remove Causes," XVII, A, 2, c, (10). See, also, the title REMOVAL OF CAUSES.

**Review of Questions of Title by United States Supreme Court.**—See ante, "Rights Secured by Treaties," XVII, A, 3, b, (3), (c), note.

(j) *Privilege of the Writ of Habeas Corpus.*—Another privilege of citizenship of the United States is the privilege of the writ of habeas corpus.<sup>56</sup>

(k) *Right to Give Information Concerning Violations of Federal Law.*—"It is the duty and the right, not only of every peace officer of the United States, but of every citizen, to assist in prosecuting, and in securing the punishment of, any breach of the peace of the United States. It is the right, as well as the duty, of every citizen, when called upon by the proper officer, to act as part of the posse comitatus in upholding the laws of his country. It is likewise his right and his duty to communicate to the executive officers any information which he has of the commission of an offense against those laws; and such information, given by a private citizen, is a privileged and confidential communication, for which no action of libel or slander will lie, and the disclosure of which cannot be compelled without the assent of the government.<sup>57</sup> "The right of a citizen informing of a violation of law, like the right of a prisoner in custody upon a charge of such violation, to be protected against lawless violence, does not depend upon any of the amendments to the constitution, but arises out of the creation and establishment by the constitution itself of a national government, paramount and supreme within its sphere of action.<sup>58</sup> Both are, within the concise definition of the chief justice in an earlier case,<sup>59</sup> "privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the constitution of the United States."<sup>60</sup>

(l) *Right of Persons in Service or Custody of United States to Protection.*—The right of every judicial or executive officer, or other person engaged in the service, or kept in the custody, of the United States, in the course of the administration of justice, to be protected from lawless violence, is a privilege or immunity of United States citizenship.<sup>61</sup>

54. Same.—Crandall v. Nevada, 6 Wall. 35, 18 L. Ed. 745. See, also, ante, "The Right to Free Ingress and Egress," XVII, A, 2, c, (6).

55. Right to use navigable waters of the United States.—Slaughter-House Cases, 16 Wall. 36, 79, 21 L. Ed. 394. See, also, the title INTERSTATE AND FOREIGN COMMERCE.

56. Privilege of the writ of habeas corpus.—Slaughter-House Cases, 16 Wall. 36, 79, 21 L. Ed. 394. See, also, the title HABEAS CORPUS.

57. Right to give information concerning violations of federal law.—Vogel v. Gruaz, 110 U. S. 311, 28 L. Ed. 158; In re Quarles, 158 U. S. 532, 535, 39 L. Ed. 1080.

58. Same; not dependent upon any of the amendments.—Logan v. United States, 144 U. S. 263, 294, 36 L. Ed. 429; In re Quarles, 158 U. S. 532, 536, 39 L. Ed. 1080.

59. Same.—In re Kemmler, 136 U. S. 436, 448, 34 L. Ed. 519.

60. Same.—In re Quarles, 158 U. S. 532, 536, 39 L. Ed. 1080. See, also, the title CIVIL RIGHTS, vol. 3, pp. 819, 820.

"It is the right of every private citizen of the United States to inform a marshal of the United States, or his deputy, of a violation of the internal revenue laws of the United States; \* \* \* this right is secured to the citizen by the constitution of the United States; and that a conspiracy to injure, oppress, threaten, or intimidate him in the free exercise or enjoyment of this right or because of his having exercised it, is punishable under § 5508 of the Revised Statutes." In re Quarles, 158 U. S. 532, 537, 39 L. Ed. 1080.

61. Right of persons in service or custody of United States to protection.—In re Quarles, 158 U. S. 532, 534, 39 L. Ed. 1080. See, also, ante, "To Execute Its Own Laws and Exercise Jurisdiction over All Persons and Places," VI, D, 2, c, (4).



(m) *Trial by Jury in State Courts.*—Article seven of the amendments to the federal constitution, that “in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved,” relates only to trials in the federal courts. A trial by jury in suits at common law pending in the state courts is not, therefore, a privilege or immunity of national citizenship, which the states are forbidden by the fourteenth amendment to abridge.<sup>62</sup>

(n) *Right to Pursue Ordinary Trade or Calling.*—The right to follow any of the ordinary callings of life is one of the privileges of a citizen of the United States.<sup>63</sup>

**Includes Right to Make All Lawful and Necessary Contracts.**—In the privilege of pursuing an ordinary calling or trade and of acquiring, holding and selling property must be embraced the right to make all proper contracts in relation thereto, and although it may be conceded that this right to contract in relation to persons or property or to do business within the jurisdiction of the state may be regulated and sometimes prohibited when the contracts or business conflict with the policy of the state as contained in its statutes, yet the power does not and cannot extend to prohibiting a citizen from making contracts of insurance outside of the limits and jurisdiction of the state, and which are also to be performed outside of such jurisdiction; nor can the state legally prohibit its citizens from doing such an act as writing a letter of notification, even though the property which is the subject of the insurance may at the time when such insurance attaches be within the limits of the states.<sup>64</sup>

**Police Regulation of Particular Trade, Occupation or Business.**—This does not interfere in any way with the acknowledged right of the state to enact such legislation in the legitimate exercise of its police or other powers as to it may seem proper. In the exercise of such right, however, care must be taken not to infringe upon those other rights of the citizen which are protected by the federal constitution.<sup>65</sup>

**62. Trial by jury in state courts.**—Edwards v. Elliott, 21 Wall. 532, 557, 22 L. Ed. 487; Walker v. Sauvinet, 92 U. S. 90, 92, 23 L. Ed. 678. See the title JURY. And see, also, ante, “Limitations Contained in the First Ten Amendments,” VI, D, 3, b, (3), (b).

**63. Right to pursue ordinary trade or calling.**—Allgeyer v. Louisiana, 165 U. S. 578, 590, 41 L. Ed. 832; Butchers' Union Slaughter-House, etc., Co. v. Crescent City etc., Slaughter-House Co., 111 U. S. 746, 764, 28 L. Ed. 585. See ante, “Right to Pursue Lawful Occupation, Acquire and Dispose of Property, without Discrimination,” VII, B, 3, b; “Interest or Estate in Profession or Occupation,” VIII, A, 21; “The Right of Life, Liberty, Private Property and the Pursuit of Happiness,” XI, et seq. See, also, the titles DUE PROCESS OF LAW; INTOXICATING LIQUORS; POLICE POWER.

**64. Includes right to make all necessary and lawful contracts.**—Allgeyer v. Louisiana, 165 U. S. 578, 591, 41 L. Ed. 832. See, also, the title DUE PROCESS OF LAW.

Acts done within the state by an insurance company or its agents doing business therein, which are in violation of the state statutes, come within the principle of the case of Hooper v. California, 155 U. S. 648, 39 L. Ed. 297, and would be controlled by it. Allgeyer v. Louisiana, 165 U. S. 578, 591, 41 L. Ed. 832.

**65. Regulation of business, trade or calling.**—Allgeyer v. Louisiana, 165 U. S. 578, 591, 41 L. Ed. 832. See the titles DUE PROCESS OF LAW; INTOXICATING LIQUORS; POLICE POWER.

**Right to operate a lottery.**—The right to operate a lottery is not a fundamental right infringed by legislation excluding letters, postals, newspapers and circulars concerning and advertising lotteries and gifts, enterprises and drawings therein from the mails. In re Rapiere, 143 U. S. 110, 134, 36 L. Ed. 93. See, generally, the titles LOTTERIES; POLICE POWER.

**Right to manufacture or sell intoxicating liquors.**—See the title INTOXICATING LIQUORS; POLICE POWER.

**Use of flag for advertising purposes.**—A state statute, which makes it a misdemeanor punishable by fine or imprisonment, or both, for any one to sell, expose for sale or have in possession for sale an article of merchandise upon which shall have been printed or placed for purposes of advertisement a representation of the flag of the United States, is not unconstitutional as depriving citizens of the United States of the right of exercising a privilege impliedly if not expressly guaranteed by the federal constitution. Halter v. Nebraska, 205 U. S. 34, 39, 51 L. Ed. 699, affirming the validity of 1 Cobby's Ann. Stat. Neb. 1903, ch. 139.

**Right to practice law.**—The right to practice law in the state courts is not one

(o) *Equal Protection of the Laws; Equal Taxation, etc.*—See, generally, the titles *CIVIL RIGHTS*, vol. 3, p. 814; *TAXATION*. And see ante, "Equal Protection of the Laws; Class Legislation," VII, et seq.

**Tax upon Bonds Held by Resident against Nonresident.**—See ante, "Exemption from Higher Taxes," XVII, A, 2, c, (9).

(p) *Equality of Rights in the Territories.*—See ante, "Limitations upon the Power of Congress; Operation of the Constitution within the Territories," VI, D, 2, c, (3), (c), (cc), (bbb), (cccc), (bbbbb); "Power of Congress to Deny Equal Rights in the Territories," VII, E. See, also, the title *TERRITORIES*.

(q) *Other Rights Secured by the War Amendments.*—Other rights and privileges of federal citizenship are those rights secured by the thirteenth and fifteenth amendments and by the other clauses of the fourteenth amendment.<sup>66</sup>

**B. The Right of Suffrage.**—The privilege to vote in any state is not given by the federal constitution, or by any of its amendments. It is not a privilege springing from citizenship of the United States.<sup>67</sup> "The right to vote in the states comes from the states, but the right of exemption from the prohibited discrimination comes from the United States."<sup>68</sup>

**Right to Vote at Federal Elections.**—The right to vote for presidential electors or members of congress, however, is a right of citizenship secured by the federal constitution and is not derived entirely from the state.<sup>69</sup>

**C. The Right of Assembly and Petition.**—The right to peaceably assemble and petition congress for a redress of grievances, or for anything else connected with the powers and duties of the national government, is an attribute of national citizenship expressly mentioned and secured by the constitution; it is therefore under the protection of the national government.<sup>70</sup>

**Not Granted by the Constitution.**—The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government." It "derives its source," to use the language of Chief Justice Marshall, in *Gibbons v. Ogden*, 9 Wheat. 1, 211, 6 L. Ed. 23, "from those laws whose authority is acknowledged by civ-

of the privileges or immunities of a citizen of the United States within the meaning of the first section of the fourteenth article of the amendments to the constitution of the United States. *Bradwell v. The State*, 16 Wall. 130, 21 L. Ed. 442.

The power of a state to prescribe the qualifications for admission to the bar of its own courts is unaffected by the fourteenth amendment, and the federal supreme court cannot inquire into the reasonableness or propriety of the rules it may prescribe. *Bradwell v. The State*, 16 Wall. 130, 21 L. Ed. 442.

Thus, a woman who has been denied a license to practice law in the courts of a state, the state law not admitting of the issuance of such license to females, cannot invoke the protection of this section of the fourteenth amendment upon the ground that her privileges and immunities as a citizen of the United States have been abridged by the state. *Bradwell v. The State*, 16 Wall. 130, 21 L. Ed. 442.

**66. Other rights secured by the war amendments.**—*Slaughter-House Cases*, 16 Wall. 36, 80, 21 L. Ed. 394.

**67. The right of suffrage.**—*Minor v. Happersett*, 21 Wall. 162, 22 L. Ed. 627; *McPherson v. Blacker*, 146 U. S. 1, 38, 36 L. Ed. 869; *Pope v. Williams*, 193 U. S. 621, 632, 48 L. Ed. 817. See, also, the

titles *CIVIL RIGHTS*, vol. 3, p. 830; *ELECTIONS*.

The right of suffrage was not necessarily one of the privileges or immunities of citizenship before the adoption of the fourteenth amendment. At the time of the adoption of that amendment, suffrage was not coextensive with the citizenship of the state; nor was it at the time of the adoption of the constitution; and neither the constitution nor the fourteenth amendment made all citizens voters. *McPherson v. Blacker*, 146 U. S. 1, 38, 36 L. Ed. 869. See, also, the title *CIVIL RIGHTS*, vol. 3, p. 830.

**68. Same.**—*McPherson v. Blacker*, 146 U. S. 1, 38, 36 L. Ed. 869. See, also, the title *CIVIL RIGHTS*, vol. 3, p. 830.

**69. Same; right to vote at federal elections.**—*Ex parte Yarbrough*, 110 U. S. 651, 28 L. Ed. 274; *In re Quarles*, 158 U. S. 532, 535, 39 L. Ed. 1080. See, generally, on this point, the titles *CIVIL RIGHTS*, vol. 3, pp. 817, 831; *ELECTIONS*.

**70. Right of assembly and petition.**—*Slaughter-House Cases*, 16 Wall. 36, 79, 21 L. Ed. 394; *United States v. Cruikshank*, 92 U. S. 542, 553, 23 L. Ed. 588; *In re Quarles*, 158 U. S. 532, 535, 39 L. Ed. 1080; *Patterson v. Colorado*, 205 U. S. 454, 464, 51 L. Ed. 879, per Harlan, J., dissenting.



ilized man throughout the world." It is found wherever civilization exists. It was not, therefore, a right granted to the people by the constitution. The government of the United States when established found it in existence, with the obligation on the part of the states to afford it protection.<sup>71</sup>

**As a Privilege of State Citizenship; Powers of the States.**—As no direct power over this right was granted to congress, it remains, according to the ruling in *Gibbons v. Ogden*, 9 Wheat. 1, 211, 6 L. Ed. 23, subject to state jurisdiction.<sup>72</sup> That is to say, that in so far as the right to peaceably assemble and petition for redress of grievances is sought to be exercised as a privilege of state citizenship, the first amendment to the constitution, like the others proposed and adopted at the same time, was not intended to limit the powers of the state governments in respect to their own citizens, but to operate upon the national government alone.<sup>73</sup> For their protection in the enjoyment of this right as a privilege of state citizenship, therefore, the people must look to the states. It was there that the power for that purpose originally rested, and not having been surrendered to the United States, there it still remains.<sup>74</sup> The state governments, therefore, unless restrained by their own constitutions, have the power to regulate or prohibit associations and meetings of the people, except in the case of peaceable assemblies to perform the duties or exercise the privileges of citizens of the United States; and have also the power to control and regulate the organization, drilling, and parading of military bodies and associations, except when such bodies or associations are authorized by the militia laws of the United States. The exercise of this power by the states is necessary to their public peace, safety and good order. To deny the power would be to deny the right of the state to disperse assemblages organized for sedition and treason, and the right to suppress armed mobs bent on riot and rapine.<sup>75</sup>

**Right to Petition Congress an Attribute of National Citizenship.**—But the right of the people peaceably to assemble for the purpose of petitioning congress for a redress of grievances, or for anything else connected with the powers or the duties of the federal government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. If, therefore, it should be alleged in an indictment that certain persons conspired or banded together to prevent a meeting for such purpose, the case would be within the provisions of the enforcement act of May 31, 1870, and within the scope of the sovereignty of the United States.<sup>76</sup>

**D. The Right to Keep and Bear Arms.—Not a Right Granted by the Constitution.**—The right to keep and bear arms is not a right granted by the constitution. Neither is it in any manner dependent upon that instrument for existence.<sup>77</sup>

**Second Amendment Not Restrictive of the States.**—The second amendment, which declares that "a well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed," is a limitation upon the power of the national government and of congress, and not upon the powers of the states. For their protection in the enjoyment of this right, therefore, the people must look to the states.<sup>78</sup>

71. Right not granted by the constitution.—*United States v. Cruikshank*, 92 U. S. 542, 551, 23 L. Ed. 588.

72. As a privilege of state citizenship; powers of the states.—*United States v. Cruikshank*, 92 U. S. 542, 551, 23 L. Ed. 588.

73. Same; not limited by federal constitutional provision.—*United States v. Cruikshank*, 92 U. S. 542, 552, 23 L. Ed. 588.

74. Same; protection of right as a privilege of state citizenship rests with the states.—*United States v. Cruikshank*, 92 U. S. 542, 552, 23 L. Ed. 588.

75. Same; state may regulate the organization, meeting and drilling of armed bodies.—*Presser v. Illinois*, 116 U. S. 252, 267, 29 L. Ed. 615.

76. Right to petition congress an attribute of national citizenship.—*United States v. Cruikshank*, 92 U. S. 542, 552, 23 L. Ed. 588.

77. Right to keep and bear arms not a right granted by the constitution.—*United States v. Cruikshank*, 92 U. S. 542, 543, 23 L. Ed. 588; *Presser v. Illinois*, 116 U. S. 252, 265, 29 L. Ed. 615.

78. Same; second amendment not restrictive of the states.—*United States v.*



**Limitations upon the Power of the States to Restrict the Right to Keep and Bear Arms.**—But while this is true, it is also true that all citizens capable of bearing arms constitute the reserved military force or reserved militia of the United States, as well as of the States, and in view of this prerogative of the general government, as well as of its general powers, the states cannot, even laying this amendment to the constitution out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.<sup>79</sup>

**Right of Individual Citizens to Organize Themselves into Military Companies.**—"The right voluntarily to associate together as a military company or organization, or to drill or parade with arms, without, and independent of, an act of congress or law of the state authorizing the same, is not an attribute of national citizenship. Military organization and military drill and parade under arms are subjects especially under the control of the government of every country. They cannot be claimed as a right independent of law. Under our political system they are subject to the regulation and control of the state and federal governments, acting in due regard to their respective prerogatives and powers. The constitution and laws of the United States will be searched in vain for any support to the view that these rights are privileges and immunities of citizens of the United States independent of some specific legislation on the subject."<sup>80</sup>

**E. Protection of Rights, Privileges and Immunities.**—"Every right, created by, arising under, or dependent upon the constitution, may be protected and enforced by such means and in such manner as congress, in the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the constitution, may in its discretion deem most eligible and best adapted to attain the object."<sup>81</sup>

Cruikshank, 92 U. S. 542, 23 L. Ed. 588; Presser v. Illinois, 116 U. S. 252, 265, 29 L. Ed. 615; Miller v. Texas, 153 U. S. 535, 539, 38 L. Ed. 812.

A state law which prohibits the carrying of dangerous weapons upon the person does not abridge the privileges or immunities of citizens of the United States as those privileges and immunities are defined in the Slaughter-House Cases, 16 Wall. 36, 21 L. Ed. 394, and in *Crandall v. Nevada*, 6 Wall. 35, 18 L. Ed. 745, and *Ward v. Maryland*, 12 Wall. 163, 20 L. Ed. 260; *Miller v. Texas*, 153 U. S. 535, 539, 38 L. Ed. 812.

**79. Limitations upon power of states to restrict the right to keep and bear arms.**—*Presser v. Illinois*, 116 U. S. 252, 265, 29 L. Ed. 615.

**80. Right of individual citizens to organize themselves into a military company.**—*Presser v. Illinois*, 116 U. S. 252, 267, 29 L. Ed. 615.

**Same; military code of Illinois.**—The military code of the state of Illinois provides that all able-bodied male citizens within certain ages shall be subject to military duty and shall constitute the state militia, and provides for their enrollment in the state militia. By another section it is provided that it shall not be lawful for any body of men, other than the regular organized volunteer militia of the state and the troops of the United States, to associate themselves together

as a military company or organization, or to drill or parade with arms in any city or town of the state without a license from the governor. Held, that these provisions are not opposed to the constitutional provision vesting in congress the power to raise and support armies and to provide for calling out, organizing, arming and disciplining the militia, or to that provision which declares that no state shall without the consent of congress keep troops in time of peace; nor does the provision which forbids bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law, infringe the right of the people to keep and bear arms. *Presser v. Illinois*, 116 U. S. 252, 264, 29 L. Ed. 615.

Nor does this legislation deprive the plaintiff of his life, liberty or property without due process of law; nor is it a bill of attainder or ex post facto law. *Presser v. Illinois*, 116 U. S. 252, 268, 29 L. Ed. 615.

**81. Protection of rights, privileges and immunities.**—*Logan v. United States*, 144 U. S. 263, 293, 36 L. Ed. 429; *In re Quarles*, 158 U. S. 532, 535, 39 L. Ed. 1080. See, generally, the title CIVIL RIGHTS, vol. 3, pp. 818, 834.

**By removal of cause into federal court.**—In *Strauder v. West Virginia*, 100 U. S. 303, 309, 312, 25 L. Ed. 664, after referring

## XVIII. Protection to Persons Accused of Crime.

**A. Person Protected**—1. RESIDENTS OF DISTRICT OF COLUMBIA.—As to the power of congress to deprive the people of the District of Columbia of the benefit of any of the constitutional guaranties of life, liberty and property, and especially of the trial by jury in criminal cases, see ante, "In the District of Columbia and Places under Exclusive Federal Control," IV, C, 3.

2. RESIDENTS IN THE TERRITORIES.—See ante, "Limitations upon the Power of Congress; Operation of the Constitution within the Territories," VI, D, 2, c, (3), (c), (cc), (bbb), (cccc), (bbbbb).

3. CITIZENS RESIDING OR SOJOURNING ABROAD.—See ante, "Exterritorial Operation," IV, C, 4.

4. ALIENS.—As to the general right of aliens to claim the benefit of the constitutional guaranties for the protection of life, liberty and property, see the title ALIENS, vol. 1, pp. 219, 247, 250, 253, 255. See, also, ante, "Citizens and Aliens," VII, B, 1, a; "Aliens," XI, E, 3.

**B. Power of President, Congress or Judiciary to Annul or Suspend Constitutional Guaranties.**—Neither the president nor congress nor the judiciary can disturb any one of the safeguards of civil liberty incorporated into the constitution, except so far as the right is given to suspend in certain cases the privilege of the writ of habeas corpus.<sup>82</sup>

**Martial Law.**—There are occasions when martial rule can be properly applied. If, in foreign invasion or civil war the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course.<sup>83</sup> But as necessity creates the rule, so it limits its duration. Martial rule can never exist where the courts are open and in the proper and unobstructed exercise of their jurisdiction; and if the military government is continued after the courts are reinstated, it is a gross usurpation of power.<sup>84</sup>

**Confined to Locality of War.**—Martial rule is also confined to the locality of actual war.<sup>85</sup>

to what was said in *United States v. Reese*, 92 U. S. 214, 23 L. Ed. 563, to the effect that rights and immunities created by or dependent upon the constitution of the United States can be protected by congress, and that the form and manner of the protection may be such as congress in the legitimate exercise of its legislative discretion shall provide, the court said: "There is express authority to protect the rights and immunities referred to in the fourteenth amendment, and to enforce observance of them by appropriate congressional legislation. And one very efficient and appropriate mode of extending such protection and securing to a party the enjoyment of the right or immunity, is a law providing for the removal of his case from a state court, in which the right is denied by the state law, into a federal court, where it will be upheld. This is an ordinary mode of protecting rights and immunities conferred by the federal constitution and laws. Section 641 is such a provision." *Kentucky v. Powers*, 201 U. S. 1, 27, 50 L. Ed. 633. See the title CIVIL RIGHTS, vol. 3, p. 838, et seq. See, also, the title REMOVAL OF CAUSES.

**Enjoining enforcement of unconstitutional statutes.**—As to the right of a federal court to enjoin the enforcement of an unconstitutional state law, see the titles COURTS; INJUNCTIONS; JURISDICTION; STATES.

**82. Power to annul or suspend constitutional guaranties.**—Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281.

**83. Same; martial law.**—Ex parte Milligan, 4 Wall. 2, 127, 18 L. Ed. 281.

**84. Same.**—Ex parte Milligan, 4 Wall. 2, 127, 18 L. Ed. 281.

**85. Same; confined to locality of war.**—Ex parte Milligan, 4 Wall. 2, 127, 18 L. Ed. 281.

**Military commissions in states where courts were open.**—Military commissions organized during the late civil war, in a state not invaded, and not engaged in rebellion, in which the federal courts were open, and in the proper and unobstructed exercise of their judicial functions, had no jurisdiction to try, convict, or sentence for any criminal offense, a citizen who was neither a resident of a rebellious state, nor a prisoner of war, nor a person in the military or naval service. And congress could not invest them with



**C. Common-Law Crimes against the United States.**—It is well settled that there are no common-law offenses against the United States,<sup>86</sup> and that the courts of the United States, in determining what constitutes an offense against the United States, must resort to the statutes of the United States, enacted in pursuance of the constitution;<sup>87</sup> though the federal courts may resort to the common law for the definition of terms by which offenses are designated.<sup>88</sup>

**D. Requirement as to Presentment or Indictment in Capital and Infamous Cases.**—1. **GENERAL NATURE AND PURPOSE OF REQUIREMENT.**—The grand jury was a body known to the common law, and to it was committed the duty of inquiring whether there was probable cause to believe a defendant guilty of the offense charged.<sup>89</sup> The general purpose of this requirement, therefore, is to ascertain whether there is probable cause to believe a defendant guilty of the offense charged, and to prevent the accused from being subjected to the burden and expense of a trial until there has been a prior inquiry and adjudication by a responsible tribunal that there is probable cause to believe him guilty.<sup>90</sup>

2. **NOT A RESTRICTION UPON THE STATES.**—This provision, like all others found in the first ten amendments, is a restriction upon the powers of the federal government, and not upon those of the states; and it is competent for the states, therefore, to abolish the grand jury system entirely and proceed in all cases by information.<sup>91</sup>

**Does Not Raise Local Requirements to the Dignity of a Constitutional Provision.**—"The fifth amendment, requiring the presentment or indictment of a grand jury, does not take up unto itself the local law as to how the grand jury should be made up, and raise the latter to a constitutional requirement."<sup>92</sup>

3. **NOT A RESTRICTION UPON LEGISLATURE OF INDIAN TRIBE OR NATION.**—The fifth amendment to the constitution does not apply to the local legislation of the Cherokee nation so as to require all prosecutions for offenses committed against the laws of that nation to be initiated by a grand jury organized in accordance with the provisions of that amendment.<sup>93</sup>

any such power. *Ex parte Milligan*, 4 Wall. 2, 18 L. Ed. 281.

The federal authority having been unopposed in the state of Indiana, and the federal courts open for the trial of offenses and the redress of grievances, the usages of war could not, under the constitution, afford any sanction for the trial there of a citizen in civil life, not connected with the military or naval service, by a military tribunal, for any offense whatever. *Ex parte Milligan*, 4 Wall. 2, 18 L. Ed. 281.

**86. Common-law crimes against the United States.**—*United States v. Hudson*, 7 Cranch 32, 3 L. Ed. 259; *United States v. Coolidge*, 1 Wheat. 415, 4 L. Ed. 124; *United States v. Britton*, 108 U. S. 199, 206, 27 L. Ed. 698; *Manchester v. Massachusetts*, 139 U. S. 240, 262, 263, 35 L. Ed. 159; *United States v. Eaton*, 144 U. S. 677, 687, 36 L. Ed. 591.

It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offense. *United States v. Eaton*, 144 U. S. 677, 688, 36 L. Ed. 591. See ante, "No Common Law of the United States," VI, D. 3, a, (4). And see, generally, the title COMMON LAW, vol. 3, pp. 970, 971, 972.

**87. Same.**—*In re Kollock*, 165 U. S. 526, 533, 41 L. Ed. 813.

**88. But courts may resort to common law for definitions.**—See the title COMMON LAW, vol. 3, p. 972.

**89. Requirement as to presentment or indictment; general nature and purpose.**—*Beavers v. Henkel*, 194 U. S. 73, 84, 48 L. Ed. 882.

**90. Same.**—*Beavers v. Henkel*, 194 U. S. 73, 84, 48 L. Ed. 882.

**91. Federal constitutional provision not a restriction upon the states.**—*Hurtado v. California*, 110 U. S. 516, 28 L. Ed. 232; *Brown v. New Jersey*, 175 U. S. 172, 174, 44 L. Ed. 119; *Beavers v. Henkel*, 194 U. S. 73, 84, 48 L. Ed. 882; *West v. Louisiana*, 194 U. S. 258, 263, 48 L. Ed. 965. See, also, the title DUE PROCESS OF LAW. And see ante, "Limitations Contained in the First Ten Amendments," VI, D. 3, b, (3), (b).

**92. Does not raise local requirements to the dignity of a constitutional provision.**—*Matter of Moran*, 203 U. S. 96, 104, 51 L. Ed. 105. See, also, *Rawlins v. Georgia*, 201 U. S. 638, 50 L. Ed. 899, where the same principle is affirmed with respect to the effect of the fourteenth amendment upon the laws of the states. See, generally, the title DUE PROCESS OF LAW.

**93. Not a restriction upon the legislature of an Indian tribe or nation.**—*Talton*



4. PERSONS PROTECTED—*a. Citizens Residing or Sojourning Abroad.*—See ante, "Exterritorial Operation," IV, C, 4.

*b. Residents of the District of Columbia.*—See ante, "In the District of Columbia and Places under Exclusive Federal Control," IV, C, 3.

*c. Residents within the Territories.*—See ante, "Limitations upon the Power of Congress; Operation of the Constitution within the Territories," VI, D, 2, c, (3), (c), (cc), (bbb), (cccc), (bbbbb).

*d. Aliens.*—See, generally, the title ALIENS, vol. 1, pp. 219, 247, 250, 253, 255. And see ante, "Citizens and Aliens," VII, B, 1, a; "Aliens," XI, E, 3.

*e. Persons in the Land and Naval Forces; Cases Arising in Time of War or Public Danger.*—By the fifth article of the amendments, cases arising in the land or naval forces, or in the militia in time of war or public danger, are excepted from the necessity of presentment or indictment by a grand jury;<sup>94</sup> and the right of trial by jury, in such cases, is subject to the same exceptions.<sup>95</sup>

**Construction of Words "When in Actual Services in Time of War or Public Danger."**—The words "when in actual service in time of war or public danger" refer merely to the last antecedent, "or in the militia," and not to the previous clause, "in the land or naval forces." A contrary construction is grammatically possible. But it is opposed to the evident meaning of the provision, taken by itself, and still more so, when it is considered together with other provisions of the constitution.<sup>96</sup> In other words, "all persons in the military or naval service of the United States are subject to the military law; the members of the regular army and navy, at all times; the militia, only so long as they are in such service."<sup>97</sup>

"The whole purpose of the provision in question is to prevent persons, not subject to the military law, from being held to answer for a capital or otherwise infamous crime, without presentment or indictment by a grand jury."<sup>98</sup>

**Suspension in Time of War or Public Danger.**—In a state where the courts are open and no state of war exists, neither the president, as commander in chief, nor any military subordinate, has any power to suspend or annul this or any other constitutional safeguard by declaring martial law and ordering persons in no way connected with the military service to be tried before a military commission for alleged offenses for which the civil laws make provision.<sup>99</sup>

5. THIS PROVISION SELF-EXECUTING.—The constitutional provision protecting every one from being prosecuted in a court of the United States without the intervention of a grand jury for any crime which is subject by law to an infamous punishment is self-executing, and no declaration of congress is needed to secure, or competent to defeat, the constitutional safeguard.<sup>1</sup> If the crime of which the defendant is accused was an infamous crime, within the meaning of the fifth amendment of the constitution, no court of the United States has juris-

*v. Mayes*, 163 U. S. 376, 382, 41 L. Ed. 196.

94. **Persons in land and naval forces; cases arising in land and naval forces.**—*Ex parte Milligan*, 4 Wall. 2, 18 L. Ed. 281; *Johnson v. Sayre*, 158 U. S. 109, 117, 39 L. Ed. 914; *Beavers v. Henkel*, 194 U. S. 73, 83, 48 L. Ed. 882.

95. **Same; trial by jury.**—*Ex parte Milligan*, 4 Wall. 2, 18 L. Ed. 281.

96. **Construction of words, "when in actual service in time of war or public danger."**—*Johnson v. Sayre*, 158 U. S. 109, 113, 39 L. Ed. 914.

97. **Same.**—*Johnson v. Sayre*, 158 U. S. 109, 114, 39 L. Ed. 914.

98. **Same.**—*Johnson v. Sayre*, 158 U. S. 109, 114, 39 L. Ed. 914.

**Persons in land or naval forces; paymaster's clerk.**—A paymaster's clerk is a person in the naval service of the United States, and subject to be tried and convicted, and to be sentenced to imprisonment, by a general court martial; *Ex parte Reed*, 100 U. S. 13, 25 L. Ed. 538; *Johnson v. Sayre*, 158 U. S. 109, 117, 39 L. Ed. 914.

99. **Suspension in time of war or public danger.**—*Ex parte Milligan*, 4 Wall. 2, 18 L. Ed. 281. See, also, ante, "Power of President, Congress or Judiciary to Annul or Suspend Constitutional Guaranties," XVIII, B.

1. **This provision self-executing.**—*Mackin v. United States*, 117 U. S. 348, 351, 29 L. Ed. 909.

diction to try or punish him, except upon presentment or indictment by a grand jury.<sup>2</sup>

6. **INFAMOUS CRIME WITHIN THE MEANING OF THIS SECTION.**—"The fifth amendment had in view the rule of the common law, governing the mode of prosecuting those accused of crime, by which an information by the attorney general, without the intervention of a grand jury, was not allowed for a capital crime, nor for any felony, rather than the rule of evidence, by which those convicted of crimes of a certain character were disqualified to testify as witnesses. In other words, of the two kinds of infamy known to the law of England before the Declaration of Independence, the constitutional amendment looked to the one founded on the opinions of the people respecting the mode of punishment, rather than to that founded on the construction of law respecting the future credibility of the delinquent."<sup>3</sup> A crime which is punishable by imprisonment in the state prison or penitentiary is an infamous crime, whether the accused is or is not sentenced or put to hard labor; and, in determining whether the crime is infamous, the test is, whether it is one for which the statute authorizes the court to award an infamous punishment, and not whether the punishment ultimately awarded is an infamous one. When the accused is in danger of being subjected to an infamous punishment, if convicted, he has the right to insist that he shall not be put upon his trial, except on the accusation of a grand jury.<sup>4</sup>

7. **FORBIDS ANY ALTERATION OF INDICTMENT BY COURT OR PROSECUTING ATTORNEY.**—The requirement that a person shall not be held to answer for a capital or otherwise infamous crime except upon the presentment or indictment of a grand jury implies that neither the court nor the prosecuting attorney shall have any power to alter the indictment after it comes from the hands of the grand jury, either by adding anything thereto or by striking out as surplusage any part thereof. Otherwise it would not be the indictment of the grand jury upon which he was tried. Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney.<sup>5</sup>

2. **Same.**—Ex parte Wilson, 114 U. S. 417, 422, 29 L. Ed. 89; Ex parte Bain, 121 U. S. 1, 12, 30 L. Ed. 849.

3. **"Infamous crime," within the meaning of this section.**—Ex parte Wilson, 114 U. S. 417, 29 L. Ed. 89; Mackin v. United States, 117 U. S. 348, 350, 29 L. Ed. 909; Ex parte Bain, 121 U. S. 1, 13, 30 L. Ed. 849; Wong Wing v. United States, 163 U. S. 228, 41 L. Ed. 140.

4. **Same.**—Ex parte Wilson, 114 U. S. 417, 29 L. Ed. 89; United States v. Petit, 114 U. S. 429, 29 L. Ed. 93; Mackin v. United States, 117 U. S. 348, 351, 29 L. Ed. 909; Parkinson v. United States, 121 U. S. 281, 30 L. Ed. 959; United States v. De Walt, 128 U. S. 393, 32 L. Ed. 485; Medley, Petitioner, 134 U. S. 160, 169, 33 L. Ed. 835; In re Mills, 135 U. S. 263, 267, 34 L. Ed. 107; In re Claasen, 140 U. S. 200, 205, 35 L. Ed. 409; Logan v. United States, 144 U. S. 263, 308, 36 L. Ed. 429; Wong Wing v. United States, 163 U. S. 228, 41 L. Ed. 140; The Paquete Habana, 175 U. S. 677, 682, 44 L. Ed. 320; Fitzpatrick v. United States, 178 U. S. 304, 307, 44 L. Ed. 1078; Motes v. United States, 178 U. S. 458, 44 L. Ed. 1150.

**Having in possession counterfeit of public security.**—"The crime of having in pos-

session, with intent to sell, an obligation engraved and printed after the similitude of a public security of the United States, punishable by fine of not more than \$5,000, or by imprisonment at hard labor not more than fifteen years, or by both, is an infamous crime, within the meaning of this amendment of the constitution." Ex parte Wilson, 114 U. S. 417, 422, 29 L. Ed. 89.

**The offense of unlawfully, fraudulently and feloniously voting at an election** for a representative in congress and of unlawfully, fraudulently and feloniously registering as an elector qualified to vote at such an election is an infamous crime within the meaning of this provision of the constitution, since under §§ 5511 and 5512 of Revised Statutes the imprisonment may be for a period longer than one year, bringing it within that class of cases in which the court can order that it shall be in the penitentiary. Revised Statutes, § 5541. This makes the crime infamous and the prosecution thereof must be by indictment and not by information. Parkinson v. United States, 121 U. S. 281, 30 L. Ed. 959.

5. **Forbids any alteration of indictment.**—Ex parte Bain, 121 U. S. 1, 13, 30 L. Ed. 849.



**E. Right to Be Informed of Nature and Cause of Accusation—1.** SIXTH AMENDMENT NOT A LIMITATION UPON STATE POWER.—In criminal cases prosecuted under the laws of the United States, the accused has the constitutional right "to be informed of the nature and cause of the accusation."<sup>6</sup> This requirement of the federal constitution was not designed as a limitation upon the powers of the state governments in reference to their own citizens, but it is restriction exclusively upon the federal government.<sup>7</sup>

2. CRIMINAL PROSECUTION WITHIN MEANING OF SIXTH AMENDMENT.—A criminal prosecution, within the meaning of the sixth amendment, is one against a person who is accused and who is to be tried by a petit jury; a criminal prosecution under article six of the amendments is much narrower than a criminal case under article five of the amendments.<sup>8</sup> "The words, in the sixth amendment, 'to be informed of the nature and cause of the accusation,' obviously refer to a person accused of crime, whether a felony or misdemeanor, for which he is prosecuted by indictment or presentment, or in some other authorized mode which may involve his personal security."<sup>9</sup>

3. INDICTMENT; SUFFICIENCY.—This is construed to mean that the indictment must set forth the offense with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged.<sup>10</sup> The constitutional right of a defendant to be informed of the nature and cause of the accusation against him entitles him to insist, at the outset, by demurrer or by motion to quash, and, after verdict, by motion in arrest of judgment, that the indictment shall apprise him of the crime charged with such reasonable certainty that he can make his defense and protect himself after judgment against another prosecution for the same offense.<sup>11</sup> Every ingredient of which the offense is composed must be accurately and clearly alleged. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intents, and these must be set forth in the indictment with reasonable particularity of time, place and circumstances.<sup>12</sup> A defendant, however, is informed of the nature and cause of the accusation against him if the indictment contains such description of the offense charged as will enable him to make his defense and to plead the judgment in bar of any further prosecution for the same crime.<sup>13</sup>

**Omission of Indecent and Obscene Matter.**—This right is not infringed by the omission from the indictment of indecent and obscene matter, alleged as not proper to be spread upon the records of the court, provided the crime

6. Right to be informed of the nature and cause of the accusation.—Const., Amendment VI. *United States v. Cruikshank*, 92 U. S. 542, 558, 23 L. Ed. 588.

7. Federal constitutional provision not a limitation upon the powers of the states.—*Barron v. Baltimore*, 7 Pet. 243, 8 L. Ed. 672; *Fox v. Ohio*, 5 How. 410, 434, 12 L. Ed. 213; *Smith v. Maryland*, 18 How. 71, 76, 15 L. Ed. 269; *Withers v. Buckley*, 20 How. 84, 90, 15 L. Ed. 816; *Twitchell v. Commonwealth*, 7 Wall. 321, 19 L. Ed. 223. See, also, ante, "Limitations Contained in the First Ten Amendments," VI, D, 3, b, (3), (b).

8. Criminal prosecution within the meaning of the sixth amendment.—*Counselman v. Hitchcock*, 142 U. S. 547, 562, 35 L. Ed. 1110; *United States v. Zucker*, 161 U. S. 475, 482, 40 L. Ed. 777.

9. Same.—*United States v. Zucker*, 161 U. S. 475, 480, 40 L. Ed. 777.

10. Indictment: sufficiency.—*United States v. Mills*, 7 Pet. 138, 142, 8 L. Ed. 636; *United States v. Cruikshank*, 92 U. S. 542, 558, 23 L. Ed. 588.

11. Same.—*Rosen v. United States*, 161 U. S. 29, 40 L. Ed. 606.

12. Same.—*United States v. Cook*, 17 Wall. 168, 174, 21 L. Ed. 638; *United States v. Cruikshank*, 92 U. S. 542, 558, 23 L. Ed. 588.

Thus where a statute provides for the punishment of those who conspire "to injure, oppress, threaten or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States," an indictment which charges an offense in the words of the statute, and in language broad enough to cover all, but without specifying a particular right which the defendants conspired to prevent or hinder the parties named in the free exercise and enjoyment thereof, is not sufficient under the requirements of this provision. *United States v. Cruikshank*, 92 U. S. 542, 558, 23 L. Ed. 588.

13. Same.—*Rosen v. United States*, 161 U. S. 29, 34, 40 L. Ed. 606.



charged, however general the language used, is yet so described as reasonably to inform the accused of the nature of the charge sought to be established against him.<sup>14</sup> In such case, the accused may apply to the court before the trial is entered upon for a bill of particulars, showing what parts of the paper would be relied on by the prosecution as being obscene, lewd, and lascivious, which motion will be granted or refused, as the court, in the exercise of a sound legal discretion, may find necessary to the ends of justice.<sup>15</sup>

4. **INDICTMENT TO BE ACCEPTED EVERYWHERE; FIFTH AMENDMENT SATISFIED BY ONE INQUEST.**—Within the spirit of the rule of giving full effect to the records and judicial proceedings of other courts, an indictment, found by the proper grand jury, should be accepted everywhere throughout the United States as at least *prima facie* evidence of the existence of probable cause.<sup>16</sup> In other words, the defendant may not, upon a proceeding to remove him to the jurisdiction in which the indictment was found, impeach it by evidence tending to show that the grand jury did not have testimony before it sufficient to justify its action.<sup>17</sup> "The thought is that no one shall be subjected to the burden and expense of a trial until there has been a prior inquiry and adjudication by a responsible tribunal that there is probable cause to believe him guilty. But the constitution does not require two such inquiries and adjudications. The government, having once satisfied the provision for an inquiry and obtained an adjudication by the proper tribunal of the existence of probable cause, ought to be able without further litigation concerning that fact to bring the party charged into court for trial. The existence of probable cause is not made more certain by two inquiries and two indictments."<sup>18</sup>

5. **PLACE OF INQUEST.**—The place where such inquiry must be had and the decision of the grand jury obtained is the locality in which, by the constitution and laws, the final trial must be had.<sup>19</sup>

**F. Right to Confront Accusers and Witnesses**—1. **PROVISION NOT APPLICABLE TO TRIALS IN STATE COURTS.**—There is no specific provision in the federal constitution which makes it necessary in a state court that the defendant should be confronted with the witnesses against him in criminal trials. The sixth amendment does not apply to proceedings in state courts.<sup>20</sup>

2. **GENERAL OBJECT AND PURPOSE OF THE CONSTITUTIONAL GUARANTY.**—"The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."<sup>21</sup>

**Proof of Different Offense by Production of the Record.**—"A fact which can be primarily established only by witnesses cannot be proved against an accused—charged with a different offense for which he may be convicted without reference to the principal offender—except by witnesses who confront

14. **Same; omission of indecent and obscene matter.**—*Rosen v. United States*, 161 U. S. 29, 40 L. Ed. 606.

15. **Same.**—*Rosen v. United States*, 161, U. S. 29, 40 L. Ed. 606.

16. **Indictment to be accepted everywhere.**—*Beavers v. Henkel*, 194 U. S. 73, 85, 48 L. Ed. 882.

17. **Same.**—*Beavers v. Henkel*, 194 U. S. 73, 87, 48 L. Ed. 882. See, also, *Greene v. Henkel*, 183 U. S. 249, 46 L. Ed. 177.

18. **Requirement satisfied by one inquest.**—*Beavers v. Henkel*, 194 U. S. 73, 84, 48 L. Ed. 882.

19. **Place of inquest.**—*Beavers v. Henkel*, 194 U. S. 73, 85, 48 L. Ed. 882.

20. **Right to confront accusers and witnesses; provision not applicable to state courts.**—*Spies v. Illinois*, 123 U. S. 131, 31 L. Ed. 80; *Brown v. New Jersey*, 175 U. S. 172, 174, 44 L. Ed. 119; *Maxwell v. Dow*, 176 U. S. 581, 586, 44 L. Ed. 597; *West v. Louisiana*, 194 U. S. 258, 261, 48 L. Ed. 965. See, also, ante "Limitations Contained in the First Ten Amendments," VI, D, 3, b, (3), (b).

21. **General object and purpose of guaranty.**—*Mattox v. United States*, 156 U. S. 237, 242, 39 L. Ed. 409.

him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases."<sup>22</sup>

3. **PROCEEDING MUST BE TECHNICALLY CRIMINAL.**—As has been previously stated, a criminal prosecution within the meaning of the sixth amendment is much narrower than a criminal case under the fifth amendment.<sup>23</sup> The sixth amendment relates to a prosecution which is technically criminal in its nature. In such a proceeding the person accused is entitled to a speedy and public trial by an impartial jury of the state, as well as of a district previously ascertained by law in which the crime charged against him shall have been committed.<sup>24</sup>

**Proceeding Must Be Directly against the Accused.**—"So the clause declaring that the accused, in a criminal prosecution, is entitled 'to be confronted with the witnesses against him,' has no reference to any proceeding (although the evidence therein may disclose, of necessity, the commission of a public offense) which is not directly against a person who is accused, and upon whom a fine or imprisonment, or both, may be imposed."<sup>25</sup>

4. **EXCEPTIONS AND LIMITATIONS TO CONSTITUTIONAL GUARANTY**—a. *Generally.*—All the cases admit some exceptions to the general rule as laid down in the sixth amendment.<sup>26</sup>

b. *In the State Courts.*—As previously stated, this provision is not applicable to trials in state courts.<sup>27</sup> What the exceptions and limitations to this prin-

**22. Proof of different offense by production of the record.**—*Kirby v. United States*, 174 U. S. 47, 55, 43 L. Ed. 890.

**Same; proof of theft by record upon charge of receiving stolen property.**—"One accused of having received stolen goods with intent to convert them to his own use, knowing at the time that they were stolen, is not, within the meaning of the constitution, confronted with the witnesses against him when the fact that the goods were stolen is established simply by the record of another criminal case with which the accused had no connection and in which he was not entitled to be represented by counsel." *Kirby v. United States*, 174 U. S. 47, 60, 43 L. Ed. 890.

So much of the act of March 3, 1875, as declares that the judgment of conviction against the principal felons shall be evidence in the prosecution against the receiver that the property of the United States alleged to have been embezzled, stolen or purloined had been embezzled, stolen or purloined, is in violation of that clause of the sixth amendment declaring that in all criminal prosecutions the accused shall be confronted with the witnesses against him. *Kirby v. United States*, 174 U. S. 47, 61, 43 L. Ed. 890. See, also, *West v. Louisiana*, 194 U. S. 258, 265, 48 L. Ed. 965, citing this case.

**23. Criminal prosecution under sixth amendment narrower than criminal prosecution under the fifth amendment.**—*United States v. Zucker*, 161 U. S. 475, 481, 40 L. Ed. 777. See, also, *Counselman v. Hitchcock*, 142 U. S. 547, 562, 35 L. Ed. 1110.

**24. Proceeding must be technically criminal.**—*United States v. Zucker*, 161 U. S. 475, 481, 40 L. Ed. 777.

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"A witness who proves facts entitling the plaintiff in a proceeding in a court of the United States, even if the plaintiff be the government, to a judgment for money only, and not to a judgment which directly involves the personal safety of the defendant, is not, within the meaning of the sixth amendment, a witness against an 'accused' in a criminal prosecution; and his evidence may be brought before the jury, in the form of a deposition, taken as prescribed by the statutes regulating the mode in which depositions to be used in the courts of the United States may be taken. The defendant, in such a case, is no more entitled to be confronted at the trial with the witnesses of the plaintiff than he would be in a case where the evidence related to a claim for money that could be established without disclosing any facts tending to show the commission of crime." *United States v. Zucker*, 161 U. S. 475, 481, 40 L. Ed. 777.

Thus, an action to recover the value of merchandise alleged to have been forfeited to the United States under the ninth section of the act of June 10, 1890, c. 407, is not a criminal proceeding within that provision of the sixth amendment entitling the accused to confront the witnesses against him. In such an action the witnesses need not have testified in person, but the evidence may be in the form of depositions. *United States v. Zucker*, 161 U. S. 475, 40 L. Ed. 777.

**25. Proceeding must be directly against the accused.**—*United States v. Zucker*, 161 U. S. 475, 481, 40 L. Ed. 777.

**26. Exceptions and limitations; generally.**—*West v. Louisiana*, 194 U. S. 258, 266, 48 L. Ed. 965.

**27. Same; in the state courts.**—See ante, "Provision Not Applicable to Trials in State Courts," XVIII, F, 1.



ciple may be, therefore, is a question for the state courts, in prosecutions therein, subject to the limitation that the state cannot deprive the accused of important and fundamental rights to the extent of depriving him of life or liberty without due process of law.<sup>28</sup>

(c) *Specific Exceptions and Limitations*—(1) *Dying Declarations*.—To the rule that an accused is entitled to be confronted with witnesses against him, the admission of dying declarations is an exception which arises from the necessity of the case. This exception was well established before the adoption of the constitution, and was not intended to be abrogated. The ground upon which such exception rests is that from the circumstances under which dying declarations are made they are equivalent to the evidence of a living witness upon oath—"the condition of the party who made them being such that every motive to falsehood must be supposed to have been silenced, and the mind to be impelled by the most powerful considerations to tell the truth."<sup>29</sup>

(2) *Where Witness Dies or Becomes Insane, or Is Kept Away by Connivance of the Defendant*.—Another exception to this rule, which existed at common law, and which was not abrogated by the adoption of the sixth amendment, is the right to read, upon the trial of the defendant, a deposition or the minutes of an examination, taken before the examining magistrate or coroner, or upon a former trial, upon its being shown that it was taken when the defendant was present and had the opportunity to cross-examine, and that the witness is since dead, insane or too ill ever to be expected to attend the trial.<sup>30</sup> "The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of."<sup>31</sup>

28. *Same*.—*West v. Louisiana*, 194 U. S. 258, 262, 48 L. Ed. 965.

29. *Dying declarations*.—*Mattox v. United States*, 146 U. S. 140, 151, 36 L. Ed. 917; *Kirby v. United States*, 174 U. S. 47, 61, 43 L. Ed. 890.

"There could be nothing more directly contrary to the letter of the provision in question than the admission of dying declarations. They are rarely made in the presence of the accused; they are made without any opportunity for examination or cross-examination; nor is the witness brought face to face with the jury; yet from time immemorial they have been treated as competent testimony, and no one would have the hardihood at this day to question their admissibility. They are admitted not in conformity with any general rule regarding the admission of testimony, but as an exception to such rules, simply from the necessities of the case, and to prevent a manifest failure of justice." *Mattox v. United States*, 156 U. S. 237, 243, 39 L. Ed. 409.

30. *Where witness dies or becomes insane*.—*Reynolds v. United States*, 98 U. S. 145, 25 L. Ed. 244; *Mattox v. United States*, 156 U. S. 237, 39 L. Ed. 409; *Motes v. United States*, 178 U. S. 458, 471, 44 L. Ed. 1150; *West v. Louisiana*, 194 U. S. 258, 262, 48 L. Ed. 965.

31. *Same*.—*Mattox v. United States*, 156 U. S. 237, 244, 39 L. Ed. 409.

"There is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards even by the death of the witness; and that, if notes of his testimony are permitted to

be read, he is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection. But general rules of law of this kind, however beneficial in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused." *Mattox v. United States*, 156 U. S. 237, 243, 39 L. Ed. 409.

Where it is shown that a person who was a witness in the former trial of the accused has since died, a transcribed copy of the reporter's stenographic notes of his testimony in such trial, supported by the testimony of the reporter that it is correct, may be admitted and read in evidence without infringing the constitutional guaranty that the accused shall be confronted with the witnesses against him; it appearing that the witness was fully examined upon the former trial and that the accused then had the privilege and opportunity of cross-examination. *Mattox v. United States*, 156 U. S. 237, 39 L. Ed. 409.

In *Mattox v. United States*, 156 U. S. 237, 39 L. Ed. 409, the indictment was for



**Witness Kept Away Through Connivance of Defendant.**—The constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. If he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.<sup>22</sup>

**Same; Burden of Proof.**—When enough has been proved to cast upon the defendant the burden of showing, and he, having full opportunity therefor, fails to show, that he has not been instrumental in concealing them or in keeping them away, he is in no condition to assert that his constitutional right has been violated by allowing competent evidence of the testimony which they gave on a previous trial between the United States and himself upon the same issue. Such evidence is admissible.<sup>33</sup>

(3) *Escape of Witness without Fault of Defendant.*—Where one of several alleged co-conspirators, upon preliminary examination before a United States commissioner, and before the conspiracy is proved, gives testimony which is put in writing and signed by him, which testimony, if accepted, is sufficient to convict all the defendants, and said witness is then committed to jail without bail, but is suffered to escape through the negligence of the officers of the government and without fault or procurement of the other defendants, so that he fails to respond when called as a witness for the government at the final trial, his written testimony taken at the preliminary hearing before the commissioner is not admissible against the other defendants even though it also appear that they were present and had the opportunity of cross-examining him at the preliminary hearing. Such a case is not within the exceptions to the constitutional rule that the accused persons are entitled to confront the witnesses against them.<sup>34</sup>

**Not Prejudicial When.**—The admission of such evidence, however, is not prejudicial or reversible error as to one of the defendants who testified at the final trial that he and the escaped witness conspired to commit and committed the murder with which they were charged, and that no one else had anything to do with it; since his testimony under oath as to his own guilt was sufficient

murder, and it was found in the United States district court of Kansas. It was held that the testimony of a former witness of the government, once taken by a stenographer on a former trial, and fully examined and cross-examined, was admissible on a second trial on proof of the death of the witness.

**32. Witnesses kept away through connivance of defendant.**—*Reynolds v. United States*, 98 U. S. 145, 25 L. Ed. 244; *Motes v. United States*, 178 U. S. 458, 472, 44 L. Ed. 1150; *West v. Louisiana*, 194 U. S. 258, 262, 48 L. Ed. 965.

And see this same principle applied to the case of a party who purposely concealed himself to avoid the service of an order to show cause why he should not be punished for contempt in disobeying a temporary restraining order of the court. In such case it was held, the court having jurisdiction of the cause and the parties to it, that the party concealing himself to avoid service of the order to show cause could not complain of the action of the court, the facts having been shown by proper return, in causing the order to be served upon his attorney, and proceeding to hear and determine the same. *Eureka Lake, etc., Canal Co. v. Yuba County*, 116 U. S. 410, 418, 29 L. Ed. 671, citing *Reyn-*

*olds v. United States*, 98 U. S. 145, 158, 25 L. Ed. 244.

**33. Same; burden of proof.**—*Reynolds v. United States*, 98 U. S. 145, 25 L. Ed. 244. See, also, *West v. Louisiana*, 194 U. S. 258, 265, 48 L. Ed. 965, citing this case with approval.

**34. Escape of witness without fault of defendant.**—*Motes v. United States*, 178 U. S. 458, 44 L. Ed. 1150.

The case of *Motes v. United States*, 178 U. S. 458, 44 L. Ed. 1150, was an indictment under § 5508 of the Revised Statutes of the United States. It was held that the admission upon the trial of written statements made by one Taylor at the preliminary examination was in violation of the rights of the accused under the sixth amendment of the constitution of the United States, because, as the court found, the absence of the witness was manifestly due to the negligence of the officers of the government. The witness was a witness for the prosecution and had been once committed to jail without bail, and his absence was, therefore, not within any recognized exception to the general rule prescribed in the constitution. See, also, *West v. Louisiana*, 194 U. S. 258, 266, 48 L. Ed. 965, citing this case with approval.

to convict him independently of the evidence given by the escaped witness and codefendant at the preliminary hearing.<sup>35</sup>

(4) *Where Witness Is Merely Nonresident or Is beyond the Jurisdiction of the Court.*—There is some contrariety of opinion as to whether, under the common law, a deposition is admissible against the accused in a criminal case merely upon proof that the defendant was present and had opportunity to cross-examine when it was taken, and that the witness has since become nonresident or permanently absent and therefore unavailable at the trial.<sup>36</sup>

**In State Courts.**—But however this may be, no question can arise under the sixth amendment when a deposition is admitted under such circumstances upon a criminal trial in a state court, since, as previously stated, that amendment has no application to proceedings in a state court.<sup>37</sup> And even conceding that the common law favors the defendant and excludes a deposition under such circumstances, it is competent for a state to change the rule, subject to the limitation that it cannot take away rights of such important and fundamental character as to deprive a defendant of his life or liberty without due process of law; and it is held that the extending of the common-law rule so as to permit the admission of a deposition under the circumstances stated is not a denial of any fundamental right nor the deprivation of life or liberty without due process of law.<sup>38</sup>

(5) *Enjoining Sale of Intoxicants; Imprisonment for Contempt.*—Article six of the amendments to the federal constitution, respecting the right of persons accused of crime to be confronted with witnesses, is not infringed by a state law authorizing the courts to punish by fine or imprisonment or both any person guilty of violating an injunction of the court restraining him from selling intoxicating liquors in violation of law.<sup>39</sup>

5. TIME AND MANNER OF RAISING OBJECTIONS.—See the titles APPEAL AND ERROR, vol. 3, p. 747; EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL.

**G. Right to Speedy Trial**—1. PRIOR TO THE CONSTITUTION.—In a case arising in Pennsylvania in 1764, it was moved on the part of the defendant to oblige the attorney general to bring on the trial or discharge the defendant; but the court held that they would not force the Crown to bring on the trial, nor discharge the defendant without some appearance of oppression.<sup>40</sup>

2. UNDER THE CONSTITUTION—*a. General Nature of Right.*—"The right to a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice. It cannot be claimed for one offense and prevent arrest for other offenses; and removal proceedings are but process for arrest—means of bringing a defendant to trial."<sup>41</sup>

35. When admission not prejudicial.—*Motes v. United States*, 178 U. S. 458, 44 L. Ed. 1150.

36. Where witness merely nonresident or beyond jurisdiction; doubt at common law.—*West v. Louisiana*, 194 U. S. 258, 262, 48 L. Ed. 965.

37. Admissibility in state court; sixth amendment not applicable.—*West v. Louisiana*, 194 U. S. 258, 262, 48 L. Ed. 965.

38. Same; not a denial of due process of law.—*West v. Louisiana*, 194 U. S. 258, 263, 267, 48 L. Ed. 965.

In *Murray v. Louisiana*, 163 U. S. 101, 41 L. Ed. 87, the state court, on the trial of plaintiff in error for murder, permitted to be read the evidence of a witness taken in the presence of the accused at the pre-

liminary hearing, and read to and signed by the witness, the prosecuting officer alleging that the witness was beyond the jurisdiction of the court and that his attendance could not be procured. The United States supreme court refused to decide as to the admissibility of the evidence, as the bill of exceptions did not show the substance of the evidence and that it was material.

39. Enjoining sale of intoxicants; imprisonment for contempt.—*Eilenbecker v. District Court*, 134 U. S. 31, 33 L. Ed. 801.

40. Right to speedy trial; prior to the constitution.—*The King v. Haas*, 1 Dall. 9, 1 L. Ed. 14.

41. Under the constitution; general nature of right.—*Beavers v. Haubert*, 198 U. S. 77, 87, 49 L. Ed. 950.

Where the accused is charged with more than one crime he cannot be tried for all at the same time, and his constitutional right to a speedy trial must be considered with regard to the practical administration of justice. It is no violation of this right, where indictments are pending against him in federal courts in different districts, to remove him, with the consent of the court, from a district in which he happens to be, and in which an indictment is pending against him, to another district in which other indictments are pending, and try him under the latter indictments first.<sup>42</sup>

b. *Constitutional Guaranty Refers Only to Proceedings Which Are Technically Criminal.*—The guaranty contained in the sixth amendment, that "in all criminal prosecutions" the accused shall enjoy the right to a speedy and public trial, relates only to those proceedings which are technically criminal in their nature.<sup>43</sup>

c. *Implies the Right to a Trial Itself.*—The constitutional guaranty of a speedy public trial implies the right to a trial itself.<sup>44</sup>

d. *Trial Involves the Exercise of Judicial Power.*—A trial, within the constitutional guaranty of a speedy and public trial by an impartial jury, involves the exercise of judicial power.<sup>45</sup>

**Trial before Military Commission Not Sufficient.**—A military commission sitting in a state where the courts are open and their process unobstructed possesses no part of the judicial power of the United States, neither can any part thereof be conferred upon it. No usage of war can sanction a military trial there for any offense whatever of a citizen in civil life, in no wise connected with the military service. One of the plainest constitutional guaranties is infringed, therefore, when such a citizen, residing in such a state, is tried by such a commission; for it is not a court of the United States ordained and established by congress and composed of judges appointed during good behavior.<sup>46</sup>

**42. Where accused charged with more than one crime.**—*Beavers v. Haubert*, 198 U. S. 77, 86, 49 L. Ed. 950.

The provision of art. 4 that in all criminal prosecutions the accused shall enjoy the right of a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, relates solely to the time and not to the place of the trial, and cannot be invoked by one against whom indictments are pending in different districts, to prevent his removal from one district to another. *Beavers v. Haubert*, 198 U. S. 77, 87, 49 L. Ed. 950.

Thus it appeared that the accused, who was living in the city of New York, which is in the southern district of that state, was taken under removal proceedings into the eastern district of that state to be tried upon an indictment there pending. Having been called upon to plead to the indictments, he made certain motions with respect thereto. Thereupon the district attorney announced his intention not to proceed further under those indictments, and announced further that he intended to prosecute proceedings to remove the accused to the District of Columbia for trial. This was done, and with the consent of the court. It was held that there had been no violation of the right of the accused to a speedy trial. *Beavers v. Haubert*, 198 U. S. 77, 87, 49 L. Ed. 950.

**43. Refers only to proceedings which are technically criminal.**—See, ante, "Proceeding Must Be Technically Criminal," XVIII, F, 3.

**44. Implies the right to a trial itself.**—*Ex parte Milligan*, 4 Wall. 2, 121, 122, 18 L. Ed. 281.

"To declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial. It is not consistent with the theory of our government that the legislature should, after having defined an offense as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents." *Wong Wing v. United States*, 163 U. S. 228, 237, 41 L. Ed. 140; *Li Sing v. United States*, 180 U. S. 486, 495, 45 L. Ed. 634.

**45. Trial involves the exercise of judicial power.**—*Ex parte Milligan*, 4 Wall. 2, 121, 18 L. Ed. 281. See, also, *Wong Wing v. United States*, 163 U. S. 228, 237, 41 L. Ed. 140; *Li Sing v. United States*, 180 U. S. 486, 495, 45 L. Ed. 634.

**46. Same; trial before military commission not sufficient.**—*Ex parte Milligan*, 4 Wall. 2, 122, 18 L. Ed. 281.



e. *Under the Act of March 3, 1863, Relating to Habeas Corpus.*—A person arrested after the passage of the act of March 3d, 1863, "relating to habeas corpus, and regulating judicial proceedings in certain cases," and under the authority of the said act, was entitled to his discharge if not indicted or presented by the grand jury convened at the first subsequent term of the circuit or district court of the United States for the district.<sup>47</sup> The omission to furnish a list of the persons arrested to the judges of the circuit or district court as provided in the said act, did not impair the right of such person, if not indicted or presented, to his discharge.<sup>48</sup>

3. **TRIALS IN STATE COURTS.**—The guaranty of a speedy and public trial contained in article six of the amendments has no reference to trials in state courts.<sup>49</sup>

**H. Place of Trial.**—1. **CONSTITUTIONAL PROVISION NOT APPLICABLE TO TRIALS IN STATE COURTS.**—The provision of the third article of the constitution that the trial of all crimes shall be held in the state where committed, has reference only to trials in the federal courts; it has no application to trials in the state courts.<sup>50</sup>

**State Law Changing Place of Trial as an Ex Post Facto Law.**—See post, "Changing Place of Trial," XIX, I, 5, c.

2. **REFERS ONLY TO PROCEEDING WHICH IS TECHNICALLY CRIMINAL.**—"The sixth amendment relates to a prosecution of an accused person which is technically criminal in its nature. In such a proceeding, the person accused is entitled to a speedy and public trial by an impartial jury of the state, as well as of a district previously ascertained by law in which the crime charged against him shall have been committed; whereas an action, in which a judgment for money only is sought, even if, in some aspects, it is one of a penal nature, may be brought wherever the defendant is found and is served with process, unless some statute requires it to be brought in a particular jurisdiction."<sup>51</sup>

3. **CRIMES COMMITTED WITHIN A STATE.**—Crimes committed within a state are local, and must be tried in the district in which the offense was committed.<sup>52</sup>

4. **CRIMES NOT COMMITTED WITHIN A STATE.**—But crimes committed against the laws of the United States, out of the limits of any state, are not local, but may be tried at such places as congress shall designate by law.<sup>53</sup>

47. *Under act of March 3, 1863, relating to habeas corpus.*—Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281.

48. *Same.*—Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281.

49. *Trials in state courts.*—Eilenbecker v. District Court, 134 U. S. 31, 33 L. Ed. 801. See, also, ante, "Limitations Contained in the First Ten Amendments," VI, D, 3, b, (3), (b).

**Trial in state court; violation of injunction against the sale of intoxicants.**—Article 6 of the amendments to the constitution of the United States declaring that the accused shall be entitled to a speedy and public trial by jury is not infringed by a state law authorizing the courts of the state to punish by fine and imprisonment any person guilty of violating an injunction of the court restraining him from selling intoxicating liquors in violation of law. Eilenbecker v. District Court, 134 U. S. 31, 33 L. Ed. 801.

50. **Place of trial; in the state courts.**—Gut v. The State, 9 Wall. 35, 19 L. Ed. 573; Nashville, etc., Railway v. Alabama, 128 U. S. 96, 101, 32 L. Ed. 352. See, also, ante, "Limitations Contained in the First Ten Amendments," VI, D, 3, b, (3), (b);

"Retrospective Acts Relating to Transfer or Removal of Causes," VIII, C, 13, g.

51. **Proceeding must be technically criminal.**—United States v. Zucker, 161 U. S. 475, 481, 40 L. Ed. 777. And see ante, "Proceeding Must Be Technically Criminal," XVIII, F, 3.

52. **Crimes committed within a state.**—United States v. Jackalow, 1 Black 484, 486, 17 L. Ed. 225; Cook v. United States, 138 U. S. 157, 183, 34 L. Ed. 906.

The locality in which an offense is charged to have been committed determines under the constitution and laws the place and court of trial. Beavers v. Henkel, 194 U. S. 73, 83, 48 L. Ed. 882.

"In such a proceeding, the person accused is entitled to a speedy and public trial by an impartial jury of the state, as well as of a district previously ascertained by law in which the crime charged against him shall have been committed." United States v. Zucker, 161 U. S. 475, 481, 40 L. Ed. 777.

53. **Crimes not committed within a state.**—United States v. Dawson, 15 How. 467, 487, 14 L. Ed. 775; United States v. Jackalow, 1 Black 484, 486, 17 L. Ed. 225; Cook v. United States, 138 U. S. 157, 183, 34 L. Ed. 906.

5. **SAME; TIME OF DESIGNATING PLACE.**—The words of article three, that "the trial shall be at such place or places as the congress may by law have directed," impose no restriction as to the place of trial, except that the trial cannot occur until congress designates the place, and may occur at any place which shall have been designated by congress previous to the trial.<sup>54</sup>

**As Affected by the Sixth Amendment.**—In respect to that clause of the sixth amendment declaring that the "district shall have been previously ascertained by law," it need only be said that if those words import immunity from prosecution where the district is not ascertained by law before the commission of the offense, or that the accused can only be tried in the district in which the offense was committed (such district having been established before the offense was committed), that amendment has reference only to offenses against the United States committed within a state, and leaves the trial of offenses not committed within any state to be controlled by the language of the second section of article three, that the trial "shall be at such place or places as the congress may by law have directed," which, as we have seen, is construed to mean at any time before the trial.<sup>55</sup>

**I. Assistance of Counsel.**—As the law formerly stood, by the mode of proceeding in criminal cases, when a person was accused of a capital crime, and his life depended upon the issue of the trial, he was denied compulsory process for his witnesses; and when they voluntarily appeared in his behalf, he was not permitted to examine them on oath, nor to have the aid of counsel in his defense, except only as regarded the questions of law.<sup>56</sup> By the sixth amendment of the federal constitution, however, it is expressly provided that the accused shall have the right to the assistance of counsel for his defense.<sup>57</sup> But while this is a right expressly secured by the constitution of the United States, it seems that an error in the matter of assigning counsel, or in refusing to permit an interview between the accused and an attorney engaged by him, is not of so fundamental a character as to go to the further jurisdiction of the court.<sup>58</sup>

**J. Compulsory Attendance of Witnesses.**—As above stated, under the law, as it formerly stood, persons accused of capital crimes were denied com-

54. **Same; time of designating place.**—Cook *v.* United States, 138 U. S. 157, 182, 34 L. Ed. 906.

55. **As affected by the sixth amendment.**—United States *v.* Dawson, 15 How. 467, 487, 488, 14 L. Ed. 775; Jones *v.* United States, 137 U. S. 202, 211, 212, 34 L. Ed. 691; Cook *v.* United States, 138 U. S. 157, 181, 182, 34 L. Ed. 906.

**Designating place after commission of crime; crimes committed in No Man's Land.**—Consistently with the principles above laid down, it was competent for congress to annex the strip of land known as No Man's Land to the eastern district of Texas, and to confer upon the circuit court of the United States for the eastern district of Texas jurisdiction to try defendants for offenses committed in No Man's Land previous to its annexation to said district. Cook *v.* United States, 138 U. S. 157, 183, 34 L. Ed. 906.

56. **Assistance of counsel; as the law formerly stood.**—United States *v.* Reid, 12 How. 361, 364, 13 L. Ed. 1023.

57. **Under the constitution.**—Const. U. S., Amend. VI. See, also, United States *v.* Reid, 12 How. 361, 364, 365, 13 L. Ed. 1023.

58. **Error does not go to the jurisdiction of the court.**—In re Shibuya Jugiro,

140 U. S. 291, 296, 35 L. Ed. 510; Andersen *v.* Treat, 172 U. S. 24, 43 L. Ed. 351.

In the case of In re Shibuya Jugiro, 140 U. S. 291, 296, 35 L. Ed. 510, the alleged assignment at Jugiro's trial 'of one as his counsel who (although he may have been an attorney at law) had not been admitted or qualified to practice as an attorney or counselor at law in the courts of New York' was held to be matter of error, and not affecting the jurisdiction of the trial court.

After an accused person has been tried, convicted and sentenced, the jurisdiction of the court is not open to collateral attack, under a habeas corpus proceeding, upon the ground that he was denied an essential or fundamental right, in that an attorney employed by him was refused permission to consult with him until after the district attorney had seen and examined him; it appearing that the accused waived examination before the commissioner, that upon his trial he was assigned counsel of his own selection, and that the statement made by him to the district attorney was voluntary and was not put in evidence, that no objections were raised to questions concerning such statement, and that no witnesses were called to contradict his answers. Andersen *v.* Treat, 172 U. S. 24, 43 L. Ed. 351.



pulsory process for witnesses in their favor.<sup>59</sup> Now, however, the constitution of the United States expressly provides that the accused shall be entitled to compulsory process for obtaining witnesses in his favor.<sup>60</sup>

**K. Trial by Jury.**—See, generally, the title JURY.

**Imprisonment for Contempt of Injunction as Violating Right to Trial by Jury.**—See the title INJUNCTIONS.

**L. Self Incrimination**—1. GENERAL NATURE AND PURPOSE OF CONSTITUTIONAL PROVISION; CONSTRUCTION.—The object of this amendment is to establish in express language and upon a firm basis the general principle of English and American jurisprudence that no one shall be compelled to give testimony which may expose him to prosecution for crime.<sup>61</sup>

**Construction.**—This provision must have a broad construction in favor of the right which it was intended to secure.<sup>62</sup> But while this is true, it should also be construed, as it was doubtless designed, to effect a practical and beneficent purpose, and not necessarily as though it were designed to protect witnesses against every possible detriment which might happen to them from their testimony, nor to unduly impede, hinder or obstruct the administration of criminal justice.<sup>63</sup> It is a reasonable construction of this provision that the witness is protected from being compelled to disclose the circumstances of his offense, the sources from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained, or made effectual for his conviction, without using his answers, as direct admissions against him.<sup>64</sup>

**State and Federal Provisions Construed Alike.**—“As the manifest purpose of the constitutional provisions, both of the states and of the United States, is to prohibit the compelling of testimony of a self-criminating kind from a party or a witness, the liberal construction which must be placed upon constitutional provisions for the protection of personal rights would seem to require that the constitutional guaranties, however differently worded, should have, as far as possible, the same interpretation.”<sup>65</sup>

2. PROVISION IN THE FIFTH AMENDMENT NOT APPLICABLE TO THE STATES.—This provision of the fifth amendment is prohibitive to the federal and not to the state governments.<sup>66</sup>

3. WHO MAY INVOKE BENEFIT OF THIS PROVISION—*a. Witness Need Not Be a Party Defendant.*—It is well settled that a witness may claim the benefit of this provision of the constitution whether he be the defendant in the case or not.<sup>67</sup>

59. **Compulsory attendance of witnesses, as the law formerly stood.**—United States *v. Reid*, 12 How. 361, 364, 13 L. Ed. 1023.

60. **Under the constitution.**—Const. U. S., Amend. VI. See, generally, the title CRIMINAL LAW; WITNESSES.

61. **General object and purpose of constitutional provision.**—*Hale v. Henkel*, 201 U. S. 43, 66, 50 L. Ed. 652; *McAlister v. Henkel*, 201 U. S. 90, 50 L. Ed. 671; *Nelson v. United States*, 201 U. S. 92, 50 L. Ed. 673.

62. **Construction of this provision.**—*Boyd v. United States*, 116 U. S. 616, 29 L. Ed. 746; *Counselman v. Hitchcock*, 142 U. S. 547, 562, 35 L. Ed. 1110.

63. **Same.**—*Brown v. Walker*, 161 U. S. 591, 596, 40 L. Ed. 819.

64. **Same.**—*Counselman v. Hitchcock*, 142 U. S. 547, 585, 35 L. Ed. 1110.

65. **State and federal provisions construed alike.**—*Counselman v. Hitchcock*, 142 U. S. 547, 584, 585, 35 L. Ed. 1110.

66. **Not applicable to the states.**—*Levy v. Superior Court*, 167 U. S. 175, 42

L. Ed. 126; *Jack v. Kansas*, 199 U. S. 372, 50 L. Ed. 234. See, also, ante, “Limitations Contained in the First Ten Amendments,” VI, D, 3, b, (3), (b).

**Violation of state constitutional provision raises no federal question.**—*Levy v. Superior Court*, 167 U. S. 175, 42 L. Ed. 126. See, also, ante, “State Constitutions,” III, A, 2.

67. **Witness need not be a party defendant in order to invoke benefit of this provision.**—*Counselman v. Hitchcock*, 142 U. S. 547, 35 L. Ed. 1110; *Brown v. Walker*, 161 U. S. 591, 40 L. Ed. 819; *Hale v. Henkel*, 201 U. S. 43, 69, 50 L. Ed. 652; *McAlister v. Henkel*, 201 U. S. 90, 91, 50 L. Ed. 671; *Nelson v. United States*, 201 U. S. 92, 50 L. Ed. 673.

“It is impossible that the meaning of the constitutional provision can only be that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself. It would doubtless cover such cases; but it is not limited to them. The object was to in-



b. *Distinction between Natural Persons and Corporations.*—There is a clear distinction in this particular between an individual and a corporation. The latter has no right to refuse to submit its books and papers for an examination at the suit of the state; but the individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no duty to the state or to his neighbors to divulge his business, or to open his doors to an investigation, so far as it may tend to criminate him. Among his rights are a refusal to incriminate himself unless given immunity from prosecution, and his property from arrest or seizure except under a warrant of the law. He owes nothing to the public so long as he does not trespass upon their rights. The rights of a corporation are entirely different. There is a reserved right in the legislature to investigate its contracts as to whether it has exceeded its powers, and demand the production of the corporate books and papers for that purpose.<sup>68</sup>

**Otherwise as to Unreasonable Searches and Seizures.**—But although an officer of a corporation which is charged with a violation of a statute of the state of its creation, or of an act of congress passed in the exercise of its constitutional powers, cannot refuse to produce the books and papers of such corporation, this must not be understood as holding that a corporation is not entitled to immunity, under the fourth amendment, against unreasonable searches and seizures.<sup>69</sup>

c. *A Personal Privilege.*—The immunity provided by the fifth amendment against self-incrimination is personal to the witness himself, and he cannot set up the privilege of another person or of a corporation as an excuse for a refusal to answer. It was never intended to permit him to plead the fact that some third person or corporation might be incriminated by his testimony, even though he were the agent of such person or corporation.<sup>70</sup> "Indeed, so strict is the rule that the privilege is a personal one that it has been held in some cases that counsel will not be allowed to make the objection."<sup>71</sup>

sure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime." Counselman v. Hitchcock, 142 U. S. 547, 562, 35 L. Ed. 1110.

**68. Distinction between natural persons and corporations.**—Hale v. Henkel, 201 U. S. 43, 74, 50 L. Ed. 652; McAlister v. Henkel, 201 U. S. 90, 50 L. Ed. 671; Nelson v. United States, 201 U. S. 92, 50 L. Ed. 673.

In view of the power of congress over interstate commerce, an examination of the books of a corporation, if duly authorized by act of congress, would not constitute an unreasonable search and seizure within the fourth amendment. Hale v. Henkel, 201 U. S. 43, 77, 50 L. Ed. 652.

**69. Same; otherwise as to unreasonable searches and seizures.**—Hale v. Henkel, 201 U. S. 43, 76, 50 L. Ed. 652.

**70. A personal privilege.**—Brown v. Walker, 161 U. S. 591, 597, 40 L. Ed. 819; Hale v. Henkel, 201 U. S. 43, 69, 50 L. Ed. 652; McAlister v. Henkel, 201 U. S. 90, 91, 50 L. Ed. 671; Nelson v. United States, 201 U. S. 92, 50 L. Ed. 673.

An officer of a corporation, which is charged with a criminal violation of the statute, cannot plead the criminality of such corporation as a refusal to produce

its books and papers. While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges. Hale v. Henkel, 201 U. S. 43, 75, 50 L. Ed. 652; McAlister v. Henkel, 201 U. S. 90, 50 L. Ed. 671; Nelson v. United States, 201 U. S. 92, 50 L. Ed. 673.

The question whether a corporation is a "person" within the meaning of this amendment really does not arise, except perhaps where a corporation is called upon to answer a bill of discovery, since it can only be heard by oral evidence in the person of some one of its agents or employees. The amendment is limited to a person who shall be compelled in any criminal case to be a witness against himself, and if he cannot set up the privilege of a third person, he certainly cannot set up the privilege of a corporation, of which he is the agent and representative. Hale v. Henkel, 201 U. S. 43, 70, 50 L. Ed. 652; McAlister v. Henkel, 201 U. S. 90, 50 L. Ed. 671; Nelson v. United States, 201 U. S. 92, 50 L. Ed. 673.

**71. Same.**—Hale v. Henkel, 201 U. S. 43, 70, 50 L. Ed. 652; McAlister v. Henkel, 201 U. S. 90, 50 L. Ed. 671; Nelson v. United States, 201 U. S. 92, 50 L. Ed. 673.

4. IN WHAT PROCEEDINGS APPLICABLE.—As we have previously seen, a criminal prosecution under article six of the amendments is much narrower than a criminal case under article five.<sup>72</sup> The language of article five of the amendments is that no person shall be compelled in any criminal case to be a witness against himself. This provision includes not merely cases in which the witness is the accused in a criminal prosecution, but extends also to the protection of persons called upon to give testimony in any investigation when such testimony might tend to show that the witness himself has committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard.<sup>73</sup>

**Proceedings before Grand Jury.**—It is entirely consistent with the language of article 5 that the privilege of not being a witness against himself is to be exercised in a proceeding before a grand jury.<sup>74</sup>

**Suits for penalties and forfeitures** incurred by the commission of offenses against the law are of a quasi criminal nature, and they are to be deemed criminal proceedings for all the purposes of the fourth amendment of the constitution, and of that portion of the fifth amendment which declares that no person shall be compelled in any criminal case to be a witness against himself.<sup>75</sup> A compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the fifth amendment to the constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the fourth amendment.<sup>76</sup>

**Discoveries in Equity Subjecting Defendant to Penalties.**—See the title DISCOVERY.

**72. In what proceedings applicable.**—*Counselman v. Hitchcock*, 142 U. S. 547, 563, 35 L. Ed. 1110; *United States v. Zucker*, 161 U. S. 475, 482, 40 L. Ed. 777. See, also, ante, "Criminal Prosecution within Meaning of Sixth Amendment," XVIII, E, 2; "Proceeding Must Be Technically Criminal," XVIII, F, 3.

**73. Same.**—*Counselman v. Hitchcock*, 142 U. S. 547, 562, 35 L. Ed. 1110; *United States v. Zucker*, 161 U. S. 475, 482, 40 L. Ed. 777.

**74. Proceedings before grand jury.**—*Counselman v. Hitchcock*, 142 U. S. 547, 563, 35 L. Ed. 1110; *United States v. Zucker*, 161 U. S. 475, 482, 40 L. Ed. 777; *Hale v. Henkel*, 201 U. S. 43, 66, 50 L. Ed. 652; *McAlister v. Henkel*, 201 U. S. 90, 50 L. Ed. 671; *Nelson v. United States*, 201 U. S. 92, 50 L. Ed. 673.

An investigation before a federal grand jury of alleged or suspected violations of the interstate commerce act is a criminal case within the meaning of this provision of the constitution, and persons called as witnesses in such investigation may claim the benefit of this provision. *Counselman v. Hitchcock*, 142 U. S. 547, 562, 35 L. Ed. 1110.

**75. Suit to recover penalty or forfeiture.**—*Boyd v. United States*, 116 U. S. 616, 634, 29 L. Ed. 746; *Lees v. United States*, 150 U. S. 476, 480, 37 L. Ed. 1150.

**76. Same; compulsory production of books and papers equivalent to search or seizure.**—*Boyd v. United States*, 116 U. S. 616, 634, 29 L. Ed. 746.

The fifth section of the act of June 22, 1874, relating to the revenue and the col-

lection of customs, provides, in substance, that in all suits and proceedings, other than criminal arising under any of the revenue laws of the United States, the attorney for the government, whenever in his belief any business book, invoice or paper belonging, or under the control of the defendant or claimant will tend to prove any allegation made by the United States, may, upon motion, obtain a notice or order from the court to such claimant or defendant to produce such book, invoice or paper, under penalty, in the event of his refusal to do so, of having such refusal taken as a confession of the truth of the allegations contained in the motion. Held, that suits to recover a penalty or to establish a forfeiture of a defendant's goods, for alleged violations of the revenue laws, although civil in form, were in their nature criminal, and were to be deemed criminal within the meaning of the fourth and fifth amendments of the federal constitution; and that as applied to such proceedings, this provision of the statute was unconstitutional as authorizing an unreasonable search or seizure in violation of the fourth amendment and as compelling the accused to be a witness against himself in violation of the fifth amendment. *Boyd v. United States*, 116 U. S. 616, 29 L. Ed. 746.

An action to recover a penalty under the alien contract labor act of February 26, 1885, though civil in form, is unquestionably criminal in its nature, and in such a case a defendant cannot be compelled to be a witness against himself. *Lees v. United States*, 150 U. S. 476, 480, 37 L. Ed. 1150.



5. WHAT CONSTITUTES A VIOLATION OF THE CONSTITUTIONAL PRINCIPLE—*a. Generally.*—Any forcible and compulsory extortion of a man's own testimony to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of the fifth amendment.<sup>77</sup>

*b. Seizure or Compulsory Production of Private Books and Papers to Be Used in Evidence.*—So it is held that the seizure or compulsory extortion of a man's private books and papers, to be used in evidence against him, to connect him with a crime or a forfeiture of his goods, is illegal, in compelling him to be a witness against himself, within the meaning of the fifth amendment and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the fourth amendment.<sup>78</sup>

**Fourth and Fifth Amendments Each Construed in the Light of the Other.**—The fourth and fifth amendments throw great light on each other. For the "unreasonable searches and seizures" condemned in the fourth amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the fifth amendment; and compelling a man "in a criminal case to be a witness against himself," which is condemned in the fifth amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the fourth amendment.<sup>79</sup> These amendments are designed to protect against com-

**77. What constitutes a violation of constitutional provision; generally.**—*Boyd v. United States*, 116 U. S. 616, 630, 29 L. Ed. 746; *Hale v. Henkel*, 201 U. S. 43, 71, 50 L. Ed. 652; *McAlister v. Henkel*, 201 U. S. 90, 50 L. Ed. 671; *Nelson v. United States*, 201 U. S. 92, 50 L. Ed. 673.

**78. Seizure or compulsory production of private books and papers.**—*Boyd v. United States*, 116 U. S. 616, 633, 29 L. Ed. 746; *Adams v. New York*, 192 U. S. 585, 597, 48 L. Ed. 575; *Hale v. Henkel*, 201 U. S. 43, 71, 50 L. Ed. 652; *McAlister v. Henkel*, 201 U. S. 90, 50 L. Ed. 671; *Nelson v. United States*, 201 U. S. 92, 50 L. Ed. 673. See, also, *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 38 L. Ed. 1047; *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 46 L. Ed. 860.

In *Boyd v. United States*, 116 U. S. 616, 29 L. Ed. 746, a section of the customs and revenue laws of the United States authorized the court in revenue cases, on motion of the government's attorney, to require the production by the defendant of certain books, records and papers in court, otherwise the allegation of the government's attorney as to their contents to be taken as true. It was held that the act was unconstitutional and void as applied to a suit for a penalty or a forfeiture of the party's goods. The case presents the question whether one can be compelled to produce his books and papers in a suit which seeks the forfeiture of his estate on pain of having the statements of government's counsel as to the contents thereof taken as true and used as testimony for the government. The court held, in an opinion by Mr. Justice Bradley, that such procedure was in violation of both the fourth and fifth amendments. The chief justice and Justice Miller held that the compulsory production of such documents did not come

within the terms of the fourth amendment as an unreasonable search or seizure, but concurred with the majority in holding that the law was in violation of the fifth amendment.

**79. Fourth and fifth amendments each construed in the light of the other.**—*Boyd v. United States*, 116 U. S. 616, 633, 29 L. Ed. 746. See, also, *Adams v. New York*, 192 U. S. 585, 48 L. Ed. 575; *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 46 L. Ed. 860. See, however, *Hale v. Henkel*, 201 U. S. 43, 72, 50 L. Ed. 652, where it is said: "Subsequent cases treat the fourth and fifth amendments as quite distinct, having different histories and performing separate functions. Thus in the case of *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 38 L. Ed. 1047, the constitutionality of the interstate commerce act, so far as it authorized the circuit courts to use their process in aid of inquiries before the commission, was sustained, the court observing in that connection: 'It was clearly competent for congress, to that end, to invest the commission with authority to require the attendance and testimony of witnesses, and the production of books, papers, tariffs, contracts, agreements and documents relating to any matter legally committed to that body for investigation. We do not understand that any of these propositions are disputed in this case.'" And again: "The *Boyd* case must also be read in connection with the still later case of *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 46 L. Ed. 860, which arose upon the petition of the commission for orders requiring the testimony of witnesses and the production of certain books, papers and documents. The case grew out of a complaint against certain railway companies that they charged unreasonable and unjust rates for the transportation of anthracite coal. Ob-



pulsory testimony from a defendant against himself in a criminal trial, and to punish wrongful invasion of the home of the citizen or the unwarranted seizure of his papers and property, and to render invalid legislation or judicial procedure having such effect.<sup>80</sup>

**Admissibility of Papers, etc., Unlawfully Seized.**—The security intended to be guaranteed by the fourth amendment against wrongful searches and seizures is designed to prevent violations of private security in person and property and unlawful invasion of the sanctity of the home of the citizen by the officers of the law, acting under legislative or judicial sanction, and to give a remedy against such usurpations when attempted.<sup>81</sup> The supreme court of the United States has refused to extend this doctrine to the extent of excluding testimony which has been obtained by means of a wrongful search or seizure where the same is otherwise competent, and where the question arises not in an attempt to resist an unlawful seizure of the private papers of the defendant, but upon objection to the introduction of the testimony. In such case, the court will not take notice how the papers or other articles were obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question.<sup>82</sup>

**Distinction as to Rights of Individuals and Corporations.**—See ante, "Distinction between Natural Persons and Corporations," XVIII, L, 3, b. See, also, the title SEARCHES AND SEIZURES.

c. *Compelling Accused to Stand Up, Walk before Jury, etc.*—Compelling the accused to stand up and walk before the jury, and stationing the jury during a recess so as to observe his size and walk, if errors at all, are not such errors as go to the jurisdiction of the court so as to be available upon a petition for a writ of habeas corpus.<sup>83</sup> In the only case in which this question has arisen the court declined to express an opinion as to whether such treatment of the prisoner was contrary to the self-incrimination clause of the fifth amendment.<sup>84</sup>

d. *Exceptions and Limitations*—(1) *Generally*.—The declaration of the fifth

jection was made to the production of certain contracts between these companies upon the ground that it would compel the witnesses to furnish evidence against themselves in violation of the fifth amendment, and would also subject the parties to unreasonable searches and seizures. It was held that the circuit court erred in holding the contracts to be irrelevant, and in refusing to order their production as evidence by the witnesses who were parties to the appeal. In delivering the opinion of the court the Boyd case was again considered in connection with the fourth and fifth amendments, and the remark made by Mr. Justice Day that the immunity statute of 1893 "protects the witness from such use of the testimony given as will result in his punishment for crime or the forfeiture of his estate." *Hale v. Henkel*, 201 U. S. 43, 73, 50 L. Ed. 652.

80. *Same*.—*Hale v. Henkel*, 201 U. S. 43, 72, 50 L. Ed. 652; *McAlister v. Henkel*, 201 U. S. 90, 50 L. Ed. 671; *Nelson v. United States*, 201 U. S. 92, 50 L. Ed. 673.

81. **Admissibility of papers unlawfully seized.**—*Adams v. New York*, 192 U. S. 585, 598, 48 L. Ed. 575.

82. *Same*.—*Adams v. New York*, 192 U. S. 585, 594, 595, 598, 48 L. Ed. 575, distinguishing *Boyd v. United States*, 116 U. S. 616, 29 L. Ed. 746, upon the ground that in that case the law held to be unconstitutional, virtually compelled the de-

fendant to furnish testimony against himself in a suit to forfeit his estate, and ran counter to both the fourth and fifth amendments.

The case of *Adams v. New York*, 192 U. S. 585, 48 L. Ed. 575, was a writ of error to the supreme court of the state of New York, involving the seizure of certain gambling paraphernalia. Nevertheless it was treated as involving the construction of the fourth and fifth amendments to the federal constitution. It was held, in substance, that the fact that papers pertinent to the issue may have been illegally taken from the possession of the party against whom they are offered, was not a valid objection to their admissibility; that the admission, as evidence in a criminal trial, of papers found in the execution of a valid search warrant, prior to the indictment, was not an infringement of the fifth amendment, and that by the introduction of such evidence, defendant was not compelled to incriminate himself. See, also, *Hale v. Henkel*, 201 U. S. 43, 72, 50 L. Ed. 652; *McAlister v. Henkel*, 201 U. S. 90, 50 L. Ed. 671; *Nelson v. United States*, 201 U. S. 92, 50 L. Ed. 673.

83. **Compelling accused to stand up, walk before jury, etc.**—*Matter of Moran*, 203 U. S. 96, 105, 51 L. Ed. 105.

84. *Same*.—*Matter of Moran*, 203 U. S. 96, 105, 51 L. Ed. 105.

amendment is that no person "shall be compelled in any criminal case to be a witness against himself." "Stringent as the general rule is, however, certain classes of cases have always been treated as not falling within the reason of the rule, and, therefore, constituting apparent exceptions."<sup>85</sup>

**Where Criminality Has Been Removed.**—Generally speaking, "The interdiction of the fifth amendment operates only where a witness is asked to incriminate himself—in other words, to give testimony which may possibly expose him to a criminal charge. But if the criminality has already been taken away, the amendment ceases to apply. The criminality provided against is a present, not a past criminality, which lingers only as a memory and involves no present danger of prosecution."<sup>86</sup>

(2) *Where Prosecution Barred by Statute of Limitations.*—Therefore, "if a prosecution for a crime, concerning which the witness is interrogated, is barred by the statute of limitations, he is compellable to answer."<sup>87</sup>

(3) *Where Crime Has Been Pardoned.*—So "if the witness has already received a pardon, he cannot longer set up his privilege, since he stands with respect to such offense as if it had never been committed."<sup>88</sup>

(4) *Immunity Statutes.*—In accordance with the principles already stated, it is held that where the witness is, by statute, granted full immunity from prosecution for the crime to which the incriminating questions relate, and to which he is in danger of being exposed, he may be compelled to testify.<sup>89</sup> In order to be valid, however, such statute must afford absolute immunity against future prosecution for the offense to which the question relates. No statute which leaves the party or witness subject to prosecution, after he answers the incriminating question put to him, can have the effect of supplanting the privilege conferred by the constitution of the United States. A statute which merely provides that the testimony given shall not be used against the party testifying is not sufficient to deprive the witness of the benefit of this provision, since it does not prevent the use of his testimony to search out other testimony to be used in evidence against him or his property in a criminal proceeding. It does not prevent the obtaining and the use of witnesses and evidence directly attributable to the testimony he might give under compulsion, and on which he might be convicted when otherwise, and if he had refused to answer, he could not possibly have been convicted.<sup>90</sup>

**85. Exceptions and limitations; generally.**—*Brown v. Walker*, 161 U. S. 591, 597, 40 L. Ed. 819.

**86. Where criminality has been removed.**—*Brown v. Walker*, 161 U. S. 591, 597, 40 L. Ed. 819; *Hale v. Henkel*, 201 U. S. 43, 67, 50 L. Ed. 652; *McAlister v. Henkel*, 201 U. S. 90, 50 L. Ed. 671; *Nelson v. United States*, 201 U. S. 92, 50 L. Ed. 673.

**87. Where prosecution barred by statute of limitations.**—*Brown v. Walker*, 161 U. S. 591, 598, 40 L. Ed. 819; *Hale v. Henkel*, 201 U. S. 43, 66, 50 L. Ed. 652; *McAlister v. Henkel*, 201 U. S. 90, 50 L. Ed. 671; *Nelson v. United States*, 201 U. S. 92, 50 L. Ed. 673.

**88. Where offense has been pardoned.**—*Brown v. Walker*, 161 U. S. 591, 598, 40 L. Ed. 819; *Hale v. Henkel*, 201 U. S. 43, 66, 50 L. Ed. 652; *McAlister v. Henkel*, 201 U. S. 90, 50 L. Ed. 671; *Nelson v. United States*, 201 U. S. 92, 50 L. Ed. 673.

**89. Immunity statutes.**—*Counselman v. Hitchcock*, 142 U. S. 547, 585, 35 L. Ed. 1110; *Brown v. Walker*, 161 U. S. 591,

594, 40 L. Ed. 819; *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 45, 46 L. Ed. 860; *Hale v. Henkel*, 201 U. S. 43, 67, 50 L. Ed. 652; *McAlister v. Henkel*, 201 U. S. 90, 50 L. Ed. 671; *Nelson v. United States*, 201 U. S. 92, 50 L. Ed. 673.

**90. Same; statute must afford absolute immunity.**—*Counselman v. Hitchcock*, 142 U. S. 547, 564, 585, 35 L. Ed. 1110; *Brown v. Walker*, 161 U. S. 591, 40 L. Ed. 819; *Hale v. Henkel*, 201 U. S. 43, 66, 50 L. Ed. 652; *McAlister v. Henkel*, 201 U. S. 90, 50 L. Ed. 671; *Nelson v. United States*, 201 U. S. 92, 50 L. Ed. 673.

**Statutes held to be insufficient.**—Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional provision was designed to guard, and is not a full substitute for that prohibition, since it does not absolutely exempt the witness from all prosecutions, but merely provides that the evidence given by him shall not be in any manner used against him in any court of the United States, in any criminal proceeding. *Counselman*

**Immaterial That Witness May Be Indicted and Compelled to Plead Immunity.**—The suggestion that the witness is imperfectly protected by reason of the fact that he may still be prosecuted and put to the annoyance and expense of pleading his immunity by way of confession and avoidance, is a detriment which the law does not recognize, since there is a possibility that any citizen, however innocent, may be subjected to a civil or criminal prosecution, and put to the expense of defending himself.<sup>91</sup>

**Same; Difficulty of Obtaining Evidence Not Considered.**—Likewise, the suggestion that a person who has testified compulsorily before a grand jury may not be able, if subsequently indicted for some matter concerning which he testified, to procure the evidence necessary to maintain his plea, is held to be more fanciful than real. In any event, it is a question relating to the weight of the testimony, which could scarcely be considered in determining the effect of the immunity statute. The difficulty of maintaining a case upon the available evidence is a danger which the law does not recognize. In prosecuting a case, or in setting up a defense, the law takes no account of the practical difficulty which either party may have in procuring his testimony.<sup>92</sup>

**As Affected by Possibility of Prosecution in Another Jurisdiction.**—A state statute exempting a defendant or witness from prosecutions in regard to the matter concerning which he is called to testify cannot prevent a prosecution

*v. Hitchcock*, 142 U. S. 547, 586, 35 L. Ed. 1110.

**Statutes held to be valid.**—The act of congress of February 4, 1887, as amended February 11, 1893, ch. 83, 27 Stat. 443, which enacts that "no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the interstate commerce commission, or in obedience to the subpoena of the commission," on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture, and which farther provides, "but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, before said commission or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding," extends full immunity from prosecution in both the state and the federal courts, accomplishes the object of the constitutional provision, and renders the witness compellable to answer. *Brown v. Walker*, 161 U. S. 591, 610, 40 L. Ed. 819; *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 45, 46 L. Ed. 860.

The immunity given by the act of February 25, 1903, is as broad as the penalties and forfeitures to which the plaintiffs in error or the corporations of which they are officers will be subjected. *Hale v. Henkel*, 201 U. S. 43, 67, 50 L. Ed. 652; *McAlister v. Henkel*, 201 U. S. 90, 50 L. Ed. 671; *Nelson v. United States*, 201 U. S. 92, 50 L. Ed. 673.

"Proceeding," what is within meaning of act of February 25, 1903, 32 Stat. 854, 904.—While there may be some doubt whether the examination of witnesses be-

fore a grand jury is a suit or prosecution, there is no doubt that it is a "proceeding" within the meaning of the proviso to the general appropriation act of February 25, 1903, 32 Stat. 854, 904, that "no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said acts," of which the antitrust law is one; provided, however, that "no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying." *Hale v. Henkel*, 201 U. S. 43, 66, 50 L. Ed. 652; *McAlister v. Henkel*, 201 U. S. 90, 50 L. Ed. 671; *Nelson v. United States*, 201 U. S. 92, 50 L. Ed. 673.

The word should receive as wide a construction as is necessary to protect the witness in his disclosures, whenever such disclosures are made in pursuance of a judicial inquiry, whether such inquiry be instituted by a grand jury, or upon the trial of an indictment found by them. The word "proceeding" is not a technical one, and is aptly used by courts to designate an inquiry before a grand jury. It has received this interpretation in a number of cases. *Hale v. Henkel*, 201 U. S. 43, 66, 50 L. Ed. 652; *McAlister v. Henkel*, 201 U. S. 90, 50 L. Ed. 671; *Nelson v. United States*, 201 U. S. 92, 50 L. Ed. 673.

**91. Immaterial that witnesses may be indicted and compelled to plead immunity.**—*Brown v. Walker*, 161 U. S. 591, 608, 40 L. Ed. 819.

**92. Same; difficulty of obtaining evidence not considered.**—*Hale v. Henkel*, 201 U. S. 43, 66, 50 L. Ed. 652; *McAlister v. Henkel*, 201 U. S. 90, 50 L. Ed. 671; *Nelson v. United States*, 201 U. S. 92, 50 L. Ed. 673.



of the same party under a statute of the United States, nor prevent the testimony given by the party in the proceedings in a state court from being used against him in a federal court for a violation of the federal statute.<sup>93</sup> But in *Brown v. Walker*, it was asserted that the federal statute there in question was sufficiently broad, and actually operated, to prevent prosecutions in the state courts as well as in the federal.<sup>94</sup> Aside from questions of this nature, however, it is well settled that neither a state statute nor a federal statute which guarantees full immunity from prosecutions in the courts of its own government can be declared unconstitutional because of the impossibility of its guaranteeing immunity from prosecution in the courts of the other, and because of the possibility that the information given may lead to a prosecution in the other jurisdiction. It is not to be presumed that a prosecution would be instituted in the courts of the other government under such circumstances, or that the evidence brought out in the testimony of the witness would be used in a prosecution in the courts of the other jurisdiction. The bare possibility that the witness may be subjected to the criminal laws of the other sovereignty is not a real danger and need not be taken into account.<sup>95</sup> Especially is this true where the state law has been construed by the state supreme court as requiring the witness to give evidence concerning only those matters which are offenses against that state and not as to those which are offenses against the United States.<sup>96</sup>

**Same; Not an Infringement of the Fourteenth Amendment.**—Neither is a state law requiring the party to testify, and affording full immunity from prosecution in the state courts, to be held unconstitutional, as depriving one of his liberty without due process of law in violation of the fourteenth amendment, because it cannot protect him against prosecution in the federal courts.<sup>97</sup>

**Immunity Statute May Operate to Compel Production of Books, Papers, etc.**—Where an immunity statute has taken away the right of a witness to the protection of the fifth amendment against self-incrimination by oral testimony, the same will be true of his refusal to produce books and papers in response to a subpoena duces tecum on the ground that they may tend to incriminate him.<sup>98</sup>

(5) *Waiver of Privilege.*—If the witness elects to waive his privilege, as he may doubtless do, since the privilege is for his protection and not for

93. As affected by possibility of prosecution in another jurisdiction.—*Jack v. Kansas*, 199 U. S. 372, 380, 50 L. Ed. 234.

94. *Same.*—*Brown v. Walker*, 161 U. S. 591, 608, 40 L. Ed. 819.

95. *Same.*—*Brown v. Walker*, 161 U. S. 591, 608, 40 L. Ed. 819; *Jack v. Kansas*, 199 U. S. 372, 381, 382, 50 L. Ed. 234; *Hale v. Henkel*, 201 U. S. 43, 68, 50 L. Ed. 652.

"The case of *United States v. Saline Bank*, 1 Pet. 100, 7 L. Ed. 69, is not in conflict with this. That was a bill for discovery, filed by the United States against the cashier of the Saline Bank, in the district court of the Virginia district, who pleaded that the emission of certain unlawful bills took place within the state of Virginia, by the law whereof penalties were inflicted for such emissions. It was held that defendants were not bound to answer and subject themselves to those penalties. It is sufficient to say that the prosecution was under a state law which imposed the penalty, and that the federal court was simply administering the state law, and no question arose as to a prosecution under another jurisdiction." *Hale v. Henkel*, 201 U. S. 43, 69, 50 L. Ed. 652

96. *Same*; where state law requires evidence only as to offenses against state.—*Jack v. Kansas*, 199 U. S. 372, 381, 50 L. Ed. 234.

Thus, the Kansas act, laws of 1897, ch. 205, § 10, known as the Kansas Anti-trust act, having been construed by the supreme court of that state as requiring the witness to testify only in regard to matters constituting offenses against the state law, was held not to be invalid because of the possibility that the evidence so given might disclose matters relating to violations of the federal statute and so afford a basis for prosecutions in the federal courts. *Jack v. Kansas*, 199 U. S. 372, 381, 50 L. Ed. 234.

97. State immunity law not a violation of the fourteenth amendment.—*Jack v. Kansas*, 199 U. S. 372, 50 L. Ed. 234.

98. Immunity statute may operate to compel production of books, papers, etc.—*Brown v. Walker*, 161 U. S. 591, 40 L. Ed. 819; *Hale v. Henkel*, 201 U. S. 43, 73, 50 L. Ed. 652; *McAlister v. Henkel*, 201 U. S. 90, 50 L. Ed. 671; *Nelson v. United States*, 201 U. S. 92, 50 L. Ed. 673.

that of other parties, and disclose his criminal connections, he is not permitted to stop, but must go on and make a full disclosure.<sup>99</sup>

(6) *Witness Taking Stand in His Own Behalf; Cross-Examination, Impeachment, etc.*—"Where an accused party waives his constitutional privilege of silence, takes the stand in his own behalf, and makes his own statement, it is clear that the prosecution has a right to cross-examine him upon such statement with the same latitude as would be exercised in the case of an ordinary witness as to the circumstances connecting him with the alleged crime. While no inference of guilt can be drawn from his refusal to avail himself of the privilege of testifying, he has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts."<sup>1</sup> If he avail himself of this privilege, his credibility may be impeached, his testimony may be assailed, and is to be weighed as that of any other witness. Assuming the position of a witness, he is entitled to all its rights and protections, and is subject to all its criticisms and burdens. As to the testimony voluntarily given, he may be fully cross-examined. It may be assailed by contradictory testimony. His credibility may be impeached, and by the same methods as are pursued in the case of any other witness. The jury may properly consider his manner of testifying, the inherent probabilities of his story, the amount and character of the contradictory testimony, the nature and extent of his interest in the result of the trial, and the impeaching evidence, in determining how much of credence he is entitled to.<sup>2</sup>

**Comment to the Jury.**—While the court would probably have no power of compelling an answer to any question, the deficiencies of his statements, or his

**99. Waiver of privilege.**—*Brown v. Walker*, 161 U. S. 591, 597, 40 L. Ed. 819.

**1. Witness taking stand in his own behalf; cross-examination, impeachment, etc.**—*Spies v. Illinois*, 123 U. S. 131, 180, 31 L. Ed. 80; *Brown v. Walker*, 161 U. S. 591, 597, 598, 40 L. Ed. 819; *Fitzpatrick v. United States*, 178 U. S. 304, 315, 44 L. Ed. 1078; *Beavers v. Haubert*, 198 U. S. 77, 90, 91, 49 L. Ed. 950; *Sawyer v. United States*, 202 U. S. 150, 165, 50 L. Ed. 972.

A defendant who voluntarily offers himself as a witness in his own behalf is bound to submit to a proper cross-examination under the law and practice in the jurisdiction where he is being tried. *Spies v. Illinois*, 123 U. S. 131, 180, 31 L. Ed. 80.

**2. Same.**—*Reagan v. United States*, 157 U. S. 301, 305, 39 L. Ed. 709; *Fitzpatrick v. United States*, 178 U. S. 304, 316, 44 L. Ed. 1078.

**What is proper cross-examination; by what law determined.**—Where the defendant is on trial in a state court, the question as to what is proper cross-examination, as, for example, whether the cross-examination must be confined to matters pertinent to the testimony in chief, or may be extended to the matters in issue, is a question of state law as administered in the courts of the state, and not of federal law. *Spies v. Illinois*, 123 U. S. 131, 180, 31 L. Ed. 80.

In the *Spies* case (*Spies v. Illinois*, 123 U. S. 131, 180, 31 L. Ed. 80), the defendant having taken the stand in his own behalf, was required on cross-examination to state whether he had received a certain letter, which was shown, purporting to have been written by Johann Most, and

addressed to the defendant. It was held that whether this was or was not proper cross-examination was a question of state law as administered by the courts of the state.

**Where a witness had sworn to an alibi**, it was held to be perfectly competent for the government to cross-examine him as to every fact which had a bearing upon his whereabouts upon the night of the murder, and as to what he did and the persons with whom he associated that night. *Fitzpatrick v. United States*, 178 U. S. 304, 315, 44 L. Ed. 1078.

**Error without prejudice.**—Even if the subject matter of the cross-examination has no tendency to connect the prisoner with the alleged crime for which he is on trial, where his answers are a denial and the government makes no attempt to contradict his evidence on the subject, no harm can arise from the cross-examination. There are some state authorities which hold that the error, if any, is not cured by answer of the witness denying the charge. But the better rule is that where it is plain that there is no injury, the exception is not available. *Sawyer v. United States*, 202 U. S. 150, 160, 50 L. Ed. 972.

**Original evidence not connected with examination in chief.**—"If the prosecution should go farther and compel the defendant, on cross-examination, to write his own name or that of another person, when he had not testified in reference thereto in his direct examination, the case of *State v. Lurch*, 12 Oregon 99, is authority for saying that this would be error. It would be a clear case of the defendant being

refusal to answer a proper question, would be a proper subject of comment to the jury.<sup>3</sup>

(7) *Questions Which Degrade but Which Do Not Incriminate*.—"If the proposed testimony is material to the issue on trial, the fact that the testimony may tend to degrade the witness in public estimation does not exempt him from the duty of disclosure. \* \* \* The design of the constitutional privilege is not to aid the witness in vindicating his character, but to protect him against being compelled to furnish evidence to convict him of a criminal charge. If he secure legal immunity from prosecution, the possible impairment of his good name is a penalty which it is reasonable he should be compelled to pay for the common good."<sup>4</sup>

**Where Question Has No Bearing upon Case**.—If the answer can have no effect upon the case, except so far as to impair the credibility of the witness, he may fall back upon his privilege.<sup>5</sup> But even in the latter case, if the answer of the witness will not directly show his infamy, but only tend to disgrace him, he is bound to answer.<sup>6</sup> Otherwise the extent to which the witness is compelled to answer such questions as do not fix upon him a criminal culpability is within the control of the legislature.<sup>7</sup>

**M. Excessive Bail or Fines; Cruel and Unusual Punishment**—1. **EXCESSIVE BAIL**.—Article 8 of the amendments to the federal constitution expressly declares that excessive bail shall not be required; but no case seems ever to have arisen in the supreme court upon this point.

**Discretion of Court in Granting or Refusing Bail**.—See the title **APPEAL AND ERROR**, vol. 1, p. 986.

2. **EXCESSIVE FINES; CRUEL AND UNUSUAL PUNISHMENTS**—a. *Eighth Amendment Not Applicable to Proceedings in State Courts*.—The provision of the eighth amendment that excessive fines shall not be imposed nor cruel and unusual punishments inflicted, applies to national and not to state legislation.<sup>8</sup>

compelled to furnish original evidence against himself. *State v. Saunders*, 14 Oregon 300, is also authority for the proposition that he cannot be compelled to answer as to any facts not relevant to his direct examination." *Fitzpatrick v. United States*, 178 U. S. 304, 316, 44 L. Ed. 1078.

3. **Comment to the jury**.—*Fitzpatrick v. United States*, 178 U. S. 304, 316, 44 L. Ed. 1078; *Beavers v. Haubert*, 198 U. S. 77, 90, 91, 49 L. Ed. 950.

Where, upon proceedings to remove an accused from one federal district to another, he, in pursuance of the state law and practice, takes the stand and makes a statement in his own behalf, denying both of the charges in the indictment under which it is sought to remove him, and at the same time claiming that he is exempt from cross-examination, it is competent to urge the deficiencies of his statement against him. *Beavers v. Haubert*, 198 U. S. 77, 90, 91, 49 L. Ed. 950.

4. **Questions which degrade, but which do not incriminate**.—*Brown v. Walker*, 161 U. S. 591, 605, 606, 40 L. Ed. 819; *Hale v. Henkel*, 201 U. S. 43, 66, 50 L. Ed. 652; *McAlister v. Henkel*, 201 U. S. 90, 50 L. Ed. 671; *Nelson v. United States*, 201 U. S. 92, 50 L. Ed. 673.

"It is not declared that he may not be compelled to testify to facts which may impair his reputation for probity, or even tend to disgrace him, but the line is

drawn at testimony that may expose him to prosecution." *Hale v. Henkel*, 201 U. S. 43, 66, 50 L. Ed. 652; *McAlister v. Henkel*, 201 U. S. 90, 50 L. Ed. 671; *Nelson v. United States*, 201 U. S. 92, 50 L. Ed. 673.

5. **Where question has no bearing upon the case**.—*Brown v. Walker*, 161 U. S. 591, 598, 40 L. Ed. 819.

6. **Same**.—*Brown v. Walker*, 161 U. S. 591, 598, 40 L. Ed. 819.

7. **Same**.—*Brown v. Walker*, 161 U. S. 591, 598, 40 L. Ed. 819.

8. **Eighth amendment not applicable to the states**.—*Ex parte Watkins*, 7 Pet. 568, 574, 8 L. Ed. 786; *Pervear v. Commonwealth*, 5 Wall. 475, 18 L. Ed. 608; *Eilenbecker v. District Court*, 134 U. S. 31, 33 L. Ed. 801; *In re Kemmler*, 136 U. S. 436, 446, 34 L. Ed. 519.

As a federal question it has always been ruled that the eighth amendment to the constitution of the United States does not apply to the states. *Pervear v. Commonwealth*, 5 Wall. 475, 18 L. Ed. 608; *O'Neil v. Vermont*, 144 U. S. 323, 332, 36 L. Ed. 450.

Whether a punishment is cruel and unusual within the meaning of a state constitutional provision does not, therefore, present a federal question. *O'Neil v. Vermont*, 144 U. S. 323, 331, 36 L. Ed. 450.

**Enjoining sale of intoxicants; violation and punishment**.—Article 8 of the amendments to the federal constitution, respect-



b. *Mandatory upon the Federal Courts.*—The eighth amendment of the federal constitution is addressed to courts of the United States exercising criminal jurisdiction, and is mandatory to them and a limitation upon their discretion.<sup>9</sup> Formerly the supreme court had no appellate jurisdiction to revise the sentence of inferior courts in criminal cases; and could not, even if the excess of the fine were apparent on the record, reverse the sentence.<sup>10</sup>

c. *What Constitutes Cruel or Unusual Punishment, or Excessive Fine.*—Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life.<sup>11</sup> Punishment of torture, and all others in the line of unnecessary cruelty, are forbidden by this amendment to the constitution.<sup>12</sup>

**Undue leniency in one case** does not transform a reasonable punishment in another case to a cruel one.<sup>13</sup>

**Increased Punishment for Habitual Criminals.**—A statute which provides for an increase of punishment upon the conviction of an offender for a second or any subsequent crime does not, for that reason, constitute cruel and unusual punishment.<sup>14</sup>

d. *Punishment Held Not to Be Cruel or Unusual.*—See the notes, *infra*.<sup>15</sup>

ing excessive fines and cruel and unusual punishment, is not infringed by a state law which authorizes the punishment, as for a contempt, of persons guilty of violating an injunction restraining them from selling intoxicating liquors in violation of law. *Eilenbecker v. District Court*, 134 U. S. 31, 33 L. Ed. 801.

9. **Mandatory upon the federal courts.**—*Ex parte Watkins*, 7 Pet. 568, 574, 8 L. Ed. 786.

10. **Revision of sentence by supreme court.**—*Ex parte Watkins*, 7 Pet. 568, 574, 8 L. Ed. 786. See, generally, as to the right of appeal in criminal cases, the title **APPEAL AND ERROR**, vol. 1, p. 415, et seq.

11. **What constitutes excessive fine or cruel and unusual punishment.**—*In re Kemmler*, 136 U. S. 436, 447, 34 L. Ed. 519.

12. **Same.**—*Wilkerson v. Utah*, 99 U. S. 130, 136, 25 L. Ed. 345; *In re Kemmler*, 136 U. S. 436, 447, 34 L. Ed. 519. See, also, *Howard v. Fleming*, 191 U. S. 126, 136, 48 L. Ed. 121.

13. **Effect of leniency in particular cases.**—*Howard v. Fleming*, 191 U. S. 126, 48 L. Ed. 121.

Defendants were indicted, tried and sentenced in a state court, and on appeal to the United States supreme court, they contended that they were denied the equal protection of the laws, in that the sentence was more severe than ever before inflicted in that state for a like offense, and was cruel and unusual, in that two of them were given ten years while a third was given only seven years imprisonment; and also in that they were sentenced to imprisonment in the penitentiary instead of to hard labor on the public roads. No case of a similar offense was cited from the judicial reports of that state, and the state supreme court, in its opinion, referred to the crime as a fashion of swindling which doubtless had been little practiced in the

state. It was held that the fact that less punishments had been inflicted for offenses of less grievous character did not make the sentence imposed upon the defendants cruel and unusual; and that neither was it material that one defendant escaped with a sentence of seven years while the others were given ten. *Howard v. Fleming*, 191 U. S. 126, 48 L. Ed. 121.

14. **Increased punishment for habitual criminals.**—*Moore v. Missouri*, 159 U. S. 673, 677, 40 L. Ed. 301; *McDonald v. Massachusetts*, 180 U. S. 311, 45 L. Ed. 542.

The Statutes of Massachusetts of 1887, ch. 435, § 1, providing a penalty of imprisonment for twenty-five years upon a third conviction for a crime carrying a penalty of not less than three years imprisonment, held not to be unconstitutional. *McDonald v. Massachusetts*, 180 U. S. 311, 45 L. Ed. 542.

15. **Forfeiture of property for period longer than the life of the accused.**—See the titles **SEQUESTRATION**; **WAR**.

**Fine and imprisonment for illegal sale of intoxicants.**—A fine of fifty dollars and imprisonment at hard labor in the house of correction during three months, for violating a statute forbidding the keeping and sale of intoxicating liquors, cannot be regarded as excessive, cruel, or unusual. *Pervear v. Commonwealth*, 5 Wall. 475, 18 L. Ed. 608.

**Ten years in the penitentiary for conspiracy to defraud.**—*In Howard v. Fleming*, 191 U. S. 126, 48 L. Ed. 121, it was held that a sentence of ten years in the state prison was not a cruel and unusual punishment for persons convicted upon a charge of swindling and conspiracy to defraud.

**Solitary confinement while awaiting execution.**—A provision that condemned persons shall be kept in solitary confinement from the time of their delivery to the warden of the state penitentiary until

**N. Twice in Jeopardy.**—See the title *AUTREFOIS, ACQUIT AND CONVICT*, vol. 2, p. 751.

### **XIX. Ex Post Facto Laws and Bills of Attainder.**

**A. Validity in the Absence of Constitutional Prohibition.**—Previous to the ratification of the federal constitution the several states had power to pass ex post facto laws and bills of attainder and confiscation, provided the same were not inhibited by the state constitution.<sup>16</sup> Generally speaking, such laws were improper and unjust, but there were instances in which they were held to be necessary for the safety and preservation of the state.<sup>17</sup>

**Acts Attainting of Treason Not Enforcible in Violation of Treaty.**—Bills of attainder, attainting of treason those persons adhering to the forces of Great Britain during the revolutionary war, and confiscating their estates, could not be enforced after the conclusion of the treaty of peace, in contravention of the express provisions of that treaty.<sup>18</sup>

**B. Origin and History of Constitutional Provisions.**—All the restrictions contained in the constitution of the United States on the power of the state legislatures were provided in favor of the authority of the federal government. The prohibition upon both the state and national governments against the making any ex post facto laws was introduced for greater caution, and arose from the knowledge that the British parliament claimed and exercised a power to pass such laws under the denomination of bills of attainder, or bills of pains and penalties, which laws were usually inspired by ambition, or personal resentment and vindictive malice.<sup>19</sup> So much importance did the convention attach to this

the time of their execution does not provide for a cruel and unusual punishment. *McElvaine v. Brush*, 142 U. S. 155, 35 L. Ed. 971; *Trezza v. Brush*, 142 U. S. 160, 35 L. Ed. 974.

The punishment of shooting, as a mode of executing the death penalty for the crime of murder in the first degree, is not included in that category within the meaning of the eighth amendment. *Wilkinson v. Utah*, 99 U. S. 130, 134, 25 L. Ed. 345.

**Electrocution.**—The laws of New York, 1888, p. 778, amending § 505 of the Code of Criminal Procedure, and providing that the punishment of death must in every instance be inflicted by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death, such current to be continued until the convicted person is dead, do not provide for a cruel and unusual punishment within the meaning of the constitutional inhibition. In re *Kemmler*, 136 U. S. 436, 449, 34 L. Ed. 519; *McElvaine v. Brush*, 142 U. S. 155, 158, 35 L. Ed. 971; *Trezza v. Brush*, 142 U. S. 160, 35 L. Ed. 974.

**16. Validity of ex post facto laws in absence of constitutional prohibition.**—*Respublica v. Chapman*, 1 Dall. 53, 59, 1 L. Ed. 33; *Cooper v. Telfair*, 4 Dall. 14, 1 L. Ed. 721.

**17. Same.**—*Respublica v. Chapman*, 1 Dall. 53, 59, 1 L. Ed. 33.

**Legislative act attainting of treason.**—Thus it was held that the first legislative assembly in the state of Pennsylvania, after the separation of that state from the British government had, the incontrovertible right to declare any person a traitor

who had, previous to such declaration, gone over to the British forces and still adhered to them. *Respublica v. Chapman*, 1 Dall. 53, 59, 1 L. Ed. 33.

**Same.—The Georgia constitution of 1777.**

—The constitution of Georgia adopted upon the 5th day of February, 1777, declared (Art. 1) that the legislative, executive and judicial departments should be separate and distinct, so that neither should exercise the powers belonging to the other; that (Art. 7) the house of assembly should have power to make such laws and regulations as might be conducive to the good order and well-being of the state, provided such laws and regulations were not repugnant to the true intent and meaning of any rule or regulation contained in said constitution; that (Art. 39) all matters of breach of the peace, felony, murder, and treason against the state should be tried in the county where the crime was committed; that (Art. 60) the principles of the habeas corpus act should be a part of said constitution; and (Art. 61) that the freedom of the press and the trial by jury should remain inviolate forever. Held, that the act of May 4th, 1782, declaring certain persons therein described to be guilty of treason, and confiscating their estates and banishing them from the state, was not in contravention of any of said provisions of the state constitution. *Cooper v. Telfair*, 4 Dall. 14, 1 L. Ed. 721.

**18. Acts attainting of treason not enforcible in violation of treaty.**—*Respublica v. Gordon*, 1 Dall. 233, 1 L. Ed. 115.

**19. Origin and history of constitutional provisions.**—*Calder v. Bull*, 3 Dall. 386, 389, 1 L. Ed. 648.



prohibition, that it is found twice in the constitution, first as a restraint upon the power of the general government, and afterwards as a limitation upon the legislative power of the states. This latter is the first clause of § 10, art. 1, and its connection with other language in the same section may serve to illustrate its meaning: "No state shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make anything but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the obligation of Contracts; or grant any Title of Nobility." It will be observed that here are grouped contiguously a prohibition against three distinct classes of retrospective laws; namely, bills of attainder, ex post facto laws, and laws impairing the obligation of contracts. As the clause was first adopted, the words concerning contracts were not in it, because it was supposed that the phrase ex post facto law included laws concerning contracts as well as others. But it was ascertained before the completion of the instrument that this was a phrase which, in English jurisprudence, had acquired a signification limited to the criminal law, and the words, "or law impairing the obligation of contracts," were added to give security to rights resting in contracts.<sup>20</sup>

**C. Definitions and General Principles**—1. **EX POST FACTO LAWS**—a. *General Principles*.—Ex post facto is a term used in the law, signifying something done after, or arising from, or to affect, another thing that was committed before.<sup>21</sup> An ex post facto law, therefore, is one which operates upon a subject not liable to it at the time the law was made.<sup>22</sup> No one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority before the imputed offense was committed, and which existed as a law at the time,<sup>23</sup> or by some law passed afterwards by which the punishment is not increased.<sup>24</sup> The prohibition, in the letter is, not to pass any law concerning and after the fact; but the plain and obvious meaning and intention of the prohibition is this: that the legislatures of the several states, shall not pass laws, after a fact done by a subject or citizen, which shall have relation to such fact, and shall punish him for having done it. The prohibition, considered in this light, is an additional bulwark in favor of the personal security of the subject, to protect his person from punishment by legislative acts having a retrospective operation.<sup>25</sup>

**Laws Enacted before Act Committed but Making Criminality to Depend upon Subsequent Acts or Events**.—See post, "Law Enacted before Act Committed but Making Criminality Thereof to Depend upon Subsequent Independent Acts or Events," XIX, I, 1, b.

b. *Ex Post Facto Laws Defined and Classified*.—Ex post facto laws are: 1. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2. Every law that aggravates a crime or makes it greater than it was when committed. 3. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed. 4. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the offender. All these are unconstitutional and void.<sup>26</sup>

20. *Same*.—2 Brancroft's History of the Constitution, 213; *Kring v. Missouri*, 107 U. S. 221, 227, 27 L. Ed. 506.

21. *Ex post facto laws; general principles*.—*Kring v. Missouri*, 107 U. S. 221, 227, 27 L. Ed. 506.

22. *Same*.—*Kring v. Missouri*, 107 U. S. 221, 227, 27 L. Ed. 506.

23. *Same*.—*Kring v. Missouri*, 107 U. S. 221, 235, 27 L. Ed. 506; *Medley, Petitioner*, 134 U. S. 160, 171, 33 L. Ed. 835.

24. *Same*.—*Medley, Petitioner*, 134 U. S. 160, 171, 33 L. Ed. 835.

25. *Same*.—*Calder v. Bull*, 3 Dall. 386, 390, 1 L. Ed. 648.

26. *Ex post facto laws defined and classified*.—*Calder v. Bull* (Opinion of Chase, J.), 3 Dall. 386, 390, 1 L. Ed. 648; *Cummings v. Missouri*, 4 Wall. 277, 18 L. Ed. 356; *Ex parte Garland*, 4 Wall. 333, 18 L. Ed. 366; *Kring v. Missouri*, 107 U. S. 221, 228, 27 L. Ed. 506; *Duncan v. Mis-*



**Or Which Alters the Situation of the Accused to His Disadvantage.**

—In addition, it may be said, generally speaking, that an *ex post facto* law is one passed after the commission of an offense and which, in relation to that offense or its consequences, alters the situation of the accused to his disadvantage.<sup>27</sup>

c. *Laws Which Mollify the Rigor of the Criminal Law.*—A law which mollifies the rigor of the criminal law is not within the constitutional prohibition; but only those that create or aggravate the crime, or increase the punishment, or change the rules of evidence for the purpose of conviction.<sup>28</sup>

d. *Refers Only to Crimes.*—It has long been settled that the phrase *ex post facto* laws is not applicable to civil laws, but to penal and criminal laws which

souri, 152 U. S. 377, 382, 38 L. Ed. 485; *Gibson v. Mississippi*, 162 U. S. 565, 590, 40 L. Ed. 1075.

**Which makes that criminal which, when committed, was no offense.**—*United States v. Hall*, 6 Cranch 171, 3 L. Ed. 189; *Briscoe v. Bank*, 11 Pet. 257, 328c. 9 L. Ed. 709; *Carpenter v. Pennsylvania*, 17 How. 456, 15 L. Ed. 127; *Cummings v. Missouri*, 4 Wall. 277, 18 L. Ed. 356; *Burgess v. Salmon*, 97 U. S. 381, 384, 24 L. Ed. 1104; *Kring v. Missouri*, 107 U. S. 221, 228, 27 L. Ed. 506; *Duncan v. Missouri*, 152 U. S. 377, 382, 38 L. Ed. 485.

**Same.—Pennsylvania act making it criminal to set up Connecticut title.**—The contention between the state of Pennsylvania and the state of Connecticut as to the ownership of certain lands situated in the county of North Hampton and others, having been finally decided in favor of the state of Pennsylvania, titles deraigned from Connecticut grants are void ab initio and confer no rights whatever; therefore, the act of April 11, 1795, declaring the taking possession of lands, or conspiring to convey, possess or settle them, in the counties of North Hampton, etc., under any title not derived from Pennsylvania, to be a criminal act, was not unconstitutional as punishing the exercise of a claim legal in its origin, and thereby violating the *ex post facto* clauses of the state and federal constitutions by making that criminal which was not criminal in its inception. (*Sup. Ct. Pa.*) *Commonwealth v. Franklin*, 4 Dall. 255, 1 L. Ed. 823.

**Which makes an act punishable in a different manner.**—*Calder v. Bull*, 3 Dall. 386, 390, 1 L. Ed. 648; *Fletcher v. Peck*, 6 Cranch 87, 138, 3 L. Ed. 162; *United States v. Hall*, 6 Cranch 171, 3 L. Ed. 189; *Cummings v. Missouri*, 4 Wall. 277, 326, 18 L. Ed. 356; *Kring v. Missouri*, 107 U. S. 221, 27 L. Ed. 506.

**Or which inflicts additional or greater punishment.**—*Calder v. Bull*, 3 Dall. 386, 390, 1 L. Ed. 648; *Fletcher v. Peck*, 6 Cranch 87, 138, 3 L. Ed. 162; *United States v. Hall*, 6 Cranch 171, 3 L. Ed. 189; *Kring v. Missouri*, 107 U. S. 221, 27 L. Ed. 506; *Carpenter v. Pennsylvania*, 17 How. 456, 15 L. Ed. 127; *Cummings v. Missouri*, 4 Wall. 277, 18 L. Ed. 356; *Burgess v. Salmon*, 97 U. S. 381, 384, 24

L. Ed. 1104; *Duncan v. Missouri*, 152 U. S. 377, 382, 38 L. Ed. 485.

**Laws which alter the legal rules of evidence.**—*Cummings v. Missouri*, 4 Wall. 277, 18 L. Ed. 356; *Kring v. Missouri*, 107 U. S. 221, 228, 27 L. Ed. 506; *Hopt v. Utah*, 110 U. S. 574, 589, 28 L. Ed. 262; *Duncan v. Missouri*, 152 U. S. 377, 382, 38 L. Ed. 485. See, also, post, "Changing Rules of Evidence; Competency of Witnesses, etc.," XIX, I, 5, i, et seq.

**27. Or which alters the situation of the accused to his disadvantage.**—*United States v. Hall*, 6 Cranch 171, 3 L. Ed. 189; *Cummings v. Missouri*, 4 Wall. 277, 18 L. Ed. 356; *Kring v. Missouri*, 107 U. S. 221, 228, 235, 27 L. Ed. 506; *Medley, Petitioner*, 134 U. S. 160, 171, 33 L. Ed. 835; *Savage, Petitioner*, 134 U. S. 176, 33 L. Ed. 842; *Duncan v. Missouri*, 152 U. S. 377, 382, 38 L. Ed. 485; *Thompson v. Utah*, 170 U. S. 343, 351, 42 L. Ed. 1061. Accord: *Carpenter v. Pennsylvania*, 17 How. 456, 15 L. Ed. 127; *Burgess v. Salmon*, 97 U. S. 381, 384, 24 L. Ed. 1104.

"It is sufficient now to say that a statute belongs to that class which by its necessary operation, and 'in its relation to the offense, or its consequences, alters the situation of the accused to his disadvantage.' *United States v. Hall*, 2 Wash. C. C. 366; *Kring v. Missouri*, 107 U. S. 221, 228, 27 L. Ed. 506; *Medley, Petitioner*, 134 U. S. 160, 171, 33 L. Ed. 835." *Thompson v. Utah*, 170 U. S. 343, 351, 42 L. Ed. 1061.

**28. Laws which mollify the rigor of the criminal law.**—*Calder v. Bull* (opinion of Chase, J.), 3 Dall. 386, 391, 1 L. Ed. 648; *Rooney v. North Dakota*, 196 U. S. 319, 325, 49 L. Ed. 494.

**Laws lengthening period of confinement between sentence and execution.**—It may be sometimes difficult to say whether particular changes in the law are or are not in mitigation of the punishment for crimes previously committed; but it must be taken that there is such mitigation when, by the later law, there is an enlargement of the period of confinement prior to the actual execution of the criminal by hanging. *Rooney v. North Dakota*, 196 U. S. 319, 325, 49 L. Ed. 494. See, also, post, "Laws Touching Time, Place and Manner of Execution, Persons Present, etc.," XIX, I, 5, h.

punish a party for acts antecedently done which were not punishable at all, or not punishable to the extent or in the manner prescribed. In short, ex post facto laws relate to penal and criminal proceedings, which impose punishment or forfeitures, and not to civil proceedings, which affect private rights retrospectively.<sup>29</sup>

2. **BILLS OF ATTAINDER**—a. *Bill of Attainder Defined*.—A bill of attainder is a legislative act which convicts of crime and inflicts punishment without a judicial trial.<sup>30</sup>

b. *Bills of Attainder and Bills of Pains and Penalties Distinguished*.—At the time of the adoption of the constitution, the terms bills of attainder and bills of pains and penalties had a clear and well-defined meaning in the English law. Bills of attainder were acts of parliament whereby, sentence of death was pronounced against the accused; while if the punishment was less than death, the act was termed a bill of pains and penalties.<sup>31</sup>

**Bills of Attainder Include Bills of Pains and Penalties**.—The term bills of attainder, in the national constitution, is general, and embraces both bills of attainder and bills of pains and penalties.<sup>32</sup>

c. *May Be Directed Either against Individuals or against Class*.—These bills, though generally directed against individuals by name, may be directed against a whole class.<sup>33</sup>

d. *May Inflict Punishment Absolutely or Conditionally*.—They may inflict punishment absolutely or may inflict it conditionally.<sup>34</sup>

**D. Punishment; What Constitutes**—1. **GENERALLY**.—The states are for-

29. **Refer only to crimes**.—*Calder v. Bull*, 3 Dall. 386, 396, 1 L. Ed. 648; *Fletcher v. Peck*, 6 Cranch 87, 138, 3 L. Ed. 162; *Ogden v. Saunders*, 12 Wheat. 213, 266, 6 L. Ed. 606; *Satterlee v. Matthewson*, 2 Pet. 380, 7 L. Ed. 458; *Watson v. Mercer*, 8 Pet. 88, 110, 8 L. Ed. 876; *Briscoe v. Bank*, 11 Pet. 257, 328d, 9 L. Ed. 709; *Carpenter v. Pennsylvania*, 17 How. 456, 463, 15 L. Ed. 127; *Locke v. New Orleans*, 4 Wall. 172, 18 L. Ed. 334; *Walker v. Whitehead*, 16 Wall. 314, 317, 21 L. Ed. 357; *Mallett v. North Carolina*, 181 U. S. 589, 45 L. Ed. 1015.

The federal constitution prohibits the enactment of bills of attainder, ex post facto laws and laws impairing the obligation of contracts. The first two of these prohibitions apply to laws of a criminal, and the last to laws of a civil, character. (Opinion of Washington, J.) *Ogden v. Saunders*, 12 Wheat. 213, 266, 267, 6 L. Ed. 606.

**Retrospective act construing statutes not relating to crimes**.—An act construing a statute imposing a tax upon collateral inheritances and testamentary dispositions of property, and making such statute applicable to the case of a succession then in course of administration, is not an ex post facto law within the tenth section of the first article of the constitution of the United States. *Carpenter v. Pennsylvania*, 17 How. 456, 463, 15 L. Ed. 127.

**Act setting aside final judgment**.—An act of the legislature setting aside a final judgment and ordering a new trial is not within the prohibition against ex post facto laws. (Opinion of Chase, J.) *Calder v. Bull*, 3 Dall. 386, 392, 1 L. Ed. 648.

**Retrospective law destroying rights of action**.—A retrospective law forbidding an action to recover debts which have not been returned for taxation, while it impairs the obligation of the contract, is not an ex post facto law within the meaning of this provision of the constitution. *Walker v. Whitehead*, 16 Wall. 314, 317, 21 L. Ed. 357.

30. **Bill of attainder defined**.—*Calder v. Bull*, 3 Dall. 386, 389, 1 L. Ed. 648; *Briscoe v. Bank*, 11 Pet. 257, 328c, 328d, 9 L. Ed. 709; *Cummings v. Missouri*, 4 Wall. 277, 323, 18 L. Ed. 356; *Kilbourn v. Thompson*, 103 U. S. 168, 182, 26 L. Ed. 377.

"An act of congress which proposed to adjudge a man guilty of a crime and inflict the punishment would be conceded by all thinking men to be unauthorized by anything in the constitution." *Kilbourn v. Thompson*, 103 U. S. 168, 182, 26 L. Ed. 377.

31. **Distinction between bills of attainder and bills of pains and penalties**.—*Calder v. Bull*, 3 Dall. 386, 389, 1 L. Ed. 648; *Cummings v. Missouri*, 4 Wall. 277, 18 L. Ed. 356; *Drehman v. Stifle*, 8 Wall. 595, 601, 19 L. Ed. 508.

32. **As used in the constitution, bills of attainder include bills of pains and penalties**.—*Cummings v. Missouri*, 4 Wall. 277, 18 L. Ed. 356; *Drehman v. Stifle*, 8 Wall. 595, 601, 19 L. Ed. 508.

33. **May be directed against individuals or against a class**.—*Cummings v. Missouri*, 4 Wall. 277, 18 L. Ed. 356.

34. **May inflict punishment absolutely or conditionally**.—*Cummings v. Missouri*, 4 Wall. 277, 18 L. Ed. 356.

bidden to pass any bill of attainder or ex post facto law by which a man shall be punished criminally or penally, by loss of his life, his liberty, his property or reputation, for an act which, at the time of its commission, violated no existing law of the land.<sup>35</sup> Such a law may inflict penalties on the person or may inflict pecuniary penalties which swell the public treasury.<sup>36</sup> A statute imposing pecuniary penalties is a statute inflicting punishments as well as a statute inflicting penalties upon the person of the offender; therefore the legislature is prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared by some previous law to render him liable to that punishment.<sup>37</sup> A bill of attainder may affect the life of an individual or may confiscate his property or may do both. In this form, the power of the legislature over the lives and fortunes of individuals is expressly restrained.<sup>38</sup>

2. **LAWS AFFECTING CIVIL AND POLITICAL RIGHTS; RIGHT TO PURSUE PROFESSION OR CALLING, ETC.**—See post, "Laws Affecting Civil and Political Rights; Right to Pursue Profession or Calling, etc.," XIX, I, 4, et seq.

**E. Rule of Construction.**—The constitutional provision that no state shall pass any ex post facto law or bill of attainder must be construed in connection with the other parts of the instrument and in the light of surrounding circumstances.<sup>39</sup>

**F. Constitutional Provisions Not to Be Indirectly Evaded.**—The constitutional provision prohibiting ex post facto laws and bills of attainder was intended to secure the rights of the citizen against deprivation for past conduct, however disguised. It cannot be evaded by the form in which the power of the state is exerted.<sup>40</sup> Although aimed solely at criminal cases, it cannot be evaded by giving a civil form to that which is in substance criminal.<sup>41</sup>

**No Practical Difference between Assuming Guilt and Declaring It.**—Again, there is no practical difference between assuming the guilt of a person and declaring it. The deprivation is effected with equal certainty in the one case as in the other; the legal result in the same; and that which cannot be done directly cannot be done indirectly.<sup>42</sup>

35. **What constitutes punishment; generally.**—*Ogden v. Saunders* (opinion of Washington, J.), 12 Wheat. 213, 266, 6 L. Ed. 606.

36. **Same; may be corporeal or pecuniary.**—*Fletcher v. Peck*, 6 Cranch 87, 138, 3 L. Ed. 162.

37. **Same.**—*Fletcher v. Peck*, 6 Cranch 87, 138, 3 L. Ed. 162.

38. **Same.**—*Fletcher v. Peck*, 6 Cranch 87, 138, 3 L. Ed. 162.

"In *Fletcher v. Peck*, 6 Cranch 87, 3 L. Ed. 162, it was decided that an act of the legislature, by which a man's estate should be seized for a crime which was not declared to be an offense by a previous law, was void." *Burgess v. Salmon*, 97 U. S. 381, 384, 385, 24 L. Ed. 1104.

39. **Construction of constitutional provision.**—*Minor v. Happersett*, 21 Wall. 162, 175, 22 L. Ed. 627.

40. **Constitutional provision not to be indirectly evaded.**—*Cummings v. Missouri*, 4 Wall. 277, 329, 18 L. Ed. 356; *Burgess v. Salmon*, 97 U. S. 381, 385, 24 L. Ed. 1104.

41. **Evasion by giving civil form to proceeding.**—*Cummings v. Missouri*, 4 Wall. 277, 18 L. Ed. 356; *Burgess v. Salmon*, 97 U. S. 381, 385, 24 L. Ed. 1104.

Thus an act increasing the internal rev-

enue on tobacco from twenty to twenty-four cents per pound, and which was signed by the president in the afternoon, is ex post facto as applied to a manufacturer who had paid the lesser tax and removed his tobacco from the factory during the forenoon of the same day; and this objection cannot be evaded by bringing a civil action to recover the difference, instead of a criminal prosecution. *Burgess v. Salmon*, 97 U. S. 381, 24 L. Ed. 1104.

42. **No difference between assuming guilt and declaring it.**—*Cummings v. Missouri*, 4 Wall. 277, 18 L. Ed. 356.

**Assuming guilt and declaring punishment conditionally; test oath.**—The Missouri constitutional provision which required priests and clergymen, in order that they might be permitted to continue in the exercise of their professions and to preach and teach, to take and subscribe an oath that they had not committed certain designated acts, some of which were at the time innocent in themselves, while others constituted offenses punishable by heavy penalties, was unconstitutional as a bill of attainder, since it assumed the guilt of the priests and clergymen and adjudged the punishment conditionally. *Cummings v. Missouri*, 4 Wall. 277, 18 L. Ed. 356.



**Evasion under Guise of Attaching Qualifications and Conditions.**—See post, "Deprivation of Right to Pursue Profession or Calling; Test Oath Cases," XIX, I, 4, b.

**G. Law Valid in Part and Void in Part.**—A general law for the punishment of offenses, which endeavors to reach by its retrospective operation, acts previously committed, as well as to prescribe a rule of conduct for the citizen in the future, is void so far as it is retroactive; but such invalidity does not affect the operation of the law in regard to offenses committed in the future.<sup>43</sup>

**H. Who May Question Constitutionality of Law.**—An act which is void in so far as it relates to past acts, but valid in so far as it relates to the future, affords no constitutional ground of complaint to one convicted thereunder for an offense committed after its enactment.<sup>44</sup>

**I. Infringement of the Constitutional Guaranty**—1. **LAWS MAKING THAT CRIMINAL WHICH WAS NOT SO IN ITS INCEPTION**—a. *Generally.*—See ante, "General Principles," XIX, C, 1, a; "Ex Post Facto Laws Defined and Classified," XIX, C, 1, b.

b. *Law Enacted before Act Committed but Making Criminality Thereof to Depend upon Subsequent Independent Acts or Events.*—An act which is not an offense at the time it is committed cannot become such by any subsequent independent act of the party with which it has no connection.<sup>45</sup>

2. **LAW DECLARING OFFENSE, FINDING FACT OF GUILT, AND FIXING PUNISHMENT.**—"To declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial. It is not consistent with the theory of our government that the legislature should, after having defined an offense as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents."<sup>46</sup>

3. **INCREASE OF PUNISHMENT FOR SUBSEQUENT OFFENSES.**—A state may undoubtedly provide that persons who have been before convicted of crime shall suffer severer punishment for subsequent offenses than for the first offense against the law. Such statutes are not ex post facto, even though enacted subsequent to the commission of the first offense.<sup>47</sup>

**43. Law partly valid and partly void.**—*Jaehne v. New York*, 128 U. S. 189, 194, 32 L. Ed. 398.

**44. Who may question constitutionality of law.**—*Jaehne v. New York*, 128 U. S. 189, 194, 32 L. Ed. 398. See, also, ante, "Who May Raise Constitutional Questions," IV, G, et seq.

Thus an act increasing the punishment of bribery from two to ten years in the state prison, even if it could be construed as including offenses committed previous to its enactment, affords no constitutional ground of complaint to one convicted thereunder for bribery committed after its enactment. *Jaehne v. New York*, 128 U. S. 189, 194, 32 L. Ed. 398.

**45. Law enacted previous to offense, but making criminality to depend upon subsequent events.**—*United States v. Fox*, 95 U. S. 670, 24 L. Ed. 538.

**Lawful acts made criminal by subsequent proceedings in bankruptcy.**—Accordingly, that part of § 5132, Rev. Stat., which declares that every person respecting whom proceedings in bankruptcy are commenced, either upon his own petition or that of a creditor, who, within three months before their commencement, ob-

tains goods upon false pretenses with intent to defraud, shall be punished by imprisonment, is inoperative to render the act an offense, because its criminal character is to be determined by subsequent proceedings, which, at the time the goods were so obtained, may not have been in his contemplation, and which may be instituted, against his will, by another. *United States v. Fox*, 95 U. S. 670, 24 L. Ed. 538.

**46. Law defining offense, finding fact of guilt, and fixing the punishment.**—*Wong Wing v. United States*, 163 U. S. 228, 244, 41 L. Ed. 140. Accord: *Li Sing v. United States*, 180 U. S. 486, 495, 45 L. Ed. 634. See, also, ante, "Legislative Judgments and Decrees," VI, D, 3, d, (3), (c), (bb), (bbb), et seq.; "Bills of Attainder," XIX, C, 2, et seq.

**47. Increased punishment for subsequent offenses.**—*Moore v. Missouri*, 159 U. S. 673, 678, 40 L. Ed. 301; *McDonald v. Massachusetts*, 180 U. S. 311, 45 L. Ed. 542.

A Massachusetts act which provided an increase of punishment upon conviction of felony, where it appeared that the guilty person had been twice before con-

4. **LAWS AFFECTING CIVIL AND POLITICAL RIGHTS; RIGHT TO PURSUE PROFESSION OR CALLING, ETC.**—a. *Generally.*—The theory upon which our political institution rests is that all men have certain inalienable rights—that among these are life, liberty and the pursuit of happiness; and that in the pursuit of happiness, all avocations, all honors, all positions, are alike open to every one; and that in the protection of these rights, all are equal before the law. Punishment, therefore, is not restricted to the deprivation of life, liberty or property in any narrow sense, but embraces deprivation or suspension of political or civil rights. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined.<sup>48</sup> Thus liberty includes not only freedom from restraints upon the person, but freedom from outrage upon the feelings as well. Property includes those estates which one may acquire in the professions. Disqualification from office may be punishment, as in cases of conviction upon impeachment. Disqualification from the pursuit of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator or guardian, may also be, and often has been, imposed as punishment.<sup>49</sup>

b. *Deprivation of Right to Pursue Profession or Calling; Test Oath Cases.*—Exclusion from the right to pursue any of the ordinary avocations of life because of a person's conduct is punishment for such conduct; and a statute which imposes such a disability because of past acts which were not so punishable at the time of their commission is *ex post facto* and void.<sup>50</sup>

**Exaction of Test Oath.**—The exaction of a test oath, whereby the party is required to swear that he has not been guilty of the acts condemned by the statute, operates not only to ascertain the parties whom the statute is intended to affect, but changes the legal rules of evidence to their disadvantage in that it not only assumes their guilt and places upon them the burden of proving their innocence, but prevents them from proving it in any but the one way, namely, by an expurgatory oath.<sup>51</sup> All enactments of this kind partake of the nature of bills of pains and penalties, and are subject to the constitutional inhibition against the passage of bills of attainder, under which general designation they are included.<sup>52</sup>

victed of felonies entailing sentences of not less than three years each, was held not to relate back to the former offenses in such manner as to render it obnoxious to the *ex post facto* clause of the federal constitution. *McDonald v. Massachusetts*, 180 U. S. 311, 45 L. Ed. 542.

48. **Laws affecting right to pursue profession, trade or calling.**—*Cummings v. Missouri*, 4 Wall. 277, 321, 322, 18 L. Ed. 356; *Pierce v. Carskadon*, 16 Wall. 234, 21 L. Ed. 276; *Ex parte Garland*, 4 Wall. 333, 18 L. Ed. 366.

49. **Same.**—*Cummings v. Missouri*, 4 Wall. 277, 320, 18 L. Ed. 356. See, also, the title **DUE PROCESS OF LAW**, as to the meaning of the terms "liberty" and "property."

50. **Same.**—*Cummings v. Missouri*, 4 Wall. 277, 18 L. Ed. 356; *Ex parte Garland*, 4 Wall. 333, 377, 18 L. Ed. 366.

51. **Same; test oath cases.**—*Cummings v. Missouri*, 4 Wall. 277, 18 L. Ed. 356; *Ex parte Garland*, 4 Wall. 333, 377, 18 L. Ed. 366.

52. **Same.**—*Cummings v. Missouri*, 4 Wall. 277, 18 L. Ed. 356; *Ex parte Garland*, 4 Wall. 333, 377, 18 L. Ed. 366.

**Same; right to practice in federal courts.**—The admitted power of congress to prescribe qualifications for the office of

attorney and counsellor in the federal courts cannot be exercised as a means for the infliction of punishment for the past conduct of such officers, against the inhibition of the constitution. (Four justices dissenting.) *Ex parte Garland*, 4 Wall. 333, 18 L. Ed. 366.

The act of congress of January 24th, 1865, providing that after its passage no person should be admitted as an attorney and counsellor to the bar of the supreme court, nor, after March 4th, 1865, to the bar of any circuit or district court of the United States, or court of claims, or be allowed to appear and be heard by virtue of any previous admission, or any special power of attorney, unless he should have first taken and subscribed the oath prescribed in the act of July 2d, 1862 (which latter act required the affiant to swear or affirm that he had never voluntarily borne arms against the United States since he had been a citizen thereof, nor voluntarily given aid, counsel or encouragement to persons engaged in armed hostility thereto, nor accepted or attempted to exercise the functions of any office under any authority in hostility to the United States, etc.), operated as a legislative decree and as a bill of pains and penalties, excluding from the practice



**Constitution Cannot Be Evaded under Guise of Prescribing Conditions and Qualifications.**—Under the form of creating a qualification or attaching a condition to the right of its citizens to hold office, or to exercise their various callings and pursuits within its jurisdiction, a state cannot, in effect, inflict a punishment for a past act which was not punishable at the time it was committed.<sup>53</sup>

**Exception; Police Régulations Defining Qualifications for Certain Professions.**—The constitutional inhibition against the enactment of ex post facto laws does not prevent the state from prescribing reasonable regulations, both as to character and fitness, as well as with respect to skill and learning, for those who desire to engage in any profession or business which affects the public or society at large.<sup>54</sup> Likewise, statutes requiring those already engaged, under sanction of law, in the practice of any profession in which the public at large is vitally interested, to submit to further examination and to attain to higher qualifications, under penalty of having their licenses revoked and being subjected to punishment for continuing in the practice of their profession without having complied with such statutes, are wholly unobjectionable.<sup>55</sup>

of law in the courts of the United States all persons who had offended in any of the particulars enumerated. Said act was void, therefore, not only as violating the constitutional inhibition against bills of attainder, but it was also void as being ex post facto, since it imposed a punishment for some acts which were not punishable at the time they were committed, and added a new punishment to that previously prescribed for certain others. Ex parte Garland, 4 Wall. 333, 18 L. Ed. 366.

**Requiring test oath of priests and clergymen.**—The requirement of the Missouri constitution that priests and clergymen, in order to continue in the exercise of their rights and privileges as such, should take and subscribe an oath that they had not committed certain designated acts connecting them with the then late rebellion, some of which acts were, at the time of their commission, punishable offenses, while others were innocent in themselves, was unconstitutional both as an ex post facto law and as a bill of pains and penalties, the latter being included in the term bills of attainder. Cummings v. Missouri, 4 Wall. 277, 18 L. Ed. 356.

**53. Evasion of constitution under guise of prescribing conditions and qualifications.**—Cummings v. Missouri, 4 Wall. 277, 319, 18 L. Ed. 356.

**54. Police regulations touching practice of trade or profession.**—Dent v. West Virginia, 129 U. S. 114, 32 L. Ed. 623; Gray v. Connecticut, 159 U. S. 74, 77, 40 L. Ed. 80; Hawker v. New York, 170 U. S. 189, 42 L. Ed. 1002; Reetz v. Michigan, 188 U. S. 505, 47 L. Ed. 563.

**55. Same: persons already engaged in practice under sanction of law.**—Dent v. West Virginia, 129 U. S. 114, 32 L. Ed. 623; Gray v. Connecticut, 159 U. S. 74, 77, 40 L. Ed. 80; Hawker v. New York, 170 U. S. 189, 42 L. Ed. 1002; Reetz v. Michigan, 188 U. S. 505, 47 L. Ed. 563. See, also, ante, "Interest or Estate in Profession or Occupation," VIII, A, 21.

**Same; practice of medicine.**—It is a mis-

take to assume that the proceedings before a state medical board are in themselves of a criminal nature, and that the state, by such proceedings, endeavors to convict one of an offense in the practice of his profession, where the state is simply seeking to ascertain who ought to be permitted to practice medicine or surgery. Criminality arises only when one assumes to practice without having his right so to do established by the action of the board. The proceedings of the board to determine his qualifications are no more criminal than examinations of applicants to teach or to practice law, and if the provisions for testing such qualifications are reasonable in their nature, a party must comply with them, and has no right to practice his profession in defiance thereof. Dent v. West Virginia, 129 U. S. 114, 32 L. Ed. 623; Hawker v. New York, 170 U. S. 189, 42 L. Ed. 1002; Reetz v. Michigan, 188 U. S. 505, 509, 47 L. Ed. 563.

Neither can it be insisted that having once engaged in the practice, and having been licensed so to do, he has a right to continue in such practice, and that such a statute is in the nature of an ex post facto law. The case of Hawker v. New York, 170 U. S. 189, 42 L. Ed. 1002, is decisive upon this question. Such a statute does not attempt to punish him for any past offense, and in the most extreme view can only be considered as requiring continued evidence of his qualifications as a physician or surgeon. As shown in Dent v. West Virginia, 129 U. S. 114, 32 L. Ed. 623, there is no similarity between statutes like this and the proceedings which were adjudged void in Cummings v. Missouri, 4 Wall. 277, 18 L. Ed. 356, and Ex parte Garland, 4 Wall. 333, 18 L. Ed. 366. See Reetz v. Michigan, 188 U. S. 505, 510, 47 L. Ed. 563.

Thus, a law which prohibits any person who has been convicted of felony from engaging in the practice of medicine, and which makes the record of con-



c. *Requirement of Test Oath as Condition to Right to Pursue Remedies in Court.*—The requirement of a test oath to the effect that the affiant has not been guilty of certain specified acts, as a condition precedent to the right to pursue the ordinary remedies in the courts of justice, such acts not entailing any such penalty under the law as it existed at the time of their commission, is within the principles above discussed, and unconstitutional and void.<sup>56</sup>

d. *Indemnity Acts.*—A statute or constitutional provision which exempts from suit for acts done by military authority is in the nature of an act of indemnity, and does not partake of the nature of a bill of pains and penalties.<sup>57</sup>

e. *Qualifications of Voters.*—An act prescribing the qualifications of voters, and making the commission of past offenses a ground of disqualification, acts merely upon the existing status of persons, and is not objectionable as an ex post facto law or bill of attainder.<sup>58</sup>

viction conclusive evidence of guilt, is not ex post facto as applied to one who was not only a licensed physician prior to its enactment, but who was indicted for and convicted of a felony previous to its enactment. *Hawker v. New York*, 170 U. S. 189, 42 L. Ed. 1002.

56. *Requirement of test oath as condition of right to pursue remedies in courts.*—*Pierce v. Carskadon*, 16 Wall. 234, 21 L. Ed. 276.

*Test oath as a condition precedent to right to file petition to set aside judgment.*

—By a statute of West Virginia, passed in September, 1863, where a judgment was rendered against a nonresident in an action in which an attachment was issued, without personal service of a copy of such attachment upon the defendant, or of process in the suit, and without his appearance therein, such defendant had a right, upon returning, or openly appearing in the state, to have the proceedings in the action reheard, upon petition filed therefor, and to make his defense as if he had appeared in the case before judgment. Under this statute a judgment was recovered against the defendants in December, 1864, and within one year thereafter they applied by petition to the state court for a rehearing, but they were not allowed to file their petition because it did not conform to a statute of the state passed in February, 1865, amending the statute of 1863, and requiring a defendant, applying to appear and defend an action where judgment was rendered, as in this case, upon publication without personal service of attachment or process, to state in his petition and verify the same by his oath, as a condition of being permitted thus to appear and defend, that he had not committed certain designated public offenses. Held, on the authority of *Cummings v. Missouri*, 4 Wall. 277, 320, 18 L. Ed. 356, and *Ex parte Garland*, 4 Wall. 333, 18 L. Ed. 366, that the court erred in refusing to receive the petition; that the act of February, 1865, in thus depriving the defendants, for past misconduct, and without judicial trial, of an existing right, partook of the nature of a bill of pains and penalties, and was subject to the constitutional inhibition against the passage of bills of attainder, under which general

designation bills of pains and penalties are included; and, also, that the statute in question, in thus depriving the defendants of the right they possessed, for acts to which such deprivation was not previously affixed by law as a punishment, came within the inhibition of the constitution against the passage of an ex post facto law. *Pierce v. Carskadon*, 16 Wall. 234, 21 L. Ed. 276.

57. *Indemnity acts.*—*Drehman v. Stifle*, 8 Wall. 595, 19 L. Ed. 508.

Section 4 of the constitution of Missouri, which ordains that, "No person shall be prosecuted in any civil action for or on account of any act by him done, performed or executed, after the first of January, one thousand eight hundred and sixty-one, by virtue of military authority vested in him by the government of the United States or that of this state, to do such act, or in pursuance to orders received by him from any person vested with such authority; and if any action or proceeding shall have heretofore been, or shall hereafter be, instituted against any person for the doing of any such act, the defendant may plead this section in bar thereof;" held, not to be unconstitutional. *Drehman v. Stifle*, 8 Wall. 595, 19 L. Ed. 508.

58. *Qualifications of voters.*—*Murphy v. Ramsey*, 114 U. S. 15, 42, 29 L. Ed. 47.

*Statute disfranchising polygamists.*—Section 8 of the act of congress of March 22, 1882, relating to the territories, and providing that no polygamist or bigamist, or person cohabiting with more than one woman, should be entitled to vote at any election in such territory, etc., is not ex post facto, in the constitutional sense, as to persons who had contracted polygamous marriages, or entered into bigamous or polygamous relations, previous to the enactment thereof. It does not impose any additional penalty for a past offense, but, referring solely to the status of persons offering to vote, prescribes a qualification defining who shall be entitled to the privilege of suffrage and who shall not, and is no more retrospective or ex post facto than any other law prescribing the qualifications of voters. *Murphy v. Ramsey*, 114 U. S. 15, 43, 29 L. Ed. 47.

5. LAWS REGULATING CRIMINAL PROCEDURE—*a. Generally.*—"So far as mere modes of procedure are concerned, a party has no more right in a criminal than in a civil action to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice and heard only by the courts in existence when its facts arose. The legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime."<sup>59</sup> A law which deprives a defendant of any substantial right secured to him by the law as it stood at the time of the commission of the offense with which he is charged is an *ex post facto* law within the meaning of the constitutional provision, even though it relates only to the remedy and to modes of procedure. There is no distinction in such case in favor of laws regulating modes of procedure.<sup>60</sup>

*b. Ex Post Facto Relates to the Time of the Offense, and Not to the Time of Trial of Other Proceeding.*—The term *ex post facto* necessarily implies a fact or act done, after which the law in question is passed. Whether it is *ex post facto* or not relates, in criminal cases, to which alone the phrase applies, to the time at which the offense charged was committed. If the law complained of was passed before the commission of the act with which the prisoner is charged, it cannot, as to that offense, be an *ex post facto* law. If passed after the commission of the offense, it is, as to that, *ex post facto*; though whether of the class forbidden by the constitution may depend on other matters. But so far as this depends on the time of its enactment, it has reference solely to the date at which the offense was committed to which the new law is sought to be applied. No other time or transaction but this has been in any adjudged case held to govern its *ex post facto* character.<sup>61</sup>

*c. Changing Place of Trial.*—An *ex post facto* law does not involve, in any of its definitions, a change of the place of trial of an alleged offense after its commission.<sup>62</sup> A law of a state changing the place of trial from one county to another county in the same district, or even to a different district from that in

59. Regulation of criminal procedure; generally.—*Kring v. Missouri*, 107 U. S. 221, 228, 27 L. Ed. 506; *Hopt v. Utah*, 110 U. S. 574, 590, 28 L. Ed. 262; *Duncan v. Missouri*, 152 U. S. 377, 382, 38 L. Ed. 485; *Gibson v. Mississippi*, 162 U. S. 565, 590, 40 L. Ed. 1075; *Thompson v. Utah*, 170 U. S. 343, 351, 42 L. Ed. 1061; *Mallett v. North Carolina*, 181 U. S. 589, 45 L. Ed. 1015.

60. Same.—*Kring v. Missouri*, 107 U. S. 221, 27 L. Ed. 506; *Duncan v. Missouri*, 152 U. S. 377, 382, 38 L. Ed. 485; *Gibson v. Mississippi*, 162 U. S. 565, 590, 40 L. Ed. 1075; *Thompson v. Utah*, 170 U. S. 343, 351, 42 L. Ed. 1061.

61. *Ex post facto* relates to the time of the offense.—*Kring v. Missouri*, 107 U. S. 221, 225, 226, 27 L. Ed. 506.

Depriving defendant of benefit of former conviction of murder in second degree, as a plea in bar to charge of murder in first degree, upon new trial.—Thus a constitutional provision adopted after the date of the offense, but previous to the date of a second trial therefor, and depriving the accused of the benefit of a previous conviction of murder in the second degree as a plea in bar to a subsequent charge of

murder in the first degree, to which he was entitled under the law as it existed at the date of the offense, is, as to his case, *ex post facto* and void. *Kring v. Missouri*, 107 U. S. 221, 27 L. Ed. 506.

And it is immaterial that the constitutional provision was adopted previous to the time the defendant interposed his plea of guilty of murder in the second degree. *Kring v. Missouri*, 107 U. S. 221, 235, 27 L. Ed. 506.

62. Changing place of trial.—*Gut v. The State*, 9 Wall. 35, 38, 19 L. Ed. 573; *Cook v. United States*, 138 U. S. 157, 183, 34 L. Ed. 906.

Same; crimes committed in No Man's Land.—Therefore the act of congress of March 1, 1889, 25 Stat. 783, c. 333, annexing the strip of public land known as No Man's Land to the eastern district of Texas, for judicial purposes, and conferring upon the circuit court of the United States for said eastern district jurisdiction to try persons indicted for offenses committed in No Man's Land previous to its annexation to said district, is not an *ex post facto* law within the meaning of the constitutional prohibition. *Cook v. United States*, 138 U. S. 157, 183, 34 L. Ed. 906.



which the offense was committed, or the indictment found, is not an *ex post facto* law, though passed subsequent to the commission of the offense or the finding of the indictment.<sup>63</sup>

d. *Constitution of Juries*.—Provisions prescribing the qualifications of grand and petit jurors and requiring them to be persons of good intelligence, sound judgment, and fair character, relate to matters of procedure and do not in any degree affect the substantial rights of persons indicted for crime committed prior to their going into effect. Such regulations are within the power of the legislature, tend to secure the proper administration of justice, and do not, in any legal sense, alter the position of the accused to his disadvantage.<sup>64</sup> But where the law, as it exists at the time of the commission of an offense, permits the trial and conviction of the accused only upon the unanimous verdict of a jury of twelve, a subsequent change, applicable to his case, and permitting him to be tried by a jury of only eight men, is, as to his case, *ex post facto* and void.<sup>65</sup>

e. *Depriving Accused of Benefit of Former Acquittal*.—See ante, "*Ex Post Facto Relates to the Time of the Offense and Not to the Time of Trial or Other Proceeding*," XIX, I, 5, b, note.

f. *Changing Rules of Evidence; Competency of Witnesses, etc.*—(1) *Generally*.—Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the defendant, is an *ex post facto* law.<sup>66</sup>

(2) *Excluding Evidence That Was Formerly Conclusive of Innocence*.—Likewise a law which excludes that which at the time of the offense would have been conclusive evidence of innocence is also within the constitutional prohibition.<sup>67</sup>

63. *Same; state law changing place of trial*.—*Gut v. The State*, 9 Wall. 35, 19 L. Ed. 573.

64. *Constitution of juries*.—*Gibson v. Mississippi*, 162 U. S. 565, 589, 40 L. Ed. 1075.

By § 1661 of the Code of Mississippi of 1880, in force when the alleged murder was committed, it was provided that "all male citizens of the United States not under the age of 21 years, nor over the age of 60 years, and not having been convicted of any infamous crime, shall be qualified to serve as jurors within the county of their residence." By the Mississippi constitution of 1890, also in force at the time of the commission of the alleged murder, it was provided, "no person shall be a grand or petit juror unless a qualified elector and able to read and write," etc. By the same section it was provided that the legislature should provide by law for procuring a list of persons so qualified and the drawing therefrom of grand and petit jurors for each term of the circuit court. By § 286 of said constitution, it was provided: "All crimes and misdemeanors and penal actions shall be tried, prosecuted and punished as though no change had taken place until otherwise provided by law." The annotated Code of 1890 went into effect on the first day of November, 1892, and repealed all prior statutes. Section 2358 of that Code changed the manner of selecting jurors, grand and petit, and prescribed as their qualifications, in part, that they should be "qualified persons of good intelligence, sound judgment, and fair char-

acter." Held, that this statute was not *ex post facto* as applied to the case of the plaintiff in error. *Gibson v. Mississippi*, 162 U. S. 565, 587, 590, 40 L. Ed. 1075.

65. *Change in number of jurors*.—*Thompson v. Utah*, 170 U. S. 343, 352, 42 L. Ed. 1061.

Where, under the territorial law existing at the time an offense was committed, the accused could only be tried and convicted upon the unanimous verdict of a jury composed of twelve men, a constitutional provision, adopted after the territory had become a state, and providing for a trial in criminal cases, other than capital, by a jury of only eight men, was, as to the case of the plaintiff in error, *ex post facto*, since it altered his situation to his disadvantage and deprived him of a substantial right. *Thompson v. Utah*, 170 U. S. 343, 352, 42 L. Ed. 1061.

66. *Laws changing rules of evidence*.—*Cummings v. Missouri*, 4 Wall. 277, 18 L. Ed. 356; *Kring v. Missouri*, 107 U. S. 221, 228, 27 L. Ed. 506; *Hopt v. Utah*, 110 U. S. 574, 590, 28 L. Ed. 262. See, also, ante, "*Ex post Facto Laws Defined and Classified*," XIX, C, 1, b.

67. *Excluding evidence that was formerly conclusive of innocence*.—*Kring v. Missouri*, 107 U. S. 221, 228, 27 L. Ed. 506.

Thus where under the law, as it stood at the time of the offense, a conviction of murder in the second degree, even though set aside or reversed, was conclusive evidence of innocence of the charge of murder in the first degree, a subsequent charge, providing that a conviction of



(3) *Shifting Burden of Proof upon the Accused.*—An act passed subsequent to the commission of an offense, and which abolishes the presumption of innocence and shifts the burden of proof upon the accused, is, as applied to persons on trial for such offenses, *ex post facto* and void.<sup>68</sup>

(4) *Where Change Does Not Affect Any Substantial Right.*—But alterations which do not increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to establish guilt, but leave untouched the nature of the crime and the amount or degree of proof essential to conviction, relate to modes of procedure only, in which no one can be said to have a vested right, and which the state, upon grounds of public policy, may regulate at pleasure.<sup>69</sup>

(5) *Statutes Enlarging Competency of Witnesses or Admitting Evidence Which Was Formerly Inadmissible.*—Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not *ex post facto* in their application to prosecutions for crimes committed prior to their passage; for they do not attach criminality to any act previously done, and which was innocent when done; nor aggravate any crime theretofore committed; or provide a greater punishment therefor than was prescribed at the time of its commission; nor do they alter the degree, or lessen the amount or measure of the proof which was made necessary to conviction when the crime was committed.<sup>70</sup>

**Admitting Evidence Which Was Formerly Inadmissible.**—Neither can a statute be invalidated solely because it admits evidence which was formerly inadmissible.<sup>71</sup>

murder in the second degree, if reversed or set aside, shall not operate as a bar to a conviction of murder in the first degree, is an *ex post facto* law within the meaning of the constitutional prohibition. *Kring v. Missouri*, 107 U. S. 221, 228, 27 L. Ed. 506.

The Missouri constitutional provision requiring a test oath of priests and clergymen was unconstitutional upon this ground, since it prevented the persons affected thereby from proving their innocence by any evidence, however, conclusive, except in the one way, namely, by an expurgatory oath. *Cummings v. Missouri*, 4 Wall. 277, 18 L. Ed. 356.

68. **Shifting burden of proof upon the accused.**—*Cummings v. Missouri*, 4 Wall. 277, 18 L. Ed. 356.

The Missouri constitutional provision requiring priests and clergymen to take and subscribe to a test oath as a condition precedent to their being permitted to exercise the rights and privileges of their calling was void upon this ground, since it assumed the guilt instead of the innocence of the parties affected thereby, and placed upon them the burden of proving their innocence. *Cummings v. Missouri*, 4 Wall. 277, 18 L. Ed. 356.

69. **Where change affects no substantial right.**—*Hopt v. Utah*, 110 U. S. 574, 590, 28 L. Ed. 262 (distinguishing *Kring v. Missouri*, 107 U. S. 221, 27 L. Ed. 506); *Thompson v. Missouri*, 171 U. S. 380, 43 L. Ed. 204.

A Missouri act providing that "comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting

the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute," relates to modes of procedure only, in which no one can be said to have a vested right. It does not change the degree of the crime or make any less amount of evidence sufficient to convict. Therefore its application to a trial for an act committed prior to its passage cannot constitute it an *ex post facto* law. *Thompson v. Missouri*, 171 U. S. 380, 385, 43 L. Ed. 204.

"The statute is to be regarded as one merely regulating procedure and may be applied to crimes committed prior to its passage without impairing the substantial guarantees of life and liberty that are secured to an accused by the supreme law of the land." *Thompson v. Missouri*, 171 U. S. 380, 388, 43 L. Ed. 204.

70. **Statutes enlarging competency of witnesses.**—*Hopt v. Utah*, 110 U. S. 574, 589, 28 L. Ed. 262, distinguishing *Kring v. Missouri*, 107 U. S. 221, 27 L. Ed. 506.

Thus an act removing the disability of convicted felons to testify in criminal cases is not *ex post facto* when applied to offenses previously committed. *Hopt v. Utah*, 110 U. S. 574, 588, 28 L. Ed. 262.

71. **Admitting evidence which was formerly inadmissible.**—*Thompson v. Missouri*, 171 U. S. 380, 387, 43 L. Ed. 204.

"If persons excluded, upon grounds of public policy, at the time of the commission of an offense, from testifying as witnesses for or against the accused, may, in virtue of a statute, become competent to testify, we cannot perceive any ground upon which to hold a statute to be *ex post facto* which does nothing more than admit evidence of a particular kind in a

*g. Laws Requiring Solitary Confinement between Conviction and Execution.*

—A law which, in addition to punishment of death for the crime of murder, provides that the accused shall be kept in solitary confinement until his execution, is, as applied to a person guilty of committing a murder previous to its enactment, and which was then punishable by death only, *ex post facto* and void.<sup>72</sup> But the fact that the law in force when the crime was committed only required confinement, whereas the later statute required close confinement, is not material, as "confinement" and "close confinement" equally mean such custody, and only such custody, as will safely secure the production of the body of the prisoner on the day appointed for his execution.<sup>73</sup> Neither does a statute, in any substantial sense, increase or make more severe the punishment by substituting close confinement in the penitentiary prior to execution for confinement in the county jail.<sup>74</sup>

*h. Laws Touching Time, Place and Manner of Execution, Persons Present, etc.*—It is well settled that the time and place of execution are not strictly part of the judgment or sentence, unless made so by statute.<sup>75</sup> Whether a convict sentenced to death shall be executed before or after sunrise, or within or without the walls of the jail, or within or outside of some other inclosure, and whether the enclosure within which he is executed shall be higher than the gallows, thus excluding the view of persons outside, are regulations that do not affect his substantial rights.<sup>76</sup>

**Statute Limiting Number and Character of Persons Permitted to Witness Execution.**—Likewise a requirement, applicable to crimes previously committed, limiting the number and character of those who may witness the ex-

criminal case upon an issue of fact which was not admissible under the rules of evidence as enforced by judicial decisions at the time the offense was committed." *Thompson v. Missouri*, 171 U. S. 380, 387, 43 L. Ed. 204.

**72. Law requiring solitary confinement between conviction and execution.**—*Medley, Petitioner*, 134 U. S. 160, 33 L. Ed. 835; *Savage, Petitioner*, 134 U. S. 176, 33 L. Ed. 842.

**Section 4 of the Minnesota act of April 24, 1889**, requiring that, after the issue of a warrant of execution by the governor, the prisoner shall be kept in solitary confinement in the jail, and certain persons only be allowed to visit him, held to be an independent provision of the statute applicable only to crimes committed after its enactment and not *ex post facto*. (Distinguishing *Medley, Petitioner*, 134 U. S. 160, 33 L. Ed. 835, upon the ground that in that case the statute was plainly intended to cover the whole subject and to apply the provision as to solitary confinement to persons convicted of crimes before its enactment as well as to the case of persons convicted of crime committed after its enactment.) *Holden v. Minnesota*, 137 U. S. 483, 492, 34 L. Ed. 734.

**73. Law requiring close confinement.**—*Rooney v. North Dakota*, 196 U. S. 319, 326, 49 L. Ed. 494.

"It is contended that 'close confinement' means 'solitary confinement,' and *Medley, Petitioner*, 134 U. S. 160, 33 L. Ed. 835, is cited in support of the contention that the new law increased the punishment to the disadvantage of the ac-

cused. We do not think that the two phrases import the same kind of punishment. Although solitary confinement may involve close confinement, a criminal could be kept in close confinement without being subjected to solitary confinement. It cannot be supposed that any criminal would be subjected to solitary confinement when the mandate of the law was simply to keep him in close confinement." *Rooney v. North Dakota*, 196 U. S. 319, 326, 49 L. Ed. 494.

**74. Same; substituting confinement in penitentiary for confinement in jail, pending execution.**—*Rooney v. North Dakota*, 196 U. S. 319, 326, 49 L. Ed. 494.

**75. Laws touching time and place of execution.**—*Holden v. Minnesota*, 137 U. S. 483, 34 L. Ed. 734; *Schwab v. Berggren*, 143 U. S. 442, 451, 36 L. Ed. 218; *In re Cross*, 146 U. S. 271, 277, 36 L. Ed. 969; *Rooney v. North Dakota*, 196 U. S. 319, 325, 49 L. Ed. 494.

"The time of execution is not part of the sentence of death unless made so by statute." *In re Cross*, 146 U. S. 271, 277, 36 L. Ed. 969.

**76. Same.**—*Holden v. Minnesota*, 137 U. S. 483, 491, 34 L. Ed. 734.

Therefore a statute applicable to crimes committed before its enactment, and providing that persons convicted thereof shall be executed before sunrise within the walls of the jail or some other enclosure higher than the gallows, excluding the view of persons outside, is not *ex post facto* within the meaning of the constitutional provision. *Holden v. Minnesota*, 137 U. S. 483, 491, 34 L. Ed. 734.

ecution, and the exclusion altogether of reporters and newspaper representatives, is not *ex post facto*.<sup>77</sup>

**Statute Increasing Time between Conviction and Execution.**—So a statute which increases the period between the time of conviction and the execution of a death sentence, thereby giving the condemned person a longer lease on life, is not *ex post facto*.<sup>78</sup>

**Same; Changing Place of Confinement and Execution.**—Neither is such a statute unconstitutional because it changes the place of confinement pending execution and the place of execution itself from the county jail to the state prison.<sup>79</sup>

**Law Making Time of Execution Secret and Uncertain.**—But a statute requiring the warden of the state prison to fix the day of death of persons condemned to execution for murder, and to keep the same secret from such condemned person, is an *ex post facto* law when it is sought to be applied to the case of one convicted of murder committed previous to its enactment, and which at the time of its commission was punishable by death only without any such requirement as to secrecy and uncertainty as to the time of inflicting the punishment.<sup>80</sup>

i. *Laws Respecting Right of Appeal.*—**Vested Right in Right of Review.**—See ante, "Power to Destroy or Impede Right of Appeal, Writ of Error, etc.," VIII, C, 13, i.

**Allowing State to Appeal in Criminal Cases.**—A statute enacted subsequent to the commission of an offense, and giving the state a right of appeal in a class of cases in which it did not have it before, is not, as applied to that offense, an *ex post facto* law.<sup>81</sup>

**77. Number and character of persons permitted to witness execution.**—Holden v. Minnesota, 137 U. S. 483, 491, 34 L. Ed. 734.

**78. Increasing time between conviction and execution.**—Rooney v. North Dakota, 196 U. S. 319, 326, 49 L. Ed. 494.

A statute (Laws of North Dakota, March 9, 1903, ch. 99) which substituted "close confinement in the penitentiary for not less than six months and not more than nine months after judgment and before execution," for "confinement in the county jail for not less than three months nor more than six months after judgment and before execution," and which substituted "hanging, within an inclosure at the penitentiary by the warden or his deputy," for "hanging by the sheriff within the yard of the jail of the county in which the conviction occurred," is not repugnant to the constitutional provision declaring that no state shall pass an *ex post facto* law. Rooney v. North Dakota, 196 U. S. 319, 324, 49 L. Ed. 494.

"The giving, by the later statute, of three months' additional time to live, after the rendition of judgment, was clearly to his advantage, for the court must assume that every rational person desires to live as long as he may. If the shortening of the time of confinement, whether in the county jail or in the penitentiary before execution, would have increased, as undoubtedly it would have increased, the punishment to the disadvantage of a criminal sentenced to be hung, the enlargement of such time must be deemed a change for his benefit. So that

a statute which mitigates the rigor of the law in force at the time a crime was committed cannot be regarded as *ex post facto* with reference to that crime." Rooney v. North Dakota, 196 U. S. 319, 325, 49 L. Ed. 494.

"Besides, the extension of the time to live, given by the later law, increased the opportunity of the accused to obtain a pardon or commutation from the governor of the state before his execution." Rooney v. North Dakota, 196 U. S. 319, 325, 49 L. Ed. 494.

**79. Changing place of confinement as well as place of execution.**—Rooney v. North Dakota, 196 U. S. 319, 326, 49 L. Ed. 494.

"The objection that the later law required the execution of the sentence of death to take place within the limits of the penitentiary rather than in the county jail, as provided in the previous statute, is without merit. However material the place of confinement may be in case of some crimes not involving life, the place of execution, when the punishment is death, within the limits of the state, is of no practical consequence to the criminal. On such a matter he is not entitled to be heard." Rooney v. North Dakota, 196 U. S. 319, 326, 49 L. Ed. 494.

**80. Making time of execution secret and uncertain.**—Medley, Petitioner, 134 U. S. 160, 33 L. Ed. 835; Savage, Petitioner, 134 U. S. 176, 33 L. Ed. 842.

**81. Retrospective law allowing state to appeal in criminal cases.**—Mallett v. North Carolina, 181 U. S. 589, 45 L. Ed. 1015.

In a case where the defendant convicted



6. PROMULGATION OF EX POST FACTO LAW BY JUDICIAL DECISION, GIVING OF INSTRUCTIONS, ETC.—The refusal of a trial judge to give an instruction treating of murder in the second degree, as required by the law applicable to all cases of homicide at the time of the commission of the crime, does not promulgate any ex post facto law where the supreme court of the state has previously construed such statute as not requiring an instruction upon the law of murder in the second degree in cases where there is no evidence from which, by any possible legitimate construction, the jury can conclude that a homicide was murder in the second degree.<sup>82</sup>

**CONSTRUCTION.**—See, generally, the titles INTERPRETATION AND CONSTRUCTION; PAROL EVIDENCE. As to construction of contracts, see the titles CONTRACTS; WORKING CONTRACTS. As to construction of deeds, see the title DEEDS. As to construction of wills, see the title WILLS. As to construction of statutes, see the title STATUTES. As to construction of pleadings, see the title PLEADING. As to construction of leases, see the title LANDLORD AND TENANT. As to construction of bonds, see the title BONDS, vol. 3, p. 406. As to construction of awards, see the title ARBITRATION AND AWARD, vol. 2, p. 484. As to construction of assignments, see the title ASSIGNMENTS, vol. 2, p. 572. As to construction of covenants, see the title COVENANTS. As to construction of records, see the titles APPEAL AND ERROR, vol. 2, p. 250; RECORDS. As to construction of compromise and settlement, see the title COMPROMISE AND SETTLEMENT, vol. 3, p. 989. As to construction of bill of lading, see the title BILL OF LADING, vol. 3, p. 238. See, also, the other various specific titles for this question.

**CONSTRUCTIVE NOTICE.**—Mr. Justice Story in his work on Equity Jurisprudence, § 399, says that constructive notice is in its nature no more than evidence of notice, the presumption of which is so violent, that the court will not allow even of its being controverted.<sup>1</sup>

of crime was entitled to appeal to an intermediate court known as the superior court, it was held that a statute enacted after his trial and conviction in the lower court, but before the perfection of his appeal to such intermediate court, and allowing to the state an appeal from the judgment of the intermediate court setting aside the judgment and verdict of the trial court and awarding a new trial, was not unconstitutional as an ex post facto law. Such act did not make that a criminal act which was innocent when done; did not aggravate an offense or change the punishment; did not alter the rules of evidence; and did not deprive the accused of any substantial right or immunity possessed by him at the time of the commission of the offense charged. *Mallett v. North Carolina*, 181 U. S. 589, 597, 45 L. Ed. 1015.

82. Promulgating ex post facto law by decision, instruction, etc.—*Davis v. Texas*, 139 U. S. 651, 653, 655, 35 L. Ed. 300.

**Refusing to instruct upon law of murder in second degree.**—The Penal Code of Texas (art. 607) provides, that if the jury shall find any person guilty of murder, they shall also find by their verdict whether it is of the first or second degree; and that if any person shall plead guilty to an indictment for murder, a jury shall be summoned to find of what degree of murder he is guilty. The Code of Crimi-

nal Procedure, art. 676, declares that the jury are the exclusive judges of the facts in the cause, but not of law in any case, and that they are bound to receive the law from the court and be governed thereby. By the uniform course of decisions of the state court of last resort, it is proper, where there is no evidence from which, by any possible legitimate construction, the jury can conclude that a homicide was murder in the second degree, for the court to decline to submit to the jury the issue and law of murder in the second degree. Held that under this state of the statutes and decisions, the giving to the jury, by the trial judge, of an instruction which did not treat of murder in the second degree, was not the promulgation and enforcement of any ex post facto law in violation of the constitution of the United States; nor did such action on the part of the trial judge amount to the denial of due process of law nor the equal protection of the laws. *Davis v. Texas*, 139 U. S. 651, 653, 655, 35 L. Ed. 300.

1. **Constructive notice.**—In later editions of Story's Equity Jurisprudence, Judge Redfield (11th Ed. § 410 a), says that the term **constructive notice** "is applied, indiscriminately, to such notice as is not susceptible of being explained or rebutted, and to that which may be. It seems more appropriate to the former

**CONSTRUCTIVE SERVICE.**—See the titles *APPEAL AND ERROR*, vol. 2, p. 164; *SUMMONS AND PROCESS*.

**CONSTRUCTIVE TOTAL LOSS.**—See the title *MARINE INSURANCE*.

**CONSTRUCTIVE TRUSTS.**—See the title *TRUSTS AND TRUSTEES*.

**CONSULAR COURTS.**—See the title *AMBASSADORS AND CONSULS*, vol. 1, p. 283.

**CONSULS.**—See the title *AMBASSADORS AND CONSULS*, vol. 1, p. 273.

**CONTAGIOUS.**—See the titles *ANIMALS*, vol. 1, p. 324; *HEALTH*. See note 1.

**CONTEMPLATION OF BANKRUPTCY.**—See the title *BANKRUPTCY*, vol. 2, p. 933.

**CONTEMPORANEOUS.**—See note 2.

**CONTEMPORANEOUS CONSTRUCTION.**—See the title *STATUTES*.

kind of notices. It will then include notice by the registry, and notice by lis pendens. But such notice as depends upon possession, upon knowledge of an agent, upon facts to put one upon inquiry, and some other similar matters, although often called **constructive notice**, is rather implied notice, or presumptive notice, subject to be rebutted or explained. **Constructive notice** is thus a conclusive presumption or a presumption of law, while implied notice is a mere presumption of fact." Quoted in *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 439, 35 L. Ed. 1062.

As to purchasers for value and without notice, see the title *VENDOR AND PURCHASER*.

1. **Contagious.**—In *Grayson v. Lynch*, 163 U. S. 468, 477, 41 L. Ed. 230, it is said: "A variance is also claimed between the allegation that the disease was a **contagious** one, and the finding of the

court that Texas fever is not communicated by contact, but is an 'infectious' disease. There is doubtless a technical distinction between the two in the fact that a **contagious** disease is communicable by contact, or by bodily exhalation, while an infectious disease pre-supposes a cause acting by hidden influences, like the miasma of prison ships or marshes, etc., or through the pollution of water or the atmosphere, or from the various ejections from animals. The word **contagious**, however, is often used in a similar sense of pestilential or poisonous, and is not strictly confined to influences emanating directly from the body."

2. **Contemporaneous.**—As to refreshing witness' memory by **contemporaneous** memoranda, see the title *WITNESSES*. And see *Putman v. United States*, 162 U. S. 687, 40 L. Ed. 1118, as to the meaning of **contemporaneous** in this connection.

# CONTEMPT.

BY E. PHILIP STEINHAEUER.

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## **XI. Appeal and Error, 542.**

### **CROSS REFERENCES.**

See the titles **APPEAL AND ERROR**, vol. 1, p. 333; **HABEAS CORPUS**; **INJUNCTIONS**; **RECEIVERS**; **WITNESSES**.

### **I. Definition and Character of Offense.**

**A. Definition.**—Contempt is a willful disregard of the authority of a court of justice or legislative body or disobedience to its lawful orders.<sup>1</sup>

**B. Character of Offense.**—Contempt of court is a specific criminal offense.<sup>2</sup>

### **II. Purpose and Nature of Proceedings.**

**A. Purpose.**—The purpose of contempt proceedings is to uphold the power of the court and also to secure to suitors therein the rights by it awarded.<sup>3</sup> Punishments for contempt of court have two aspects, namely: 1. To vindicate the dignity of the court from disrespect shown to it or its orders. 2. To compel the performance of some order or decree of the court which it is in the power of the party to perform and which he refuses to obey.<sup>4</sup>

**B. Nature.**—A contempt proceeding is *sui generis*. It is criminal in its nature, in that the party is charged with doing something forbidden, and, if found guilty, is punished. Yet it may be resorted to in civil as well as criminal actions, and also independently of any civil or criminal action.<sup>5</sup>

**Secures Suitors' Rights.**—A court enforcing obedience to its orders by proceedings for contempt is not executing the criminal laws of the land, but only securing to suitors the rights which it has adjudged them entitled to.<sup>6</sup>

**Element of Personal Injury.**—A criminal contempt involves no element of personal injury. It is directed against the power and dignity of the court, and private parties have little if any interest in the proceedings for its punishment. But if the contempt consists in the refusal of a party or a person to do an act which the court has ordered him to do for the benefit or the advantage of a party to a suit or action pending before it, and he is committed until he complies with the order, the commitment is in the nature of an execution to enforce the judgment of the court, and the party in whose favor that judgment was rendered is the real party in interest in the proceedings.<sup>7</sup>

### **III. Power to Punish.**

**A. Power of Court**—1. **INHERENT POWER.**—The power to punish for contempts is inherent in all courts.<sup>8</sup> The power to fine for contempt, imprison

1. **Definition.**—Black 'L. Dict.

2. **Character of offense.**—New Orleans *v. Steamship Co.*, 20 Wall. 387, 392, 22 L. Ed. 354; *In re Swan*, 150 U. S. 637, 652, 37 L. Ed. 1207; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 38 L. Ed. 1047; *Bessette v. Conkey Co.*, 194 U. S. 324, 48 L. Ed. 997. See post, "Nature," II, B.

3. **Purpose.**—*Bessette v. Conkey Co.*, 194 U. S. 324, 327, 48 L. Ed. 997, reaffirmed in *The Matter of Lewis*, 202 U. S. 614, 50 L. Ed. 1172.

4. *In re Chiles*, 22 Wall. 157, 22 L. Ed. 819; *Bessette v. Conkey Co.*, 194 U. S. 324, 337, 48 L. Ed. 997; *In The Matter of Lewis*, 202 U. S. 614, 50 L. Ed. 1172; *Eureka Lake, etc., Canal Co. v. Superior Court*, 116 U. S. 410, 417, 29 L. Ed. 671.

5. **Nature.**—*Bessette v. Conkey Co.*, 194 U. S. 324, 326, 48 L. Ed. 997, reaffirmed in *The Matter of Lewis*, 202 U. S. 614, 50 L. Ed. 1172.

6. **Secures suitors' rights.**—*In re Debs*, 158 U. S. 564, 596, 39 L. Ed. 1092.

7. **Element of personal injury.**—*Bessette v. Conkey Co.*, 194 U. S. 324, 328, 48 L. Ed. 997, reaffirmed in *The Matter of Lewis*, 202 U. S. 614, 50 L. Ed. 1172.

8. **Inherent power.**—*Ex parte Robinson*, 19 Wall. 505, 510, 22 L. Ed. 205; *Ex parte Terry*, 128 U. S. 289, 32 L. Ed. 405. See, generally, the title **COURTS**.

"The summary power to commit and

for contumacy, or enforce the observance of order, are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others; and such powers are given to the circuit courts by implication.<sup>9</sup> And this inherent power is recognized and enforced by a statute (§ 725, Rev. Stat.) expressly authorizing courts of the United States to punish contempts of their authority when manifested by disobedience of their lawful writs, process, orders, rules, decrees, or commands.<sup>10</sup>

**Necessity of.**—The existence of the inherent power of courts to punish for contempts is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice.<sup>11</sup>

2. **LIMITATION OF.**—Under the act of congress of 1789, the question whether particular acts constitute a contempt, as well as the mode of proceeding against the offender, was left to be determined according to established rules and principles of the common law. The act of 1831, however, materially modified that of 1789.<sup>12</sup> The act, in terms, applies to all courts; whether it can be held to limit the authority of the supreme court, which derives its existence and powers from the constitution, may perhaps be a matter of doubt. But that it

punish for contempts tending to obstruct or degrade the administration of justice,' is inherent in courts of chancery and other superior courts, as essential to the execution of their powers and to the maintenance of their authority, and is part of the law of the land, within the meaning of *Magna Charta*." *Ex parte Terry*, 128 U. S. 289, 303, 32 L. Ed. 405.

Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect and decorum in their presence, and submission to their lawful mandates, and as a corollary to this proposition, to preserve themselves and their officers from the approach and insults of pollution. *Anderson v. Dunn*, 6 Wheat. 204, 226, 5 L. Ed. 242. *Ex parte Terry*, 128 U. S. 289, 303, 32 L. Ed. 405; *Eilenbecker v. Plymouth County*, 134 U. S. 31, 36, 33 L. Ed. 801.

**United States courts.**—From the very nature of their institution, and that their lawful judgments may be respected and enforced, the courts of the United States possess the power to punish for contempt. *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 489, 38 L. Ed. 1047, reaffirmed in *In re Lochren Commissioner*, 163 U. S. 692, 41 L. Ed. 319.

9. *United States v. Hudson*, 7 Cranch 32, 33, 3 L. Ed. 259; *Ex parte Crane*, 5 Pet. 190, 210, 8 L. Ed. 92; *Ex parte Terry*, 128 U. S. 289, 302, 32 L. Ed. 405; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 489, 38 L. Ed. 1047.

**Section 2005, Comp. laws of the territory of New Mexico**, provides that whenever a peremptory mandamus is directed to a public officer, body or board, commanding the performance of any public duty, and he refuses to perform the duty so enjoined he may be fined; but such provision does not exclude the power of the court to punish for contempt for disobedience of the writ, or to compel obedience to the writ by imprisonment until

compliance. *In re Delgado*, 140 U. S. 586, 588, 589, 35 L. Ed. 578. See post, "In Presence of Court," V, B.

10. *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 489, 38 L. Ed. 1047, reaffirmed in *In re Lochren Commissioner*, 163 U. S. 692, 41 L. Ed. 319; Rev. Stat., § 725; 1 Stat. 83; 4 Stat. 487; *United States v. Hudson*, 7 Cranch 32, 3 L. Ed. 259; *Anderson v. Dunn*, 6 Wheat. 204, 227, 5 L. Ed. 242; *Ex parte Robinson*, 19 Wall. 505, 510, 22 L. Ed. 205; *Ex parte Terry*, 128 U. S. 289, 302, 303, 32 L. Ed. 405.

11. **Necessity of.**—*Ex parte Robinson*, 19 Wall. 505, 510, 22 L. Ed. 205; *Ex parte Terry*, 128 U. S. 289, 32 L. Ed. 405.

"We have seen that it is a settled doctrine in the jurisprudence both of England and of this country, never supposed to be in conflict with the liberty of the citizen, that for direct contempts committed in the face of the court, at least one of superior jurisdiction, the offender may, in its discretion, be instantly apprehended and immediately imprisoned, without trial or issue, and without other proof than its actual knowledge of what occurred; and that, according to an unbroken chain of authorities, reaching back to the earliest times, such power, although arbitrary in its nature and liable to abuse, is absolutely essential to the protection of the courts in the discharge of their functions. Without it, judicial tribunals would be at the mercy of the disorderly and violent, who respect neither the laws enacted for the vindication of public and private rights, nor the officers charged with the duty of administering them." *Ex parte Terry*, 128 U. S. 289, 313, 32 L. Ed. 405.

12. **Limitation of.**—*In re Savin*, 131 U. S. 267, 275, 33 L. Ed. 150; *Ex parte Robinson*, 19 Wall. 505, 511, 22 L. Ed. 205; *Ex parte Bradley*, 7 Wall. 364, 372, 19 L. Ed. 214.

applies to the circuit and district courts there can be no question. These courts were created by act of congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction. The act of 1831 is, therefore, to them the law specifying the cases in which summary punishment for contempts may be inflicted. It limits the power of these courts in this respect to three classes of cases: 1st, where there has been misbehavior of a person in the presence of the courts, or so near thereto as to obstruct the administration of justice; 2d, where there has been misbehavior of any officer of the courts in his official transactions; and, 3d, where there has been disobedience or resistance by any officer, party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the courts.<sup>13</sup>

**B. Power of Legislative Bodies.**—See post, "Power of Legislative Bodies," X.

**C. Subordinate Administrative Bodies.**—No other bodies than the legislative or judicial have power to punish for contempt,<sup>14</sup> for in a judicial sense, there is no such thing as contempt of a subordinate administrative body.<sup>15</sup>

#### IV. Where There Is Doubt as to Defendant's Misconduct.

Process of contempt is a severe remedy, and should not be resorted to where there is fair ground of doubt as to the wrongfulness of the defendant's conduct.<sup>16</sup>

#### V. What Constitutes Contempt.

**A. In General.**—It is contempt of court to disobey the court's lawful writs, process, orders, rules, decrees, or commands.<sup>17</sup>

13. *Ex parte Robinson*, 19 Wall. 505, 22 L. Ed. 205.

14. **Subordinate administrative bodies.**—*Anderson v. Dunn*, 6 Wheat. 204, 232. 5 L. Ed. 242.

15. In *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 489. 38 L. Ed. 1047, where it was held one could not be adjudged guilty of contempt by an interstate commerce commissioner, for refusing to answer questions asked by such commissioner.

16. **Doubt as to defendant's misconduct.**—*California, etc., Paving Co. v. Molitor*, 113 U. S. 609, 618, 28 L. Ed. 1106.

In *California, etc., Paving Co. v. Molitor*, 113 U. S. 609, 28 L. Ed. 1106, where the defendant was enjoined from infringing plaintiff's patent, and afterwards used a new process which he claimed was different from the one he was enjoined from using, and the court was divided on the question as to the truth of such defense; held, that under such circumstances, the remedy should not be by process of contempt.

17. **In general.**—Section 728, Rev. Stat. *United States v. Hudson*, 7 Cranch 32, 3 L. Ed. 259; *Anderson v. Dunn*, 6 Wheat. 204. 5 L. Ed. 242; *Ex parte Robinson*, 19 Wall. 505, 22 L. Ed. 205; *Ex parte Terry*, 128 U. S. 289, 32 L. Ed. 405; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 38 L. Ed. 1047.

**Supersedeas.**—Where a person is removed from office by a judgment of a state court, and then seeks to have the judgment reversed on a writ of error to

the supreme court, his appointed successor is not guilty of contempt if he assumes to carry out his duties after a supersedeas bond is approved, but before it is filed in the clerk's office. *Foster v. Kansas*, 112 U. S. 201, 28 L. Ed. 629. See, generally, the title SUPERSEDEAS AND STAY OF PROCEEDINGS.

**Lynching defendant who has appealed to supreme court.**—If a person is sentenced to death in a state court, and petitions to the circuit court of the United States for a writ of habeas corpus, which writ the circuit court is without jurisdiction to entertain, and then appeals to the supreme court from the decision of the circuit court denying the order, the supreme court, even though it has no jurisdiction of the appeal, has jurisdiction to decide whether the case is properly before it, and until its judgment declining jurisdiction is announced, it has authority to make orders to preserve the existing conditions, and anyone disobeying such orders will be guilty of contempt. So held in *United States v. Shipp*, 203 U. S. 563, 573, 51 L. Ed. 319, where a negro sentenced to death in a state court sought a writ of habeas corpus in the circuit court of the United States; the circuit court was without jurisdiction to entertain the petition and denied the writ; he then appealed to the supreme court and it ordered that "all proceedings against the appellant be stayed, and the custody of said appellant be retained pending this appeal." With knowledge of such order



**B. In Presence of Court.—In General.**—Although an offense is indictable, it may be punished for contempt when the offender is guilty of misbehavior in the presence of the court or misbehavior so near thereto as to obstruct the administration of justice.<sup>18</sup>

**What Constitutes "Presence."**—The act is committed in the presence of the court if done in the place set apart for the use of the court, its officers, jurors and witnesses.<sup>19</sup>

**Retirement from Court Room.**—The power of the court to punish for contempt is not lost by the retirement of the guilty person from the court room after he has committed the contempt. It may order his immediate imprisonment without other proof than that supplied by its actual knowledge and view of the facts and without examination on trial in any form.<sup>20</sup> And his departure, without making some apology for, or explanation of, his conduct, might justly be held to aggravate his offense.<sup>21</sup>

**C. Disobedience of Order of Court**—1. **NECESSITY FOR NOTICE OF ORDER.**—A person cannot be guilty of a contempt for not obeying an order of the court until such order has been made and he is aware of it.<sup>22</sup>

2. **VIOLATION OF ORDER OF INJUNCTION.**—A person commits a contempt of court if he violates an order of injunction lawfully made, by a court of competent jurisdiction.<sup>23</sup> But a person is not guilty of contempt for violating

and with intent to hinder the delay required for the trial of the appeal, certain persons created a mob and hanged the prisoner. Held, that such acts constituted contempt of court.

**Pocketing the venire.**—It has been held in Pennsylvania that to pocket the venire is contempt of court. *Keppel v. Williams*, 1 Dall. 29, 1 L. Ed. 23.

**18. In presence of court.**—In *re Savin*, 131 U. S. 267, 33 L. Ed. 150, where one attempted to bribe a witness outside of the court room not to testify against him. See, also, *Pettibone v. United States*, 148 U. S. 197, 206, 37 L. Ed. 419; In *re Delgado*, 140 U. S. 586, 35 L. Ed. 578.

**19. What constitutes presence.**—In *re Cuddy*, 131 U. S. 280, 284, 33 L. Ed. 154; In *re Savin*, 131 U. S. 267, 277, 33 L. Ed. 150.

In *re Savin*, 131 U. S. 267, 268, 277, 33 L. Ed. 150, where one was in attendance upon the court in obedience to a subpoena commanding him to appear as a witness in behalf of one of the parties to a case then being tried, while he was so in attendance, and when in the jury room, temporarily used as a witness room, the appellant endeavored to deter him from testifying in favor of the government in whose behalf he had been summoned; and, on the same occasion, and while the witness was in the hallway of the courtroom, the appellant offered him money not to testify against one Goujon, the defendant in that case. Held, that such acts constitute misbehavior in the presence of the court, and that the appellant could be punished, without an indictment, by fine and imprisonment for contempt of court.

**20. Retirement from court room.**—*Ex parte Terry*, 128 U. S. 289, 311, 32 L. Ed. 405.

"If, in order to avoid punishment, he

had absconded, or fled from the building, immediately after his conflict with the marshal, the court, in its discretion, and as the circumstances rendered proper, could have ordered process for his arrest and given him an opportunity, before sending him to jail, to answer the charge of having committed a contempt. But in such a case the failure to order his arrest, and to give him such opportunity of defense, would not affect its power to inflict instant punishment. Jurisdiction to inflict such punishment having attached while he was in the presence of the court, it would not have been defeated or lost by his flight and voluntary absence." *Ex parte Terry*, 128 U. S. 289, 311, 32 L. Ed. 405.

**21. Ex parte Terry**, 128 U. S. 289, 311, 32 L. Ed. 405.

**22. Necessity for notice of order.**—In *re Chiles*, 22 Wall. 157, 169, 22 L. Ed. 819.

In *Wilson v. North Carolina*, 169 U. S. 586, 43 L. Ed. 865, a person was given the title to an office by a judgment in quo warranto proceedings, and took possession of the office in accord with such judgment after a writ of error was allowed and a supersedeas bond filed. He proved that he was in ignorance of the fact that the writ of error had been allowed or that the bond had been filed; held, that he was not guilty of contempt.

**23. Violation of order of injunction.**—A party is guilty of contempt of court where he has been perpetually enjoined from setting up any claim or title to certain bonds or coupons, and he subsequently asserts ownership openly and continuously, or claims ownership in a notice sent to a foreign country, although based upon a claim different from the one set up in the suit. In *re Chiles*, 22 Wall. 157, 22 L. Ed. 819. See, generally, the title **INJUNCTIONS**.

an injunction unwarranted as a matter of law,<sup>24</sup> for if a court is without jurisdiction to issue an injunction, its adjudication, that one disobeying such order is guilty of contempt, is void.<sup>25</sup>

**Excuse for Disobedience.**—A person is not guilty of contempt of court for violating an injunction if he was authorized to do so by higher authority,<sup>26</sup> or under certain circumstances, he may be excused at the discretion of the court.<sup>27</sup>

3. **REFUSAL TO OBEY WRIT OF MANDAMUS.**—A district judge is not guilty of contempt of court in a case where he is directed by mandamus by the supreme court, to reinstate certain suits which had been dismissed from the docket, and to proceed to adjudicate them according to law, and he does reinstate the suits and orders them for trial as directed by the court, but delays take place so that a verdict can be given on only one of them, and he suspends judgment on this verdict in order to take time to consider a motion for a new trial.<sup>28</sup>

**D. Misconduct of Witnesses**—1. **DISOBEYING ORDER OF WITHDRAWAL.**—If a witness disobeys the order of withdrawal, he may be proceeded against for contempt.<sup>29</sup>

2. **DISOBEYING SUBPŒNA.**—It has been held in Pennsylvania that when witnesses are so much indisposed as to be incapable of attending in obedience to the subpœna, they are not in contempt of court by their absence.<sup>30</sup>

3. **REFUSAL TO TESTIFY**—a. *In General.*—A person commits contempt of court if he refuses to testify.<sup>31</sup>

b. *Constitutional and Statutory Immunity.*—**Fifth Amendment.**—The fifth amendment to the constitution provides that no person "shall be compelled in any criminal case to be a witness against himself" therefore, under such circumstances, a person cannot be adjudged guilty of contempt in refusing to answer.<sup>32</sup>

**Section 860, Rev. Stat.**—And as legislation cannot detract from the privilege afforded by the constitution, a person cannot be compelled to testify as a witness against himself under § 860 of the Revised Statute, for the protection of such statute is not co-extensive with the constitutional provision.<sup>33</sup>

24. *Worden v. Searls*, 121 U. S. 14, 26, 30 L. Ed. 853.

25. *In re Sawyer*, 124 U. S. 200, 31 L. Ed. 402.

26. **Excuse for disobedience.**—Where city authorities are perpetually enjoined by a state court from levying and collecting a tax for the payment of principal and interest on certain bonds, and are subsequently ordered by mandamus, issued by the circuit court of the United States, to make such levy in aid of execution of a judgment, the state court cannot regard the officers as guilty of contempt by complying with the order of the circuit court. In *United States v. Keokuk*, 6 Wall. 514, 548, 18 L. Ed. 933, affirming *Riggs v. Johnson County*, 6 Wall. 166, 18 L. Ed. 768.

27. Where the supreme court ordered, by injunction, the removal or remodeling of a bridge over the Ohio river, and such bridge was subsequently blown down, and a judge in vacation then enjoined its being rebuilt except in conformity with the previous decree of the supreme court, but the bridge was rebuilt in disregard of such order, and subsequently congress declared the bridge to be lawful; the supreme court held that the act of congress afforded full authority to the defendants

to reconstruct the bridge and that as the granting of an attachment for a disobedience of a decree rested in the discretion of the court, it would not grant an attachment for contempt. *Pennsylvania v. Wheeling, etc., Bridge Co.*, 18 How. 421, 436, 15 L. Ed. 435.

28. **Refusal to obey writ of mandamus.**—*Ex parte Bradstreet*, 8 Pet. 588, 8 L. Ed. 1054. See, generally, the title **MANDAMUS**.

29. **Disobeying order of withdrawal.**—*Holder v. United States*, 150 U. S. 91, 37 L. Ed. 1010. See, generally, the title **WITNESSES**.

30. **Disobeying subpœna.**—*Butcher v. Coats* (Pa. Sup. Ct.), 1 Dall. 340, 1 L. Ed. 166. See, generally, the title **WITNESSES**.

31. **In general.**—In a Pennsylvania case it was held that a Jew could be fined for contempt for refusing to testify on his Sabbath. *Stansbury v. Marks* (Pa. Sup. Ct.), 2 Dall. 213, 1 L. Ed. 333.

32. **Fifth amendment.**—*Counselman v. Hitchcock*, 142 U. S. 547, 35 L. Ed. 1110. See the title **WITNESSES**.

33. **Section 860.**—*Counselman v. Hitchcock*, 142 U. S. 547, 35 L. Ed. 1110. See the title **WITNESSES**.

**Act of 1893.**—By the act of congress of February 11, 1893, ch. 83, 27 Stat. 443, it is provided that full immunity shall be given any person testifying as a witness against himself before the interstate commerce commission, and it is held that if a person refuses in such case, he will be guilty of contempt.<sup>34</sup>

**E. Acts Obstructing Administration of Justice**—1. **BREACH OF PEACE.**—A breach of the peace in open court is a direct disturbance and a palpable contempt of the authority of the court.<sup>35</sup>

2. **BRINGING A FICTITIOUS SUIT.**—Any attempt, by a mere colorable dispute, to obtain the opinion of the court upon a question of law, which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended, and treated as a punishable contempt of court.<sup>36</sup> And this rule is applicable to a case where an appellant becomes sole party in interest and dominus litis on both sides.<sup>37</sup>

3. **MISCONDUCT OF COUNSEL.**—If an attorney acts in good faith and in the honest belief that his advice is well founded, he cannot be adjudged guilty of contempt in advising a court where such advice turns out to be erroneous. The preservation of the independence of the bar is too vital to the due administration of justice to allow of the application of any other general rule.<sup>38</sup>

4. **INTERFERENCE WITH PROPERTY IN CUSTODIA LEGIS.**—**Property Held by Receiver.**—Money or property in the hands of a receiver is in custodia legis; the court will not allow him to be sued touching the property in his charge, nor for any malfeasance as to the parties, or others, without its consent; nor will it permit his possession to be disturbed by force, nor violence to be offered to his person while in the discharge of his official duties; in such cases the court will vindicate its authority, and, if need be, will punish the offender by fine and imprisonment for contempt.<sup>39</sup>

34. **Act of 1893.**—*Brown v. Walker*, 161 U. S. 591, 40 L. Ed. 819.

35. **Breach of peace.**—*Ex parte Terry*, 128 U. S. 289, 308, 32 L. Ed. 405.

36. **Bringing a fictitious suit.**—*Cleveland v. Chamberlain*, 1 Black, 419, 426, 17 L. Ed. 93; *Lord v. Veazie*, 8 How. 251, 254, 12 L. Ed. 1067.

To attempt to confer by a false and fraudulent averment, a jurisdiction upon a district court to which it is not entitled under the constitution, is a gross contempt of court. So held in *Eberly v. Moore*, 24 How. 147, 158, 16 L. Ed. 612, where the plaintiffs as citizens of Kentucky, commenced a suit in the district court against the defendants, as citizens of Texas, and the defendants charged that the plaintiffs were in fact citizens of Texas. See, generally, the titles **APPEAL AND ERROR**, vol. 1, p. 333; **FICTITIOUS SUIT**.

37. *Cleveland v. Chamberlain*, 1 Black, 419, 17 L. Ed. 93.

An appellant who becomes the equitable owner of the whole opposing interest, who procures a discontinuance as to his codefendants, against whom no final decree is made, employs counsel on both sides, and makes up a record to suit himself in order that he may obtain an opinion of this court, affecting the rights and interests of persons not parties to the pretended controversy, is justly chargeable with conduct highly reprehensible and a punishable contempt of court.

*Cleveland v. Chamberlain*, 1 Black, 419, 17 L. Ed. 93.

38. **Misconduct of counsel.**—In *re Watts*, 190 U. S. 1, 47 L. Ed. 933, where a state court acted upon the advice of attorneys and compelled a receiver appointed by a bankruptcy court to surrender certain property, held, that such attorneys were not guilty of contempt of the bankruptcy court, it appearing that they gave the advice in good faith.

39. **Property held by receiver.**—*Davis v. Gray*, 16 Wall. 203, 218, 21 L. Ed. 447; *Wiswall v. Sampson*, 14 How. 52, 14 L. Ed. 322; In *re Tyler*, 149 U. S. 164, 37 L. Ed. 689; *Taylor v. Carryl*, 20 How. 583, 15 L. Ed. 1028; *Krippendorf v. Hyde*, 110 U. S. 276, 25 L. Ed. 145; *Batton v. Barbour*, 104 U. S. 126, 26 L. Ed. 672; *Gumbel v. Pitkin*, 124 U. S. 131, 31 L. Ed. 374. See, generally, the title **RECEIVERS**.

In *re Tyler*, 149 U. S. 164, 37 L. Ed. 689, where a sheriff was enjoined by the circuit court from levying upon property in the hands of a receiver appointed by a circuit court of the United States, and after such order he retained possession of the property, it was held that he was guilty of contempt.

"The possession of property by the judicial department, whether federal or state, cannot be arbitrarily encroached upon without violating the fundamental principle, which requires co-ordinate de-



5. **PREJUDICIAL PUBLICATIONS IN NEWSPAPERS.—Pending Cause.**—If a court regards a publication concerning a matter of law pending before it, as tending to obstruct the administration of justice, it may punish the publisher for contempt, and the truth of the publication is no defense.<sup>40</sup> And it has been held in Pennsylvania, that to publish remarks in a newspaper, which tend to prejudice a court in the eyes of the public with respect to the merits of a cause pending in court, is a contempt of such court, punishable by attachment.<sup>41</sup>

**When Cause Finished.**—But when a case is finished, courts are subject to the same criticism as other people.<sup>42</sup>

6. **INFLUENCING JURORS.**—If a person attempts, in the presence of the court, to approach a prospective juror with a view of improperly influencing his actions, he is guilty of contempt, and may be punished by fine or imprisonment, at the discretion of the court, and without indictment.<sup>43</sup>

## VI. Purging Contempts.

The disavowal of intent, under oath, does not purge one of a contempt consisting of personal presence and overt acts.<sup>43a</sup>

## VII. Defenses.

**A. For Refusal to Testify.**—It is no defense in contempt proceedings against witnesses for refusing to answer questions or to produce papers, in regard to a corporation, that the questions are immaterial, and that the papers are not in their possession or under their control, and therefore the possession is not personal, but is that of the corporation.<sup>44</sup>

**B. That Judges Are Sitting in Their Own Cases.**—One cannot set up the defense that the judges are sitting in their own cases, for the grounds upon which contempts are punished are impersonal.<sup>45</sup>

partments to refrain from interference with the independence of each other, \* \* \* and the position that a petty officer can take property from the possession of a court without permission and without warrant, 'upon his own motion and without instructions from any other persons,' \* \* \* because in his view the duty is imposed upon him by a particular statute, and that the court is without power to pass upon the questions involved, or, if it does so, that its judgment may be treated with contemptuous defiance, is utterly inadmissible in any community assuming to be governed by law." In re Swan, 150 U. S. 637, 652, 37 L. Ed. 1207.

**40. Prejudicial publications in newspapers.**—Patterson v. Colorado, 205 U. S. 454, 463, 51 L. Ed. 879.

"The rule applied to criminal libels applies yet more clearly to contempts. A publication likely to reach the eyes of a jury, declaring a witness in a pending cause a perjurer, would be none the less a contempt that it was true. It would tend to obstruct the administration of justice, because even a correct conclusion is not to be reached or helped in that way, if our system of trials is to be maintained. The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or pub-

lic print." Patterson v. Colorado, 205 U. S. 454, 462, 51 L. Ed. 879.

**41. Respublica v. Oswald,** 1 Dall. 319, 1 L. Ed. 155.

**42. When cause finished.**—Patterson v. Colorado, 205 U. S. 454, 463, 51 L. Ed. 879.

**43. Influencing juror.**—In re Cuddy, 131 U. S. 280, 284, 33 L. Ed. 154. See the title **JURY**.

**43a. Purging contempts.**—In United States v. Shipp, 203 U. S. 563, 574, 51 L. Ed. 319, where a negro was hanged by a mob in violation of an order of the supreme court to stay proceedings pending an appeal, and on being tried for contempt of such order the defendants severally denied under oath that they had anything to do with the murder, it was held, that such denial under oath did not purge them of contempt. See post, "Right to Notice and Hearing," VIII. D.

**44. Refusal to testify.**—Nelson v. United States, 201 U. S. 92, 50 L. Ed. 673. See, generally, the titles **PRODUCTION OF DOCUMENTS; WITNESSES**. See ante, "Constitutional and Statutory Immunity," V. D, 3. b.

**45. Patterson v. Colorado,** 205 U. S. 454, 463, 51 L. Ed. 879, citing United States v. Shipp, 203 U. S. 563, 574, 51 L. Ed. 319.

"No doubt judges naturally would be slower to punish when the contempt carried with it a personally dishonoring

## VIII. Procedure and Practice.

**A. Jurisdiction.—When Jurisdiction Attaches.**—Jurisdiction to punish for contempt attaches instantly upon the contempt being committed in the presence of the court.<sup>46</sup>

**When Court Acts without Authority.**—A court has no right in law to punish for any contempt of its unauthorized requirements.<sup>47</sup> Therefore, an order committing a person for contempt is a nullity where the court is without the jurisdiction to make the order.<sup>48</sup> For example, if the command of a writ of mandamus is in whole or in part beyond the power of the court, the writ, or so much as is in excess of jurisdiction, is void, and the court has no right to punish for any contempt of such unauthorized requirement.<sup>49</sup>

**B. Summary Proceedings.**—The courts of the United States, may, under the Revised Statutes, proceed summarily for contempt.<sup>50</sup>

**C. Right to Trial by Jury.**—A jury trial is not necessary to due process of law on an inquiry for contempt.<sup>51</sup>

**D. Right to Notice and Hearing.—To Notice.**—Where a contempt is committed in the presence of the court, no other notice is usually necessary.<sup>52</sup>

**By an Attorney.**—But a proceeding to punish an attorney generally for misbehavior in his office, or for any particular instance of misbehavior, stands on very different ground, he must be given notice or opportunity to defend.<sup>53</sup>

**To Be Heard.**—A court possessing plenary power to punish for contempt has no right to summon a defendant to answer, and then after obtaining jurisdiction

charge, but a man cannot expect to secure immunity from punishment by the proper tribunal, by adding to illegal conduct a personal attack." *Patterson v. Colorado*, 205 U. S. 454, 463, 51 L. Ed. 879.

**46. When jurisdiction attaches.**—*Ex parte Terry*, 128 U. S. 289, 311, 32 L. Ed. 405.

**47. When court acts without authority.**—*Ex parte Rowland*, 104 U. S. 604, 612, 26 L. Ed. 861.

**48. Ex parte Terry**, 128 U. S. 289, 305, 32 L. Ed. 405.

**49. In Ex parte Rowland**, 104 U. S. 604, 612, 26 L. Ed. 861, it was held, that where county commissioners are charged with the duty of levying and assessing a special tax and do all they can to enable the collector to proceed with the collection, they cannot be lawfully ordered by mandamus to cause the tax to be collected, and if so ordered, they will not be guilty of contempt if they disobey the order. See, also, *In re Ayers*, 123 U. S. 443, 486, 31 L. Ed. 216.

A district court is without jurisdiction to compel, by habeas corpus, a grandparent to deliver a child to its father, and therefore, an attempt to enforce the judgment by attachment and imprisonment of the grandparent for contempt of the order is void. *In re Burrus*, 136 U. S. 586, 597, 34 L. Ed. 500.

**50. Summary proceedings.**—*In re Savin*, 131 U. S. 267, 276, 33 L. Ed. 150; *Eilenbecker v. Plymouth County*, 134 U. S. 31, 33 L. Ed. 801; *Thomas v. Kansas*, 205 U. S. 535, 536, 51 L. Ed. 919.

"And although the word 'summary' was, for some reason, not repeated in the pres-

ent revision, which invests the courts of the United States with power 'to punish by fine or imprisonment, at the discretion of the court, contempts of their authority' in certain cases defined in § 725, we do not doubt that the power to proceed summarily, for contempt, in those cases, remains, as under the act of 1831, with those courts." *In re Savin*, 131 U. S. 267, 276, 33 L. Ed. 150. It was, in effect, so adjudged in *Ex parte Terry*, 128 U. S. 289, 32 L. Ed. 405.

A contempt of court is an offense against the court and against the administration of justice, for which courts have always had the right to punish the party by summary proceeding and without trial by jury; and in that sense it is due process of law within the meaning of the fourteenth amendment of the constitution. That provision of the constitution was never intended to interfere with or abolish the powers of the courts in proceedings for contempt, whether this contempt occurred in the course of a criminal proceeding or of a civil suit. *Eilenbecker v. Plymouth County*, 134 U. S. 31, 39, 33 L. Ed. 801, reaffirmed in *Thomas v. Kansas*, 205 U. S. 535, 536, 51 L. Ed. 919.

**51. Right to trial by jury.**—*Tinsley v. Anderson*, 171 U. S. 101, 108, 43 L. Ed. 91, reaffirmed in *Spaugh v. Fitts*, 205 U. S. 540, 51 L. Ed. 921; *Dreyer v. Pease*, 176 U. S. 681, 44 L. Ed. 637; *Dav v. Conley & McTague*, 179 U. S. 679, 680, 45 L. Ed. 383; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 38 L. Ed. 1047. See, generally, the title JURY.

**52. To notice.**—*Ex parte Bradley*, 7 Wall. 364, 373, 19 L. Ed. 214.

**53. By an attorney.**—*Ex parte Bradley*, 7 Wall. 364, 373, 19 L. Ed. 214.

by the summons, refuse to allow the party summoned to answer or strike his answer from the files, suppress the testimony in his favor, and condemn him without consideration thereof and without a hearing, on the theory that he has been guilty of a contempt of court.<sup>54</sup>

**E. Relief by Habeas Corpus.**—When a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for the contempt is equally void. And when the proceedings for contempt in such a case results in imprisonment, the supreme court will by its writ of habeas corpus, discharge the prisoner.<sup>55</sup>

**F. Effect and Conclusiveness of Adjudication.**—**Effect.**—When a court commits a party for a contempt, their adjudication is a conviction, and their commitment, in consequence, is execution.<sup>56</sup>

**Conclusiveness.**—The sole adjudication for contempt, and the punishment thereof, belongs exclusively and without interference to each respective court.<sup>57</sup> The power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court.<sup>58</sup>

## IX. Punishment.

Where a person commits a contempt in the presence of a United States court, he may be punished under § 725, Rev. Stat., by fine or imprisonment, at the discretion of the court, and without indictment.<sup>59</sup>

## X. Power of Legislative Bodies.

**A. Source of Power.**—The right of the house of representatives to punish the citizen for a contempt of its authority or a breach of its privileges can derive no support from the precedents and practices of the two houses of English

**54. To be heard.**—*Hovey v. Elliott*, 167 U. S. 409, 413, 42 L. Ed. 215.

It is not necessary for the court to require service of interrogatories upon the person charged with contempt, so that, in answering them, he can purge himself of the contempt charged. It can, in its discretion, adopt such mode of determining that question as it deems proper, provided due regard is had to the essential rules that obtain in the trial of matters of contempt. In *re Savin*, 131 U. S. 267, 278, 33 L. Ed. 150.

Where a person charged with contempt is entitled, of right, to purge himself, under oath, of the contempt, that right is not denied to him, where he is informed of the nature of the charges against him by the testimony of a witness taken down by a sworn stenographer at the preliminary examination, and is present at the hearing of the contempt, is represented by counsel, testifies under oath in his own behalf, and has full opportunity to make his defense. In *re Savin*, 131 U. S. 267, 279, 33 L. Ed. 150.

**55. Relief by habeas corpus.**—In *re Ayers*, 123 U. S. 443, 485, 31 L. Ed. 216, where a person in England obtained an injunction in a circuit court of the United States, against certain officers of the commonwealth of Virginia, prohibiting them from suing to enforce collections of taxes, and subsequently such officers were ad-

judged guilty of contempt and imprisoned by the circuit court for violating its order; the supreme court held that such a suit was the same as a suit against the state of Virginia within the meaning of the eleventh amendment to the constitution, and therefore, the circuit court was without jurisdiction, consequently, its orders were void, and the prisoners were not guilty of contempt, and were discharged on habeas corpus by the supreme court. See, generally, the title HABEAS CORPUS.

In *re Sawyer*, 124 U. S. 200, 31 L. Ed. 402, where a circuit court of the United States issued an injunction, against the mayor and council of a city to restrain them from removing a city officer from office, and then imprisoned them for contempt in disobeying such order; the supreme court held that the circuit court was without jurisdiction in the case, therefore, its orders were void, and the court released the mayor and council on habeas corpus.

**56. Effect of adjudication.**—*Ex parte Kearney*, 7 Wheat. 38, 42, 5 L. Ed. 391.

**57. Conclusiveness.**—*New Orleans v. Steamship Co.*, 20 Wall. 387, 392, 22 L. Ed. 354.

**58. In re Debs**, 158 U. S. 564, 594, 39 L. Ed. 1092.

**59. In re Cuddy**, 131 U. S. 280, 284, 33 L. Ed. 154.



parliament, nor from the adjudged cases in which English courts have upheld these practices.<sup>60</sup>

**Constitutional Authority.**—No general power of inflicting punishment for contempt is conferred on either house by the constitution.<sup>61</sup> And, quære, whether the power to punish for contempt exists as one necessary to enable either house of congress to exercise successfully their function of legislation.<sup>62</sup> But the constitution expressly empowers each house to punish its own members for disorderly behavior. Such misconduct may consist of refusal to obey some rule made by the house for the preservation of order, or for the breach of rules in regard to attendance. And the punishment may, in a proper case, be imprisonment.<sup>63</sup>

**B. Review by the Supreme Court.**—The house of congress has not the general right possessed by the courts to punish for contempt—the cases in which they can do this being very limited—and where the rights and liberties of the subject are concerned, the legality of its actions may be examined and determined by the supreme court.<sup>64</sup>

**C. Refusal to Answer Pertinent Questions.**—The refusal to answer pertinent questions in a matter of inquiry within the jurisdiction of the senate, constitutes a contempt of that body, and by the statute this is also made an offense against the United States.<sup>64a</sup>

**D. Inquiry into Private Affairs of Citizens.**—No person can be punished for contumacy as a witness before either House, unless his testimony is required in a matter into which the House has jurisdiction to inquire, and neither of these bodies possess the general power of making inquiry into private affairs of a citizen.<sup>65</sup>

**60. Source of power.**—*Kilbourn v. Thompson*, 103 U. S. 168, 189, 26 L. Ed. 377.

**61. Constitutional authority.**—*Kilbourn v. Thompson*, 103 U. S. 168, 182, 26 L. Ed. 377.

**62.** *Kilbourn v. Thompson*, 103 U. S. 168, 189, 26 L. Ed. 377.

**63.** *Kilbourn v. Thompson*, 103 U. S. 168, 189, 190, 26 L. Ed. 377.

**64. Review by the supreme court.**—In *Kilbourn v. Thompson*, 103 U. S. 168, 197, 199, 26 L. Ed. 377, overruling a part of *Anderson v. Dunn*, which held that the house could take cognizance of contempts committed against itself, either by its own members or by third persons.

**64a. Refusal to answer pertinent questions.**—In *re Chapman*, Petitioner, 166 U. S. 661, 671, 41 L. Ed. 1154.

"In *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. Ed. 377, among other important rulings, it was held that there existed no general power in congress, or in either house, to make inquiry into the private affairs of a citizen; that neither house could, on the allegation that an insolvent debtor of the United States was interested in a private business partnership, investigate the affairs of that partnership, as a mere matter of private concern; and that consequently there was no authority in either house to compel a witness to testify on the subject. The case at bar is wholly different. Specific charges publicly made against senators had been brought to the attention of the senate, and the senate had determined that investigation was necessary. The subject matter as affecting the senate was

within the jurisdiction of the senate. The questions were not intrusions into the affairs of the citizens; they did not seek to ascertain any facts as to the conduct, methods, extents or details of the business of the firm in question, but only whether that firm, confessedly engaged in buying and selling stocks, and the particular stock named, was employed by any senator to buy or sell for him any of that stock, whose market price might be affected by the senate's action. We cannot regard these questions as amounting to an unreasonable search into the private affairs of the witness simply because he may have been in some degree connected with the alleged transactions, and as investigations of this sort are within the power of either of the two houses they cannot be defeated on purely sentimental grounds." In *re Chapman*, Petitioner, 166 U. S. 661, 668, 41 L. Ed. 1154.

**65. Inquiry into private affairs of citizens.**—*Kilbourn v. Thompson*, 103 U. S. 168, 190, 26 L. Ed. 377. See ante, "Refusal to Answer Pertinent Questions," X, C.

In *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. Ed. 377, a company that was a debtor of the United States became insolvent and bankruptcy proceedings were instituted in the district court. While the proceedings were going on, resolutions were made by the house of representatives authorizing an investigation of the company's affairs, and in furtherance of such resolutions they appointed an examining committee; this committee summoned one *Kilbourn* before them as a wit-

**E. Punishment.**—The power of the house to punish for contempt, extends to the imprisonment of the guilty party, which cannot exceed the time of adjournment.<sup>66</sup>

### XI. Appeal and Error.

See, generally, the title **APPEAL AND ERROR**, vol. 1, p. 333.

**CONTENTS.**—See note 1.

**CONTENTS UNKNOWN.**—See the title **BILL OF LADING**, vol. 3, p. 237.

**CONTIGUOUS.**—See note 2.

**CONTINGENT FEES.**—See the titles **ATTORNEY AND CLIENT**, vol. 2, p. 724; **CHAMPERTY AND MAINTENANCE**, vol. 3, p. 671.

**CONTINGENT REMAINDERS.**—See the title **REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS**.

**CONTINGENT, REMOTE AND SPECULATIVE DAMAGE.**—See the title **DAMAGES**.

**CONTINGENT RIGHTS.**—See note 3.

**CONTINUANCE IN OFFICE.**—See note 4.

**CONTINUED OF COURSE.**—See note 5.

ness, but he refused to answer questions or produce certain papers as requested, and as a consequence was adjudged guilty of contempt by the house, and was imprisoned. He then brought suit against the committee and the sergeant at arms by whom he was imprisoned. The supreme court held that the subject matter was one beyond the constitutional authority of the legislature—being judicial and not legislative—that the committee, therefore, had no lawful authority to require Kilbourn to testify as a witness beyond what he voluntarily chose to tell; that the orders and resolutions of the house, and the warrant of the speaker, under which Kilbourn was imprisoned, were, in the manner, void for want of jurisdiction in that body, and that his imprisonment was without any lawful authority.

**66. Punishment.**—*Anderson v. Dunn*, 6 Wheat. 204, 230, 5 L. Ed. 242.

**1. Contents.**—In *Sere v. Pitot*, 6 Cranch 332, 335, 3 L. Ed. 240, it is said: "The term 'other chose in action,' is broad enough to comprehend either case; and the word **contents** is too ambiguous in its import, to restrain that general term. The **contents** of a note are the sum it shows to be due; and the same may, without much violence to language, be said of an account." See, also, *North American Trans.*, etc., Co. v. *Morrison*, 178 U. S. 262, 44 L. Ed. 1061; *Mexican N. R. Co. v. Davidson*, 157 U. S. 201, 39 L. Ed. 672. See, also, **CHOSE IN ACTION**, vol. 3, p. 784. And see the title **COURTS**.

**2. Contiguous.**—A grant of exclusive power to supply water to a municipality and its inhabitants provided that nothing therein "shall be so construed as to prevent the city council from granting to any person or persons, **contiguous** to the river, the privilege of laying pipes to the river, exclusively for his or their own use." In construing this exception the court said: "The contract with the waterworks company does not interfere with, but expressly reserves.

the riparian rights of any one '**contiguous** to the river.' To that class the appellee does not belong; for his hotel is distant many blocks from the Mississippi River, and others own and occupy the intervening property." *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 682, 29 L. Ed. 525.

**3. Contingent rights.**—In *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 673, 40 L. Ed. 838, it is said: "It is said by Mr. Justice Cooley, that 'rights are vested, in contradistinction to being expectant or **contingent**. They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. They are expectant, when they depend upon the continued existence of the present condition of things until the happening of some future event. They are **contingent**, when they are only to come into existence on an event or condition which may not happen or be performed until some other event may prevent their vesting.' Principles of Const. Law, 332." See, generally, the title **CONSTITUTIONAL LAW**.

**4. Continuance in office.**—*Quære*, whether the sureties in a marshal's bond, conditioned for the faithful execution of his duty, "during his **continuance in the said office**," are liable for money received by him, after his removal from office, upon an execution which remained in his hands at the time of such removal? *United States v. Giles*, 9 Cranch 212, 3 L. Ed. 708. See, generally, the titles **PUBLIC OFFICES**; **PRINCIPAL AND SURETY**.

**5. Continued of course.**—In *McDowell v. United States*, 159 U. S. 596, 600, 40 L. Ed. 271, it is said: "The declaration that the process, etc., shall be **continued, of course**, means simply continued without any special order, and was obviously designed to prevent that failure of right which in many cases might otherwise result from the absence of a judge."

# CONTINUANCES.

BY FRANK STUART.

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## CROSS REFERENCES.

See the titles ADJOURNMENTS, vol. 1, p. 118; APPEAL AND ERROR, vol. 1, p. 333; DISMISSAL, DISCONTINUANCE AND NONSUIT.

As to postponement of sentence, see the title SENTENCE AND PUNISHMENT.  
As to power of de facto judge to order a continuance, see the titles DE FACTO OFFICERS; JUDGES; PUBLIC OFFICERS.



## I. Continuances in Civil Cases.

**A. At Law**—1. **GENERAL CONSIDERATION.**—A court cannot lay down a general rule for the continuance of causes; but must, under the circumstances of each case, take care that injustice is not done, either by precipitate trials or wanton delays, and where there appears to be a fair ground for the postponement, the cause will be continued.<sup>1</sup>

2. **POWER TO CONTINUE.**—A court has power to open its judgment rendered at the present term and continue the cause, if, upon the record, one of the judges who concurred in the decision supposes it to be erroneous.<sup>2</sup>

3. **AS A MATTER OF DISCRETION.**—It rests in the sound discretion of the court below to grant or refuse a motion to continue a case.<sup>3</sup> But where, under the recognized practice, a party makes a clear case for a continuance, it is an abuse of discretion to refuse it.<sup>4</sup>

4. **CONTINUANCES BY OPERATION OF LAW.**—In the supreme court of the District of Columbia if any matter in hand is not disposed of at one term, it is deemed to have been continued to the next. Whatever parties are bound to take notice of at one term they must follow to the next, if they are not, in some appropriate form, dismissed from further attendance.<sup>5</sup>

5. **GROUND**s—*a. In General.*—Where there appears to be a fair ground for postponement, the cause will be continued.<sup>6</sup>

*b. Loss of Record.*—The loss of a record, and an unsuccessful search for it, presents a good cause for a continuance.<sup>7</sup>

*c. Delay in Filing Pleadings.*—See post, "Continuances in Chancery Cases," I, B.

*d. Lack of Preparation.*—Lack of preparation caused by death of party's only counsel is ground for a continuance.<sup>8</sup>

1. **General consideration.**—*Symes v. Irvine*, 2 Dall. 383, 384, 1 L. Ed. 425. Compare *Hunter v. Fairfax*, 3 Dall. 305, 1 L. Ed. 613. See post, "As a Matter of Discretion," I, A, 3.

2. **Power to continue.**—*United States v. Knight*, 1 Black 488, 17 L. Ed. 80. See the title **REHEARING**.

**As to power to continue criminal cases,** see post, "Continuances in Criminal Cases," II.

**Power to adjourn.**—See the title **ADJOURNMENTS**, vol. 1, p. 118.

3. **Granting or refusing continuance discretionary.**—*Thompson v. Selden*, 20 How. 194, 15 L. Ed. 1001; *Marine Ins. Co. v. Hodgson*, 6 Cranch 206, 217, 218, 3 L. Ed. 200; *Sims v. Hundley*, 6 How. 1, 12 L. Ed. 319; *Hardy v. United States*, 186 U. S. 224, 226, 46 L. Ed. 1137; *McFaul v. Ramsey*, 20 How. 523, 15 L. Ed. 1010; *United States v. Rio Grande, etc.*, *Irrigation Co.*, 184 U. S. 416, 46 L. Ed. 619; *Goldsby v. United States*, 160 U. S. 70, 40 L. Ed. 343; *Woods v. Young*, 4 Cranch 237, 2 L. Ed. 607; *Hunter v. Fairfax*, 3 Dall. 305, 1 L. Ed. 613; *Barrow v. Hill*, 13 How. 54, 14 L. Ed. 48; *Crumpton v. United States*, 138 U. S. 361, 34 L. Ed. 958; *Cox v. Hart*, 145 U. S. 376, 36 L. Ed. 741; *Earnshaw v. United States*, 146 U. S. 60, 68, 36 L. Ed. 887; *Means v. Bank*, 146 U. S. 620, 36 L. Ed. 1107; *Isaacs v. United States*, 159 U. S. 487, 489, 40 L. Ed. 229; *Cook v. Burnley*, 11 Wall. 672, 676, 20 L. Ed. 84; *Fidelity, etc., Co. v. Bucki, etc., Co.*, 189 U. S. 135,

143, 47 L. Ed. 744; *Crim v. Handley*, 94 U. S. 652, 24 L. Ed. 216.

**As to a review for an abuse of this discretion,** see the title **APPEAL AND ERROR**, vol. 1, p. 987.

**Illustration.**—The postponement of a trial based on the grounds of the absence of a witness, and the illness of one of party's counsel, is within the discretion of the trial court. *Means v. Bank*, 146 U. S. 620, 629, 36 L. Ed. 1107.

4. **Abuse of discretion.**—*Earnshaw v. United States*, 146 U. S. 60, 68, 36 L. Ed. 887; *Means v. Bank*, 146 U. S. 620, 629, 36 L. Ed. 1107; *Isaacs v. United States*, 159 U. S. 487, 489, 40 L. Ed. 229. See the title **APPEAL AND ERROR**, vol. 1, p. 988.

**Review.**—See the title **APPEAL AND ERROR**, vol. 1, p. 987.

5. **Continuance by operation of law.**—*Goddard v. Ordway*, 101 U. S. 745, 751, 25 L. Ed. 1040. See the title **APPEAL AND ERROR**, vol. 1, p. 987.

6. **Fair grounds for postponement.**—*Symes v. Irvine*, 2 Dall. 383, 384, 1 L. Ed. 425. Compare *Hunter v. Fairfax*, 3 Dall. 305, 1 L. Ed. 613. See ante, "General Consideration," I, A, 1.

7. **Loss of record.**—*Crim v. Handley*, 94 U. S. 652, 24 L. Ed. 216. See the title **LOST INSTRUMENTS AND RECORDS**.

8. **Lack of preparation.**—Where a case is of great importance, the death of a party's only counsel just before the term will be grounds for a continuance, if the

e. *Absence of Counsel*.—The sickness of leading counsel is sufficient ground for a continuance.<sup>9</sup>

f. *Absence of Party*.—(1) *In General*.—Where it appears that the defendant is absent, engaged in plaintiff's service, the cause will be continued.<sup>10</sup>

(2) *Sickness*.—The sickness of a party is not alone ground for a continuance.<sup>11</sup> But if there is filed an affidavit stating that there are material witnesses, who have not been summoned, in consequence of this sickness; or if the plaintiff himself is a witness, to prove books or the like: it may have weight with the court, otherwise the trial must proceed.<sup>12</sup>

g. *Death of Party*.—This subject is treated elsewhere.<sup>13</sup>

h. *Absence of Evidence or Witnesses*.—(1) *In General*.—A case may be continued for want of a material witness, duly subpoenaed and served.<sup>14</sup>

(2) *Cumulative Evidence*.—A cause will not be continued for the introduction of mere cumulative evidence,<sup>15</sup> unless the introduction thereof would naturally affect the merits of the case.<sup>16</sup>

(3) *Sickness of Witness*.—The sickness of a witness if duly presented and supported by an affidavit in due form is ground for a continuance.<sup>17</sup>

(4) *Effect of Statute Authorizing Taking of Deposition*.—It is not sufficient reason for forcing a cause to a trial, in the absence of a material witness, that an act of congress authorizes his deposition to be taken.<sup>18</sup>

(5) *Necessity for Exercising Due Diligence*.—**In General**.—In order to obtain a continuance on the ground of the absence of a witness, it must be shown that the party has exercised due diligence to obtain the absent witness.<sup>19</sup>

**What Constitutes**.—In order to constitute due diligence, the party asking for

party has not had time to secure other counsel, and have the case prepared for argument and trial. *Hunter v. Fairfax*, 3 Dall. 305, 1 L. Ed. 613. See the title APPEAL AND ERROR, vol. 2, p. 360.

9. **Sickness of leading counsel**.—See the title APPEAL AND ERROR, vol. 2, p. 360.

**As a matter of discretion**.—See ante, "As a Matter of Discretion," I. A. 3.

**Death of counsel causing lack of preparation**.—See ante, "Lack of Preparation," I. A. 5, d. See, also, the title APPEAL AND ERROR, vol. 2, p. 360.

**Sickness of party**.—See post, "Sickness," I. A. 5, f. (2).

**On appeal**.—See the title APPEAL AND ERROR, vol. 1, p. 988; vol. 2, p. 360.

10. **Absence of party**.—*Respublica v. Matlack*, 2 Dall. 108, 1 L. Ed. 310.

11. **Sickness**.—*Jones v. Little*, 2 Dall. 182, 1 L. Ed. 340.

12. *Jones v. Little*, 2 Dall. 182, 1 L. Ed. 340.

**Sickness of counsel**.—See the title APPEAL AND ERROR, vol. 2, p. 360.

13. **Death of party**.—See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 12.

**Death of counsel**.—See the title APPEAL AND ERROR, vol. 2, p. 360. See, also, ante, "Lack of Preparation," I. A. 5, d.

14. **Absence of material witness duly subpoenaed and served**.—*Schlusser v. Leshner*, 1 Dall. 251, 1 L. Ed. 123; *United States v. Caldwell*, 2 Dall. 333, 1 L. Ed. 404. But see *Pennington v. Scott*, 2 Dall. 94, 1 L. Ed. 304. See post, "Effect of Stat-

ute Authorizing Taking of Deposition," I. A. 5, h. (4).

**As a matter of discretion**.—See ante, "As a Matter of Discretion," I. A. 3.

**Necessity for exercising due diligence**.—See post, "Necessity for Exercising Due Diligence," I. A. 5, h. (5).

15. **Cumulative evidence**.—*Mitchel v. United States*, 9 Pet. 711, 724, 9 L. Ed. 283; *United States v. The Brig Union*, 4 Cranch 216, 2 L. Ed. 600.

**Documentary evidence**.—A cause will not be continued for the purpose of obtaining additional documentary evidence. *Mitchel v. United States*, 9 Pet. 711, 724, 9 L. Ed. 283. See the title DOCUMENTARY EVIDENCE.

**Value**.—After deciding the question of value, upon the weight of the evidence, the court will not continue the cause, for the party to produce further evidence as to the value. *United States v. The Brig Union*, 4 Cranch 216, 2 L. Ed. 600.

16. **Cumulative evidence affecting merits of case**.—A cause will not be continued for the purpose of obtaining additional documentary evidence unless, the court is satisfied that the introduction thereof would naturally affect the merits of the case. *Mitchel v. United States*, 9 Pet. 711, 724, 9 L. Ed. 283. See the title DOCUMENTARY EVIDENCE.

17. **Sickness of witness**.—*Crim v. Handley*, 94 U. S. 652, 24 L. Ed. 216. See the title WITNESSES.

18. **Statute authorizing deposition**.—*Symes v. Irvine*, 2 Dall. 383, 1 L. Ed. 425. See the title DEPOSITIONS.

19. **Diligence**.—*Pennington v. Scott*, 2 Dall. 94, 1 L. Ed. 304.

the continuance must have pursued every step required by law to obtain the witness.<sup>20</sup>

(6) *Competency and Materiality*.—In order to obtain a continuance on the ground of the absence of a witness, it must be shown that his testimony is material and competent.<sup>21</sup>

i. *Defense to Claim on Bond for Erroneous Assessment of Duties*.—Under the 65th section of the duty act of 1799, where a bond has been given for duties, and errors in the calculation thereof are alleged on affidavit, at the first term to which suit has been brought on the bond, a delay of one term is allowed for the purposes of examination and correction. Where there is a real defense to the claim on the bond, an opportunity to obtain evidence by a continuance, according to the circumstances of the case, must be given.<sup>22</sup>

6. THE AFFIDAVIT—a. *Who May Make*.—The affidavit must be made by some one interested in the suit or action.<sup>23</sup>

b. *Form and Contents*.—It is not necessary on an affidavit to continue, on the ground that a material witness is absent, to inquire what the testimony would be, in order that it might appear whether it was really material.<sup>24</sup>

c. *Affidavit as Part of Record*.—See the title APPEAL AND ERROR, vol. 2, p. 198.

7. TERMS ON GRANTING.—The court on granting a continuance may order that a rule be granted to try the cause at the next term, or the applicant suffer a non pros.<sup>25</sup> But a rule for trial or a non pros. will not preclude the plaintiff from showing reasonable cause of delay at the next term.<sup>26</sup>

8. ORDER OF ENTRY.—A continuance, relating back, may be entered at any time, to effect the purposes of justice.<sup>27</sup> Where a continuance has been granted,

20. What constitutes due diligence.—*Pennington v. Scott*, 2 Dall. 94, 1 L. Ed. 304.

*Necessity of subpœna*.—"The defendant moved to put off the trial, on an affidavit that an attorney of this court was a material witness. He had not been subpœnaed; but had promised the defendant to attend; and had left town, a few days ago. Under these circumstances, the court did not think a subpœna necessary, to entitle the defendant to put off the trial." *White v. Lynch*, 2 Dall. 183, 1 L. Ed. 341. But see ante, "In General," I, A, 5, h, (1). See the title WITNESSES.

21. *Materiality and competency*.—*Means v. Bank*, 146 U. S. 620, 629, 36 L. Ed. 1107. See ante, "In General," I, A, 5, h, (1). But see post, "Form and Contents," I, A, 6, b.

22. *Erroneous assessment of duties*.—*United States v. Phelps*, 8 Pet. 700, 8 L. Ed. 1094. See the title REVENUE LAWS.

23. *Who may make affidavit*.—The affidavit of the landlord of the defendant, who is interested in the suit, may be received to prove the absence of a material witness, in order to grant a continuance. *Hunter v. Kennedy*, 1 Dall. 81, 1 L. Ed. 46. See the title AFFIDAVITS, vol. 1, p. 200.

Where two actions are brought on a note, since the maker is liable to the indorser, the maker is considered as eventually interested in both actions, and hence both trials may be postponed on his affidavit alone. *Jackson v. Mason*, 1 Dall. 135, 1 L. Ed. 70. See the title BILLS, NOTES AND CHECKS, vol. 3, p. 257.

24. *Absence of material witness*.—*Jackson v. Mason*, 1 Dall. 135, 1 L. Ed. 70. See, generally, the title AFFIDAVITS, vol. 1, p. 200. But see ante, "Competency and Materiality," I, A, 5, h, (6).

*Necessity for affidavit*.—See ante, "Sickness of Witness," I, A, 5, h, (3).

25. *Terms*.—*Schlosser v. Leshner*, 1 Dall. 251, 1 L. Ed. 123. See the title DISMISSAL, DISCONTINUANCE AND NONSUIT.

*Illustration*.—A rule for trial of a cause at the next term, or a non pros. will be granted where the plaintiff has been guilty of negligence in obtaining documentary evidence. *Todd v. Thompson*, 2 Dall. 105, 1 L. Ed. 309. See the titles DISMISSAL, DISCONTINUANCE AND NONSUIT; DOCUMENTARY EVIDENCE.

*Entry of continuance by mistake*.—Where an entry for a continuance has been made by mistake, which is discovered at once, and notice thereof given, it does not prevent the party from insisting on a rule for trial at the next term, or non pros., if the plaintiff has suffered no injury, but it seems otherwise if the plaintiff has suffered injury thereby. *Nesbit v. Pope*, 2 Dall. 143, 1 L. Ed. 324.

26. *Reasonable grounds for delay at next term*.—*Schlosser v. Leshner*, 1 Dall. 251, 1 L. Ed. 123.

27. *Continuance relating back*.—*Shepard v. Wilson*, 6 How. 259, 260, 12 L. Ed. 430. See the title RELATION.

*Effect of entry by mistake as precluding rule for trial at next term, or non pros.*—See ante, "Terms on Granting," I, A, 7.



but nothing afterwards is done in the cause, a continuance cannot be arbitrarily entered, in order to preserve the lien of a domestic attachment.<sup>28</sup>

9. **APPEAL AND ERROR.**—See the title **APPEAL AND ERROR**, vol. 1, p. 987; vol. 2, p. 360.

**B. Continuances in Chancery Cases.**—1. **AS A MATTER OF DISCRETION.**—The granting of a continuance in chancery is within the discretion of the court.<sup>29</sup>

2. **GROUND.**—A court of chancery will be disposed to hear favorably every application to postpone a trial, until the plaintiff has filed a satisfactory answer to a bill in equity.<sup>30</sup>

3. **APPEAL AND ERROR.**—See the title **APPEAL AND ERROR**, vol. 1, p. 987; vol. 2, p. 360.

## II. Continuances in Criminal Cases.

**A. General Consideration.**—With respect to motions for continuance, the granting or refusal of them is unquestionably a necessary incident to, and a part of, the hearing and determining of criminal charges; and the exercise of that power in such criminal proceedings is indispensable to the right of the accused to have a fair and full investigation of the offense charged against him and to a sufficient time for the summoning of his witnesses as well as for employing and consulting with counsel to aid him in his defense.<sup>31</sup>

**B. Power to Grant.**—A continuance may be granted in a criminal case.<sup>32</sup>

**C. Continuance as a Matter of Discretion.**—The granting or refusing of a continuance in a criminal case is generally a matter of discretion.<sup>33</sup>

28. *Hooton v. Will*, 1 Dall. 450, 1 L. Ed. 218. See, generally, the title **ATTACHMENT AND GARNISHMENT**, vol. 2, p. 660.

29. **Continuances in equity.**—See ante, "As a Matter of Discretion," I, A, 3.

A subpoena in chancery was issued from the circuit court of the United States for the Louisiana district, on the 15th of July, 1837, returnable to the next term of the court, to be holden in November; some of the defendants appeared, and an affidavit was filed, stating that upwards of 200 persons were named as defendants in the bill, and that owing to the epidemic in New Orleans and at La Fayette, and the absence of many of the defendants, it had been impossible for the defendants to prepare for a defense to the bill; for this and for other reasons, an extension of the time for their appearance was essentially necessary for their proper defense, etc., and that the application was not made for delay. The circuit court, on this affidavit, laid a rule on the complainants to show cause why the defendants should not be allowed to the next term to make their appearance and defense; and that in the meantime no further proceeding should be had in the case; the solicitors for the complainants moved that the cause should be placed on the rule docket of the court, that the complainants might proceed in the cause, according to the chancery practice; this motion was overruled by the circuit court. The complainants moved the supreme court for a rule on the circuit court to show cause why a mandamus, in the nature of a procedendo, should not issue, commanding the court to send the case to the rule docket of the court. We can perceive nothing in the

proceedings of the circuit court to warrant the rule to show cause, which has been asked for in behalf of the complainants; on the contrary, judging from the evidence contained in the record, the conduct of the court in relation to the cause in question, appears to have been strictly conformable to the practice and principles of a court of equity. *Poultney v. La Fayette*, 12 Pet. 472, 9 L. Ed. 1161. See the title **EQUITY**.

30. **Failure to file answer.**—*Hurst v. Hurst*, 3 Dall. 512, 1 L. Ed. 700. See the title **EQUITY**.

**Failure to answer bill of discovery.**—Where the plaintiff has failed to answer a bill of discovery filed against him, the case will be continued. *Hurst v. Hurst*, 3 Dall. 512, 1 L. Ed. 700. See the title **DISCOVERY**.

**Affidavit.**—See ante, "Who May Make," I, A, 6, a.

31. *United States v. Jones*, 134 U. S. 483, 487, 33 L. Ed. 1007. See, generally, the title **CRIMINAL LAW**.

32. **Power to grant continuances in criminal cases.**—*King v. Rapp*, 1 Dall. 9, 1 L. Ed. 14; *United States v. Jones*, 134 U. S. 483, 33 L. Ed. 1007. See ante, "Power to Continue," I, A, 2; "General Consideration," II, A.

The court may grant a continuance in a criminal case where the defendant is a clergyman and his living depends on his acquittal. *King v. Rapp*, 1 Dall. 9, 1 L. Ed. 14.

**Power to grant in civil cases.**—See ante, "Power to Continue," I, A, 2.

33. **Continuances in criminal cases discretionary.**—*Hardy v. United States*, 186 U. S. 224, 227, 46 L. Ed. 1137; *Isaacs v.*

**D. Fees of Commissioner for Granting.**—The decision of a United States circuit court commissioner upon a motion for a continuance of the hearing of a criminal charge is a judicial act within the meaning of Rev. Stat., § 847, and hence in such case the commissioner is entitled to a per diem compensation.<sup>34</sup>

**E. Appeal and Error.**—See the title *APPEAL AND ERROR*, vol. 1, p. 988; vol. 2, p. 360.

**CONTRABAND.**—See, also, the titles *PRIZE*; *WAR*. The classification of goods as contraband or not contraband has much perplexed text writers and jurists. A strictly accurate and satisfactory classification is perhaps impracticable; but that which is best supported by American and English decisions may be said to divide all merchandise into three classes. Of these classes, the first consists of articles manufactured and primarily and ordinarily used for military purposes in time of war; the second, of articles which may be and are used for purposes of war, or peace, according to circumstances; and the third, of articles exclusively used for peaceful purposes. Merchandise of the first class, destined to a belligerent country or places occupied by the army or navy of a belligerent, is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege.<sup>1</sup>

United States, 159 U. S. 487, 489, 40 L. Ed. 229. See, also, cases cited, ante, "As a Matter of Discretion," I, A, 3.

**Illustrations.**—It appears that forty-nine days before the case was called for trial an application was made and granted to have the witness, whose testimony was desired, summoned at the expense of the government, the affidavit showing that she was within the jurisdiction of the court. It was not shown that any diligence was used to procure the attendance of the witness; or that any attachment was asked for, although the trial continued for several days, or why the subpoena was not served. The affidavit did not show that the defendant could not make the same proof by other witnesses, or that he could not safely go to trial without the testimony of the witness in question. In fact, all that the affidavit showed that the witness could prove was established by other testimony, including that of the defendant himself. Held, clearly no abuse of discretion to refuse a continuance, under such circumstances. *Isaacs v. United States*, 159 U. S. 487, 489, 40 L. Ed. 229.

Defendant was indicted in the district court of Alaska for murder; an affidavit was filed asking for a continuance of the cause. The grounds alleged in the affidavit for a continuance were that certain witnesses for the defense would testify he was not at the scene of the crime at the time the indictment alleged the crime to have been committed, and also that they would explain the possession of certain money found on the defendant's person. Held, that as it appeared that the possession of the money found on the defendant was immaterial to the charges, and as it clearly appeared from the affidavit of-

fered by the government in opposition, that some of defendant's statements were false, that there was no abuse of discretion in refusing a continuance of the cause. *Hardy v. United States*, 186 U. S. 224, 46 L. Ed. 1137. See the title *CRIMINAL LAW*.

**34. Fees of commissioner.**—United States *v. Jones*, 134 U. S. 483, 487, 33 L. Ed. 1007; United States *v. Ewing*, 140 U. S. 142, 35 L. Ed. 388. See, generally, the title *UNITED STATES COMMISSIONERS*.

**1. Contraband.**—The *Peterhoff*, 5 Wall. 28, 58, 18 L. Ed. 564.

In *United States v. Diekelman*, 92 U. S. 520, 526, 23 L. Ed. 742, it was said: "What is **contraband** depends upon circumstances. Money and bullion do not necessarily partake of that character; but, when destined for hostile use or to procure hostile supplies, they do. Whether they are so or not, under the circumstances of a particular case, must be determined by some one when a necessity for action occurs."

In *The Benito Estenger*, 176 U. S. 568, 573, 44 L. Ed. 592, the court quotes and affirms *The Commercen*, 1 Wheat. 382, 388, 4 L. Ed. 116, where Mr. Justice Story said: "By the modern law of nations provisions are not, in general, deemed **contraband**; but they may become so, although the property of a neutral, on account of the particular situation of the war, or on account of their destination. \* \* \* If destined for the ordinary use of life in the enemy's country, they are not, in general, **contraband**; but it is otherwise if destined for military use. Hence, if destined for the army or navy of the enemy, or for his ports of naval or military equipment, they are deemed **contraband**."

# CONTRACT LABOR LAW.

BY ROBERT E. MAXWELL.

- I. Statutory Provisions, 549.**
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- II. To Whom Statute Applicable, 549.**
- III. Enforcement, 550.**
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## CROSS REFERENCES.

See the titles *ALIENS*, vol. 1, p. 210; *CHINESE EXCLUSION ACTS*, vol. 3, p. 769.

### I. Statutory Provisions.

**A. Provisions Stated.**—By statute it is made unlawful for anyone, in any manner, to prepay the transportation, or encourage the importation of any alien or aliens, into the United States, under contract or agreement, made previous to the importation of such alien or aliens, to perform labor or service of any kind in the United States.<sup>1</sup>

**B. Object.**—It was primarily the object of the act to prohibit the introduction of assisted immigrants, brought here under contracts previously made by corporations and capitalists to prepay their passage and obtain their services at low wages for limited periods of time. It was a measure introduced and advocated by the trades union and labor associations, designed to shield the interests represented by such organizations from the effects of the competition in the labor market of foreigners brought here under contracts having a tendency to stimulate immigration and reduce the rates of wages.<sup>2</sup>

**C. Constitutionality.**—The contract labor law act,<sup>3</sup> has been held to be a proper exercise of the power of congress and is consequently valid.<sup>4</sup>

### II. To Whom Statute Applicable.

The act of February 26, 1885, is applicable only to cheap and unskilled laborers.<sup>5</sup> By this act professional actors, artists, lecturers, singers and persons em-

**1. Provisions stated.**—*Ekiu v. United States*, 142 U. S. 651, 35 L. Ed. 1146; *Church of the Holy Trinity v. United States*, 143 U. S. 457, 458, 36 L. Ed. 226; *United States v. Laws*, 163 U. S. 258, 260, 41 L. Ed. 151.

**2. Object.**—*United States v. Laws*, 163 U. S. 258, 261, 41 L. Ed. 151.

**3.** Act of February 26, 1885, 23 Stat. 332, ch. 164.

**4. Constitutionality of statute.**—*Ekiu v. United States*, 142 U. S. 651, 35 L. Ed. 1146; *Church of the Holy Trinity v. United States*, 143 U. S. 457, 36 L. Ed. 226; *Lees v. United States*, 150 U. S. 476, 479, 37 L. Ed. 1150. See the title *CONSTITUTIONAL LAW*, ante, p. 1.

In *Church of the Holy Trinity v. United States*, 143 U. S. 457, 36 L. Ed. 226, the constitutionality of the alien contract labor act was assumed; and since *The Chinese Exclusion Case*, 130 U. S. 581, 32 L. Ed. 1068, and the case of *Fong Yue Ting v. United States*, 149 U. S. 698, 37

L. Ed. 905, affirming fully the power of congress over the exclusion of aliens, there can be little doubt in the matter. *Lees v. United States*, 150 U. S. 476, 479, 37 L. Ed. 1150.

Congress having the absolute power to exclude aliens, it may exclude some and admit others, and the reasons for its discrimination are not open to challenge in the courts. *Lees v. United States*, 150 U. S. 476, 480, 37 L. Ed. 1150. See the title *ALIENS*, vol. 1, p. 210.

Penalty for breach, see post, "Enforcement," III.

**5. Cheap and unskilled laborers.**—Referring back to the report of the committee of the house of congress there appears this language: "It seeks to restrain and prohibit the immigration or importation of laborers who would have never seen our shores but for the inducements and allurements of men whose only object is to obtain labor at the lowest possible rate, regardless of the social and ma-



ployed strictly as personal or domestic servants are not excluded from the country.<sup>6</sup> By the act of March 3, 1891, the act of 1885 was amended so as to exclude ministers, professors and persons belonging to any recognized profession from its operation.<sup>7</sup>

**Chemist.**—A contract made with an alien in a foreign country to come to this country as a chemist on a sugar plantation in Louisiana, in pursuance of which contract such alien does come to this country and is employed on a sugar plantation in Louisiana, and his expenses paid by the defendant, is not a contract to perform labor or service as prohibited in the act of congress passed February 26, 1885.<sup>8</sup>

### III. Enforcement.

**Imposition of Penalty for Breach.**—Given the power to exclude, congress has a right to make that exclusion effective by punishing those who assist in introducing, or attempting to introduce, aliens in violation of its prohibition. The importation of alien laborers, who are under previous contract to perform

terial well-being of our own citizens and regardless of the evil consequences which result to American laborers from such immigration." *Church of the Holy Trinity v. United States*, 143 U. S. 457, 465, 36 L. Ed. 226.

The act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its territories and the District of Columbia, has no application to a contract between a religious society or congregation in this country and a minister of the gospel who is an alien, to come and minister to them, but only to cheap and unskilled labor. *Church of the Holy Trinity v. United States*, 143 U. S. 457, 463, 36 L. Ed. 226; *United States v. Laws*, 163 U. S. 258, 264, 41 L. Ed. 151.

"We find, therefore, that the title of the act of February 26, 1885, the evil which was intended to be remedied, the circumstances surrounding the appeal to congress, the reports of the committee of each house, all concur in affirming that the intent of congress was simply to stay the influx of this cheap unskilled labor." *Church of the Holy Trinity v. United States*, 143 U. S. 457, 465, 36 L. Ed. 226.

**Manual labor only.**—The alien contract labor law was intended to apply only to the manual laborer, as distinguished from the professional man or any one whose toil is that of the brain. *Church of the Holy Trinity v. United States*, 143 U. S. 457, 36 L. Ed. 226; *United States v. Laws*, 163 U. S. 258, 41 L. Ed. 151.

**6. Actors, artists, lecturers, singers and servants excluded.**—The fifth section of the act of February 26, 1885, ch. 164, 23 Stat. 332, enacts that the act shall not apply "to professional actors, artists, lecturers or singers, nor to persons employed strictly as personal or domestic servants." *United States v. Laws*, 163 U. S. 258, 260, 41 L. Ed. 151.

**7. Ministers, professors, and persons of any recognized profession excluded.**—Congress amended the fifth section of the

statute of February 26, 1885, by adding to the proviso therein mentioned the words "nor to ministers of any religious denomination, nor persons belonging to any recognized profession, nor professors for colleges and seminaries," so that the proviso would read that the provisions of this act should not "apply to professional actors, artists, lecturers or singers, nor to persons employed strictly as personal or domestic servants, nor to ministers of any religious denomination, nor to persons belonging to any recognized profession, nor professors for colleges and seminaries." Act of March 3, 1891, ch. 551, 26 Stat. 1084; *United States v. Laws*, 163 U. S. 258, 265, 41 L. Ed. 151.

If by the terms of the act of 1885 the provisions thereof applied only to unskilled laborers whose presence simply tended to degrade American labor, the meaning of the act as amended by the act of 1891 becomes if possible still plainer. Now by its very terms it is not intended to apply to any person belonging to any recognized profession. *United States v. Law*, 163 U. S. 258, 266, 41 L. Ed. 151.

**8. Chemist.**—A chemist would be included in the class with professions. Although the study of chemistry is the study of a science, yet a chemist who occupies himself in the practical use of his knowledge of chemistry as his services may be demanded may certainly at this time be fairly regarded as in the practice of a profession. *United States v. Laws*, 163 U. S. 258, 266, 41 L. Ed. 157.

"The fact that the individual in question, by his contract, had agreed to sell his time, labor and skill to one employer, and in one prescribed branch of the science, does not in the least militate against his being a professional chemist, nor does it operate as a bar to the claim that while so employed he is nevertheless practicing a recognized profession." *United States v. Law*, 163 U. S. 258, 268, 41 L. Ed. 157.

labor in the United States, is the act denounced, and the penalty is visited not upon the alien laborer—although by the amendment of February 23, 1887, 24 Stat. 414, ch. 220, he is to be returned to the country from which he came—but upon the party assisting in the importation. If congress has power to exclude such laborers, it has the power to punish any one who assists in their introduction.<sup>9</sup>

**Nature of Action to Recover Penalty.**—An action to recover a penalty under the alien contract labor act, though an action civil in form, is unquestionably criminal in its nature, and in such a case a defendant cannot be compelled to be a witness against himself.<sup>10</sup>

**Jurisdiction.**—The penalty for violation of the act of congress of February 26, 1885, prohibiting the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its territories, and the District of Columbia, may be recovered in the district court of the United States.<sup>11</sup>

#### IV. Deportation.

**Second Hearing.**—The secretary of commerce and labor has the right to direct a second hearing and to make the order of deportation under § 21 of the act of March 3, 1903, ch. 1012, although there had been an inquiry at the time of the petitioners' landing and a decision in their favor under § 25, 32 Stat. 1218, 1220.<sup>12</sup>

**CONTRACTORS.**—See the titles INDEPENDENT CONTRACTORS; WORKING CONTRACTS. As to contractors' lien, see the title MECHANICS' LIENS. As to contractors' bond, see the title WORKING CONTRACTS.

**9. Imposition of penalty by congress.**—*Lees v. United States*, 150 U. S. 476, 480, 37 L. Ed. 1150.

**10. Criminal in its nature.**—*Lees v. United States*, 150 U. S. 476, 480, 37 L. Ed. 1150. See the title PENALTIES AND FORFEITURES.

**11. Jurisdiction.**—*Lees v. United States*, 150 U. S. 476, 478, 37 L. Ed. 1150.

**12. Deportation.**—*Pearson v. Williams*, 202 U. S. 281, 282, 50 L. Ed. 1029.

Decisions of a similar type long have been recognized as decisions of the executive department, and cannot constitute *res judicata* in a technical sense. *Pearson v. Williams*. 202 U. S. 281, 285, 50 L. Ed. 1029.

# CONTRACTS.

BY H. W. WESTER.

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#### CROSS REFERENCES.

See the titles ALTERATION OF INSTRUMENTS, vol. 1, p. 261; ASSIGNMENTS, vol. 2, p. 549; BILLS, NOTES AND CHECKS, vol. 3, p. 257; CROSS BILLS; ESTOPPEL; EXCHANGE OF PROPERTY; JOINT ADVENTURES; LIMITATION OF ACTIONS AND ADVERSE POSSESSION; MANDAMUS; MARRIAGE CONTRACTS AND SETTLEMENTS; PAYMENT; RELEASE; REWARDS; SALES; TENDER; WARRANTY.

As to maritime contracts, see the title ADMIRALTY, vol. 1, p. 119. As to contracts relative to affairs connected with the army or navy, see the title ARMY AND NAVY, vol. 2, p. 494. As to contracts between attorney and client, see the

title ATTORNEY AND CLIENT, vol. 2, p. 703. As to contracts under seal, see the titles BONDS, vol. 3, p. 382; COVENANTS. As to contracts in the nature of bribes, see the title BRIBERY, vol. 3, p. 514. As to contracts relative to bridges, see the title BRIDGES, vol. 3, p. 516. As to brokerage contracts, see the title BROKERS, vol. 3, p. 531. As to contracts relative to charities, see the title CHARITIES, vol. 3, p. 675. As to the constitutional right of citizens to enter into contractual relation, see the title CONSTITUTIONAL LAW, ante, p. 1. As to contracts with the District of Columbia, see the title DISTRICT OF COLUMBIA. As to contracts for commission sales, see the title FACTORS AND COMMISSION MERCHANTS. As to gambling contracts, see the title GAMBLING CONTRACTS. As to contracts indirectly connected with illegal contracts, see the titles GAMBLING CONTRACTS; ILLEGAL CONTRACTS. As to impairment of obligation of contracts, see the title IMPAIRMENT OF OBLIGATION OF CONTRACTS. As to contracts of insurance, see the general title INSURANCE, and references there given to particular insurance titles. As to contracts of lease, see the title LANDLORD AND TENANT. As to marriage contracts, see the title MARRIAGE CONTRACTS AND SETTLEMENTS. As to transactions relative to mines, see the title MINES AND MINERALS. As to contracts between or by partners, see the title PARTNERSHIP. As to penalties or forfeitures under contracts, see the title PENALTIES AND FORFEITURES. As to contracts between physician and patient, see the title PHYSICIANS AND SURGEONS. As to contracts for carrying mail, see the title POSTAL LAWS. As to contracts of agency, see the title PRINCIPAL AND AGENT; see, also, the title MASTER AND SERVANT. As to contracts relative to public lands, see the title PUBLIC LANDS. As to contracts relative to railroad affairs, see the titles RAILROADS; STREET RAILWAYS; WORKING CONTRACTS. As to contracts in restraint of trade, see the title RESTRAINT OF TRADE. As to contracts relative to the transfer of property generally, see the titles SALES; VENDOR AND PURCHASER. As to contracts with states, see the title STATES. As to contracts relative to corporate stock, see the title STOCKS AND STOCKHOLDERS. As to contracts made on Sunday or holiday, see the title SUNDAYS AND HOLIDAYS. As to contracts of suretyship, see the title PRINCIPAL AND SURETY. As to contracts having to do with telegraphs or telephones, see the title TELEGRAPHS AND TELEPHONES. As to contracts with the federal government, see the title UNITED STATES. As to usurious contracts, see the title USURY. As to the effect of war upon contracts, see the title WAR. As to contracts relating to waterworks, see the title WATER COMPANIES AND WATERWORKS. As to services rendered under contract for, or under expectation of, a legacy, see the title WILLS. As to building contracts, see the title WORKING CONTRACTS.

### I. Definitions and Effect.

A contract is an agreement,<sup>1</sup> between competent parties,<sup>2</sup> founded upon a consideration,<sup>3</sup> to do or not to do a particular thing.<sup>4</sup> As to the definitions of various classes of contracts, see post, "Classification of Contracts," III. As

**1. Agreement as an essential element.**—As to the agreement as constituting an essential element of a contract, see post, "Mutual Assent," II. B. 4.

**2. Necessity for competent parties.**—As to the necessity for competent parties to a contract, see post, "Competent Parties," II. B. 1.

**3. Consideration as an essential.**—As to the necessity for consideration in a contract, see post, "Necessity for Consideration," II. B. 7. b.

**4. Definition of contract.**—Fletcher v. Peck, 6 Cranch 87, 136, 3 L. Ed. 162; Sturges v. Crowninshield, 4 Wheat. 122, 197, 4 L. Ed. 529; Green v. Biddle, 8 Wheat. 1, 92, 5 L. Ed. 547; Ogden v.

Saunders, 12 Wheat. 213, 256, 6 L. Ed. 606; Charles River Bridge v. Warren Bridge, 11 Pet. 420, 573, 9 L. Ed. 773; Woodruff v. Trapnall, 10 How. 190, 205, 13 L. Ed. 383; Edwards v. Kearzey, 96 U. S. 595, 600, 24 L. Ed. 793; Louisiana v. New Orleans, 109 U. S. 285, 288, 27 L. Ed. 936; Chase v. Curtis, 113 U. S. 452, 464, 28 L. Ed. 1038.

In Dartmouth College v. Woodward, 4 Wheat. 518, 656, 4 L. Ed. 629, it is said: "What is a contract? It may be defined to be a transaction between two or more persons, in which each party comes under an obligation to the other, and each reciprocally acquires a right to whatever is promised by the other. Powell on



to bills of lading,<sup>5</sup> charters,<sup>6</sup> compromises,<sup>7</sup> enlistments,<sup>8</sup> exemptions,<sup>9</sup> franchises,<sup>10</sup> grants,<sup>11</sup> guaranty,<sup>12</sup> indemnity,<sup>13</sup> insurance policies,<sup>14</sup> judgments and decrees,<sup>15</sup> joint adventures,<sup>16</sup> leases,<sup>17</sup> legislation relating to taxation,<sup>18</sup> letters of credit,<sup>19</sup> licenses,<sup>20</sup> marriage,<sup>21</sup> partition,<sup>22</sup> public offices,<sup>23</sup> statutes,<sup>24</sup> subscriptions,<sup>25</sup> suretyship,<sup>26</sup> wills,<sup>27</sup> as constituting contracts, see the appropriate titles. The regular effect of all contracts is, on one side, to acquire, and on the other, to part with, some property or rights; or to abridge, or to restrain natural liberty, by binding the parties to do, or restraining them from doing, something which before they might have done, or omitted.<sup>28</sup>

## II. Formation and Essential Elements.

**A. Formation and Execution**—1. **OFFER AND ACCEPTANCE**—a. *General Statement*.—Where one of the parties either accepts a continuing offer, or renews a proposal which is accepted by the other, a binding contract results,<sup>29</sup> the agreement being complete the moment of the acceptance of offer.<sup>30</sup>

Cont. 6. Under this definition, says Mr. Powell, it is obvious, that every feoffment, gift, grant, agreement, promise, etc., may be included, because in all there is a mutual consent of the minds of the parties concerned in them, upon an agreement between them respecting some property or right that is the object of the stipulation."

As to what constitutes a contract within the meaning of the United States constitution relative to the impairment of obligation of contracts, see the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**.

**The agreement and the instrument distinguished**.—"The contract is the concrete result of the meeting of the minds of the contracting parties. The evidence thereof is but the instrument by which the fact that the will of the parties did meet is shown." *Richmond, etc., R. Co. v. Patterson Tobacco Co.*, 169 U. S. 311, 314, 42 L. Ed. 759.

**Terms "contract" and "obligation" not synonymous**.—"The terms 'contract,' and 'obligation,' although sometimes used loosely as convertible terms, do not properly impart the same idea." *Ogden v. Saunders*, 12 Wheat. 213, 316, 6 L. Ed. 606.

**Obligation of contract**.—As to what constitutes the obligation of a contract, see the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**.

5. **Bills of lading**.—See the title **BILL OF LADING**, vol. 3, p. 232.

6. **Charters**.—See the titles **BANKS AND BANKING**, vol. 3, p. 1; **CORPORATIONS**.

7. **Compromises**.—See the title **COMPROMISE AND SETTLEMENT**, vol. 3, p. 981.

8. **Enlistments**.—See the titles **ARMY AND NAVY**, vol. 2, p. 527; **MILITIA**.

9. **Exemptions**.—See the titles **EXEMPTIONS FROM EXECUTION AND ATTACHMENT**; **HOMESTEAD EXEMPTIONS**; **TAXATION**.

10. **Franchises**.—See **FRANCHISES**. And see, also, the various titles under

which the consideration of particular franchises would necessarily arise.

11. **Grants**.—See the title **PUBLIC LANDS**.

12. **Guaranty**.—See the title **GUARANTY**.

13. **Indemnity**.—See the title **INDEMNITY**.

14. **Insurance policies**.—See the general title **INSURANCE**, and the particular insurance titles.

15. **Judgments and decrees**.—See the title **JUDGMENTS AND DECREES**.

16. **Joint adventures**.—See the title **JOINT ADVENTURES**.

17. **Leases**.—See the title **LANDLORD AND TENANT**.

18. **Legislation relating to taxation**.—As to a legislative act granting the power of taxation, or exempting property from taxation, as constituting a contract, see the title **TAXATION**.

19. **Letters of credit**.—See the title **LETTERS OF CREDIT**.

20. **Licenses**.—See the title **LICENSES**.

21. **Marriage**.—See the title **MARRIAGE**.

22. **Partition**.—See the title **PARTITION**.

23. **Public offices**.—See the title **PUBLIC OFFICERS**, and the various titles under which particular public offices are treated.

24. **Statutes**.—See the title **STATUTES**.

25. **Subscriptions**.—See the title **SUBSCRIPTIONS**, and references there given.

26. **Suretyship**.—See the title **PRINCIPAL AND SURETY**.

27. **Wills**.—See the title **WILLS**.

28. **Effect of contract**.—*Dartmouth College v. Woodward*, 4 Wheat. 518, 656, 4 L. Ed. 629.

29. *Commercial Mutual Marine Ins. Co. v. Union Mutual Ins. Co.*, 19 How. 318, 320, 15 L. Ed. 636; *Garfield v. United States*, 93 U. S. 242, 244, 23 L. Ed. 779.

30. *Burton v. United States*, 202 U. S. 344, 386, 50 L. Ed. 1057. See post, "Communication of Acceptance," II, A, 1, g.

b. *Necessity of Acceptance.*—An offer imposes no obligation on either party until it is accepted.<sup>31</sup>

c. *Acceptance of Offer and Performance of Consideration Compared.*—Though the acceptance of an offer and the performance of the consideration are different things, and though the former does not imply the latter, yet the latter does necessarily imply the former; and as the want of either is fatal to the promise, the question whether an offer has been accepted can never in strictness become material in those cases in which a consideration is necessary; and for all practical purposes it may be said that the offer is accepted in such cases by giving or performing the consideration.<sup>32</sup>

d. *Form of Words.*—To constitute a promise binding in law, no form of words is necessary,<sup>33</sup> if there is a clear and distinct proposal, accepted in the terms in which it is made, simply and absolutely, that contains the contract between the parties.<sup>34</sup>

e. *Time for Acceptance.*—The party making the offer has the right to dictate the terms in regard to the time when the proposition shall be accepted, as well as to other material circumstances; nor would the court be astute to inquire after the reasons why a time for acceptance was fixed.<sup>35</sup> If the offer does not limit the time for its acceptance, it must be accepted within a reasonable time after the receipt of the proposal,<sup>36</sup> and before any intimation is received that the offer is withdrawn.<sup>37</sup> If the offer does limit the time for the acceptance, it may,

**31. Necessity of acceptance.**—*Minneapolis, etc., Railway v. Columbus Rolling Mill*, 119 U. S. 149, 151, 30 L. Ed. 376; *Eliason v. Henshaw*, 4 Wheat. 225, 228, 4 L. Ed. 556; *Carr v. Duval*, 14 Pet. 77, 83, 10 L. Ed. 361; *Commercial Mutual Marine Ins. Co. v. Union Mutual Ins. Co.*, 19 How. 318, 320, 15 L. Ed. 636; *National Bank v. Hall*, 101 U. S. 43, 50, 25 L. Ed. 822; *Durkee v. Board of Liquidation*, 103 U. S. 646, 26 L. Ed. 598.

"For example, if one merchant offer to sell goods to another, such an offer is not binding until it has been in some form accepted by the party to whom it was made. Liability cannot arise in such a case, because the party making the offer cannot be held answerable to the other for not selling the goods, unless that other by accepting the offer has bound himself to purchase." *Blossom v. Railroad Co.*, 3 Wall. 196, 205, 18 L. Ed. 43.

When A signs a writing by which he declares he will sell to B his house at a certain price, this is a mere proposition and not a contract. *Tillev v. County of Cook*, 103 U. S. 155, 161, 26 L. Ed. 374.

In 1859 A lent to B, who was largely interested in an embarrassed railroad, \$5,000 to buy certain judgments against the road, and B having bought, in 1859 and the early part of 1860, judgments to the amount of \$31,000, assigned the whole of them to A, absolutely. Subsequently, that is to say in August, 1860, A made a transfer (so called) of them to B, "upon B's payment of \$5,000, with interest from this date;" and gave to B a power of attorney of the same date, authorizing him "for me and in my name" to dispose of them as he might see proper. Held, that the so-called transfer was executory, amounting only to an offer that if B would pay the \$5,000, B should become owner of the judgments; and that B hav-

ing, in May, 1861, gone South and joined the rebels there, and not come back till 1865, could not in 1868 file a bill, and on an allegation that A had collected the judgments, claim the proceeds, less the \$5,000 and interest. *French v. Hay*, 22 Wall. 231, 22 L. Ed. 799.

If a proposal be made by letter, stating also that the writer will empower A to act for him, and the other party apply to A and make known his acceptance, but A informs him that he has received no instructions, and will not act, there is no complete and binding contract. *Barr v. Lapsley*, 1 Wheat. 151, 4 L. Ed. 58.

**32. Acceptance of offer and performance of consideration compared.**—*Davis v. Wells*, 104 U. S. 159, 166, 26 L. Ed. 686, quoting *Langdell's Cases on Contracts*, 987.

**33. No particular form of words necessary.**—*Webster v. Upton*, 91 U. S. 65, 68, 23 L. Ed. 384; *Garfield v. United States*, 93 U. S. 242, 244, 23 L. Ed. 779.

**34. Chicago v. Greer**, 9 Wall. 726, 735, 19 L. Ed. 769. See, also, *Canal Co. v. Ray*, 101 U. S. 522, 526, 25 L. Ed. 792.

"The written acceptance by one party of a written proposal made to him by another party creates a contract of the same force and effect as if formal articles of agreement had been written out and signed by said parties." *Brown v. District of Columbia*, 127 U. S. 579, 583, 32 L. Ed. 262.

**35. Carr v. Duval**, 14 Pet. 77, 83, 10 L. Ed. 361; *Waterman v. Banks*, 144 U. S. 394, 402, 36 L. Ed. 479. See post, "Time as Essence," IX, A, 6, c.

**36. Minneapolis, etc., Railway v. Columbus Rolling Mill**, 119 U. S. 149, 151, 30 L. Ed. 376; *Burton v. United States*, 202 U. S. 344, 374, 384, 50 L. Ed. 1057.

**37. Burton v. United States**, 202 U. S. 344, 384, 50 L. Ed. 1057.

at any time within the limit and so long as it remains open, be accepted or rejected by the party to whom it was made;<sup>38</sup> but the offer is withdrawn by the expiration of the time.<sup>39</sup>

f. *Manner of Acceptance*.—An offer of a bargain, by one person to another, imposes no obligation upon the former, unless it is accepted by the latter, according to the terms on which the offer was made; any qualification of, or departure from, those terms, invalidates the offer, unless the same be agreed to by the party who made it.<sup>40</sup>

g. *Communication of Acceptance*.—It is to be taken as settled law, both in this country and in England, in cases of contracts between parties distant from each other, but communicating in modes recognized in commercial business, that when an offer is made by one person to another, the minds of the parties meet and a contract is to be deemed concluded, when the offer is accepted in reasonable time, either by telegram duly sent in the ordinary way, or by letter duly posted to the proposer, provided either be done before the offer is withdrawn, to the knowledge of or upon notice to the other party.<sup>41</sup>

38. Minneapolis, etc., Railway v. Columbus Rolling Mill, 119 U. S. 149, 151, 30 L. Ed. 376.

39. See *Waterman v. Banks*, 144 U. S. 394, 402, 36 L. Ed. 479.

40. *Manner of acceptance*.—*Elason v. Henshaw*, 4 Wheat. 225, 4 L. Ed. 556; *Carr v. Duval*, 14 Pet. 77, 82, 10 L. Ed. 361; *Chicago v. Greer*, 9 Wall. 726, 735, 19 L. Ed. 769; *Insurance Co. v. Young*, 23 Wall. 85, 106, 23 L. Ed. 152; *Tilley v. County of Cook*, 103 U. S. 155, 161, 26 L. Ed. 374; *Minneapolis, etc., Railway v. Columbus Rolling Mill*, 119 U. S. 149, 151, 30 L. Ed. 376; *Compania Bilbaina v. Spanish-American, etc., Power Co.*, 146 U. S. 483, 497, 36 L. Ed. 1054.

"A proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modification suggested." *Minneapolis, etc., Railway v. Columbus Rolling Mill*, 119 U. S. 149, 151, 30 L. Ed. 376; *National Bank v. Hall*, 101 U. S. 43, 50, 25 L. Ed. 822.

A. offered to purchase of B. two or three hundred barrels of flour, to be delivered at Georgetown (District of Columbia), by the first water, and to pay for the same \$9.50 per barrel; and to the letter, containing this offer, required an answer by the return of the wagon by which the letter was sent; this wagon was, at that time, in the service of B., and employed by him in conveying flour from his mill to Harper's Ferry, near to which place A. then was; his offer was accepted by B., in a letter sent by the first regular mail to Georgetown, and received by A. at that place; but no answer was ever sent to Harper's Ferry. Held, that this acceptance, communicated at a place different from that indicated by A., imposed no obligation binding upon him. *Elason v. Henshaw*, 4 Wheat. 225, 4 L. Ed. 556.

The defendant, by letter, offered to sell to the plaintiff from two to five thousand

tons of steel rails at a specified price, and added that if the offer was accepted he should be notified before Dec. 20. On December 16 the plaintiff telegraphed the defendant to enter his order for twelve hundred tons of the rails at the stipulated price. On December 18 the defendant declined to fill the order for that quantity of the rails. It was held that this closed the transaction between the parties and the defendant was not obliged to fill an order, made by the plaintiff on the 19 of December, for two thousand tons of rails. *Minneapolis, etc., Railway v. Columbus Rolling Mill*, 119 U. S. 149, 152, 30 L. Ed. 370.

41. *Acceptance by mail or telegram*.—*Tayloe v. Merchants' Fire Ins. Co.*, 9 How. 390, 13 L. Ed. 187, in which case the court remarked: "This is, also, the effect of the case of *Elason v. Henshaw*, 4 Wheat. 225, 228, 4 L. Ed. 556, in this court, though the point was not necessarily involved in the decision of the case. The acceptance there had not been according to the terms of the bargain proposed, for which reason the plaintiff failed." *Burton v. United States*, 202 U. S. 344, 384, 50 L. Ed. 1057; *Patrick v. Bowman*, 149 U. S. 411, 424, 37 L. Ed. 790.

"Putting the answer by letter in the mail containing the acceptance, and thus placing it beyond the control of the party, it is valid as a constructive notice of acceptance." *Burton v. United States*, 202 U. S. 344, 374, 384, 50 L. Ed. 1057, citing 2 Kent's Com. 477.

Where there was a correspondence relating to the insurance of a house against fire, the insurance company making known the terms upon which they were willing to insure, the contract was complete when the insured placed a letter in the postoffice accepting the terms. The house having been burned down whilst the letter of acceptance was in progress by the mail, the company was held responsible. *Tayloe v. Merchants' Fire Ins. Co.*, 9 How. 390, 13 L. Ed. 187; *Burton v. United States*, 202 U. S. 344, 384, 50 L. Ed. 1057.



h. *Duplicate Offer*.—Where an offer is made in duplicate but a postscript is added to one copy which is not included in the other, the acceptance of the offer contained in the copy first coming into the hands of the party accepting, constitutes the contract, regardless of the fact that the copy upon which this acceptance was based was sent out subsequent to the other copy.<sup>42</sup>

i. *Effect of Rejection of Offer*.—The rejection of an offer leaves the matter as if no offer had ever been made,<sup>43</sup> and the other party, having once rejected the offer, cannot afterwards revive it by tendering an acceptance of it.<sup>44</sup>

j. *Revocation of Offer*.—(1) *Power to Revoke*.—An offer may at any time before rights have accrued thereunder be withdrawn by the party making it,<sup>45</sup> unless there is an express agreement on good consideration to accept within a limited time, or when other acts are done which the person making the offer consents to be bound by.<sup>46</sup>

(2) *Time for Revocation*.—An offer cannot be withdrawn unless the withdrawal reaches the party to whom it is addressed before his reply announcing the acceptance has been transmitted.<sup>47</sup>

(3) *Effect of Revocation*.—The revocation of an offer leaves the matter as if no offer had ever been made.<sup>48</sup>

2. **WRITING**.—As to what contracts should be in writing, see the title **FRAUDS, STATUTE OF**.

3. **SIGNING**.—The general rule is that whether a contract has been actually signed is immaterial, so long as the terms of the contract were agreed upon and understood between the parties, the signing of the formal writing having only the effect of calling into existence additional evidence of the contract.<sup>49</sup> But under particular statutes requiring that a contract shall be signed, it has been held that the making of a mark constitutes signing.<sup>50</sup>

42. **Duplicate offer**.—*Bell v. Cunningham*, 3 Pet. 69, 83, 7 L. Ed. 606.

43. **Effect of rejection of offer**.—*Minneapolis, etc., Railway v. Columbus Rolling Mill*, 119 U. S. 149, 151, 30 L. Ed. 376.

44. *Minneapolis, etc., Railway v. Columbus Rolling Mill*, 119 U. S. 149, 151, 30 L. Ed. 376.

45. **Power to revoke**.—*Minneapolis, etc., Railway v. Columbus Rolling Mill*, 119 U. S. 149, 151, 30 L. Ed. 376; *Shuey v. United States*, 92 U. S. 73, 76, 23 L. Ed. 697; *Smithmeyer v. United States*, 147 U. S. 342, 359, 37 L. Ed. 196; *Stitt v. Huidekopers*, 17 Wall. 384, 21 L. Ed. 644; *Waterman v. Banks*, 144 U. S. 394, 402, 36 L. Ed. 479.

46. *Stitt v. Huidekopers*, 17 Wall. 384, 21 L. Ed. 644.

47. **Time for revocation**.—*Tayloe v. Merchants' Fire Ins. Co.*, 9 How. 390, 400, 13 L. Ed. 187; *Burton v. United States*, 202 U. S. 344, 374, 384, 50 L. Ed. 1057.

"The authorities are abundant to the proposition that when an offer is made and accepted by the posting of a letter of acceptance, before notice of withdrawal is received, the contract is not impaired by the fact that a revocation had been mailed before the letter of acceptance." *Patrick v. Bowman*, 149 U. S. 411, 424, 37 L. Ed. 790.

"An offer by letter, or by a special agent, is an authority revocable in itself, but not to be revoked without notice to the party receiving it, and never after it

has been executed by an acceptance. There would be no certainty in making contracts through the medium of the mail, if the rule were otherwise." *Burton v. United States*, 202 U. S. 344, 384, 50 L. Ed. 1057, quoting 2 Kent's Com. 477.

48. **Effect of revocation of offer**.—*Minneapolis, etc., Railway v. Columbus Rolling Mill*, 119 U. S. 149, 151, 30 L. Ed. 376.

49. **Signing**.—*Girard Ins., etc., Co. v. Cooper*, 162 U. S. 529, 543, 40 L. Ed. 1062.

50. "If this question were necessarily to be decided by the principles of law, as settled in the courts of England and the United States, there would be no doubt of the truth of the legal proposition, that making a mark is signing, even in the attestation of a last will and testament; which has been fenced around by the law with more than ordinary guards, because they are generally made by parties, when they are sick, and when, too, they are frequently inops consilii, and when they, therefore, need all the protection which the law can afford to them. This principle is fully settled by many cases, amongst others, 8 Ves. 185, 504; 17 Ibid. 459. See also 5 Johns. 144." *Zacharie v. Franklin*, 12 Pet. 151, 162, 9 L. Ed. 1035. See the title **SIGNATURE**.

"The question has been directly adjudicated in Louisiana. In 9 La. 512, it is said, 'that the force and effect to be given to instruments, which have for signatures, only the ordinary marks of the parties to them, depend more upon the rules of evidence than the dicta of law relating to the

4. **SEALING.**—Contracts under seal are treated under other titles.<sup>51</sup>
5. **STAMPS.**—As to revenue stamps on contracts, see the title **REVENUE LAWS**, and references there given.
6. **DELIVERY.**—A written contract cannot become a binding obligation until it has been delivered.<sup>52</sup> Its delivery may be absolute or conditional. If the latter, then it does not become a binding obligation until the condition upon which its delivery depends has been fulfilled.<sup>53</sup>
7. **FUTURE EXECUTION OF FORMAL CONTRACT.**—Frequently contracts are entered into with the express understanding that they are not to become binding except on the happening of certain contingencies.<sup>54</sup>
- B. Essential Elements**—1. **COMPETENT PARTIES.**—A contract, to be valid, must be entered into by competent parties.<sup>55</sup> As to agents,<sup>56</sup> brokers,<sup>57</sup> corporations,<sup>58</sup> counties,<sup>59</sup> District of Columbia,<sup>60</sup> drunken persons,<sup>61</sup> factors and commission merchants,<sup>62</sup> fiduciaries,<sup>63</sup> infants,<sup>64</sup> insane persons,<sup>65</sup> married women,<sup>66</sup> municipal corporations,<sup>67</sup> religious societies,<sup>68</sup> schools and school districts,<sup>69</sup> slaves,<sup>70</sup> spendthrifts,<sup>71</sup> states,<sup>72</sup> United States,<sup>73</sup> as competent parties, see the appropriate titles.
2. **SUBJECT MATTER.**—A contract must contain proper subject matter,<sup>74</sup> which,

validity of contracts required to be made in writing. The genuineness of instruments under private signature, depends on proof; and in all cases where they are established by legal evidence, instruments signed by the ordinary mark of a person, incapable of writing his name, ought to be held as written evidence. According to the rules of evidence, as adopted in this state, the ordinary mark of a party to a contract, places the evidence of it on a footing with all private instruments in writing.' To the same point, see the case of *Madison v. Zabriskie*, 11 La. 251. This branch, then, of the objection to the admission of the instrument in evidence, is wholly untenable." *Zacharie v. Franklin*, 12 Pet. 151, 162, 9 L. Ed. 1035.

51. **Sealing.**—See the titles **BONDS**, vol. 3, p. 382; **DEEDS**; **MORTGAGES AND DEEDS OF TRUST**; **SEALS AND SEALED INSTRUMENTS**.

52. **Necessity for delivery.**—*Burke v. Dulaney*, 153 U. S. 228, 238, 38 L. Ed. 698.

53. **Absolute or conditional delivery.**—*Hartford Fire Ins. Co. v. Wilson*, 187 U. S. 467, 474, 47 L. Ed. 261, citing *Burke v. Dulaney*, 153 U. S. 228, 238, 38 L. Ed. 698.

54. **Future execution of formal contract.**—Before signing a contract the parties agreed that they would seek the legal advice of one of two lawyers named by them, as to its legality, and if they were advised by either of them that it was illegal it should be of no effect. They were advised by one of these lawyers that the agreement was one that would not stand the test of a legal investigation. In an action brought on this contract, it was held that it never went into effect, and that the condition upon which it was to become operative never occurred. *Ware v. Allen*, 128 U. S. 590, 595, 32 L. Ed. 563.

55. **Necessity for competent parties.**—*Dartmouth College v. Woodward*, 4 Wheat. 518, 656, 4 L. Ed. 629; *United*

*States v. Linn*, 15 Pet. 290, 311, 10 L. Ed. 742; *McGee v. Mathis*, 4 Wall. 143, 155, 18 L. Ed. 314; *Farrington v. Tennessee*, 95 U. S. 679, 685, 24 L. Ed. 558; *Insurance Co. v. Dutcher*, 95 U. S. 269, 271, 24 L. Ed. 410. See, also, *Hall v. United States*, 92 U. S. 27, 30, 23 L. Ed. 597.

56. **Agents.**—See the title **PRINCIPAL AND AGENT**.

57. **Brokers.**—See the title **BROKERS**, vol. 3, p. 531.

58. **Corporations.**—See the title **CORPORATIONS**, and references there given.

59. **Counties.**—See the title **COUNTIES**.

60. **District of Columbia.**—See the title **DISTRICT OF COLUMBIA**.

61. **Drunken persons.**—See the title **DRUNKENNESS**.

62. **Factors and commission merchants.**—See the title **FACTORS AND COMMISSION MERCHANTS**.

63. **Fiduciaries.**—See the titles **EXECUTORS AND ADMINISTRATORS**; **GUARDIAN AND WARD**; **TRUSTS AND TRUSTEES**.

64. **Infants.**—See the title **INFANTS**.

65. **Insane persons.**—See the title **INSANITY**.

66. **Married women.**—See the title **HUSBAND AND WIFE**.

67. **Municipal corporations.**—See the title **MUNICIPAL CORPORATIONS**.

68. **Religious societies.**—See the title **RELIGIOUS SOCIETIES**.

69. **Schools and school districts.**—See the title **SCHOOLS**.

70. **Slaves.**—See the title **SLAVES**.

71. **Spendthrifts.**—See the title **SPENDTHRIFTS AND SPENDTHRIFT TRUSTS**.

72. **States.**—See the title **STATES**.

73. **United States.**—See the title **UNITED STATES**.

74. **Necessity for proper subject matter.**—*McGee v. Mathis*, 4 Wall. 143, 155,

to be valid, must be for lawful purposes, not prohibited by law.<sup>75</sup>

3. **MOTIVE AS AFFECTING VALIDITY.**—The motives which induce a party to make a contract, whether justifiable or censurable, can have no influence on its validity.<sup>76</sup>

4. **MUTUAL ASSENT.**—It is essential to the validity of a contract that the minds of the parties should meet as to all of its terms. They must have contracted *ad idem*.<sup>77</sup> Both minds must meet in the transaction; and if one is so weak, un-

18 L. Ed. 314; *New Jersey v. Wilson*, 7 Cranch 164, 3 L. Ed. 303.

75. **Legality of subject matter.**—See the titles **GAMBLING CONTRACTS**; **ILLEGAL CONTRACTS**; **LOTTERIES**; **RESTRAINT OF TRADE**; **USURY**.

76. **Motive as effecting validity.**—*McDonald v. Smalley*, 1 Pet. 620, 624, 7 L. Ed. 287.

77. **Mutual assent.**—*New Jersey v. Wilson*, 7 Cranch 164, 3 L. Ed. 303; *The Frances*, 8 Cranch 354, 3 L. Ed. 587; *McGee v. Mathis*, 4 Wall. 143, 155, 18 L. Ed. 314; *Scott v. United States*, 12 Wall. 443, 444, 20 L. Ed. 438; *Ambler v. Whipple*, 20 Wall. 546, 556, 22 L. Ed. 403; *Insurance Co. v. Young*, 23 Wall. 85, 107, 23 L. Ed. 152; *Piedmont, etc., Life Ins. Co. v. Ewing*, 92 U. S. 377, 23 L. Ed. 610; *Whiteside v. United States*, 93 U. S. 247, 255, 23 L. Ed. 882; *Utley v. Donaldson*, 94 U. S. 29, 49, 24 L. Ed. 54; *United States v. Bostwick*, 94 U. S. 53, 65, 24 L. Ed. 65; *Insurance Co. v. Dutcher*, 95 U. S. 269, 271, 24 L. Ed. 410; *Farrington v. Tennessee*, 95 U. S. 679, 685, 24 L. Ed. 558; *National Bank v. Hall*, 101 U. S. 43, 49, 25 L. Ed. 822; *Davis v. Wells*, 104 U. S. 159, 165, 26 L. Ed. 686; *Louisiana v. New Orleans*, 109 U. S. 285, 288, 27 L. Ed. 936; *Laver v. Dennett*, 109 U. S. 90, 97, 27 L. Ed. 867; *Chase v. Curtis*, 113 U. S. 452, 464, 28 L. Ed. 1038; *Minneapolis, etc., Railway v. Columbus Rolling Mill*, 119 U. S. 149, 151, 30 L. Ed. 376; *Fire Ins. Ass'n v. Wickham*, 141 U. S. 564, 579, 35 L. Ed. 860; *Holder v. Aultman*, 169 U. S. 81, 89, 42 L. Ed. 669; *Richmond, etc., R. Co. v. Patterson Tobacco Co.*, 169 U. S. 311, 314, 42 L. Ed. 759; *Moffett, etc., Co. v. Rochester*, 178 U. S. 373, 386, 44 L. Ed. 1108.

"Where there is a misunderstanding as to anything material, the requisite mutuality of assent as to such thing is wanting; consequently, the supposed contract does not exist, and neither party is bound. In the view of the law in such case, there has been only a negotiation, resulting in a failure to agree. What has occurred is as if it were not, and the rights of the parties are to be determined accordingly." *Utley v. Donaldson*, 94 U. S. 29, 47, 24 L. Ed. 54; *Scott v. United States*, 12 Wall. 443, 444, 20 L. Ed. 438.

An offer accepted by one other than the one to whom it was addressed will not be binding upon the party making the offer. *Grant v. Naylor*, 4 Cranch 224, 2 L. Ed. 603.

As to the effect of, and relief against misunderstandings or mistakes in contracts, see the titles **MISTAKE AND ACCIDENT**; **RESCISSION, CANCELLATION AND REFORMATION**.

"It cannot for a moment be contended, that, while parties are still in negotiation as to the terms of a contract, one of them, learning of a total change in the condition of the subject matter of the contract of which the other is ignorant, can at that moment accept terms which he has refused before, and by doing so bind the party who had offered those terms when the condition of affairs was wholly different." *Piedmont, etc., Life Ins. Co. v. Ewing*, 92 U. S. 377, 380, 23 L. Ed. 610.

"Until the terms of the agreement have received the assent of both parties, the negotiation is open, and imposes no obligation on either." *Carr v. Duval*, 14 Pet. 77, 83, 10 L. Ed. 361.

"Communications which have been cited do not import a contract. They were negotiations preparatory to an agreement, but not an agreement itself." *Head v. Providence Ins. Co.*, 2 Cranch 127, 165, 2 L. Ed. 229.

**Consent as to consideration.**—Consideration, like every other part of a contract, must be the result of agreement. "The mere presence of some incident to a contract which might under certain circumstances be upheld as a consideration for a promise, does not necessarily make it the consideration for the promise in that contract. To give it that effect it must have been offered by one party and accepted by the other as one element of the contract." *Fire Ins. Ass'n v. Wickham*, 141 U. S. 564, 579, 35 L. Ed. 860.

**Consent as to parties.**—"In making a contract, parties are as important an element as the terms with reference to the subject matter. Mutual assent as to both is alike necessary." *National Bank v. Hall*, 101 U. S. 43, 50, 25 L. Ed. 822.

**Consent to modification or abandonment.**—As to the necessity for mutual assent to the modification or abandonment of a contract already made, see post, "Modification and Ratification," V; "Waiver or Abandonment," VIII.

**Every feature must be agreed upon.**—*Fire Ins. Ass'n v. Wickham*, 141 U. S. 564, 579, 35 L. Ed. 860; *National Bank v. Hall*, 101 U. S. 43, 50, 25 L. Ed. 822; *Compania Tibaina v. Spanish-American, etc., Power Co.*, 146 U. S. 483, 497, 36 L. Ed. 1054, citing *Elison v. Henshaw*, 4 Wheat. 225, 4 L. Ed. 556; *Insurance Co. v. Young*, 23



sound, and diseased that the party is incapable of understanding the nature and quality of the act to be performed, or its consequences, he is incompetent to assent to the terms and conditions of the instrument, whether that state of his mind was produced by mental or physical disease, and whether it resulted from ordinary sickness or from accident, or from debauchery, or from habitual and protracted intemperance.<sup>78</sup> And this rule applies likewise to those cases in which the consenting party is controlled by improper methods.<sup>79</sup>

5. **CERTAINTY AND COMPLETENESS.**—A contract to be valid should be certain and complete in every particular.<sup>80</sup> But a contract is not avoided by misnaming the corporation with which it is made.<sup>81</sup>

6. **MUTUALITY**—a. *Necessity for Mutuality.*—A contract to be binding must be mutual; one party cannot be bound unless the other be also,<sup>82</sup> notwithstanding

Wall. 85, 23 L. Ed. 152; *Tilley v. County of Cook*, 103 U. S. 155, 26 L. Ed. 374; *Minneapolis, etc., Railway v. Columbus Rolling Mill*, 119 U. S. 149, 151, 30 L. Ed. 376. See ante, "Manner of Acceptance," II, A, 1, f.

A new party could no more be imported into the contract and imposed upon another party without the consent of the latter than a change could be made in like manner in other pre-existing stipulations. One original party might have been willing to contract with a firm as it was originally, but not as it was subsequently. At any rate, he has the right to know and to decide for himself. Without his assent a thing is wanting which was indispensable to the continuity of the contract. *National Bank v. Hall*, 101 U. S. 43, 50, 25 L. Ed. 822.

**Refusal to recognize contractual relation.**—In *Kirk v. United States*, 163 U. S. 49, 55, 41 L. Ed. 66, the court said: "We know of no principle upon which a contract can be evoked from a distinct refusal of one party to recognize the rights of the other, and a formal protest against any such rights being granted to him."

78. **Consent as dependent upon condition of mind.**—*Johnson v. Harmon*, 94 U. S. 371, 373, 24 L. Ed. 271. See the titles **DRUNKENNESS; FRAUD AND DECEIT; INFANTS; INSANITY.**

79. **Freedom of consent.**—See the titles **DURESS; UNDUE INFLUENCE.**

80. **Certainty and completeness.**—See *Roberts v. Benjamin*, 124 U. S. 64, 72, 31 L. Ed. 334; *National Bank v. Hall*, 101 U. S. 43, 50, 25 L. Ed. 822, citing *Appleby v. Johnson*, Law Rep. 9, C. P. 158. See ante, "Mutual Assent," II, B, 4.

D. and P. agreed to purchase a contract for R. from M. The contract to purchase stated that the sum of fifteen thousand dollars "the said D. and P. have this day advanced and paid to said M." The contract was signed by M. It was held that this statement was ambiguous and did not show actual prior or simultaneous payment. *Mills v. Dow*, 133 U. S. 423, 431, 33 L. Ed. 717.

Two committees representing first and second mortgage bondholders of a railroad company met, and it was agreed between them that the second mortgage

bondholders should participate in a reorganization of the company, in which the first mortgage bondholders were to purchase the property of the railroad company. It was held, that the agreement was too vague and indefinite to furnish a foundation for its enforcement. *Robinson v. Iron R. Co.*, 135 U. S. 522, 532, 34 L. Ed. 276.

81. **Misnaming a party.**—*County of Moultrie v. Fairfield*, 105 U. S. 370, 377, 26 L. Ed. 945. See the title **MISTAKE AND ACCIDENT.**

82. **Mutuality.**—*Dorsey v. Packwood*, 12 How. 126, 136, 13 L. Ed. 921; *Farrington v. Tennessee*, 95 U. S. 679, 685, 24 L. Ed. 558; *Tilley v. County of Cook*, 103 U. S. 155, 161, 26 L. Ed. 374; *Patrick v. Bowman*, 149 U. S. 411, 425, 37 L. Ed. 790.

"In suits upon unilateral contracts, it is only where the defendant has had the benefit of the consideration for which he bargained that he can be held bound." *Richardson v. Hardwick*, 106 U. S. 252, 255, 27 L. Ed. 145.

**Agreement to transfer realty.**—An agreement, whereby the purchaser of a plantation "bound himself to transfer to his son-in-law one-half of the plantation, slaves, cattle and stock, as soon as the son-in-law should pay for one-half of the cost of said property, either with his own private means, or with one-half of the profits of the plantation," was deficient in mutuality. The son-in-law was not bound to render any services nor pay any money. It was a nude pact. *Dorsey v. Packwood*, 12 How. 126, 13 L. Ed. 921.

**Tripartite agreement between public park and railroads for right of way.**—*Joy v. St. Louis*, 138 U. S. 1, 51, 34 L. Ed. 843. See the titles **PARKS AND PUBLIC SQUARES; RAILROADS.**

**Reorganization of company.**—Two committees representing first and second mortgage bondholders of a railroad company met and it was agreed between them that the second mortgage bondholders should participate in a reorganization of the company, in which the first mortgage bondholders were to purchase the property of the railroad company. It was also agreed that the second mortgage bondholders should rank substantially as they did before. It was held that there was no

ing that the principle of mutuality thus applied may enable a party to take advantage of the invalidity of his own act.<sup>83</sup> But agreements are frequently made which are not, in a certain sense, binding on both sides at the time when executed, and in which the whole duty to be performed rests primarily with one of the contracting parties.<sup>84</sup>

b. *Implication of Mutuality*.—Undoubtedly necessary implication is as much a part of an instrument as if that which is so implied was plainly expressed, but omissions or defects in written instruments cannot be supplied by virtue of that rule unless the implication results from the language employed in the instrument, or is indispensable to carry the intention of the parties into effect; as where the act to be done by one of the contracting parties can only be done upon something of a corresponding character being done by the opposite party, the law in such a case, if the contract is so framed that it binds the party contracting to do the act, will imply a correlative obligation on the part of the other party to do what is necessary on his part to enable the party so contracting to accomplish his undertaking and fulfill his contract.<sup>85</sup>

7. *CONSIDERATION*.—a. *Definitions and Distinctions*.—The consideration, in the legal sense of the word, of a contract is the quid pro quo, that which the party to whom a promise is made does or agrees to do in exchange for the promise.<sup>86</sup> There is a clear distinction sometimes between the motive that may induce to entering into a contract and the consideration of the contract. Nothing is consideration that is not regarded as such by both parties.<sup>87</sup> A consideration

binding agreement between these committees as there was no mutuality in the agreement alleged. *Robinson v. Iron R. Co.*, 135 U. S. 522, 532, 34 L. Ed. 276.

83. *Patrick v. Bowman*, 149 U. S. 411, 425, 37 L. Ed. 790.

84. *Contracts not binding when executed*.—Contracts of guaranty may fall under that class, as when a person solicits another to employ a particular individual as his agent for a specified period, and engages that if the person addressed will do so, he, the applicant, will be responsible for the moneys the agent shall receive and neglect to pay over during that time. The party indemnified in such a case is not bound to employ the party designated by the guarantor; but if he do employ him in pursuance of the promise, the guaranty attaches and becomes binding on the party who gave it. *Storm v. United States*, 94 U. S. 76, 83, 24 L. Ed. 42.

85. *Implication of mutuality*.—*Hudson Canal Co. v. Pennsylvania Coal Co.*, 8 Wall. 276, 288, 19 L. Ed. 349. See, also, *United States v. Babbitt*, 1 Black 55, 61, 17 L. Ed. 94.

Where the obligation of plaintiffs requires an expenditure of a large sum in preparation to enable them to perform it, and a continuous readiness to perform, the law implies a duty in the other party to do whatever is necessary for him to do to enable plaintiffs to comply with their promise or covenant. *United States v. Speed*, 8 Wall. 77, 84, 19 L. Ed. 449.

"So if one person engages to work and render services which require great outlay of money, time, and trouble, and he is only to be paid according to the work he performs, the contract necessarily implies an obligation on the part of the employer

to supply the work." *Hudson Canal Co. v. Pennsylvania Coal Co.*, 8 Wall. 276, 289, 19 L. Ed. 349.

"If one person covenants or engages by contract to buy an estate of another at a given price, the law will imply a corresponding obligation on the part of such other person to sell, although the contract is silent as to any such obligation, as the person contracting to purchase cannot fulfill his contract unless the other party will consent to sell." *Hudson Canal Co. v. Pennsylvania Coal Co.*, 8 Wall. 276, 288, 19 L. Ed. 349.

"Persons often contract to manufacture some particular article, and in such cases the law implies a corresponding obligation on the part of the other party to take it when it is completed according to the contract, because if it were not so the party rendering the services and incurring the expense in fulfilling his contract could not claim any remuneration." *Hudson Canal Co. v. Pennsylvania Coal Co.*, 8 Wall. 276, 289, 19 L. Ed. 349. See the title *SALES*.

86. *Consideration defined*.—*Phoenix Life Ins. Co. v. Raddin*, 120 U. S. 183, 197, 30 L. Ed. 644.

87. *Motive and consideration distinguished*.—*Fire Ins. Ass'n v. Wickham*, 141 U. S. 564, 579, 35 L. Ed. 860.

In *Philpot v. Gruninger*, 14 Wall. 570, 577, 20 L. Ed. 743, the court said: "It is the price voluntarily paid for a promisor's undertaking. An expectation of results often leads to the formation of a contract, but neither the expectation nor the result is 'the cause or meritorious occasion requiring a mutual recompense in fact or in law.' Surely a creditor may do a favor to his debtor, or, may enter into a new

may be either a good, or a valuable one. A good consideration is that of blood, or natural affection, or love; as when a man grants an estate to a near relation. Blood or marriage are the most common and suitable considerations in this species of conveyance.<sup>88</sup> The valuable consideration is such as money, marriage, or any other equivalent given for the grant.<sup>89</sup>

b. *Necessity for Consideration*.—A contract, to be valid, must be founded on sufficient consideration.<sup>90</sup>

c. *Presumption of Consideration*.—Where a contract is under seal, a seal imports a consideration,<sup>91</sup> while in a simple contract consideration must be proved.<sup>92</sup>

and independent contract with him, induced by which the debtor may assent to giving a note for the previously existing indebtedness. Without the favor or the new contract there is in such a case a full consideration for the note, and the parties may not have contemplated that the favor or the new contract was to be paid for. To regard them as entering into the consideration of the note would be to make a contract for the parties to which their minds never assented."

"Consideration, like every other part of a contract, must be the result of agreement. The parties must understand and be influenced to the particular action by something of value or convenience and inconvenience recognized by all of them as the moving cause. That which is a mere fortuitous result flowing accidentally from an arrangement, but in no degree prompting the actors to it, is not to be esteemed a legal consideration." *Fire Ins. Ass'n v. Wickham*, 141 U. S. 564, 579, 35 L. Ed. 860.

"The mere presence of some incident to a contract which might under certain circumstances be upheld as a consideration for a promise, does not necessarily make it the consideration for the promise in that contract. To give it that effect it must have been offered by one party and accepted by the other as one element of the contract." *Fire Ins. Ass'n v. Wickham*, 141 U. S. 564, 579, 35 L. Ed. 860.

88. "Good" and "valuable" consideration compared.—*Vanhorn v. Harrison*, 1 Dall. 137, 138, 1 L. Ed. 70, citing 2 Bl. Com. 297, 336; *King v. Thompson*, 9 Pet. 204, 218, 9 L. Ed. 102. As to the construction of the terms "valuable consideration" and good consideration when a question arises under the statute of frauds, see the title FRAUDS, STATUTE OF.

89. *Vanhorn v. Harrison*, 1 Dall. 137, 138, 1 L. Ed. 70.

90. *Necessity for sufficient consideration*.—*New Jersey v. Wilson*, 7 Cranch 164, 3 L. Ed. 303; *Allen v. Hammond*, 11 Pet. 63, 9 L. Ed. 633; *United States v. Linn*, 15 Pet. 290, 311, 10 L. Ed. 742; *Woodruff v. Trapnall*, 10 How. 190, 205, 13 L. Ed. 383; *McGee v. Mathis*, 4 Wall. 143, 155, 18 L. Ed. 314; *Railroad Co. v. Reeves*, 10 Wall. 176, 19 L. Ed. 909; *Farrington v. Tennessee*, 95 U. S. 679, 685, 24 L. Ed. 558; *Edwards v. Kearzey*, 96 U. S.

595, 599, 24 L. Ed. 793; *Durkee v. Board of Liquidation*, 103 U. S. 646, 26 L. Ed. 598; *Tilley v. County of Cook*, 103 U. S. 155, 161, 26 L. Ed. 374; *Leuisiana v. New Orleans*, 109 U. S. 285, 288, 27 L. Ed. 936; *Robinson v. Iron R. Co.*, 135 U. S. 522, 532, 34 L. Ed. 276; *Fire Ins. Ass'n v. Wickham*, 141 U. S. 564, 579, 35 L. Ed. 860.

An agreement where there is no consideration is a nude pact; the promise of a gratuity spontaneously made, which may be kept, changed, or recalled at pleasure; and this rule of law applies to the agreements of states made without consideration as well as to those of persons. *Tucker v. Ferguson*, 22 Wall. 527, 528, 22 L. Ed. 805.

"The question of consideration, whether arising upon the admissibility of evidence or presented as a point in pleading, is not one of procedure and remedy. It goes to the substance of the right itself, and belongs to the constitution of the contract." *Pritchard v. Norton*, 106 U. S. 124, 135, 27 L. Ed. 104.

**Particular contracts considered**.—See post, "Executory and Executed Contracts," III. F. As to necessity for consideration in particular contracts, see the specific titles, such as GUARANTY; INDEMNITY; NOVATION; SUBSCRIPTIONS, etc.

91. **Presumption of consideration**.—*United States v. Linn*, 15 Pet. 290, 315, 10 L. Ed. 742; *Storm v. United States*, 94 U. S. 76, 83, 24 L. Ed. 42; *Hilton v. Guyot*, 159 U. S. 113, 199, 40 L. Ed. 95; *Jackson v. Ashton*, 11 Pet. 229, 248, 9 L. Ed. 698. See the titles BONDS, vol. 3, p. 394; SEALS AND SEALED INSTRUMENTS.

"Want of consideration is not a sufficient answer to an action on a sealed instrument. The seal imports a consideration, or renders proof of consideration unnecessary; because the instrument binds the parties by force of the natural presumption that an instrument executed with so much deliberation and solemnity is founded upon some sufficient cause." *Storm v. United States*, 94 U. S. 76, 84, 24 L. Ed. 42.

92. *United States v. Linn*, 15 Pet. 290, 315, 10 L. Ed. 742; *Hilton v. Guyot*, 159 U. S. 113, 199, 40 L. Ed. 95.



d. *Sufficiency of Consideration*—(1) *Valuable Consideration*—(a) *Statement of the Rule*.—A benefit to the promisor,<sup>93</sup> or to a third person at his instance,<sup>94</sup> or a loss, inconvenience or damage to promisee,<sup>95</sup> consequent upon and directly resulting from the promise of the promisor in behalf of the promisee,<sup>96</sup> is sufficient to create a valuable consideration for a promise.

(b) *Specific Applications of the Rule*—(aa) *Mutual Promises*.—Cases often arise where the agreement consists of mutual promises, the one promise being the consideration for the other; and it has never been seriously questioned that such an agreement is valid, and that the parties are bound to fulfill their respective stipulations.<sup>97</sup> Whether one promise be the consideration for another, or whether the performance, and not the mere promise, be the consideration, is to be determined by the intention and meaning of the parties, as collected from the instrument, and the application of good sense and right reason to each particular case.<sup>98</sup>

(bb) *Illegal Consideration*.—As to the legality of consideration, see the titles GAMBLING CONTRACTS; ILLEGAL CONTRACTS; LOTTERIES; RESTRAINT OF TRADE; USURY.

(cc) *Compromise*.—As to compromise of a disputed claim as constituting a sufficient consideration for a new promise, see the title COMPROMISE AND SETTLEMENT, vol. 3, p. 980.

**93. Benefit to promisor.**—Emerson v. Slater, 22 How. 28, 43, 16 L. Ed. 360; Piatt v. United States, 22 Wall. 496, 507, 22 L. Ed. 858; United States v. Linn, 15 Pet. 290, 314, 10 L. Ed. 742.

"The smallest spark of benefit or accommodation is sufficient to create a valid consideration for a promise." Austyn v. McLure, 4 Dall. 227, 229, 1 L. Ed. 811.

"To constitute a consideration, it is not absolutely necessary that a benefit should accrue to the person making the promise." Violett v. Patton, 5 Cranch, 142, 3 L. Ed. 61. See post, footnote catchline, "Loss, Inconvenience or Damage to Promisee," this section. See the titles GUARANTY; PARTIES.

"To constitute a valuable consideration, it is not necessary that money should be paid; an expenditure made upon the faith of the contract being sufficient." King v. Thompson, 9 Pet. 204, 219, 9 L. Ed. 102.

A consideration moving to A. and B., with whom C. afterwards enters into partnership, and of which consideration C. thus gets the benefit, will support a promise by C. Philpot v. Gruninger, 14 Wall. 570, 20 L. Ed. 743.

**94. Benefit to third person.**—"In the common case of a letter of credit given by A. to B., the person who, on the faith of that letter, trusts B., is admitted to have his remedy against A., although no benefit accrued to A. as the consideration of his promise." Violett v. Patton, 5 Cranch 142, 150, 3 L. Ed. 61. See, also, Emerson v. Slater, 22 How. 28, 43, 16 L. Ed. 360; Piatt v. United States, 22 Wall. 496, 507, 22 L. Ed. 858. And see the titles GUARANTY; LETTERS OF CREDIT.

**95. Loss, inconvenience or damage to promisee.**—King v. Thompson, 9 Pet. 204, 218, 9 L. Ed. 102; United States v. Linn, 15 Pet. 290, 314, 10 L. Ed. 742; Emerson

v. Slater, 22 How. 28, 43, 16 L. Ed. 360; Piatt v. United States, 22 Wall. 496, 507, 22 L. Ed. 858; Indianapolis Rolling Mill v. St. Louis, etc., Railroad, 120 U. S. 256, 260, 30 L. Ed. 639.

"Damage to the promisee constitutes as good a consideration as benefit to the promisor." Townsley v. Sumrall, 2 Pet. 170, 182, 7 L. Ed. 386; Violett v. Patton, 5 Cranch 142, 150, 3 L. Ed. 61.

In Hendrick v. Lindsay, 93 U. S. 143, 148, 23 L. Ed. 855, the court said: "Damage to the promisee constitutes as good a consideration as benefit to the promisor. In Pillan v. Van Mierop, 3 Burr. 1663, the court say, 'Any damage or suspension of a right, or possibility of a loss occasioned to the plaintiff by the promise of another, is a sufficient consideration for such promise, and will make it binding, although no actual benefit accrues to the party promising.' This rule is sustained by a long series of adjudged cases."

**96. The promise must be the inducement to the transaction.** Violett v. Patton, 5 Cranch 142, 150, 3 L. Ed. 61; Piatt v. United States, 22 Wall. 496, 507, 22 L. Ed. 858; Emerson v. Slater, 22 How. 28, 43, 16 L. Ed. 360.

**97. Mutual promises.**—Storm v. United States, 94 U. S. 76, 83, 24 L. Ed. 42; Emerson v. Slater, 22 How. 28, 35, 16 L. Ed. 360; Philpot v. Gruninger, 14 Wall. 570, 577, 20 L. Ed. 743; Hyde v. Booraem, 16 Pet. 169, 177, 10 L. Ed. 925; Louisville Gas Co. v. Citizens' Gas Co., 115 U. S. 683, 694, 29 L. Ed. 510; Struthers v. Drexel, 122 U. S. 487, 494, 30 L. Ed. 1216; Ridings v. Johnson, 128 U. S. 212, 216, 32 L. Ed. 401; Burdon Cent. Sugar Refining Co. v. Payne, 167 U. S. 127, 146, 42 L. Ed. 105. See, also, post, "Synallagmatic Contracts," III. B; "Commutative Contracts," III, C.

**98. Jones v. United States,** 96 U. S. 24, 27, 24 L. Ed. 644.

(dd) *Marriage and Promise of Marriage*.—Marriage, in contemplation of the law, is not only a valuable consideration, but is a consideration of the highest value, and from motives of the soundest policy is upheld with a strong resolution.<sup>99</sup>

(ee) *Suspension of Existing Demand*.—A suspension of an existing demand is frequently of the utmost importance to a debtor, and it constitutes one of the oldest titles of the law under the head of forbearance, and has always been considered a sufficient and valid consideration.<sup>1</sup>

(ff) *Release of Unliquidated Claim for Damages*.—There is no doubt of the general proposition that the release of an unliquidated claim for damages is a good consideration for a promise, as between the parties.<sup>2</sup>

(gg) *Relinquishment of Dowry*.—A woman's right of dower being a valuable right which she cannot be compelled to resign, and which the law protects very carefully from her husband's control, her release of it is a good consideration for a promise to pay money to her separate use, and though by the laws of the jurisdiction under which the right is given, the wife might, in fact, under the special circumstances of the case, really have had no right of dower, still if her release was deemed requisite to secure the sale of the property, such release is a good consideration for the promise to pay her money.<sup>3</sup>

(hh) *Relinquishment of Defenses*.—The relinquishment of the defense in an action, and confessing judgment is a sufficient consideration to support a contract.<sup>4</sup>

(ii) *Relinquishment of Individual Rights by Association Member*.—As to the relinquishment of all right to individual property by a member of an association as constituting sufficient consideration for agreements on the part of the society, see the title ASSOCIATIONS, vol. 1, p. 634.

(jj) *Surrender of Collateral Security*.—The surrender of other instruments, although held as collateral security, is also a sufficient consideration.<sup>5</sup>

(kk) *Part Payment*.—As to part payment as constituting sufficient consideration for the release of the entire obligation, see the title PAYMENT.

(ll) *Confidence Induced by Undertaking Service*.—The confidence induced by

**99. Marriage and promise of marriage.**—*Magniac v. Thomson*, 7 Pet. 348, 8 L. Ed. 709.

In *Prewet v. Wilson*, 103 U. S. 22, 24, 26 L. Ed. 360, the court said: "Now, marriage is not only a valuable consideration, but, as Coke says, there is no other consideration so much respected in the law. Fisher justly observes, that 'Marriage is attended and followed by pecuniary consequences; by happiness or misery to the parties; by life to unborn children; by quiet or repose to the state; by what money ordinarily buys and by what no money can buy, to an extent which cannot be estimated or expressed, except by the word "infinite." To say, therefore, that it is to be regarded, where it is the inducement to any contract, as a valuable consideration, is to utter truth, yet only a part of the truth.' And, also, that 'Marriage is to be ranked among the valuable considerations, yet it is distinguishable from most of these in not being reducible to a value which can be expressed in dollars and cents, while still it is in general terms of the very highest value.' Law of Married Women, §§ 775, 776. Such is the purport and language running through all the decisions, both in England and in this country, with reference to marriage as a consideration for an ante-nuptial set-

tlement." See the titles FRAUDULENT AND VOLUNTARY CONVEYANCES; MARRIAGE CONTRACTS AND SETTLEMENTS.

**1. Suspension of existing demand.**—*Goodman v. Simonds*, 20 How. 343, 371, 15 L. Ed. 934; *Manufacturing Co. v. Bradley*, 105 U. S. 175, 26 L. Ed. 1034.

**2. Release of unliquidated claim for damages.**—*Union Pacific R. Co. v. Goodridge*, 149 U. S. 680, 691, 37 L. Ed. 896. See the title RELEASE.

**3. Sykes v. Chadwick**, 18 Wall. 141, 21 L. Ed. 824.

**4. Release of defenses.**—*Union Bank v. Geary*, 5 Pet. 99, 114, 8 L. Ed. 60, in which case the court, in commenting on this point, remarked: "It is unnecessary to examine whether this defense would have been available or not. The validity of the contract did not depend upon that question. It is enough, that the bank considered it a doubtful question; and that they supposed they were gaining some benefit by foreclosing all inquiry on the subject; and the complainant, by precluding herself from setting up the defense, waived what she supposed might have been of material benefit to her."

**5. Surrender of collateral security.**—*Goodman v. Simonds*, 20 How. 343, 371, 15 L. Ed. 934.

undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it.<sup>6</sup>

(mm) *Agreement to Pay in Confederate Notes*.—A promise to pay in "Confederate notes" in consideration of the receipt of such notes and of drafts payable by them, was not a nudum pactum.<sup>7</sup>

(nn) *Adoption of Gauge and Establishing Connections by Railroad*.—A contract by a railroad to adopt a certain gauge and form certain connections with other roads constitutes a valuable consideration.<sup>8</sup>

(oo) *Compensation and Emoluments of Office*.—Being entitled to the compensation and emoluments attached to an office is a sufficient consideration to support a promise.<sup>9</sup>

(2) *Good Consideration*.—As to such consideration as is termed "good consideration," see ante, "Definitions and Distinctions," II, B, 7, a.

e. *Adequacy of Consideration*.—A valuable consideration, however small or nominal, if given or stipulated for in good faith, is, in the absence of fraud, sufficient to support a promise. A stipulation in consideration of one dollar is just as effectual and valuable a consideration as a larger sum stipulated for or paid.<sup>10</sup> A mere nominal consideration need not to be proven and is immaterial if disproven.<sup>11</sup>

f. *Divisibility of Consideration*.—Every part of the consideration goes equally to the whole promise.<sup>12</sup>

g. *Failure of Consideration*.—Matters as to failure of consideration will be treated elsewhere in this work.<sup>13</sup>

### III. Classification of Contracts.

**A. Alternative Contracts.**—An alternative contract is one under which the promisor shall do one of two things at his election.<sup>14</sup>

**B. Synallagmatic Contracts.**—A synallagmatic contract is a bilateral agreement which contains mutual and reciprocal obligations.<sup>15</sup>

**C. Commutative Contracts.**—Likewise commutative contracts are those in which what is done, given or promised by one party, is considered as equivalent to, or a consideration for what is done, given or promised by the other.<sup>16</sup>

**D. Entire and Separable Contracts.**—Where a contract consists of many parts, which may be considered as parts of one whole, the contract is entire.

**6. Confidence induced by undertaking service.**—*Philadelphia, etc., R. Co. v. Derby*, 14 How. 468, 485, 14 L. Ed. 502. See the title NEGLIGENCE.

**7. Agreement to pay in Confederate notes.**—*Planters' Bank v. Union Bank*, 16 Wall. 483, 21 L. Ed. 473. See, generally, the titles ILLEGAL CONTRACTS; PAYMENT.

**8. *Zabriskie v. Cleveland, etc., R. Co.***, 23 How. 381, 399, 16 L. Ed. 488.

**9. Compensation and emoluments of office.**—*United States v. Linn*, 15 Pet. 290, 313, 10 L. Ed. 742. See the title PUBLIC OFFICERS, and references there given.

**10. Adequacy of consideration.**—*Lawrence v. McCalmont*, 2 How. 426, 452, 11 L. Ed. 326; *Eyre v. Potter*, 15 How. 42, 59, 14 L. Ed. 592; *Austyn v. McLure*, 4 Dall. 227, 229, 1 L. Ed. 811; *Davis v. Wells*, 104 U. S. 159, 167, 26 L. Ed. 686; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683, 694, 29 L. Ed. 510.

"And this is equally true as to contracts of guaranty as to other contracts." *Davis v. Wells*, 104 U. S. 159, 168, 26 L. Ed. 686; *Eyre v. Potter*, 15 How. 42, 59, 14 L. Ed. 592. See the title GUARANTY.

**11. *Struthers v. Drexel***, 122 U. S. 487, 494, 30 L. Ed. 1216.

**12. Divisibility of consideration.**—*Hazelton v. Sheckells*, 202 U. S. 71, 78, 50 L. Ed. 939.

**13. Failure of consideration.**—See the titles DAMAGES; INSURANCE; MIS-TAKE AND ACCIDENT; SALES; SET-OFF. RECOUPMENT AND COUNTERCLAIM; VENDOR AND PURCHASER.

**14. Definition of alternative contract.**—*Texas, etc., R. Co. v. Marlor*, 123 U. S. 687, 702, 31 L. Ed. 303. See post, "Time of Performance," IX, A, 4.

**15. Synallagmatic contracts.**—*Zacharie v. Franklin*, 12 Pet. 151, 162, 9 L. Ed. 1035. See ante, "Mutual Promises," II, B, 7, d, (1), (b), (aa).

**16. Commutative contracts.**—*Burdon Cent. Sugar Refining Co. v. Payne*, 167 U. S. 127, 146, 42 L. Ed. 105; *Ridings v. Johnson*, 128 U. S. 212, 216, 32 L. Ed. 401; *Hyde v. Booraem*, 16 Pet. 169, 177, 10 L. Ed. 925. See ante, "Mutual Promises," II, B, 7, d, (1), (b), (aa).



When the parts may be considered as so many distinct contracts, entered into at one time, and expressed in the same instrument, but not thereby made one contract, the contract is a separable contract. But, if the consideration of the contract is single and entire, the contract must be held to be entire, although the subject of the contract may consist of several distinct and wholly independent items.<sup>17</sup> It is a well-settled principle of law, that, unless there can be some express stipulation to the contrary, whenever an entire sum is to be paid for the entire work, performance or service is a condition precedent; being one consideration and one debt, it cannot be divided.<sup>18</sup> Where the contract is entire if a party is justified in refusing to perform a material part, he is justified in refusing to perform any portion.<sup>19</sup> But where some parts of a contract are illegal while others are legal, the legal may be separated from the illegal, if there be no imputation of *malum in se*; and if the good part show a sufficient cause of action, it is error to sustain demurrer to the whole.<sup>20</sup>

**E. Express and Implied Contracts.**—Express contracts are where the terms of the agreement are openly avowed and uttered at the time of the making of it. Implied contracts are such as reason and justice dictate from the nature of the transaction, and which, therefore, the law presumes that every man undertakes to perform.<sup>21</sup>

**F. Executory and Executed Contracts.**—A contract is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing.<sup>22</sup> An executed contract is one which the object of the contract is performed.<sup>23</sup> A contract executed, as well as one which is executory, contains obligations binding on the parties;<sup>24</sup> but an executed contract is the evidence of a thing done; and, it would seem, does not necessarily impose any duty or obligation on either party to do any act or thing.<sup>25</sup> An executory contract requires only a slight consideration to support it,<sup>26</sup> while an exe-

**17. Entire and separable contracts.**—Black's Law Dict., title, "Entire Contract," citing 2 Pars. Cont. 517.

"A contract for the payment of distinct sums of money, at different periods, is very much in the nature of distinct contracts." *Faw v. Marsteller*, 2 Cranch 10, 24, 2 L. Ed. 191.

**18.** *Washington, etc., Steam-Packet Co. v. Sickles*, 10 How. 419, 440, 13 L. Ed. 479.

In a contract providing that the defendant should use the plaintiff's patent fuel saver on board a steamboat, it was stipulated that the first two hundred and fifty dollars saved should be applied as the purchase price of the machine and after that three-fourths of what was saved should be paid the plaintiffs. No time was set for settlement. The agreement was held to be one entire contract and not divisible at the will of the plaintiffs into payment at the end of each trip or week or other portion of time. *Washington, etc., Steam-Packet Co. v. Sickles*, 10 How. 419, 440, 13 L. Ed. 479.

**19.** *Diamond Glue Co. v. United States Glue Co.*, 187 U. S. 611, 614, 47 L. Ed. 328. See *McMullen v. Hoffman*, 174 U. S. 639, 43 L. Ed. 1117.

**20. Legal and illegal parts separable.**—See the title **ILLEGAL CONTRACTS**.

**21. Express and implied contracts.**—*Morley v. Lake Shore, etc., R. Co.*, 146 U. S. 162, 173, 36 L. Ed. 925, quoting 2 Story, Const., § 1377.

As to implied contracts, see the title **IMPLIED CONTRACTS**.

**22. Definition of executory and executed contracts.**—*Fletcher v. Peck*, 6 Cranch 87, 136, 3 L. Ed. 162; *Dartmouth College v. Woodward*, 4 Wheat. 518, 657, 4 L. Ed. 629. See, also, *Walsh v. Preston*, 109 U. S. 297, 318, 27 L. Ed. 940.

"An executory contract is one where it is stipulated by the agreement of minds, upon a sufficient consideration, that something is to be done or not to be done by one or both the parties." *Farrington v. Tennessee*, 95 U. S. 679, 683, 24 L. Ed. 558.

Thus where the grant of a water privilege contemplated that the aperture, the trunk or forebay, and the sliding gate or gates should be constructed after the grant was made, to that extent the contract was executory. *Canal Co. v. Ray*, 101 U. S. 522, 25 L. Ed. 792.

**23.** *Fletcher v. Peck*, 6 Cranch 87, 136, 3 L. Ed. 162; *Dartmouth College v. Woodward*, 4 Wheat. 518, 657, 4 L. Ed. 629.

"A contract is executed where everything that was to be done is done, and nothing remains to be done." *Farrington v. Tennessee*, 95 U. S. 679, 683, 24 L. Ed. 558.

**24. Obligation of executory and executed contracts.**—*Fletcher v. Peck*, 6 Cranch 87, 135, 3 L. Ed. 162.

**25.** *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 573, 9 L. Ed. 773.

**26. Consideration necessary to support executory contract.**—*Farrington v. Tennessee*, 95 U. S. 679, 683, 24 L. Ed. 558.

cuted contract requires no consideration to support it.<sup>27</sup>

**G. Joint and Several Contracts.**—A contract may be either joint or several as the parties are jointly or severally bound to perform the promise or obligation therein contained, and may be joint and several where the parties may be held separately or jointly liable at the option of the one seeking its enforcement.<sup>28</sup> It is not a principle of equity that every joint covenant shall be treated as if it were joint and several. The court will not vary the legal effect of the instrument by making it several as well as joint, unless it can see, either by independent testimony or from the nature of the transaction itself, that the parties concerned intended to create a separate as well as joint, liability.<sup>29</sup> In joint and several contracts each party is bound severally as well as jointly, and may be sued severally as well as jointly.<sup>30</sup> Persons liable on a joint and several contract may be all sued in one action; or one may be sued alone, and cannot plead the nonjoinder of the others in abatement.<sup>31</sup> And where the contract is several, an action will lie in favor of either party without joining the other.<sup>32</sup> But it is an elemental principle of the common law, that where a contract is joint

**27. Consideration necessary to support executed contract.**—*Farrington v. Tennessee*, 95 U. S. 679, 683, 24 L. Ed. 558; *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629. See the title GIFTS.

**28. Joint and several contracts.**—See the titles BILLS, NOTES AND CHECKS, vol. 3, p. 257; BONDS, vol. 3, p. 427, 428; RES ADJUDICATA; PARTIES.

Fifteen insurance companies had issued policies upon certain property. Claims having been made against the companies on these policies, they signed a written agreement to unite in resisting the claims and in defending all suits and legal proceedings instituted against any of the companies on any of the policies. They agreed to pay the costs, fees, and expenses of the suits pro rata. The agreement also named a committee to conduct the resistance to the claims of the insured and to defend all suits by them. The committee was empowered to employ counsel and attorneys to appear for the said companies and each thereof. The compensation of the attorneys was to be assessed by the committee pro rata upon each of the companies. Under this agreement an attorney was employed in behalf of all the companies. The employment was general, no special terms being fixed. In a suit brought by the attorney for his fees it was held that the companies were severally, not jointly liable for the payment of them. *Adriatic Fire Ins. Co. v. Treadwell*, 108 U. S. 361, 363, 367, 27 L. Ed. 754.

S. agreed to represent the entire interests and sales of coal of three other parties; that he would confine himself to the use and handling of their coal alone in all his sales of soft coal, and that he would take the same from them in equal quantities. The other three parties agreed to sell coal to no one to conflict with the interests of S. and that they would encourage and aid the trade of S. in all lawful ways in their power. There was nothing in

the contract indicating that the three parties were connected in any way, except that each was to furnish an equal quantity of coal. It was held this was a several and not a joint contract. *Shipman v. Straitsville Cent. Min. Co.*, 158 U. S. 356, 361, 39 L. Ed. 1015.

**29.** *Pickersgill v. Lahens*, 15 Wall. 140, 143, 21 L. Ed. 119.

**30.** *Breedlove v. Nicolet*, 7 Pet. 413, 8 L. Ed. 731.

And in all suits on contracts in writing, made by two or more persons, it is lawful to declare against any one or more of them. This is such a severance of the contract as puts it in the power of the plaintiff to hold any portion of them jointly, and the others severally, bound by the contract; and there is no obligation on the part of the plaintiff to put the defendants in such condition, by his pleadings, as to compel each to contribute his portion for the benefit of the others. *Minor v. Mechanics' Bank*, 1 Pet. 46, 7 L. Ed. 47; *Amis v. Smith*, 16 Pet. 303, 10 L. Ed. 973.

**31.** *Lovejoy v. Murray*, 3 Wall. 1, 11, 18 L. Ed. 129. See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 31.

**32.** S. agreed to represent the entire interests and sales of coal of three other parties; that he would confine himself to the use and handling of their coal alone in all his sales of soft coal; and that he would take the same from them in equal quantities. The other three parties agreed to sell coal to no one to conflict with the interests of S., and that they would encourage and aid the trade of S. in all lawful ways in their power. There was nothing in the contract indicating that the three parties were connected in any way, except that each was to furnish an equal quantity of coal. It was held that under these circumstances, an action would lie in favor of either of these parties without joining the others. *Shipman v. Straitsville Cent. Min. Co.*, 158 U. S. 356, 361, 39 L. Ed. 1015.



and not several, all the joint obligees who are alive must be joined as plaintiffs, and that the defendant can object to a nonjoinder of plaintiffs, not only by demurrer but in arrest of judgment, under the plea of the general issue.<sup>33</sup>

#### IV. Interpretation and Construction.<sup>34</sup>

**A. Intention of Parties**—1. GENERAL STATEMENT OF RULE.—Contracts artificially drafted, or where the language employed is obscure, imperfect, or ambiguous, are always open to construction,<sup>35</sup> and it is a principle recognized and acted upon as a cardinal rule by all courts of justice, in the construction of contracts, whether under seal or not,<sup>36</sup> that the intention of the parties at the time of making the contract is to be inquired into; and, if not forbidden by law, is to be effectuated.<sup>37</sup> In determining the real character of a contract, courts will always look to its purpose, rather than to the name given to it by the parties,<sup>38</sup>

**33.** *Farni v. Tesson*, 1 Black 309, 315, 17 L. Ed. 67. See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 31.

**34.** Interpretation and construction.—See, generally, the title INTERPRETATION AND CONSTRUCTION.

**35.** Contracts subject to construction.—*Hudson Canal Co. v. Pennsylvania Coal Co.*, 8 Wall. 276, 290, 19 L. Ed. 349; *West v. Smith*, 101 U. S. 263, 271, 25 L. Ed. 809.

**36.** Seal immaterial as affecting construction according to intention.—*Hudson Canal Co. v. Pennsylvania Coal Co.*, 8 Wall. 276, 290, 19 L. Ed. 349.

**37.** Construction according to intention of parties.—*Hollingsworth v. Fry*, 4 Dall. 345, 347, 1 L. Ed. 860; *United States v. Gurney*, 4 Cranch 333, 343, 2 L. Ed. 638; *Gracie v. Palmer*, 8 Wheat. 605, 634, 5 L. Ed. 696; *Renner v. Bank*, 9 Wheat. 581, 588, 6 L. Ed. 166; *Ogden v. Saunders*, 12 Wheat. 213, 256, 6 L. Ed. 606; *Tiernan v. Jackson*, 5 Pet. 580, 8 L. Ed. 234; *Bradley v. Washington, etc., Steam-Packet Co.*, 13 Pet. 89, 10 L. Ed. 72; *Hobson v. McArthur*, 16 Pet. 182, 193, 10 L. Ed. 930; *Mauran v. Bullus*, 16 Pet. 528, 10 L. Ed. 1056; *Neves v. Scott*, 9 How. 196, 211, 13 L. Ed. 102; *Philadelphia, etc., R. Co. v. Howard*, 13 How. 307, 339, 14 L. Ed. 157; *Raymond v. Tyson*, 17 How. 53, 60, 15 L. Ed. 47; *Slater v. Emerson*, 19 How. 224, 238, 15 L. Ed. 626; *Barreda v. Silsbee*, 21 How. 146, 161, 16 L. Ed. 86; *Lowber v. Bangs*, 2 Wall. 728, 736, 17 L. Ed. 768; *The Binghamton Bridge*, 3 Wall. 51, 74, 18 L. Ed. 137; *Nash v. Towne*, 5 Wall. 689, 18 L. Ed. 527; *Bronson v. Rhodes*, 7 Wall. 229, 254, 19 L. Ed. 141; *Garison v. United States*, 7 Wall. 688, 691, 19 L. Ed. 277; *Hudson Canal Co. v. Pennsylvania Coal Co.*, 8 Wall. 276, 290, 19 L. Ed. 349; *Scott v. United States*, 12 Wall. 443, 444, 20 L. Ed. 438; *Canal Co. v. Hill*, 15 Wall. 94, 21 L. Ed. 64; *Jones v. United States*, 96 U. S. 24, 27, 24 L. Ed. 644; *Insurance Co. v. Gridley*, 100 U. S. 614, 616, 25 L. Ed. 746; *Railroad Companies v. Schutte*, 103 U. S. 118, 140, 26 L. Ed. 327; *Insurance Co. v. Trefz*, 104 U. S. 197, 203, 26 L. Ed. 708; *London Assurance Co. v. Drennen*, 116 U. S. 461, 29 L. Ed. 688; *Tennessee v. Whitworth*, 117 U. S. 129, 137, 29 L. Ed.

830; *Pollak v. Brush Electric Ass'n*, 123 U. S. 446, 455, 32 L. Ed. 474; *Beardsley v. Beardsley*, 138 U. S. 262, 266, 34 L. Ed. 928; *Albright v. Oyster*, 140 U. S. 493, 514, 35 L. Ed. 534; *Loud v. Pomona Land & Water Co.*, 153 U. S. 564, 576, 38 L. Ed. 822; *O'Brien v. Miller*, 168 U. S. 287, 297, 42 L. Ed. 469; *Calderon v. Atlas Steamship Co.*, 170 U. S. 272, 280, 42 L. Ed. 1033; *Pinney v. Nelson*, 183 U. S. 144, 148, 46 L. Ed. 125; *United States v. Bethlehem Steel Co.*, 205 U. S. 105, 119, 51 L. Ed. 731.

"What is implied is as effectual as what is expressed. The intent of the parties, as manifested, is the contract." *Equitable Ins. Co. v. Hearne*, 20 Wall. 494, 496, 22 L. Ed. 398; *United States v. Babbitt*, 95 U. S. 334, 336, 24 L. Ed. 480, citing *United States v. Babbitt*, 1 Black 55, 17 L. Ed. 94.

**38.** Construction according to purpose rather than form.—*Canal Co. v. Hill*, 15 Wall. 94, 21 L. Ed. 64; *Secombe v. Steele*, 20 How. 94, 104, 15 L. Ed. 833; *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664, 672, 23 L. Ed. 1003; *Beardsley v. Beardsley*, 138 U. S. 262, 266, 34 L. Ed. 928; *Davis v. Patrick*, 141 U. S. 479, 489, 35 L. Ed. 826.

In *Heryford v. Davis*, 102 U. S. 235, 244, 26 L. Ed. 160, it is said: "What, then, is the true construction of the contract? The answer to this question is not to be found in any name which the parties may have given to the instrument, and not alone in any particular provisions it contains, disconnected from all others, but in the ruling intention of the parties, gathered from all the language they have used. It is the legal effect of the whole which is to be sought for. The form of the instrument is of little account."

Thus where in several places in an instrument the agreement is called a "lease" and the parties are called "lessor" and "lessee," while, on the other hand, in the record of the proceedings of the executive committee of one of the parties of its stockholders, it is called an agreement "granting trackage rights" what it was styled by the parties does not determine its character or their legal relations. *Union Pacific R. Co. v. Chicago, etc., R. Co.*, 163 U. S. 564, 582, 41 L. Ed. 265.



and they are not at liberty, to make a new contract either by disregarding words used by the parties, descriptive of the subject matter, or of any material incident, or by inserting words which the parties have not made use of.<sup>39</sup> But while it is true that in cases of ambiguity in contracts, courts will lean toward the presumed intention of the parties and will so construe such contract as to effectuate such intention; where the language is clear and explicit there is no call for construction, and this principle does not apply. Parties are presumed to know the force and effect of the language in which they have chosen to embody their contracts, and to refuse to give effect to such language might result in artfully misleading others who had relied upon the words being used in their ordinary sense.<sup>40</sup>

2. **HOW INTENTION ASCERTAINED.**—It is a fundamental rule that in the construction of contracts, if the language is doubtful, the courts, in ascertaining the meaning of the parties, especially as to the subject matter,<sup>41</sup> should look, not only to the language employed,<sup>42</sup> but to the subject matter,<sup>43</sup> the conduct,<sup>44</sup>

**39. Power of court to make or alter contract.**—*Gavinzel v. Crump*, 22 Wall. 308, 319, 22 L. Ed. 783; *Robbins v. Rollins*, 127 U. S. 622, 633, 32 L. Ed. 292; *Cheney v. Libby*, 134 U. S. 68, 78, 33 L. Ed. 818; *New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79, 91, 35 L. Ed. 943; *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452, 462, 38 L. Ed. 231; *Burdon Cent. Sugar Refining Co. v. Payne*, 167 U. S. 127, 146, 42 L. Ed. 105; *Baltzer v. Ralieggh, etc.*, R. Co., 115 U. S. 634, 647, 29 L. Ed. 505, citing *Hunt v. Rousmaniere*, 1 Pet. 1, 7 L. Ed. 27; *Harrison v. Fortlage*, 161 U. S. 57, 63, 40 L. Ed. 616, citing *Norrington v. Wright*, 115 U. S. 188, 29 L. Ed. 366; *Filley v. Pope*, 115 U. S. 213, 29 L. Ed. 372; *Watts v. Camors*, 115 U. S. 353, 29 L. Ed. 406; *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255, 30 L. Ed. 920; *Seitz v. Brewers' Refrigerating Mach. Co.*, 141 U. S. 510, 35 L. Ed. 837.

In *Culliford v. Gomila*, 128 U. S. 135, 158, 32 L. Ed. 381, it is said: "The court is bound to give effect to the stipulations of the contract, but not to provisions which the parties deliberately omitted to insert, after attention had been directed to them. This ruling is in harmony with the views laid down in *Norrington v. Wright*, 115 U. S. 188, 29 L. Ed. 366, and in *Filley v. Pope*, 115 U. S. 213, 29 L. Ed. 372.

**40. Necessity for construction must exist.**—*Calderon v. Atlas Steamship Co.*, 170 U. S. 272, 280, 42 L. Ed. 1033. See, also, *Lowrey v. Hawaii*, 206 U. S. 206, 219, 51 L. Ed. 1026; *Loud v. Pomona Land & Water Co.*, 153 U. S. 564, 576, 38 L. Ed. 822; *Baltzer v. Raleigh, etc.*, R. Co., 115 U. S. 634, 644, 29 L. Ed. 505.

And see *United States v. Gleason*, 175 U. S. 588, 606, 44 L. Ed. 284, wherein it is said: "The contract, being free from ambiguity, no exposition is allowable contrary to the express words of the instrument."

**41. Ascertaining the subject matter.**—*Canal Co. v. Hill*, 15 Wall. 94, 21 L. Ed. 64; *Reed v. Insurance Co.*, 95 U. S. 23, 24 L. Ed. 348; *West v. Smith*, 101 U. S. 263, 271, 25 L. Ed. 809.

**42. Intention ascertained from language employed.**—*Neves v. Scott*, 9 How. 196, 211, 13 L. Ed. 102; *Barreda v. Silsbee*, 21 How. 146, 161, 16 L. Ed. 86; *Lowber v. Bangs*, 2 Wall. 728, 736, 17 L. Ed. 768; *Nash v. Towne*, 5 Wall. 689, 18 L. Ed. 527; *Hudson Canal Co. v. Pennsylvania Coal Co.*, 8 Wall. 276, 290, 19 L. Ed. 349; *Canal Co. v. Hill*, 15 Wall. 94, 21 L. Ed. 64; *Moran v. Prather*, 23 Wall. 492, 501, 23 L. Ed. 121; *Hendrick v. Lindsay*, 93 U. S. 143, 147, 23 L. Ed. 855; *Jones v. United States*, 96 U. S. 24, 27, 24 L. Ed. 644; *Heryford v. Davis*, 102 U. S. 235, 244, 26 L. Ed. 160; *Railroad Companies v. Schutte*, 103 U. S. 118, 140, 26 L. Ed. 327; *Rives v. Duke*, 105 U. S. 132, 140, 26 L. Ed. 1031; *Merriam v. United States*, 107 U. S. 437, 441, 27 L. Ed. 531; *Mobile, etc., R. Co. v. Jurey*, 111 U. S. 584, 592, 28 L. Ed. 527; *Beardsley v. Beardsley*, 138 U. S. 262, 266, 34 L. Ed. 928; *Pinney v. Nelson*, 183 U. S. 144, 148, 46 L. Ed. 125.

**The incidental liability** of a contracting party is not broader than his liability upon the principal contract. *Constable v. National Steamship Co.*, 154 U. S. 51, 59, 33 L. Ed. 903.

**43. Intention as ascertainment from examination of subject matter.**—*Barreda v. Silsbee*, 21 How. 146, 161, 16 L. Ed. 86; *Nash v. Towne*, 5 Wall. 689, 18 L. Ed. 527; *Hudson Canal Co. v. Pennsylvania Coal Co.*, 8 Wall. 276, 290, 19 L. Ed. 349; *Canal Co. v. Hill*, 15 Wall. 94, 21 L. Ed. 64; *Hendrick v. Lindsay*, 93 U. S. 143, 147, 23 L. Ed. 855; *Brawley v. United States*, 96 U. S. 168, 24 L. Ed. 622; *West v. Smith*, 101 U. S. 263, 271, 25 L. Ed. 809; *Richmond Min. Co. v. Eureka Min. Co.*, 103 U. S. 839, 846, 26 L. Ed. 557; *United States v. Granite Co.*, 105 U. S. 37, 39, 26 L. Ed. 1005; *Mobile, etc., R. Co. v. Jurey*, 111 U. S. 584, 592, 28 L. Ed. 527; *Chicago, etc., R. Co. v. Hoyt*, 149 U. S. 1, 11, 37 L. Ed. 625.

**44. Intention as shown by conduct of parties.**—See *Old Jordan Min., etc., Co. v. Societe Des Mines*, 164 U. S. 261, 270, 41 L. Ed. 427; *Lowber v. Bangs*, 2 Wall. 728, 737, 17 L. Ed. 768; *Lowrey v. Hawaii*, 206

and situation of the parties as between themselves and with relation to the subject matter,<sup>45</sup> and the surrounding facts and circumstances,<sup>46</sup> and may avail themselves of the same light which the parties possessed when the contract was made.<sup>47</sup> The transaction must necessarily be held to have been entered into with the intention to produce its natural result.<sup>48</sup>

**B. Construction at Law and in Equity.**—A court of law is the proper tribunal for determining the construction of contracts, but the contract is undoubtedly construed alike both in equity and at law. Courts of equity, however,

U. S. 206, 215, 51 L. Ed. 1026; See, also, *Paige v. Banks*, 13 Wall. 608, 616, 20 L. Ed. 709; *Irwin v. United States*, 16 How. 513, 14 L. Ed. 1038. See post, "Construction by Parties," IV, I.

**45. Intention as shown from the situation of parties.**—*Ward v. United States*, 14 Wall. 28, 20 L. Ed. 792; *Hendrick v. Lindsay*, 93 U. S. 143, 147, 23 L. Ed. 855; *West v. Smith*, 101 U. S. 263, 271, 25 L. Ed. 809; *Chicago, etc., R. Co. v. Denver, etc., R. Co.*, 143 U. S. 596, 609, 36 L. Ed. 277; *Runkle v. Burnham*, 153 U. S. 216, 224, 38 L. Ed. 694; *Winona & St. Peter Land Co. v. Minnesota*, 159 U. S. 526, 531, 40 L. Ed. 247; *Union Pacific R. Co. v. Chicago, etc., R. Co.*, 163 U. S. 564, 582, 41 L. Ed. 265; *Walker v. Brown*, 165 U. S. 654, 668, 41 L. Ed. 865; *O'Brien v. Miller*, 168 U. S. 287, 297, 42 L. Ed. 469; *Pinney v. Nelson*, 183 U. S. 144, 148, 46 L. Ed. 125; *Lowrey v. Hawaii*, 206 U. S. 206, 215, 51 L. Ed. 1026.

**46. Intention as shown by surrounding facts and circumstances.**—*Bradley v. Washington, etc., Steam-Packet Co.*, 13 Pet. 89, 10 L. Ed. 72; *Slater v. Emerson*, 19 How. 224, 236, 15 L. Ed. 626; *Barreda v. Silsbee*, 21 How. 146, 161, 16 L. Ed. 86; *Lowrey v. Bangs*, 2 Wall. 728, 737, 17 L. Ed. 768; *Nash v. Towne*, 5 Wall. 680, 18 L. Ed. 527; *Cavazos v. Trevino*, 6 Wall. 773, 784, 18 L. Ed. 813; *Thorington v. Smith*, 8 Wall. 1, 19 L. Ed. 361; *Scott v. United States*, 12 Wall. 443, 444, 20 L. Ed. 438; *Canal Co. v. Hill*, 15 Wall. 94, 21 L. Ed. 64; *Maryland v. Railroad Co.*, 22 Wall. 105, 22 L. Ed. 713; *Moran v. Prather*, 23 Wall. 492, 501, 23 L. Ed. 121; *Burdell v. Denig*, 92 U. S. 716, 722, 23 L. Ed. 764; *Hendrick v. Lindsay*, 93 U. S. 143, 147, 23 L. Ed. 855; *Reed v. Insurance Co.*, 95 U. S. 23, 24 L. Ed. 348; *Brawley v. United States*, 96 U. S. 168, 24 L. Ed. 622; *West v. Smith*, 101 U. S. 263, 271, 25 L. Ed. 809; *United States v. Peck*, 102 U. S. 64, 65, 26 L. Ed. 46; *Rives v. Duke*, 105 U. S. 132, 140, 26 L. Ed. 1031; *Merriam v. United States*, 107 U. S. 437, 441, 27 L. Ed. 531; *United States v. Gibbons*, 109 U. S. 200, 203, 27 L. Ed. 906; *Mobile, etc., R. Co. v. Jurey*, 111 U. S. 584, 592, 28 L. Ed. 527; *Baltzer v. Raleigh, etc., R. Co.*, 115 U. S. 634, 644, 29 L. Ed. 505; *Gisborn v. Charter Oak Life Ins. Co.*, 142 U. S. 326, 332, 35 L. Ed. 1029; *Chicago, etc., R. Co. v. Denver, etc., R. Co.*, 143 U. S. 596, 609, 36 L. Ed. 277; *Winona & St. Peter Land Co. v. Minnesota*, 159 U. S. 526, 531, 40 L. Ed.

247; *Chicago, etc., R. Co. v. Hoyt*, 149 U. S. 1, 11, 37 L. Ed. 625; *Old Jordan Min., etc., Co. v. Societe Des Mines*, 164 U. S. 261, 270, 41 L. Ed. 427; *United States v. Bethlehem Steel Co.*, 205 U. S. 105, 118, 51 L. Ed. 731; *Lowrey v. Hawaii*, 206 U. S. 206, 215, 51 L. Ed. 1026.

A reference to what are called "surrounding circumstances," is allowed for the purpose of ascertaining the subject matter of a contract, or for an explanation of the terms used, not for the purpose of adding a new and distinct undertaking. *Maryland v. Railroad Co.*, 22 Wall. 105, 22 L. Ed. 713.

A person entered into a contract, with the proper military official, to cut and furnish a certain quantity of hay to a military station. There was only one place where he could cut the hay within hundreds of miles and it was known that he relied on this place for his supply. Although the contract made no mention of the source from which the hay was to be procured, it was held, it could be shown by parol evidence of the surrounding circumstances that this was the source relied on by the parties to the contract. *United States v. Peck*, 102 U. S. 64, 65, 26 L. Ed. 46. As to reference to prior or contemporaneous transactions, see the title PAROL EVIDENCE.

**47. Courts placed in situation of parties.**—Courts, in the construction of contracts, may avail themselves of the same light which the parties enjoyed when the contract was executed. They are, accordingly, entitled to place themselves in the same situation as the parties who made the contract, in order that they may view the circumstances as those parties viewed them, and so judge of the meaning of the words and of the correct application of the language to the things described. *Nash v. Towne*, 5 Wall. 689, 18 L. Ed. 527; *Goddard v. Foster*, 17 Wall. 123, 142, 21 L. Ed. 589; *Moran v. Prather*, 23 Wall. 492, 501, 23 L. Ed. 121; *Cavazos v. Trevino*, 6 Wall. 773, 784, 18 L. Ed. 813.

And in *Scott v. United States*, 12 Wall. 443, 444, 20 L. Ed. 438, it is said: "This process is always effective. When the terms employed are doubtful or obscure, there is no surer guide to their intent and meaning."

**48. Presumption of intention.**—*Scott v. Armstrong*, 146 U. S. 490, 511, 36 L. Ed. 1050.



make distinction in all cases between that which is matter of substance and that which is matter of form; and if it is found that, by insisting on form, the substance will be defeated, equity holds it to be inequitable to allow a person to insist on such form and thereby defeat the substance.<sup>49</sup> When a court of law is construing an instrument, whether a public law or a private contract, it is legitimate if two constructions are fairly possible, to adopt that one which equity would favor.<sup>50</sup>

**C. Every Contract Construed Separately.**—The construction of every contract must be determined from the language used in each particular case.<sup>51</sup>

**D. Construction to Uphold Contract.**—The universal rule is that where a contract will bear two constructions equally consistent with its language, one of which will render it operative and the other void, the former will be preferred.<sup>52</sup>

**E. Separate Writings Parts of Same Transaction.**—It is well-settled law that several writings executed between the same parties substantially at the same time and relating to the same subject matter may be read together as forming parts of one transaction,<sup>53</sup> nor is it necessary that the instruments should in terms refer to each other if in point of fact they are parts of a single transaction. Until it appears that the several writings are parts of a single transaction, either from the writings themselves or by extrinsic evidence, the case is not brought within the rule, as it may be that the same parties may have had more than one transaction in one day of the same general nature.<sup>54</sup>

**F. Construction against Party Employing Words.**—If doubtful, words of a contract are to be taken most strongly against the party employing them.<sup>55</sup>

**G. Construction Must Be Reasonable.**—The contract must receive a reasonable construction, so as to carry the intention of the parties into effect.<sup>56</sup>

**H. Whole Contract Construed Together.**—The elementary canon of in-

**49. Construction at law and in equity.**—*Secombe v. Steele*, 20 How. 94, 104, 15 L. Ed. 833, quoting *Parkin v. Thorald*, 16 Beav. 59. See post, "Intention of Parties," IV, A; "Time as Essence," IX, A, 6, c.

**50. Construction according to principles of equity.**—*Washington, etc., R. Co. v. Coeur D'Alene R. & Nav. Co.*, 160 U. S. 77, 101, 40 L. Ed. 346.

**51. Every contract construed separately.**—*Railroad Companies v. Schutte*, 103 U. S. 118, 140, 26 L. Ed. 327.

**52. Construction to uphold contract.**—*Ewing v. Howard*, 7 Wall. 499, 506, 19 L. Ed. 293; *Hobbs v. McLean*, 117 U. S. 567, 576, 29 L. Ed. 940; *Noonan v. Bradley*, 9 Wall. 394, 407, 19 L. Ed. 757; *United States v. Central Pac. R. Co.*, 118 U. S. 235, 241, 30 L. Ed. 173. See the title ILLEGAL CONTRACTS.

"Every intendment is to be made against the construction of a contract under which it would operate as a snare." *Utley v. Donaldson*, 94 U. S. 29, 46, 24 L. Ed. 54.

"It is not the duty of a court, by legal subtlety, to overthrow a contract, but rather to uphold it and give it effect; and no strained or artificial rule of construction is to be applied to any part of it. If there is no ambiguity, and the meaning of the parties can be clearly ascertained, effect is to be given to the instrument used, whether it is a legislative grant or not." *The Binghamton Bridge*, 3 Wall. 51, 74, 18 L. Ed. 137.

**53. Separate writings part of same**

**transaction.**—*Bailey v. Railroad Co.*, 17 Wall. 96, 108, 21 L. Ed. 611. See, also, *United States v. Boisdore*, 11 How. 63, 87, 13 L. Ed. 605; *United States v. Bostwick*, 94 U. S. 53, 65, 24 L. Ed. 65; *Joy v. St. Louis*, 138 U. S. 1, 38, 34 L. Ed. 843.

**54.** *Bailey v. Railroad Co.*, 17 Wall. 96, 108, 21 L. Ed. 611; *Harvey v. United States*, 105 U. S. 671, 688, 26 L. Ed. 1206.

As to the construction where the original contract has been modified or extended but forms an independent agreement, see post, "Modification and Reformation," V.

**55. Construction against party employing words.**—*Insurance Companies v. Wright*, 1 Wall. 456, 468, 17 L. Ed. 505; *Garrison v. United States*, 7 Wall. 688, 690, 19 L. Ed. 277; *Noonan v. Bradley*, 9 Wall. 394, 407, 19 L. Ed. 757; *Grace v. American Central Ins. Co.*, 109 U. S. 278, 282, 27 L. Ed. 932; *American Surety Co. v. Pauly*, 170 U. S. 133, 144, 160, 42 L. Ed. 977, citing *National Bank v. Insurance Co.*, 95 U. S. 673, 24 L. Ed. 563.

**56. Construction must be reasonable.**—*Barreda v. Silsbee*, 21 How. 146, 161, 16 L. Ed. 86; *Merriam v. United States*, 107 U. S. 437, 444, 27 L. Ed. 531; *Chicago, etc., R. Co. v. Hoyt*, 149 U. S. 1, 13, 37 L. Ed. 625; *Pine River Logging Co. v. United States*, 186 U. S. 279, 291, 46 L. Ed. 1164; *Baltzer v. Raleigh, etc., R. Co.*, 115 U. S. 634, 644, 29 L. Ed. 505.

"It is against the rules, both of law and of reason, to admit by implication in the construction of a contract a principle which goes in destruction of it." *Murray*



terpretation is, not that particular words may be isolatedly considered, but that the whole contract must be brought into view and interpreted with reference to the nature of the obligations between the parties, and the intention which they have manifested in forming them.<sup>57</sup>

**I. Construction by Parties.**—In cases where the language used by the parties to the contract is indefinite or ambiguous, and, hence, of doubtful construction, the practical interpretation by the parties themselves is entitled to great, if not controlling, influence. The interest of each, generally, leads him to a construction most favorable to himself, and when the difference has become serious, and beyond amicable adjustment, it can be settled only by the arbitrament of the law. But, in an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the court as the true one.<sup>58</sup> But where its meaning is clear, an erroneous construction of it by them will not control its effect.<sup>59</sup> And what one party to a contract understands or believes is not to

*v. Charleston*, 96 U. S. 432, 445, 24 L. Ed. 760.

"A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity." *Murray v. Charleston*, 96 U. S. 432, 445, 24 L. Ed. 760.

All mercantile contracts ought to be construed according to their plain meaning to men of sense and understanding, and not according to forced and refined constructions, which are intelligible only to lawyers, and scarcely to them. *Lowber v. Bangs*, 2 Wall. 728, 736, 17 L. Ed. 768.

**57. Whole contract construed together.**

—*Boardman v. Reed*, 6 Pet. 328, 345, 8 L. Ed. 415; *Ewing v. Burnet*, 11 Pet. 41, 54, 9 L. Ed. 624; *Neves v. Scott*, 9 How. 196, 211, 13 L. Ed. 102; *Randon v. Toby*, 11 How. 493, 519, 13 L. Ed. 784; *Philadelphia, etc., R. Co. v. Howard*, 13 How. 307, 339, 14 L. Ed. 157; *Dermott v. Jones*, 2 Wall. 1, 7, 17 L. Ed. 762; *Canal Co. v. Hill*, 15 Wall. 94, 21 L. Ed. 64; *Black v. United States*, 91 U. S. 267, 269, 23 L. Ed. 324; *United States v. Bostwick*, 94 U. S. 53, 65, 24 L. Ed. 65; *Heryford v. Davis*, 102 U. S. 235, 244, 26 L. Ed. 160; *Tennessee v. Whitworth*, 117 U. S. 129, 137, 29 L. Ed. 830; *Pollak v. Brush Electric Ass'n*, 128 U. S. 446, 455, 32 L. Ed. 474; *Beardsley v. Beardsley*, 138 U. S. 262, 266, 34 L. Ed. 928; *Chicago, etc., R. Co. v. Denver, etc., R. Co.*, 143 U. S. 596, 609, 36 L. Ed. 277; *Winona & St. Peter Land Co. v. Minnesota*, 159 U. S. 526, 531, 40 L. Ed. 247; *Chicago, etc., R. Co. v. Hoyt*, 149 U. S. 1, 11, 37 L. Ed. 625; *Union Pacific R. Co. v. Chicago, etc., R. Co.*, 163 U. S. 564, 582, 41 L. Ed. 265; *O'Brien v. Miller*, 168 U. S. 287, 297, 42 L. Ed. 469.

"The contract must be so construed as to give meaning to all its provisions, and \* \* \* that interpretation would be incorrect which would obliterate one portion of the contract in order to enforce another part thereof." *Burdon Cent. Sugar Refining Co. v. Payne*, 167 U. S. 127, 142, 42 L. Ed. 105.

"This general rule of construction should especially guide a court of admiralty in interpreting a contract of bottomry and

respondentia." *O'Brien v. Miller*, 168 U. S. 287, 297, 42 L. Ed. 469.

**58. Construction by parties.**—*Lowber v. Bangs*, 2 Wall. 728, 737, 17 L. Ed. 768; *Cavazos v. Trevino*, 6 Wall. 773, 18 L. Ed. 813; *Bronson v. Rodes*, 7 Wall. 229, 245, 19 L. Ed. 141; *Chicago v. Sheldon*, 9 Wall. 50, 54, 19 L. Ed. 594; *Steinbach v. Stewart*, 11 Wall. 566, 576, 20 L. Ed. 56; *Topliff v. Topliff*, 122 U. S. 121, 131, 30 L. Ed. 1110; *District of Columbia v. Gallaher*, 124 U. S. 505, 510, 31 L. Ed. 526; *Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 99, 37 L. Ed. 93; *Constable v. National Steamship Co.*, 154 U. S. 51, 95, 38 L. Ed. 903; *Old Jordan Min., etc., Co. v. Societe Des Mines*, 164 U. S. 261, 270, 41 L. Ed. 427; *Lowrey v. Hawaii*, 206 U. S. 206, 215, 51 L. Ed. 1026. See, also, ante, "How Intention Ascertained," IV, A, 2, footnote, "Intention as Shown by Conduct of Parties."

"Where both parties to a contract have by their subsequent conduct given it a construction different from what the law might have given it, the courts will adopt that construction." *Pine River Logging Co. v. United States*, 186 U. S. 279, 290, 46 L. Ed. 1164.

In *Insurance Co. v. Dutcher*, 95 U. S. 269, 273, 24 L. Ed. 410, the court in commenting on this rule, remarked: "The practical interpretation of an agreement by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant than to see what they have done. Self-interest stimulates the mind to activity, and sharpens its perspicacity. Parties in such cases often claim more, but rarely less, than they are entitled to. The probabilities are largely in the direction of the former."

And in *Hunting Elevator Co. v. Bosworth*, 179 U. S. 415, 435, 45 L. Ed. 256, it was said: "The dealings and conduct of the parties in executing the contract dispel all question as to the proper interpretation to be given it."

**59. Where meaning is clear.**—*Railroad Co. v. Trimble*, 10 Wall. 367, 19 L. Ed. 948.

govern its construction unless such understanding or belief was induced by the conduct or declarations of the other party.<sup>60</sup>

**J. Construction According to Existing Laws.**—Contracts are usually made with reference to the established law of the land, and should be so understood and construed, unless otherwise clearly indicated by the terms of the agreement.<sup>61</sup>

**K. Presumption as to Binding Effect upon Representatives.**—In the absence of express words, the law presumes that the parties to a contract intend to bind not only themselves, but their personal representatives.<sup>62</sup>

**L. Words and Phrases.**<sup>63</sup>—Contracts are to be construed according to the sense and meaning of the terms which the parties have used,<sup>64</sup> and if they are clear and unambiguous, their terms are to be taken and understood in their plain,<sup>65</sup> ordinary, and popular sense,<sup>66</sup> and a liberal and

**60. Interpretation must have foundation.**—*Bank v. Kennedy*, 17 Wall. 19, 20, 21 L. Ed. 551.

**61. Construction according to existing laws.**—*Wilson v. Rousseau*, 4 How. 646, 685, 11 L. Ed. 1141. *The West River Bridge Co. v. Dix*, 6 How. 507, 532, 12 L. Ed. 535; *United States v. Boisdore*, 11 How. 63, 88, 13 L. Ed. 605; *Rees v. Watertown*, 19 Wall. 107, 121, 22 L. Ed. 72. See the title CONFLICT OF LAWS, vol. 3, p. 1020. See, also, the title BROKERS, vol. 3, p. 541.

In *Ogden v. Saunders*, 12 Wheat. 213, 297, 6 L. Ed. 606, it is said: "Many things are necessarily implied, and to be governed by some rule not contained in the agreement; and this rule can be no other than the existing law when the contract is made, or to be executed."

And in *Brown v. Wiley*, 20 How. 442, 447, 15 L. Ed. 965, it is said: "When the operation of the contract is clearly settled by general principles of law, it is taken to be the true sense of the contracting parties. This is not only a positive rule of the common law, but it is a general principle in the construction of contracts. Some precedents to the contrary may be found in some of our states, originating in hard cases; but they are generally overruled by the same tribunals from which they emanated, on experience of the evil consequences flowing from a relaxation of the rule."

"Contracts created by, or entered into, under the authority of statutes, are to be interpreted according to the language used in each particular case to express the obligation assumed." *Railroad Companies v. Schutte*, 103 U. S. 118, 140, 26 L. Ed. 327.

The parties should look to the general established system of law on the subject in arranging their several rights and obligations, in dealing with property in the nature of rights and privileges secured to patentees rather than to any possible change that might be effected by private acts of congress upon individual application. *Wilson v. Rousseau*, 4 How. 646, 685, 11 L. Ed. 1141. See the title PATENTS.

**62. Presumption as to binding effect upon representatives.**—*Matteson v. Dent*, 176 U. S. 521, 528, 44 L. Ed. 571.

**63. Specific words and phrases considered.**—For the treatment of such specific words and phrases as may arise in the construction of a contract, consult the lists of words and phrases in this work.

**64. How meaning ascertained.**—Where the language is in the shape of a deposition, where the party interrogated is giving his testimony, and the meaning of his statements must be ascertained from his own peculiar use of language, if he is a foreigner, with an imperfect knowledge of the language, it is obviously just and reasonable that that circumstance should be considered in determining the meaning of the words he has used. *Insurance Co. v. Trefz*, 104 U. S. 197, 203, 26 L. Ed. 708.

In *Insurance Co. v. Trefz*, 104 U. S. 197, 203, 26 L. Ed. 708, the court said: "And to ascertain its meaning—the meaning the law will affix to it—it is perfectly proper to determine the sense in which the words were used by the speaker; the sense in which he intended they should be understood by the person spoken to, and in which they were actually understood by both. As was well said by Mr. Justice Swayne, in *Insurance Co. v. Gridley*, 100 U. S. 614, 25 L. Ed. 746: 'The object of all symbols is to convey the meaning of those who use them, and when that can be ascertained it is conclusive.'"

**65. Terms given their plain and literal meaning.**—*Moran v. Prather*, 23 Wall. 492, 499, 23 L. Ed. 121; *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452, 463, 38 L. Ed. 231.

"In construing contracts, words are to receive their plain and literal meaning, even though the intention of the party drawing the contract may have been different from that expressed. A party to a contract is responsible for ambiguity in his own expressions, and has no right to induce another to contract with him on the supposition that his words mean one thing while he hopes the court will adopt a construction by which they would mean another thing more to his advantage." *Calderon v. Atlas Steamship Co.*, 170 U. S. 272, 280, 42 L. Ed. 1033, citing *Clark on Contracts*, p. 593.

**66. Terms given ordinary and popular meaning.**—*Moran v. Prather*, 23 Wall. 492,

fair construction will be given to the words, either singly or in connection with the subject matter.<sup>67</sup> Ambiguous words or phrases may be reasonably construed to effect the intention of the parties, but the province of construction, except when technical terms are employed, can never extend beyond the language employed, the subject matter, and the surrounding circumstances.<sup>68</sup> Terms of art, in the absence of parol testimony, must be understood in their primary sense, unless the context evidently shows that they were used in the particular case in some other and peculiar sense, in which case the testimony of persons skilled in the art or science may be admitted to aid the court in ascertaining the true intent and meaning of that part of the instrument.<sup>69</sup>

**M. Punctuation.**—Punctuation is a most fallible standard by which to interpret a writing; it may be resorted to, when all other means fail; but the court will first take the instrument by its four corners, in order to ascertain its true meaning; if that is apparent, on judicially inspecting the whole, the punctuation will not be suffered to change it.<sup>70</sup>

**N. Usages and Customs.**—The construction of contracts by the aid of an examination of usages and customs will be treated in the title *USAGES AND CUSTOMS*.

**O. Contracts Involving Public Interests.**—Where the subject matter of a contract concerns the interest of the public, the contract is to be construed liberally in favor of the public.<sup>71</sup>

**P. Questions of Law and Fact.**—The general rule is that it is the province of the court to construe written contracts and evidence not depending in any degree on oral testimony or extrinsic facts, but wholly upon the construction of the correspondence in writing between the parties, presents a pure question of law, to be decided by the court;<sup>72</sup> but it is equally well settled that where the effect of the instrument depends not merely on its construction and meaning, but upon collateral facts and extrinsic circumstances, the inferences of fact to be drawn from the paper must be left to the jury, or, in other words, where the effect of a written instrument collaterally introduced in evidence depends not merely on its construction and meaning, but also upon extrinsic facts and cir-

501, 23 L. Ed. 121; *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452, 463, 38 L. Ed. 231.

The customary meaning of a word among merchants is a matter of fact for the jury to decide upon evidence. *Law v. Cross*, 1 Black 533, 17 L. Ed. 185.

"If a party seeks to make out that certain words used in a contract have a different acceptation from their ordinary sense, either for the purposes of trade, or within a certain market, or in a particular country, he must prove it; not by calling witnesses, some of whom will say it is one way and some the other, and then leaving it to the jury to say which they believe; but by clear, distinct and irresistible evidence." *De Witt v. Berry*, 134 U. S. 306, 315, 33 L. Ed. 896, quoting *Carter v. Crick*, 4 H. & N. 412, 417.

"Where the state is concerned the words employed are sometimes to be taken most strongly against the other party, but in this, as in other cases of contracts, language is to be given, if possible, its usual and ordinary meaning." *Railroad Companies v. Schutte*, 103 U. S. 118, 140, 26 L. Ed. 327. See the titles *STATES*; *UNITED STATES*.

**67. Liberal construction of words.**—The

*Binghamton Bridge*, 3 Wall. 51, 74, 18 L. Ed. 137.

**68. Ambiguous terms.**—*Moran v. Prather*, 23 Wall. 492, 501, 23 L. Ed. 121.

**69. Terms of art.**—*Moran v. Prather*, 23 Wall. 492, 499, 23 L. Ed. 121. See the title *EXPERT AND OPINION EVIDENCE*.

**70. Punctuation.**—*Ewing v. Burnet*, 11 Pet. 41, 54, 9 L. Ed. 624.

**71. Contracts involving public interests.**—*Joy v. St. Louis*, 138 U. S. 1, 38, 34 L. Ed. 843, citing *Parker v. Great Western Railway*, 7 Scott N. R. 835, 870; *Colman v. Eastern Counties Railway*, 10 Beav. 1, 14; *Canal Co. v. Wheeley*, 2 B. & Ad. 792; *Blakemore v. Canal Co.*, 1 Myl. & K. 154, 165; *Lee v. Milner*, 2 Younge & Coll. Fx. 611, 618; *Ware v. Canal Co.*, 28 L. J. Ch. N. S. pt. 1, 153, 157; *Gray v. Railway Co.*, 4 Railway Cases, 240.

**72. Questions of law.**—*Levy v. Gadsby*, 3 Cranch 180, 186, 2 L. Ed. 404; *Brown v. McGran*, 14 Pet. 478, 493, 10 L. Ed. 550; *Drakely v. Gregg*, 8 Wall. 242, 19 L. Ed. 409; *Ward v. United States*, 14 Wall. 28, 20 L. Ed. 792; *Goddard v. Foster*, 17 Wall. 123, 142, 21 L. Ed. 589; *West v. Smith*, 101 U. S. 263, 270, 25 L. Ed. 809; *Hamilton v. Liverpool, etc., Ins. Co.*, 136



cumstances,<sup>73</sup> or only shows part of a course of dealing between the parties,<sup>74</sup> and inferences to be drawn from it are inferences of fact and not of law, and of course are open to explanation.

### V. Modification and Reformation.<sup>75</sup>

The terms of a contract may be varied by a subsequent agreement,<sup>76</sup> to which modification mutual assent is as indispensable as it was to making the contract originally,<sup>77</sup> and it has been held that, to make a negotiation for the modification of a contract effectual, it must appear that it was the intention of the party proposing it wholly to abandon the original contract.<sup>78</sup> While for a full understanding of the scope of the obligations created by it, the original contract must be referred to, yet, in determining the import of the language used, the modification is to be construed as an independent agreement, and when it makes an extension of the obligations to a new matter, anything which is stated as an exception is to be taken as an exception to the obligations assumed in respect to this additional matter.<sup>79</sup> As to the reformation of a contract, see the title RE-SCISSION, CANCELLATION AND REFORMATION.

### VI. Ratification.

A deed given in pursuance of a previous contract is equivalent to a ratification of such contract.<sup>80</sup> The ratification by a principal of the acts of his agent<sup>81</sup> and the ratification of the contracts of an infant after obtaining his majority<sup>82</sup> will be treated under separate titles.

### VII. Merger and Novation.

As to merger or novation of contracts, see the titles MERGER; NOVATION.

U. S. 242, 255, 34 L. Ed. 419; *Hughes v. Dundie Mortgage Co.*, 140 U. S. 98, 104, 35 L. Ed. 354. See the title QUESTIONS OF LAW AND FACT.

The rule of law that the interpretation of written instruments is a question of law for the court, is applied with full force to agreements to be deduced from the correspondence of the parties, and the fact that the language of the letters containing the offer or acceptance is doubtful, does not relieve the court of this duty, or make the question one of fact for the jury. *Goddard v. Foster*, 17 Wall. 123, 21 L. Ed. 589.

**73. Questions of fact.**—*West v. Smith*, 101 U. S. 263, 270, 25 L. Ed. 809; *Levy v. Gadsby*, 3 Cranch 180, 186, 2 L. Ed. 404; *Etting v. United States' Bank*, 11 Wheat. 59, 74, 6 L. Ed. 419; *Barreda v. Silsbee*, 21 How. 146, 167, 16 L. Ed. 86; *Iasigi v. Brown*, 17 How. 183, 196, 15 L. Ed. 205; *Turner v. Yates*, 16 How. 14, 23, 14 L. Ed. 824; *Drakely v. Gregg*, 8 Wall. 242, 19 L. Ed. 409; *Rankin v. Fidelity Ins. Trust, etc., Co.*, 189 U. S. 242, 253, 47 L. Ed. 792.

It is only where terms used are technical, or terms having a peculiar meaning in a particular trade or place, that the aid of the jury is invoked to ascertain their meaning. *Goddard v. Foster*, 17 Wall. 123, 21 L. Ed. 589.

**74.** *Turner v. Yates*, 16 How. 14, 23, 14 L. Ed. 824; *Brown v. McGran*, 14 Pet. 479, 493, 10 L. Ed. 550.

**75. Modification.**—As to modification of written contracts by parol agreements, see the title PAROL EVIDENCE. See, also, the titles FRAUDS, STATUTE OF; MERGER; NOVATION.

**76. Power to modify contract.**—*Canal Co. v. Ray*, 101 U. S. 522, 25 L. Ed. 792; *Hawkins v. United States*, 96 U. S. 689, 694, 24 L. Ed. 607, citing *Emerson v. Slater*, 22 How. 28, 16 L. Ed. 360; *Teal v. Bilby*, 123 U. S. 572, 578, 31 L. Ed. 263; *Swain v. Seamens*, 9 Wall. 254, 271, 19 L. Ed. 554.

**77. Mutual assent to modification.**—*Utley v. Donaldson*, 94 U. S. 29, 47, 24 L. Ed. 54; *Whiteside v. United States*, 93 U. S. 247, 253, 23 L. Ed. 882; *Wheeler v. New Brunswick, etc., R. Co.*, 115 U. S. 29, 34, 29 L. Ed. 341; *Constable v. National Steamship Co.*, 154 U. S. 51, 73, 38 L. Ed. 903.

**78. Intention to abandon original contract.**—*Utley v. Donaldson*, 94 U. S. 29, 49, 24 L. Ed. 54, citing *Murray v. Harway*, 56 N. Y. 347; *Robinson v. Page*, 3 Russ. 122.

**79. Construction of supplemental agreement.**—*Anvil Min. Co. v. Humble*, 153 U. S. 540, 548, 38 L. Ed. 814.

**80. Ratification.**—*Hunt v. Oliver*, 118 U. S. 211, 220, 30 L. Ed. 128.

**81. Ratification of acts of agent.**—See the title PRINCIPAL AND AGENT.

**82. Ratification of contracts of infants.**—See the title INFANTS.

## VIII. Waiver or Abandonment.

The questions arising as to waiver or abandonment of rights under contracts will be treated elsewhere.<sup>83</sup>

## IX. Discharge of Contract.

**A. Performance.**—1. DEMAND FOR PERFORMANCE.—Unless the contract so provides, the demand of one of the parties thereto that the other shall perform his agreement need not be in writing.<sup>84</sup> Where the amount to which the plaintiff is entitled is clear, an action by him for a breach of the contract will not be defeated solely on the ground that his demand upon the defendant was in excess of that amount.<sup>85</sup>

2. NECESSITY FOR PERFORMANCE.—If a party by his contract charge himself with an obligation possible to be performed, he must make it good,<sup>86</sup> unless his performance is rendered impossible.<sup>87</sup> Neither party can insist that the other has lost his rights under the contract until he has himself done what he was bound to do.<sup>88</sup>

3. STRICT AND SUBSTANTIAL PERFORMANCE.—In many instances substantial performances of the contract is sufficient,<sup>89</sup> and as a general rule a party to a contract imposing mutual obligations may accept, as performance by the opposite party, some other thing than that specifically designated; and if he does, he cannot afterwards insist upon exact performance. Nothing is more common than such fulfillment of contract obligations. In equity it is certainly regarded as sufficient fulfillment.<sup>90</sup> But where the thing to be done is a condition precedent, strict performance is required.<sup>91</sup>

4. TIME OF PERFORMANCE.<sup>92</sup>—In the interpretation of contracts, where time

**83. Waiver of abandonment.**—See the titles RESCISSION, CANCELLATION AND REFORMATION; WAIVER. See, also, post, "Breach," IX, B.

**84. Necessity for demand to be in writing.**—*Colby v. Reed*, 99 U. S. 560, 25 L. Ed. 484.

**85. Excessive demand.**—*Colby v. Reed*, 99 U. S. 560, 25 L. Ed. 484.

**86. Necessity for performance.**—*Walsh v. Preston*, 109 U. S. 297, 318, 27 L. Ed. 940; *Wheeler v. New Brunswick, etc., R. Co.*, 115 U. S. 29, 36, 29 L. Ed. 341; *Florence Min. Co. v. Brown*, 124 U. S. 385, 389, 31 L. Ed. 424; *Coughran v. Bigelow*, 164 U. S. 301, 310, 41 L. Ed. 442, citing *Telfener v. Russ*, 162 U. S. 170, 171, 40 L. Ed. 930; *Kelsey v. Crowther*, 162 U. S. 404, 40 L. Ed. 1017; *United States v. Gleason*, 175 U. S. 588, 602, 44 L. Ed. 284, citing *Dermott v. Jones*, 2 Wall. 1, 17 L. Ed. 762. See post, "Necessity for Performance," IX, A, 6, b.

When a contract becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. *McCracken v. Heyward*, 2 How. 608, 612, 11 L. Ed. 397.

**87. See post, "Excuses for Nonperformance," IX, A, 7.**

**88. Brown v. Slee**, 103 U. S. 828, 837, 26 L. Ed. 618.

**89. Substantial performance.**—See the title WORKING CONTRACTS.

"If a party has done all that could rea-

sonably be expected of him to perform his part of the agreement, it will be considered, in equity, as having been done." *Dolton v. Cain*, 14 Wall. 472, 477, 20 L. Ed. 830.

Thus if a man agrees to do certain work, and he does it jointly with another, he is still entitled to recover upon the agreement. *Blakeney v. Evans*, 2 Cranch 185, 2 L. Ed. 248.

A contract was made between M. and S. by which S. agreed to give M. an interest in certain fees for collecting a large number of claims which he believed would be due from the government to postmasters and late postmasters upon a readjustment of salaries under the provisions of an act approved June 12, 1866. The consideration for the contract was money furnished by M. for the prosecution of the said claims and to urge the passage of bills then pending in congress looking to their settlement. The bills alluded to failed of passage but one was passed later which was practically identical to one of them and under which the claims were paid. It was held that this failure of the passage of the act did not entitle S. to refuse to pay the amount of the fees agreed on. *Spalding v. Mason*, 161 U. S. 375, 395, 40 L. Ed. 738.

**90. Canal Co. v. Ray**, 101 U. S. 522, 524, 25 L. Ed. 792; *Dermott v. Jones*, 2 Wall. 1, 17 L. Ed. 762.

**91. Strict performance.**—See post, "Necessity for Performance," IX, A, 6, b.

**92. Time of performance.**—See, also, post, "Times as Essence," IX, A, 6, c.

is to be computed from a particular day or a particular event, as when an act is to be performed within a specified period from or after a day named, the general rule is to exclude the day thus designated, and to include the last day of the specified period,<sup>93</sup> and, where performance by one of the parties within the stipulated number of days has been debarred by act of the other party, he must complete the performance within the time originally agreed upon where he undertakes to perform without complaining of the delay.<sup>94</sup> It is a settled principle of the common law, applicable to all contracts, that a party has until the last day limited by his agreement, to perform his engagement,<sup>95</sup> and even until the last hour of the day. The common law knows of no fractions of a day; custom, however, and that introduced, too, principally by banks, has limited the day to a few hours of business. But this, and whatever other rules have been adopted by consent, and merely for the convenience of commercial men, are departures from the common-law doctrine.<sup>96</sup> If the contract be that the promisor shall do one of two things by a certain day, at his election, he cannot exercise his election after the day has passed.<sup>97</sup> The performance of a contract made in consideration of a release from liability for personal injuries is not complete until the death or removal of the disabilities of the injured party.<sup>98</sup> Where a contract by its terms fails to fix the time of performance, performance within a reasonable time is all that is required.<sup>99</sup> An agreement which is to subsist for a very great

**93. "Form" or "within" certain periods.**—*Sheets v. Selden*, 2 Wall. 177, 17 L. Ed. 822.

**94.** The defendant entered into a contract by which he was to erect, within 60 days from a specified date, on a boat to be furnished by the plaintiff, certain machinery for pressing tan bark. The plaintiff failed to furnish the boat at the time he agreed to do so but when he did furnish it the defendant proceeded to erect the machinery without complaining of the delay in furnishing the boat. It was held that the element of time was not eliminated from the contract but that under these circumstances the defendant was bound to erect the machinery within 60 days from the time the boat was furnished. *McGowan v. American Pressed Tan Bark Co.*, 121 U. S. 575, 600, 30 L. Ed. 1027.

**95. Party entitled to entire time agreed upon.**—*Renner v. Bank*, 9 Wheat. 581, 585, 6 L. Ed. 166.

Two dealers in ice entered into a contract by which one agreed to take a cargo of ice from the other, in return for which he was to give him the same quantity of ice the next year. In an action for damages for breach of the contract to return the ice, it was held that the defendant had the option of delivering the ice at any time during the shipping season of the next year, and could consult his own convenience as to the day when he would deliver it. *Dingley v. Oler*, 117 U. S. 490, 500, 29 L. Ed. 984.

By the contract, the defendants were to use a machine during the continuance of the patent right; and no time being pointed out for a settlement, a right of action did not accrue until the whole service has been performed. *Washington, etc., Steam-Packet Co. v. Sickles*, 10 How. 419, 13 L. Ed. 479.

**96. Fractions of day.**—*Renner v. Bank*, 9 Wheat. 581, 585, 6 L. Ed. 166.

**97. Alternative contract.**—In *Texas, etc., R. Co. v. Marlor*, 123 U. S. 687, 702, 31 L. Ed. 303, the court said: "This is familiar law, and needs no citation of authorities."

**98. Contracts releasing from liability for personal injuries.**—P., while employed by the T. C., etc., R. Co., was seriously injured, and, in consideration for his releasing them from all liability for the accident, or from injuries from it, or from the effects of it, the company agreed to give him such work as he could do and to pay him regular wages while he was disabled and also to furnish him with supplies, fuel and a garden. Later another contract was substituted for this one by which P. was to receive an increased amount per month with fuel and a garden but no supplies were to be furnished. It was held that this contract bound the company to its performance, so long as P. should be disabled by reason of the injuries he had received and if they were permanent it bound the company for its performance during his life. *Pierce v. Tennessee, etc., R. Co.*, 173 U. S. 1, 10, 43 L. Ed. 591.

**99. Performance within reasonable time.**—*Minneapolis Gas Light Co. v. Kerr Murray Mfg. Co.*, 122 U. S. 300, 305, 30 L. Ed. 1190; *United States v. Smith*, 94 U. S. 214, 218, 24 L. Ed. 115.

B. entered into a contract with T. and Co. by which he was to winter a large number of cattle for them. An agreement of the contract was that if any of the cattle died B. was to preserve the hides as evidence of their death. If he did not preserve the hides he was to be held liable for the whole number of the cattle. When the time came to deliver the cattle the



length of time, as for a thousand years, would be entered into with precisely the same sentiments as an agreement to subsist forever.<sup>1</sup>

5. PLACE OF PERFORMANCE.—As to place of performance, see the title CONFLICT OF LAWS, vol. 3, pp. 1041, 1042.

6. CONDITIONS—*a. Definitions and Classifications.*—As to the definition and classification of conditions generally, see the titles CONDITIONS, vol. 3, p. 1004; COVENANTS; DEEDS; PUBLIC LANDS. As to contracts not to become binding except on the happening of certain contingencies, see ante, "Future Execution of Formal Contract," II, A. 7. Much is found in the opinions of courts and elementary writers in regard to dependent and independent conditions, but it is difficult at all times to distinguish whether contracts are dependent or independent,<sup>2</sup> and although many nice distinctions are to be found upon the question, yet it is evident that the inclination of courts have strongly favored, as being obviously the most just, the construction, which makes the promises of the parties dependent rather than independent.<sup>3</sup> However, the controlling rule is to ascertain the intention of the parties, as the question whether covenants are dependent or independent must be determined in each case upon the proper construction to be placed on the language employed by the parties to express their agreement.<sup>4</sup> If the language is clear and unambiguous it must be taken according to its plain meaning as expressive of the intention of the parties, and under settled principles of judicial decision should not be controlled by the supposed inconvenience or hardship that may follow such construction. If parties think proper, they may agree that the right of one to maintain an action against another shall be conditional or dependent upon the plaintiff's performance of covenants entered into on his part. On the other hand, they may agree that the performance by one shall be a condition precedent to the performance by the other. The question in each case is, which intent is disclosed by the language employed in the contract.<sup>5</sup> If the agreements go to a part only of the consideration on both sides,<sup>6</sup> or where the acts stipulated to be done are to be done at different times,<sup>7</sup> it is a general

hides of those missing were not produced, but there was evidence tending to show that during the winter in which the cattle died B. had produced the hides to C., one of the owners of the cattle, and counted them to him, and requested him to accept delivery of them. It was held that, as there was no provision in the contract as to when the hides should be counted, the reasonable construction was that the hides should be counted at the time the cattle died. *Teal v. Bilby*, 123 U. S. 572, 581, 31 L. Ed. 263.

1. Long term contracts.—*Faw v. Mars-teller*, 2 Cranch 10, 24, 2 L. Ed. 191.

2. Difficulty in distinguishing dependent and independent conditions.—*Dermott v. Jones*, 23 How. 220, 231, 16 L. Ed. 442.

3. Courts favor dependent condition.—*Bank v. Hagner*, 1 Pet. 455, 7 L. Ed. 219; *Pollak v. Brush Electric Ass'n*, 128 U. S. 446, 455, 32 L. Ed. 474; *Telfener v. Russ*, 162 U. S. 170, 180, 40 L. Ed. 930.

4. Intention of parties as to conditions.—*Philadelphia, etc., R. Co. v. Howard*, 13 How. 307, 339, 14 L. Ed. 157; *Slater v. Emerson*, 19 How. 224, 238, 15 L. Ed. 626; *Pollak v. Brush Electric Ass'n*, 128 U. S. 446, 455, 32 L. Ed. 474; *Loud v. Pomona Land & Water Co.*, 153 U. S. 564, 576, 38 L. Ed. 822. See ante, "Intention of Parties," IV, A.

In *Lowber v. Bangs*, 2 Wall. 728, 736,

17 L. Ed. 768, the court said: "The rule has been established, by a long series of adjudications in modern times, that the question whether covenants are to be held dependent or independent of each other, is to be determined by the intention and meaning of the parties, as it appears on the instrument, and by the application of common sense, to each particular case, and to which intention, when once discovered, all technical forms of expression must give way."

Two covenants were made in a contract, one for the transfer of certain corporate stock and the other for the transfer of personal property. The consideration for each of these agreements was separate and distinct. It was held that these covenants were independent of each other. *Pollak v. Brush Electric Ass'n*, 128 U. S. 446, 455, 32 L. Ed. 474.

5. *Loud v. Pomona Land & Water Co.*, 153 U. S. 564, 576, 38 L. Ed. 822.

6. Independent conditions.—*Dermott v. Jones*, 23 How. 220, 231, 16 L. Ed. 442; *Lowber v. Bangs*, 2 Wall. 728, 736, 17 L. Ed. 768.

7. *Slater v. Emerson*, 19 How. 224, 238, 15 L. Ed. 626; *Goldsborough v. Orr*, 8 Wheat. 217, 225, 5 L. Ed. 600. See, also, *Loud v. Pomona Land & Water Co.*, 153 U. S. 564, 579, 38 L. Ed. 822.

If there be a day for the payment of money, and that comes before the day

rule the stipulations are to be construed as independent of each other, and in cases which arise where either party, in case of a breach of the contract, may be compensated in damages, it is usually held that the conditions are mutual and independent.<sup>8</sup> Where a specified thing is to be done by one party as the consideration of the thing to be done by the other, it is undeniably the general rule that the covenants are mutual, and are dependent, if they are to be performed at the same time.<sup>9</sup> When the agreements go to the whole of the consideration on both sides, the promises are dependent, and one of them is a condition precedent to the other.<sup>10</sup> If money is to be paid on a day certain, in consideration of a thing to be performed at an earlier day, the performance of that thing is a condition precedent to the payment;<sup>11</sup> and if money is to be paid by installments, some before a thing shall be done and some when it is done, the doing of the thing is a condition precedent to the latter payments.<sup>12</sup> Concurrent promises are those where the acts to be performed are simultaneous; and either party may sue the other for a breach of the contract, on showing, either that he was able, ready, and willing to do his act at a proper time and in a proper way, or that he was prevented by the act or default of the other contracting party.<sup>13</sup>

b. *Necessity for Performance.*—It has become an elementary principle that a party bound to perform a condition precedent cannot sue on the contract without proof that he has performed that condition,<sup>14</sup> or at least has been ready, if al-

for the doing of the thing, or before the time when the thing from its nature can be performed, then the payment is obligatory, and an action may be brought for it, independently of the act to be done. *Dermott v. Jones*, 23 How. 220, 231, 16 L. Ed. 442.

And if money is to be paid by installments, some before a thing shall be done and some when it is done, the doing of the thing is not a condition precedent to the former payments. *Dermott v. Jones*, 23 How. 220, 231, 16 L. Ed. 442. See, also, *Loud v. Pomona Land & Water Co.*, 153 U. S. 564, 579, 38 L. Ed. 822.

8. *Jones v. United States*, 96 U. S. 24, 28, 24 L. Ed. 644.

9. *Dependent conditions.*—*Phillips, etc., Const. Co. v. Seymour*, 91 U. S. 646, 650, 23 L. Ed. 341; *Loud v. Pomona Land & Water Co.*, 153 U. S. 564, 578, 38 L. Ed. 822.

A railroad company became embarrassed, and was unable to pay the contractor, and a person interested in the company agreed to give the contractor his individual promissory notes if he would finish the work by a certain day. Held that the covenants of the respective parties were dependent. *Slater v. Emerson*, 19 How. 224, 15 L. Ed. 626; *Emerson v. Slater*, 22 How. 28, 40, 16 L. Ed. 360.

10. *Dermott v. Jones*, 23 How. 220, 231, 16 L. Ed. 442; *Lowber v. Bangs*, 2 Wall. 728, 736, 17 L. Ed. 768.

11. *Dermott v. Jones*, 23 How. 220, 231, 16 L. Ed. 442.

12. *Dermott v. Jones*, 23 How. 220, 231, 16 L. Ed. 442.

13. *Concurrent promises.*—*Dermott v. Jones*, 23 How. 220, 232, 16 L. Ed. 442, citing 2 *Parsons on Contracts*, ch. 3, § 89.

14. *Necessity for performance of conditions.*—*Bank v. Hagner*, 1 Pet. 455, 465,

7 L. Ed. 219; *Hyde v. Booraem*, 16 Pet. 169, 177, 10 L. Ed. 925; *Van Buren v. Digges*, 11 How. 461, 475, 13 L. Ed. 771; *Dorsey v. Packwood*, 12 How. 126, 13 L. Ed. 921; *Marshall v. Baltimore, etc., R. Co.*, 16 How. 314, 337, 14 L. Ed. 933; *Phillips, etc., Const. Co. v. Seymour*, 91 U. S. 646, 650, 23 L. Ed. 341; *Jones v. United States*, 96 U. S. 24, 28, 24 L. Ed. 644; *Brown v. Slee*, 103 U. S. 828, 837, 26 L. Ed. 618; *Richardson v. Hardwick*, 106 U. S. 252, 255, 27 L. Ed. 145; *The Tornado*, 108 U. S. 342, 352, 27 L. Ed. 747; *Pollak v. Brush Electric Ass'n*, 128 U. S. 446, 455, 32 L. Ed. 474; *Loud v. Pomona Land & Water Co.*, 153 U. S. 564, 578, 38 L. Ed. 822; *Telfener v. Russ*, 162 U. S. 170, 181, 40 L. Ed. 930; *New Orleans v. Texas, etc., R. Co.*, 171 U. S. 312, 333, 43 L. Ed. 178; *Mutual Life Ins. Co. v. Phinney*, 178 U. S. 327, 344, 44 L. Ed. 1088. See the title WORKING CONTRACTS.

"Where the stipulations of a contract are interdependent, a defendant cannot be sued for the nonperformance of stipulations on his part which were dependent on conditions which the plaintiff has not performed." *The Tornado*, 108 U. S. 342, 351, 27 L. Ed. 747.

"Where the conditions are dependent and of the essence of the contract, it is everywhere held that the performance of one depends on the performance of another, in which case the rule is universal, that, until the prior condition is performed, the other party is not liable to an action on the contract." *Jones v. United States*, 96 U. S. 24, 28, 24 L. Ed. 644.

A statement descriptive of the subject matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, or condition precedent, upon the failure or nonperformance of which the party ag-



lowed by the other party, to perform, his own stipulations, which are a condition precedent to his right of action.<sup>15</sup> Notwithstanding the fact that the procure-

grieved may repudiate the whole contract. *Lowber v. Bangs*, 2 Wall. 728, 17 L. Ed. 768; *Davison v. Von Lingen*, 113 U. S. 40, 28 L. Ed. 885; *Norrington v. Wright*, 115 U. S. 188, 29 L. Ed. 366; *Fillee v. Pope*, 115 U. S. 213, 219, 29 L. Ed. 372; *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255, 261, 30 L. Ed. 920. See the titles INSURANCE; SALES.

"The general rule of law is, that while a special contract remains open—that is, unperformed—the party whose part of it has not been done cannot sue in indebitatus assumpsit to recover a compensation for what he has done, until the whole shall be completed." *Dermott v. Jones*, 23 How. 220, 233, 16 L. Ed. 442.

Where in part performance of an agreement a party has advanced money, or done an act, and then stops short and refuses to proceed to its conclusion, the other party being ready and willing to proceed and fulfill all his stipulations according to the contract, such first-named party will not be permitted to recover back for what has thus been advanced or done. *Hansbrough v. Peck*, 5 Wall. 497, 18 L. Ed. 520.

When the entire fulfillment of the contract is contemplated as the basis of the arrangement, the contract, under the laws of Louisiana, is treated as indivisible; and neither party can compel the other to a specific performance, unless he complies with it in toto. *Hyde v. Booraem*, 16 Pet. 169, 10 L. Ed. 925.

"The contract is the supreme source of mutual rights, and cannot be overridden by the incidents of its performance." *The Eliza Lines*, 199 U. S. 119, 132, 50 L. Ed. 115.

"A shipowner was entitled to freight only for carrying the cargo and delivering it at Liverpool, with the implied covenant that a particular vessel was to take it on board and enter on the voyage. Before that event occurred this vessel was substantially put out of existence by no fault of the shipper, and he had and could have no benefit from the contract. He had a right, therefore, to treat the contract as rescinded, so far as any liability for freight was concerned." *The Tornado*, 108 U. S. 342, 351, 27 L. Ed. 747.

Where one entered into a contract with a railroad company to secure the passage of the law granting such company permission to run its road through certain territory and the act of assembly which was passed, and afterwards used by the company for want of better, was obtained by the opponents of the company, and in spite of the opposition of the plaintiff, the fact that the company was compelled to accept the act, the same being secured under modifications and compromise with the opponents, would not entitle the plain-

tiff to his stipulated reward. *Marshall v. Baltimore, etc., R. Co.*, 16 How. 314, 337, 14 L. Ed. 953.

In order to relieve a company from its embarrassments the board of directors authorized the conversion of its debts into shares of its stock. The conversion of notes, which represented the debts of the company, was to take effect only on the condition that all the creditors consented, and that the conversion was made within ten days. Under these conditions a large part of the creditors surrendered their notes and took stock instead. Some of the creditors refused to convert their notes into stock. It was held that the agreement of those who allowed their notes to be turned into stock, was rendered void and of no effect by the non-compliance with the conditions on which it was made. *Pugh v. Fairmount, etc., Min. Co.*, 112 U. S. 238, 241, 242, 28 L. Ed. 684.

Where the parties, in their contract, fix on a certain mode by which the amount to be paid shall be ascertained, the party that seeks an enforcement of the agreement must show that he has done everything on his part, which could be done, to carry it into effect; he cannot compel the payment of the amount claimed, unless he procure the kind of evidence required by the contract; or show that, by time or accident, he is unable to do so. *United States v. Robeson*, 9 Pet. 319, 9 L. Ed. 142.

A stipulation in a charter party that the chartered vessel, then in distant seas, would proceed from one port named (where it was expected that she would be) to another port named (where the charterer meant to load her), "with all possible dispatch," is a warranty that she will so proceed; and goes to the root of the contract. It is not a representation simply that she will so proceed, but a condition precedent to a right of recovery. Accordingly, if a vessel go to a port out of the direct course, the charterer may throw up the charter party. *Lowber v. Bangs*, 2 Wall. 728, 17 L. Ed. 768.

"If it be stipulated in a contract that a duty arising out of it shall be performed by a particular officer, the performance of such duty by deputies, under his direction, will not satisfy the terms of the contract, nor bind the parties, except in cases where it was known that such officer was accustomed to act by deputies. *Leonard v. Davis*, 1 Black 476, 17 L. Ed. 222.

**15. Readiness to perform conditions.**—*Bank v. Hagner*, 1 Pet. 455, 465, 7 L. Ed. 219; *Hyde v. Booraem*, 16 Pet. 169, 177, 10 L. Ed. 925; *Dorsey v. Packwood*, 12 How. 126, 13 L. Ed. 921; *Phillips, etc., Const. Co. v. Seymour*, 91 U. S. 646, 650, 23 L. Ed. 341; *Jones v. United States*, 96



ment of his rights may thus be dependent upon the caprice of another who unreasonably refuses to perform yet he cannot be relieved from the contract into which he has voluntarily entered.<sup>16</sup> For, where the right to demand the performance of a certain act depends on the execution by the promisee of a condition precedent or prior act, it is clear that the readiness and offer of the latter to fulfill the condition, and the hindrance of its performance by the promisor, are in law equivalent to the completion of the condition precedent, and will render the promisor liable upon his contract.<sup>17</sup>

c. *Time as Essence*.—The time fixed for the performance of a contract is, at law, deemed its essence.<sup>18</sup> On the other hand, the general doctrine on this point is expressed in the maxim, "that time is not of the essence of a contract in equity,"<sup>19</sup> unless the party seeking performance has been guilty of gross laches, or has been inexcusably negligent in performing the contract on his part, or if there has, in the intermediate period, been a material change in circumstances, affecting the rights, interests or obligations of the parties.<sup>20</sup> But while it is true that in equity time is generally not considered as of the essence of a contract, it is only true when compensation can be made for its lapse, and the rule is inapplicable in case of an offer that requires acceptance to make a contract.<sup>21</sup> How-

U. S. 24, 27, 24 L. Ed. 644; *The Tornado*, 108 U. S. 342, 352, 27 L. Ed. 747; *Pollak v. Brush Electric Ass'n*, 128 U. S. 446, 455, 32 L. Ed. 474; *Loud v. Pomona Land & Water Co.*, 153 U. S. 564, 578, 38 L. Ed. 822; *Telfener v. Russ*, 162 U. S. 170, 181, 40 L. Ed. 930.

**16. Contracts conditional upon performance being satisfactory.**—*Buckstaff v. Russell*, 151 U. S. 626, 632, 38 L. Ed. 292; *Washington, etc., Steam-Packet Co. v. Sickles*, 10 How. 419, 13 L. Ed. 479.

**17. Reason for rule requiring performance.**—*Jones v. United States*, 96 U. S. 24, 27, 24 L. Ed. 644.

*In Mutual Life Ins. Co. v. Hill*, 193 U. S. 551, 559, 48 L. Ed. 788, the court said: "It is simple justice between two parties to a contract containing depending stipulations that neither should be permitted to exact performance by the other without having himself first performed. It is true cases arise in which one party is enabled to take advantage of some statutory provision and exact compliance from the other without having himself first complied, and courts may not ignore the scope and efficacy of such statutory provisions, but, nevertheless, a judgment for failure to perform against one party in favor of the other, when the latter was the first delinquent, is offensive to the sense of righteousness and fair dealing. We have had before us a series of cases coming from the same jurisdiction in which, when the insured had for a series of years neglected to pay their insurance premiums or perform their parts of the insurance contract, their heirs or beneficiaries have, on their deaths, sought to obtain judgments against the insurance company for the amounts which would have been due on the policies if the insured had performed their stipulations in respect to the payment of premiums. Courts have always set their faces against an insurance company which, having received its premiums, has sought by technical defences to avoid

payment, and in like manner should they set their faces against an effort to exact payment from an insurance company when the premiums have deliberately been left unpaid."

**18. Time as essence at law.**—*Bank v. Hagner*, 1 Pet. 455, 7 L. Ed. 219.

**19. Time as essence in equity.**—*Ahl v. Johnson*, 20 How. 511, 521, 15 L. Ed. 1005; *Brashier v. Gratz*, 6 Wheat. 528, 533, 5 L. Ed. 322.

"Courts of equity make a distinction in all cases between that which is matter of substance and that which is matter of form; and if it find that, by insisting on form, the substance will be defeated, it holds it to be inequitable to allow a person to insist on such form, and thereby defeat the substance. For instance, A has contracted to sell an estate to B, and to complete the title by the 25th of October; but no stipulation is introduced, that either party considers time of the essence of the contract. A completes the title by the 26th; at law, the contract is at an end, and B may bring an action for the nonperformance of the contract, and obtain damages for the breach; but equity holds, that unless B can show that the delay of twenty-four hours really produced some injury to him, he is not to be permitted to bring this action or to avoid the performance of the contract; not, certainly, on the ground that the 25th of October was not a part of the contract, but on the ground that it is unjust that B should escape the performance of a contract which has been substantially performed by A, by reason of some omission in a formal but immaterial portion of it." *Secombe v. Steele*, 20 How. 94, 104, 15 L. Ed. 833.

**20. Taylor v. Longworth**, 14 Pet. 172, 10 L. Ed. 405. See the titles LACHES; SPECIFIC PERFORMANCE; VENDOR AND PURCHASER.

**21. French v. Hay**, 22 Wall. 231, 236, 22 L. Ed. 799.

ever, time may be made of the essence of the contract by the express stipulations of the parties,<sup>22</sup> or it may arise by implication from the very nature of the property,<sup>23</sup> or the avowed objects of the contracting parties.<sup>24</sup> And the principle of the court of equity does not depend upon considerations collateral to the contract merely, nor on the conduct of the parties subsequently, showing that time was not of the essence of the contract in the particular case. But it must affirmatively appear that the parties regarded time or place as an essential element in their agreement, or a court of equity will not so regard it.<sup>25</sup> It is a general rule that where time is of the essence of the contract, there can be no recovery at law in case of failure to perform within the time stipulated.<sup>26</sup> But, both at common law and in chancery, there are exceptions to this rule, growing out of the nature of the thing to be done and the conduct of the parties.<sup>27</sup>

**22. Stipulations rendering time the essence.**—*Taylor v. Longworth*, 14 Pet. 172, 174, 10 L. Ed. 405; *Slater v. Emerson*, 19 How. 224, 15 L. Ed. 626; *Ahl v. Johnson*, 20 How. 511, 520, 15 L. Ed. 1005; *Stinson v. Dousman*, 20 How. 461, 466, 15 L. Ed. 966; *Secombe v. Steele*, 20 How. 94, 104, 15 L. Ed. 833; *Holgate v. Eaton*, 116 U. S. 33, 40, 29 L. Ed. 538; *Brown v. Guarantee Trust, etc., Co.*, 128 U. S. 403, 414, 32 L. Ed. 468; *Cheney v. Libby*, 134 U. S. 68, 77, 33 L. Ed. 818; *Waterman v. Banks*, 144 U. S. 394, 403, 36 L. Ed. 479. See the titles SALES; WORKING CONTRACTS.

"It is said by some writers, that it is impossible to make time of the essence of the contract where damages may compensate for the delay. But this is not correct as a general proposition." *Slater v. Emerson*, 19 How. 224, 238, 15 L. Ed. 626.

"Where it plainly appears that the sale is conditional, and its completion is dependent upon the fulfillment of any of the terms with punctuality by either party, a court of equity, in general, will not interpose to relieve the party in default, on the principle that time is not of the essence of the contract." *Stinson v. Dousman*, 20 How. 461, 466, 15 L. Ed. 966.

**23. Time as essence implied from nature of contract.**—*Taylor v. Longworth*, 14 Pet. 172, 174, 10 L. Ed. 405; *Ahl v. Johnson*, 20 How. 511, 520, 15 L. Ed. 1005; *Holgate v. Eaton*, 116 U. S. 33, 40, 29 L. Ed. 538; *Brown v. Guarantee Trust, etc., Co.*, 128 U. S. 403, 414, 32 L. Ed. 468; *Cheney v. Libby*, 134 U. S. 68, 77, 33 L. Ed. 818; *Waterman v. Banks*, 144 U. S. 394, 403, 36 L. Ed. 479. See the title WORKING CONTRACTS.

This principle is peculiarly applicable where the property is of such character that it will likely undergo sudden, frequent or great fluctuations in value. In respect to mineral property it has been said, that it requires, and of all properties, perhaps, the most requires, the parties interested in it to be vigilant and active in asserting their rights. *Waterman v. Banks*, 144 U. S. 394, 403, 36 L. Ed. 479.

"In the contracts of merchants, time is of the essence. The time of shipment is the usual and convenient means of fixing

the probable time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons." *Norrington v. Wright*, 115 U. S. 188, 203, 29 L. Ed. 366; *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255, 261, 30 L. Ed. 920.

"Time is usually of the essence of an executory contract for the sale and subsequent delivery of goods, where no right of property in the same passes by the bargain from the vendor to the purchaser; and the rule in such a case is, that the purchaser is not bound to accept and pay for the goods, unless the same are delivered or tendered on the day specified in the contract." *Jones v. United States*, 96 U. S. 24, 24 L. Ed. 644. See the title SALES.

**24. Time as essence implied from avowed object of parties.**—*Taylor v. Longworth*, 14 Pet. 172, 174, 10 L. Ed. 405; *Holgate v. Eaton*, 116 U. S. 33, 40, 29 L. Ed. 538; *Brown v. Guarantee Trust, etc., Co.*, 128 U. S. 403, 414, 32 L. Ed. 468; *Cheney v. Libby*, 134 U. S. 68, 77, 33 L. Ed. 818.

**25. That time was essence must appear affirmatively.**—*Secombe v. Steele*, 20 How. 94, 104, 15 L. Ed. 833; *Brown v. Guarantee Trust, etc., Co.*, 128 U. S. 403, 414, 32 L. Ed. 468.

**26. Effect of failure to perform within stipulated time.**—*Bank v. Hagner*, 1 Pet. 455, 7 L. Ed. 219; *Slater v. Emerson*, 19 How. 224, 15 L. Ed. 626; *Phillips, etc., Const. Co. v. Seymour*, 91 U. S. 646, 650, 23 L. Ed. 341; *Jones v. United States*, 96 U. S. 24, 28, 24 L. Ed. 644; *Norrington v. Wright*, 115 U. S. 188, 203, 29 L. Ed. 366; *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255, 261, 30 L. Ed. 920; *Loud v. Pomona Land & Water Co.*, 153 U. S. 564, 578, 38 L. Ed. 822. See the titles RESCISSION, CANCELLATION AND REFORMATION; WORKING CONTRACTS.

**27. In the case of Slater v. Emerson**, 19 How. 224, 15 L. Ed. 626, the court held that where there was a contract to finish a railroad by a given day, the parties to which were the contractor with the railroad company of the one part, and a stockholder in the company of the other part, time was of the essence of the contract; and there could be no recovery on the written agreement without showing per-

7. EXCUSES FOR NONPERFORMANCE—*a. General Rules as to Impossibility of Performance.*—Impossible conditions cannot be performed; and if a person contracts to do what at the time is absolutely impossible, the contract will not bind him, because no man can be obliged to perform an impossibility;<sup>28</sup> but where the

formance within the time limited. *Emerson v. Slater*, 22 How. 28, 16 L. Ed. 360.

Where there was a special contract to build a house by a certain day, which was not fulfilled, owing to various circumstances, and the contractor brought a suit setting forth the special contract and averring performance, it was erroneous in the court to instruct the jury to find for the plaintiff, as the work was not finished by the appointed day, though it was completed after the time with the knowledge and approbation of the defendant. *Dermott v. Jones*, 23 How. 220, 16 L. Ed. 442.

In *Phillips, etc., Const. Co. v. Seymour*, 91 U. S. 646, 650, 23 L. Ed. 341, the court, after recognizing these exceptions, said: "The familiar case of part performance, possession, etc., in chancery, where time is not of the essence of the contract, or has been waived by the acquiescence of the party, is an example of the latter; and the case of contracts for building houses, railroads, or other large and expensive constructions, in which the means of the builder and his labor become combined and affixed to the soil, or mixed with materials and money of the owner, often afford examples at law. If A. contract to deliver a horse to B. on Monday next, for which B. agrees to pay \$100, A. cannot recover by an offer to deliver on Tuesday; but if A. agree to deliver a horse, buggy, and harness on Monday, and B. accepts delivery of the horse and buggy, can he refuse to pay anything, though he accepts delivery of the harness on Tuesday? This is absurd. He waives, by this acceptance, the point of time as to the harness, at least so far as A.'s right to recover the agreed sum is concerned. If B. have suffered any damage by the delay, he can recover it by an action on A.'s covenant to deliver on Monday, or, if he wait to be sued, he may recoup by setting it up in that action as a cross-demand growing out of the same contract. Such we understand to be especially the law applicable to building contracts."

And in *Cheney v. Libby*, 134 U. S. 68, 78, 33 L. Ed. 818, it is said: "Even where time is made material, by express stipulation, the failure of one of the parties to perform a condition within the particular time limited will not in every case defeat his right to specific performance, if the condition be subsequently performed, without unreasonable delay, and no circumstances have intervened that would render it unjust or inequitable to give such relief. The discretion which a court of equity has to grant or refuse specific performance, and which is always exercised with reference to the circumstances of the particular case before it (*Hennessy v.*

*Woolworth*, 128 U. S. 438, 442, 32 L. Ed. 500), may, and of necessity must often be controlled by the conduct of the party who bases his refusal to perform the contract upon the failure of the other party to strictly comply with its conditions." See the title SPECIFIC PERFORMANCE.

"A subsequent performance and acceptance by the defendant will authorize a recovery on a quantum meruit." *Slater v. Emerson*, 19 How. 224, 238, 15 L. Ed. 626; *Emerson v. Slater*, 22 How. 28, 16 L. Ed. 360; *Dermott v. Jones*, 2 Wall. 1, 17 L. Ed. 762. See, generally, the title ASSUMPSIT, vol. 2, p. 636.

In *Manufacturing Co. v. United States*, 17 Wall. 592, 595, 21 L. Ed. 715, the court said: "We cannot believe there would be any hesitation in holding an individual liable who, after making such a contract as was made in this instance, and requesting such alterations for his own benefit, and who, while aware of the increased time necessary, and that the other party was in good faith and with reasonable diligence performing the work, should say, 'I will not receive or pay for the work done, because it was not done within the time first stipulated.'"

But when the plaintiff has been guilty of fraud, or has willfully abandoned the work, leaving it unfinished, he cannot recover in any form of action. *Dermott v. Jones*, 2 Wall. 1, 17 L. Ed. 762. See the titles FRAUD AND DECEIT; WORKING CONTRACTS.

28. Impossible conditions.—*Boyden v. United States*, 13 Wall. 17, 22, 20 L. Ed. 527; *Jones v. United States*, 96 U. S. 24, 29, 24 L. Ed. 644; *Jacksonville, etc., R. & Nav. Co. v. Hooper*, 160 U. S. 514, 527, 40 L. Ed. 515.

"Where there is obvious physical impossibility, or legal impossibility, which is apparent on the face of the contract, the latter is void." *Jacksonville, etc., R. & Nav. Co. v. Hooper*, 160 U. S. 514, 527, 40 L. Ed. 515.

Where subject matter has ceased to exist.—"There is such a defense known to the law as an impossibility of performance. Instances of such a defense are found in cases where the subject matter of the contract had ceased to exist, as where there was a contract of sale of a cargo of grain supposed by the parties to be on its voyage to England, but which, having become heated on the voyage, had been unloaded and sold, and where it was held that the contract was void, inasmuch 'as it plainly imputed that there was something which was to be sold and purchased at the time of the contract,' whereas the



contract is to do a thing which is possible in itself, the performance is not excused by the occurrence of an inevitable accident or other contingency, although it was not foreseen by the party, nor was within his control.<sup>29</sup> While an impossibility

object of the sale had ceased to exist." *Jacksonville, etc., R. & Nav. Co. v. Hooper*, 160 U. S. 514, 527, 40 L. Ed. 515, citing *Courtrier v. Hastle*, 5 H. L. Cas. 673; *Allen v. Hammond*, 11 Pet. 63, 9 L. Ed. 633.

"So, also, where a person purchased an annuity which, at the time of the purchase, had ceased to exist owing to the death of the annuitant, it was held that he could recover the price which he had paid for it." *Jacksonville, etc., R. & Nav. Co. v. Hooper*, 160 U. S. 514, 527, 40 L. Ed. 515, citing *Strickland v. Turner*, 7 Exch. 208.

"In contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied, that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance." *The Tornado*, 108 U. S. 342, 351, 27 L. Ed. 747.

"The rule has been applied to excuse the owner of a music hall, which had been burned, from fulfilling a contract to let the use of it." *The Tornado*, 108 U. S. 342, 351, 27 L. Ed. 747.

"The principle was extended farther in *Appleby v. Myers*, L. R. 2 C. P. 651. There the plaintiffs contracted to erect certain machinery on the defendant's premises at specific prices for particular portions, and to keep it in repair for two years, the price to be paid upon completion of the whole. After some portions of the work had been finished, and others were in the course of completion, the premises, with all the machinery and materials thereon, were destroyed by an accidental fire. It was held that both parties were excused from the further performance of the contract, and that the plaintiffs were not entitled to sue in respect of those portions of the work which had been completed, whether the materials used had become the property of the defendant or not." *The Tornado*, 108 U. S. 342, 351, 27 L. Ed. 747.

**Difficulty or inconvenience.**—But as between individuals, the impossibility which releases a man from the obligation to perform his contract must be a real impossibility, and not a mere inconvenience. *Smoot's Case*, 15 Wall. 36, 46, 21 L. Ed. 107.

The general rule is that impossibility of performance arising subsequently to the making of the contract, even though it arises without any fault on the part of the covenantor, does not discharge him from his liability under the contract. "The principle deducible from the authorities is that if what is agreed to be done is possible and lawful, it must be done. Difficulty or improbability of accomplishing the undertaking will not avail the defend-

ant. It must be shown that the thing cannot by any means be effected. Nothing short of this will excuse performance. The answer to the objection of hardship in all such cases is that it might have been guarded against by a proper stipulation. It is in the province of courts to enforce contracts—not to make or modify them. When there is neither fraud, accident, nor mistake, the exercise of dispensing power is not a judicial function." *Jacksonville, etc., R. & Nav. Co. v. Hooper*, 160 U. S. 514, 527, 40 L. Ed. 515; *Jones v. United States*, 96 U. S. 24, 29, 24 L. Ed. 644; *The Harriman*, 9 Wall. 161, 172, 19 L. Ed. 629.

In *United States v. Gleason*, 175 U. S. 588, 602, 44 L. Ed. 284, it is said: "Difficulties, even if unforeseen, and however great, will not excuse him. If parties have made no provision for a dispensation, the rule of law gives none—nor, in such circumstances, can equity interpose. *Dermott v. Jones*, 2 Wall. 1, 17 L. Ed. 762; *Cutter v. Powell*, 2 Smith's Leading Cases, 1, 7th Amer. Ed." See, also, *Gavinzel v. Crump*, 22 Wall. 308, 321, 22 L. Ed. 783.

**29. Subsequent inevitable accident or contingency.**—*Boyden v. United States*, 13 Wall. 17, 22, 20 L. Ed. 527; *Jones v. United States*, 96 U. S. 24, 29, 24 L. Ed. 644; *Jacksonville, etc., R. & Nav. Co. v. Hooper*, 160 U. S. 514, 527, 40 L. Ed. 515.

"If a tenant agree to repair, and the tenement be burned down, he is bound to rebuild. A company agreed to build a bridge in a substantial manner, and to keep it in repair for a certain time. A flood carried it away. It was held that the company was bound to rebuild. A person contracted to build a house upon the land of another. Before it was completed it was destroyed by fire. It was held that he was not thereby excused from the performance of his contract. A party contracted to erect and complete a building on a certain lot. By reason of a latent defect in soil the building fell down before it was completed. It was held that the loss must be borne by the contractor." *Dermott v. Jones*, 2 Wall. 1, 8, 17 L. Ed. 762. See, also, *Railroad Co. v. Smith*, 21 Wall. 255, 263, 22 L. Ed. 513. See, generally, the title WORKING CONTRACTS.

"There can be no question that a party may by an absolute contract bind himself or itself to perform things which subsequently become impossible, or pay damages for the nonperformance, and such construction is to be put upon an unqualified undertaking, where the event which causes the impossibility might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the

may release the party from liability to suit for nonperformance, it does not stand for performance so as to enable the party to sue and recover as if he had performed.<sup>30</sup>

b. *Act of God*.—Where the performance of a contract is rendered impossible by the act of God, the general rule is that such obstruction is a sufficient excuse for nonperformance.<sup>31</sup>

c. *Act of Law*.—The nonperformance of the terms of a contract will be excused where performance is rendered impossible by law.<sup>32</sup>

d. *Act of Public Enemy*.—Obstructions interposed by the act of a public enemy will excuse from performance, so far as the effect of such preventing cause necessarily extends. In cases of partial prevention, it would seem, therefore, that it would be incumbent upon the party to satisfy the court that he had complied with the conditions so far as he was not necessarily prevented by the public enemy.<sup>33</sup>

e. *Act of Party*.—It is a sound principle that the conduct of one party to a contract which prevents the other from performing his part is an excuse for nonperformance.<sup>34</sup>

promisor. But where the event is of such a character that it cannot be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens." *Chicago, etc., R. Co. v. Hoyt*, 149 U. S. 1, 15, 37 L. Ed. 625.

**Mere inability to pay.**—"There is no doubt of the general proposition that mere inability to pay is no defense to the performance of a contract, or to a promise to pay." *Sunflower Oil Co. v. Wilson*, 142 U. S. 313, 321, 35 L. Ed. 1025.

**30. Impossibility as a substitute for performance.**—*Smoot's Case*, 15 Wall. 36, 46, 21 L. Ed. 107.

**31. Performance rendered impossible by act of God.**—*Dermott v. Jones*, 2 Wall. 1, 7, 17 L. Ed. 762; *United States v. Gleason*, 175 U. S. 588, 602, 44 L. Ed. 284; *Huidekoper v. Douglass*, 3 Cranch 1, 73, 2 L. Ed. 347. See *ACT OF GOD*, vol. 1, p. 115. And see the titles *CARRIERS*, vol. 3, p. 593, 594; *DEEDS*.

**32. Act of law as excuse.**—*Dermott v. Jones*, 2 Wall. 1, 7, 17 L. Ed. 762; *United States v. Gleason*, 175 U. S. 588, 602, 44 L. Ed. 284. See, however, *Lowrey v. Hawaii*, 206 U. S. 206, 223, 51 L. Ed. 1026, where it is held that a government cannot by a change of its laws excuse itself from its previous engagements. See *ACT OF LAW*, vol. 1, p. 115. See the titles *ALTERATION OF INSTRUMENTS*, vol. 1, p. 261; *BANKRUPTCY*, vol. 2, p. 792; *MERGER*.

**33. Act of public enemy.**—*Huidekoper v. Douglass*, 3 Cranch 1, 73, 2 L. Ed. 347. See the title *WAR*.

**34. Act of party as excuse for nonperformance by other party.**—*Clearwater v. Meredith*, 1 Wall. 25, 39, 17 L. Ed. 604; *Dermott v. Jones*, 2 Wall. 1, 7, 17 L. Ed. 762; *Gibbons v. United States*, 8 Wall.

269, 273, 19 L. Ed. 453; *Emigrant Co. v. County of Adams*, 100 U. S. 61, 70, 25 L. Ed. 563; *United States v. Peck*, 102 U. S. 64, 65, 26 L. Ed. 46; *Chicago, etc., R. Co. v. Hoyt*, 149 U. S. 1, 15, 37 L. Ed. 625; *United States v. Gleason*, 175 U. S. 588, 602, 44 L. Ed. 284.

If a party to a contract who is entitled to the benefit of a condition, upon the performance of which his responsibility is to arise, by any act of his own prevent the performance, the opposite party is excused from proving a strict compliance with the condition. Thus, if the precedent act is to be performed at a certain time or place, and a strict performance of it is prevented by the absence of the party who has a right to claim it; the law will not permit him to set up the non-performance of the condition as a bar to the responsibility which his part of the contract has imposed upon him. *Williams v. United States Bank*, 2 Pet. 96, 102, 7 L. Ed. 360, cited in *District of Columbia v. Camden Iron Works*, 181 U. S. 453, 461, 45 L. Ed. 948.

The repudiation of a contract warrants the other party in going no further in performance on his side. *Roehm v. Horst*, 178 U. S. 1, 44 L. Ed. 953; *The Eliza Lines*, 199 U. S. 119, 128, 50 L. Ed. 115.

A person entered into a contract, with the proper military official, to cut and furnish a certain quantity of hay to a military station. There was only one place where he could cut the hay within hundreds of miles and it was known that he relied on this place for his supply although no mention of the source was made in the contract. The government authorities allowed third parties to cut the hay at this place and supply the station. It was held that the act of officials, in allowing the hay to be cut and supplied by third parties, prevented and hindered the other party from performing his part of the contract and was an excuse

f. *Insolvency*.—The insolvency of one party to a contract does not release the other from its obligations, provided, always, the consideration promised, if money, be paid, or if the consideration be the note or other obligation of the insolvent, money be tendered in its place.<sup>35</sup>

8. **WAIVER**.—If a party to a contract, who is entitled to the benefit of a condition, upon the performance of which his responsibility is to arise, dispensed with the performance, the opposite party is excused from proving a strict compliance with the condition.<sup>36</sup> But waiver of a stipulation in an agreement, to be effectual, must be made intentionally, and with knowledge of the circumstances.<sup>37</sup> The failure of both parties to perform is equivalent to a waiver by each of the default of the other.<sup>38</sup>

9. **PART PERFORMANCE**.—The law relating to part performance will be treated elsewhere.<sup>39</sup>

**B. Breach**—1. **RENUNCIATION**.—An absolute and unequivocal renunciation

for nonperformance by him. *United States v. Peck*, 102 U. S. 64, 65, 26 L. Ed. 46.

It does not seem that there would be any hesitation in holding an individual liable who, after making such a contract as was made in the case of *Manufacturing Co. v. United States*, 17 Wall. 592, 595, 21 L. Ed. 715, and requesting such alterations for his own benefit, and who, while aware of the increased time necessary, and that the other party was in good faith and with reasonable diligence performing the work, should say, "I will not receive or pay for the work done, because it was not done within the time first stipulated."

C. and T. entered into a written agreement whereby C. contracted to sell to T. certain parcels of land. The contract contained a provision forbidding its modification or change. "except by entry in writing signed by both parties," coupled with the provision that no court should relieve T. from a failure to comply strictly and literally with the contract. It was held that such provisions cannot be applied where the efficient cause of the failure of the party seeking specific performance to comply strictly and literally with the contract was the conduct of the other party. *Cheney v. Libby*, 134 U. S. 68, 80, 33 L. Ed. 818.

A railroad company agreed to deliver at certain elevators, or tracks connected therewith, an average of 5,000,000 bushels of wheat per year for ten years, and in case the grain so delivered or brought to the elevators for delivery, fell short of that quantity it was to pay one cent per bushel on the amount of such deficiency. It was held that when the company offered the stipulated amount of grain at the elevators it had performed the condition of the contract and the inability of the lessees of the elevators to accept the grain so tendered, on account of the storage capacity of the elevators being fully occupied by third parties, whose action in respect to allowing the grain to remain or to be removed, was beyond the control of either the railroad company or the lessees of the elevators, could not

operate to defeat such performance or constitute any ground for thereafter holding the railroad company liable on its contract. *Chicago, etc., R. Co. v. Hoyt*, 149 U. S. 1, 14, 37 L. Ed. 625. See post, "Breach," IX, B.

35. *Insolvency*.—*Florence Min. Co. v. Brown*, 124 U. S. 385, 389, 31 L. Ed. 424. See the title **INSOLVENCY**.

36. **Waiver of performance**.—*Williams v. United States Bank*, 2 Pet. 96, 102, 7 L. Ed. 360; *District of Columbia v. Camden Iron Works*, 181 U. S. 453, 461, 45 L. Ed. 948. See, also, *Phillips, etc., Const. Co. v. Seymour*, 91 U. S. 646, 650, 23 L. Ed. 341; *United States v. Peck*, 102 U. S. 64, 65, 26 L. Ed. 46. See the title **WAIVER**.

"Conditions precedent may doubtless be waived by the party in whose favor they are made." *Jones v. United States*, 96 U. S. 24, 28, 24 L. Ed. 644.

37. **Waiver must be intentionally and knowingly made**.—*Utley v. Donaldson*, 94 U. S. 29, 49, 24 L. Ed. 54; *Bennecke v. Insurance Co.*, 105 U. S. 355, 359, 26 L. Ed. 990. See the title **INSURANCE**.

This is the rule when there is a direct and precise agreement to waive the stipulation. A fortiori is this the rule when there is no agreement either verbal or in writing to waive the stipulation, but where it is sought to deduce a waiver from the conduct of the party. Thus, where a written agreement exists and one of the parties sets up an arrangement of a different nature, alleging conduct on the other side amounting to a substitution of this arrangement for a written agreement, he must clearly show not merely his own understanding, but that the other party had the same understanding. *Bennecke v. Insurance Co.*, 105 U. S. 355, 359, 26 L. Ed. 990.

38. **Waiver by both parties**.—*Brown v. Slee*, 103 U. S. 828, 837, 26 L. Ed. 618.

39. **Part performance**.—See the titles **ASSUMPSIT**, vol. 2, p. 636; **FRAUDS**, **STATUTE OF**; **PAYMENTS**; **SPECIFIC PERFORMANCE**; **WORKING CONTRACTS**. See, also, ante, "Necessity for Performance," IX, A, 6, b.



of the contract by one of the parties, acted upon by the party to whom the promise was made,<sup>40</sup> discharges the other party,<sup>41</sup> giving such other party the right to either sue immediately or refrain from so doing until the expiration of the time for final performance.<sup>42</sup>

**40. Renunciation as breach.**—The renunciation must be absolute and unequivocal and must have been acted on by the party to whom the promise was made. *Roehm v. Horst*, 178 U. S. 1, 15, 44 L. Ed. 953, citing *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255, 264, 30 L. Ed. 920.

"In *Smoot's Case*, 15 Wall. 36, 21 L. Ed. 107, this court quoted with approval the qualifications stated by Benjamin on Sales, 1st. Ed., 424, 2d. Ed., § 568, that 'a mere assertion that the party will be unable, or will refuse to perform his contract, is not sufficient; it must be a distinct and unequivocal absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the promise was made; for, if he afterwards continue to urge or demand a compliance with the contract, it is plain that he does not understand it to be at an end.'" *Dingley v. Oler*, 117 U. S. 490, 503, 29 L. Ed. 984.

Two dealers in ice entered into a contract by which one agreed to take a cargo of ice from the other, in return for which he was to give him the same quantity of ice the next year. In an action for damages for breach of the contract to return the ice it was held that the defendant had the option of delivering the ice at any time during the shipping season of the next year and a refusal to deliver the ice, made before the end of the season, would not entitle the plaintiff to sue for anticipatory breach unless it was distinct, unequivocal, and absolute, and that as this refusal was not treated as final at that time, it could not be so treated later in order to enable the plaintiff to bring his action. *Dingley v. Oler*, 117 U. S. 490, 502, 503, 29 L. Ed. 984.

**41.** *Hammond v. Mason, etc.*, *Organ Co.*, 92 U. S. 724, 727, 23 L. Ed. 767; *Hinckley v. Pittsburgh Bessemer Steel Co.*, 121 U. S. 264, 273, 30 L. Ed. 967; *Ankeny v. Clark*, 148 U. S. 345, 353, 37 L. Ed. 475; *Roehm v. Horst*, 178 U. S. 1, 8, 44 L. Ed. 953, cited in *The Eliza Lines*, 199 U. S. 119, 129, 50 L. Ed. 115.

"In *Johnstone v. Milling*, 16 Q. B. Div. 467, Lord Esher, Master of the Rolls, puts the principle thus: 'When one party assumes to renounce the contract, that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract. Such a renunciation does not of course amount to a rescission of the contract, because one party to a contract cannot by himself rescind it, but by wrongfully making such a renunciation of the contract he entitles the other party, if he pleases, to agree to the con-

tract being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission. The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation.'" *Roehm v. Horst*, 178 U. S. 1, 12, 44 L. Ed. 953.

"The doctrine that there may be an anticipatory breach of an executory contract by an absolute refusal to perform it, has become the settled law of England as applied to contracts for services, for marriage, and for the manufacture or sale of goods. The cases are extensively commented on in the notes to *Cutter v. Powell*, 2 Smith's Leading Cases, 1212, 1220, 9th edition, by Richard Henn Collins and Arbuthnot." *Roehm v. Horst*, 178 U. S. 1, 8, 44 L. Ed. 953. See the titles MASTER AND SERVANT; SALES. See ante, "Act of Party," IX, A, 7, e.

**42.** *Roehm v. Horst*, 178 U. S. 1, 7, 44 L. Ed. 953; *North Chicago Rolling Mill Co. v. St. Louis Ore. etc. Co.*, 152 U. S. 596, 614, 38 L. Ed. 565. See, also, *Pierce v. Tennessee, etc., R. Co.*, 173 U. S. 1, 12, 43 L. Ed. 591.

In *Roehm v. Horst*, 178 U. S. 1, 119, 44 L. Ed. 953, the court said: "The parties to a contract which is wholly executory have a right to the maintenance of the contractual relations up to the time for performance, as well as to a performance of the contract when due. If it appear that the party who makes an absolute refusal intends thereby to put an end to the contract so far as performance is concerned, and that the other party must accept this position, why should there not be speedy action and settlement in regard to the rights of the parties? Why should a locus penitentiae be awarded to the party whose wrongful action has placed the other at such disadvantage? What reasonable distinction per se is there between liability for a refusal to perform future acts to be done under a contract in course of performance and liability for a refusal to perform the whole contract made before the time for commencement of performance?"

"In *Frost v. Knight*, L. R. 7 Ex. 111, defendant had promised to marry plaintiff so soon as his (defendant's) father should die. While his father was yet alive he absolutely refused to marry plaintiff, and it was held in the Exchequer Chamber, overruling the decision of the Court of Exchequer, L. R. 5 Ex. 322,

2. ACTS RENDERING PERFORMANCE IMPOSSIBLE.—Where one party to an executory contract prevents the performance of it or deliberately incapacitates himself or renders performance of his contract impossible, his act amounts to an injury to the other party, which gives the other party a cause of action for breach of contract,<sup>43</sup> and this rule applies equally as well where the United States

that for this breach an action was well brought during the father's lifetime. Cockburn, C. J., said: "The law with reference to a contract to be performed at a future time, where the party bound to performance announces prior to the time his intention not to perform it, as established by the cases of *Hochster v. De la Tour*, 2 E. & B. 678, and the *Danube & Black Sea Company v. Xenos*, 13 C. B. (N. S.) 825, on the one hand, and *Avery v. Bowden*, 5 E. & B. 714, *Reid v. Hoskins*, 6 E. & B. 953, and *Barwick v. Buba*, 2 C. B. (N. S.) 563, on the other, may be thus stated. The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it." *Roehm v. Horst*, 178 U. S. 1, 10, 44 L. Ed. 953.

"As Lord Chief Justice Cockburn observed, in *Frost v. Knight*, the promisee has the right to insist on the contract as subsisting and effective before the arrival of the time for its performance, and its unimpaired and unimpeached efficacy may be essential to his interests, dealing as he may with rights acquired under it in various ways for his benefit and advantage. And of all such advantage, the repudiation of the contract by the other party, and the announcement that it never will be fulfilled, must of course deprive him. While by acting on such repudiation and the taking of timely measures, the promisee may in many cases avert, or, at all events, materially lessen the injurious effects which would otherwise flow from the nonfulfillment of the contract." *Roehm v. Horst*, 178 U. S. 1, 19, 44 L. Ed. 953.

It is obvious "that both as to renunciation after commencement of performance and renunciation before the time for performance has arrived, money contracts, pure and simple, stand on a different footing from executory contracts for the pur-

chase and sale of goods." *Roehm v. Horst*, 178 U. S. 1, 18, 44 L. Ed. 953.

43. Acts rendering performance impossible.—*United States v. Smith*, 94 U. S. 214, 218, 24 L. Ed. 115; *New York, etc., R. Co. v. Winter*, 143 U. S. 60, 73, 36 L. Ed. 71; *Ankeny v. Clark*, 148 U. S. 345, 353, 37 L. Ed. 475; *Roehm v. Horst*, 178 U. S. 1, 8, 44 L. Ed. 953; *Lovell v. St. Louis Mutual Life Ins. Co.*, 111 U. S. 264, 274, 28 L. Ed. 423, citing *United States v. Behan*, 110 U. S. 338, 339, 28 L. Ed. 168. See ante, "Excuses for Nonperformance," IX, A, 7.

"It is to be observed that when it is said in some of the books that where one party puts an end to the contract, the other party cannot sue on the contract, but must sue for the work actually done under it, as upon a quantum meruit, this only means that he cannot sue the party in fault upon the stipulations contained in the contract, for he himself has been prevented from performing his own part of the contract upon which the stipulations depend. But surely, the willful and wrongful putting an end to a contract, and preventing the other party from carrying it out, is itself a breach of the contract for which an action will lie for the recovery of all damage which the injured party has sustained. The distinction between those claims under a contract which result from a performance of it on the part of the claimant, and those claims under it which result from being prevented by the other party from performing it, has not always been attended to. The party who voluntarily and wrongfully puts an end to a contract and prevents the other party from performing it, is estopped from denying that the injured party has not been damaged to the extent of his actual loss and outlay fairly incurred." *United States v. Behan*, 110 U. S. 338, 346, 28 L. Ed. 168.

In *Anvil Min. Co. v. Humble*, 153 U. S. 540, 552, 38 L. Ed. 814, performance had been commenced, but completion was prevented by defendant, and Mr. Justice Brewer, speaking for the court, said: "Whenever one party thereto is guilty of such a breach as is here attributed to the defendant, the other party is at liberty to treat the contract as broken and desist from any further effort on his part to perform; in other words, he may abandon it, and recover as damages the profits which he would have received through full performance. Such an abandonment is not technically a rescission of the contract, but is merely an acceptance of the situation which the wrongdoing of the other party has brought about." Generally



is a party.<sup>44</sup>

3. FAILURE TO PERFORM.—It is a general rule that where the conditions are dependent the failure of one party to perform, unless such want of performance is waived by the other party, constitutes a breach.<sup>45</sup>

speaking, it is true that when a contract is not performed the party who is guilty of the first breach is the one upon whom rests all the liability for the nonperformance. A party who engages to do work has a right to proceed free from any let or hindrance of the other party, and if such other party interferes, hinders, and prevents the doing of the work to such an extent as to render its performance difficult and largely diminish the profits, the first may treat the contract as broken, and is not bound to proceed under the added burdens and increased expense. It may stop and sue for the damages which it has sustained by reason of the nonperformance which the other has caused. *Roehm v. Horst*, 178 U. S. 1, 15, 44 L. Ed. 953.

"In *Lovell v. St. Louis Mutual Life Ins. Co.*, 111 U. S. 264, 28 L. Ed. 423, a life insurance company had terminated its business and transferred its assets and policies to another company, and the court held that this in itself authorized the insured to treat the contract as at an end, and to sue to recover back the premiums already paid, although the time for the performance of the obligation of the insurance company, to wit, the death of the insured, had not arrived. Mr. Justice Bradley, delivering the opinion of the court, said: 'Our third conclusion is, that as the old company totally abandoned the performance of its contract with the complainant by transferring all its assets and obligations to the new company, and as the contract is executory in its nature, the complainant had a right to consider it as determined by the act of the company, and to demand what was justly due to him in that exigency. Of this we think there can be no doubt. Where one party to an executory contract prevents the performance of it, or puts it out of his power to perform it, the other party may regard it as terminated and demand whatever damages he has sustained thereby.'" *Roehm v. Horst*, 178 U. S. 1, 14, 44 L. Ed. 953.

Where one party has performed a part of the contract according to its terms, and has been prevented from performing the residue by the failure of the other party to do his part, he may receive compensation for the work actually performed. *Chicago v. Tilley*, 103 U. S. 146, 154, 26 L. Ed. 371.

44. *Smoot's Case*, 15 Wall. 36, 47, 21 L. Ed. 107; *United States v. Smith*, 94 U. S. 214, 217, 24 L. Ed. 115. See, also, *Clark v. United States*, 6 Wall. 543, 546, 18 L. Ed. 916; *Manufacturing Co. v. United States*, 17 Wall. 592, 21 L. Ed. 715; *United*

*States v. Behan*, 110 U. S. 338, 28 L. Ed. 168. See the title WORKING CONTRACTS.

45. Failure to perform.—*Norrington v. Wright*, 115 U. S. 188, 205, 29 L. Ed. 366; *Canal Co. v. Gordon*, 6 Wall. 561, 18 L. Ed. 894; *Phillips, etc., Const. Co. v. Seymour*, 91 U. S. 646, 649, 23 L. Ed. 341; *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452, 462, 38 L. Ed. 231. See, generally, post, "Conditions," IX, A, 6. See the title WORKING CONTRACTS.

The American Board of Commissioners for Foreign Missions for a long time conducted a school in the Hawaiian Islands. The school was later sold to the Hawaiian government with the condition that it should be continued, at the expense of the government, as an institution for the cultivation of sound literature and solid science. And further, that it should not teach or allow to be taught any religious tenet or doctrine contrary to those theretofore inculcated by the Mission, a summary of which was enclosed with the agreement. The government agreed that in case of violation of the conditions upon which the transfer was made the property should be reconveyed to the Board of Commissioners or the sum of fifteen thousand dollars should be paid to them instead. An action was brought by the board for the recovery of the sum. It was held that as the institution had been used for twenty-five years to educate young men to be Christian ministers, a religious instruction was prescribed, and as the government had discontinued such instruction, the board could recover the prescribed amount. *Lowrey v. Hawaii*, 206 U. S. 206, 221, 224, 51 L. Ed. 1026.

A person entered into a contract with a publisher by which he agreed to act as agent for the publisher for the sale of a certain book. The contract was indefinite as to the time during which it was to continue in force. It was held that when either party terminated it the other was no longer bound by its provisions. *Warren v. Stoddart*, 105 U. S. 224, 228, 229, 26 L. Ed. 1117.

An agreement between a claimant and certain persons in Washington, whereby the claimant agreed to allow those persons a proportion of what might be recovered, was terminated when the United States and Great Britain made a convention, providing for the appointment of a board of commissioners to decide upon claims, in which the one in question was included. The agreement looked only to the services in Washington of the persons employed. *Pemberton v. Lockett*, 21 How. 257, 16 L. Ed. 137.



4. **MOTIVE FOR BREACH.**—The motive for the breach commonly is immaterial in an action on the contract.<sup>46</sup>

5. **DAMAGES.**—As to damages for breach of contract, see the title **DAMAGES**.

**C. Renewal.**—Where a party has been absolved from his contract and has afterwards consented to renew the agreement and proceeds to its fulfillment, its terms are the same as those of the original contract.<sup>47</sup> As to renewal of contracts by a municipality, see the title **MUNICIPAL CORPORATIONS**.

## X. Procedure.

**A. Parties.**—As to the general treatment of necessary parties, see the titles **EQUITY; PARTIES**. As to competency of parties, see ante, "Competent Parties," II, B, 1. As to actions on joint and several contracts, see ante, "Joint and Several Contracts," III, G. As to actions in name of assignee of a contract, see the title **ASSIGNMENTS**, vol. 2, p. 592.

**B. Defenses**<sup>48</sup>—1. **EQUITABLE DEFENSES.**—As to equitable defenses, see the title **ACTIONS**, vol. 1, p. 114, and references.

2. **DRUNKENNESS.**—As to drunkenness at the time of the execution of the contract as a defense, see the title **DRUNKENNESS**.

3. **FRAUD.**—As to fraud as a defense, see the title **FRAUD AND DECEIT**.

4. **INFANCY.**—As to infancy as a defense, see the title **INFANTS**.

5. **ILLEGALITY.**—As to illegality as a defense, see the title **ILLEGAL CONTRACTS**, and references there given.

6. **MISTAKE.**—As to mistake as a defense, see the title **MISTAKE AND ACCIDENT**.

7. **DURESS AND UNDUE INFLUENCE.**—As to duress or undue influence as a defense, see the titles **DURESS; UNDUE INFLUENCE**.

8. **CHAMPERTY AND MAINTENANCE.**—As to champerty, see the title **CHAMPERTY AND MAINTENANCE**, vol. 3, p. 668.

9. **ASSIGNMENT OF INTEREST.**—As to an assignment of interest in the contract as a defense, see the title **SPECIFIC PERFORMANCE**.

10. **WANT OF MUTUALITY.**—Where the defendant has actually received the consideration of a written agreement, it is no answer to an action brought against him for a breach of his covenants in the same to say that the agreement did not bind the plaintiff to perform the promises on his part therein contained, provided it appears that the promises in question have, in fact, been performed in good faith, and without prejudice to the defendant.<sup>49</sup>

11. **WANT OR FAILURE OF CONSIDERATION.**—As to want or failure of consideration, see treatment and references under ante, "Consideration," II, B, 7.

12. **FAILURE TO PERFORM.**—It has been held that failure of performance may be set up in defense.<sup>50</sup>

46. **Motive for breach.**—*Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U. S. 540, 547, 47 L. Ed. 1171, citing *Grand Tower Co. v. Phillips*, 23 Wall. 471, 480, 23 L. Ed. 71.

47. **Renewal.**—*Gibbons v. United States*, 8 Wall. 269, 273, 19 L. Ed. 453. See the titles "BILLS, NOTES AND CHECKS," vol. 3, p. 292; **INSURANCE; LANDLORD AND TENANT**.

48. **Defenses.**—See also, ante, "Excuses for Nonperformance," IX, A, 7.

49. **Want of mutuality.**—*Storm v. United States*, 94 U. S. 76, 83, 24 L. Ed. 42. And see *Joy v. St. Louis*, 138 U. S. 1, 50, 34 L. Ed. 843. See ante, "Mutuality," II, B, 6.

50. In *Van Buren v. Digges*, 11 How. 461, 475, 13 L. Ed. 771, the court said: "We are aware of the rule laid down in

the earlier English cases, which prescribed that in all instances wherein a party shall have been injured, either by a partial failure of consideration for the contract, or by the nonfulfillment of the contract, or by breach of warranty, the person so injured could not in an action against him upon the contract defend himself by alleging and proving these facts; but could obtain redress only by a cross action against the party from whom the injury shall have proceeded. This doctrine of the earlier cases has been essentially modified by later decisions, and brought by them to the test of justice and convenience, which requires that whenever compensation or an equivalent is claimed by a party in return for the performance of conditions for which such compensation or equivalent has been stipulated, the per-

**C. The Declaration**—1. EXECUTORY AND EXECUTED CONTRACTS.—Where a special contract remains executory the plaintiff must sue upon it. When it has been fully executed according to its terms and nothing remains to be done but the payment of the price, he may sue upon the contract or in *indebitatus assumpsit* and rely upon the common counts. In either case the contract will determine the rights of the parties.<sup>51</sup>

2. CONSIDERATION.—The mention of a mere nominal consideration may be omitted in the pleadings where the contract is set out according to its legal effect.<sup>52</sup>

3. PERFORMANCE.—An averment of performance is always made in the declaration, upon contracts containing dependent undertakings, and that averment must be supported by proof.<sup>53</sup>

4. DEFINITENESS AND CERTAINTY.—In all actions on special agreements or written contracts, the contract given in evidence must correspond with that stated in the declaration.<sup>54</sup> In general, courts of law lean against an extension of the principles applied to cases of variance. Mistakes of this nature are usually mere slips of attorneys, and do not touch the merits of the case;<sup>55</sup> and the variance is immaterial, where it does not change the nature of the contract, which must receive the same legal construction, whether the words be in or out of the declaration.<sup>56</sup> Where the declaration purports to be the recital of a deed or record in *hæc verba*, trifling variances have been deemed fatal;<sup>57</sup> but in setting forth the material parts of a deed or other written instrument, it is not necessary to

son so claiming is bound to show a fulfillment in good faith of those conditions; and the party against whom the claim shall be made shall be permitted to repel it by proof of an entire failure to perform, or of an imperfect or unfaithful performance; or by proof of injurious consequences resulting from either of these delinquencies; and shall not be driven exclusively to his cross action." See ante, "Failure to Perform," IX, B. 3; "Necessity for Performance," IX, A, 6, b.

**51. The declaration—executed and executory contracts.**—Chesapeake & Ohio Canal Co. v. Knapp, 9 Pet. 541, 565, 9 L. Ed. 222; Dermott v. Jones, 2 Wall. 1, 17 L. Ed. 762; Bibb v. Allen, 149 U. S. 481, 499, 37 L. Ed. 817. See the title ASSUMPSIT, vol. 2, p. 636.

**52. Nominal consideration.**—Struthers v. Drexel, 122 U. S. 487, 494, 30 L. Ed. 1210.

**53. Declaration as to performance.**—Bank v. Hagner, 1 Pet. 455, 7 L. Ed. 219; Telfener v. Russ, 162 U. S. 170, 180, 40 L. Ed. 930; Loud v. Pomona Land & Water Co., 153 U. S. 564, 576, 38 L. Ed. 822.

In Phillips, etc., Const. Co. v. Seymour, 91 U. S. 646, 649, 23 L. Ed. 341, the court said: "It is said that the declaration is fatally defective because it does not aver that the plaintiffs were ready, willing, and able to perform the covenants on their part to be performed by the contract. It is true that this might have been alleged in more formal and apt terms than it is. But they do aver, that, from the time they entered upon the work in July until the fifteenth day of December—the day of the alleged breach on the part of defendant—they prosecuted the same with all the energy and skill they possessed,

having men in large numbers—to wit, more than 1,000—with suitable teams and other equipments, along the whole line of the road of 160 miles; and that defendant had expressed entire satisfaction with the manner in which plaintiffs were doing the work. We are inclined to think, that, coupled with the allegation that defendant was in default for nonpayment for work actually done, this was sufficient. It is not like a case where a plaintiff has done nothing, but is required to put a defendant in default by offering to perform, or showing a readiness to perform."

**54. Definiteness and certainty.**—Sheehy v. Mandeville, 7 Cranch 208, 217, 3 L. Ed. 317.

**55. Extention of principles applied to variance not approved.**—Ferguson v. Harwood, 7 Cranch 408, 412, 3 L. Ed. 386, where it is said: "Lord Mansfield has well observed that it is extremely hard upon the party to be turned round and put to expense from such mistakes of his counsel, and it is hard also upon the profession."

**56. Ferguson v. Harwood, 7 Cranch 408, 414, 3 L. Ed. 386.**

"The words of a contract stated in a declaration must have the same legal construction as they would have in the contract itself." Ferguson v. Harwood, 7 Cranch 408, 414, 3 L. Ed. 386.

When a contract is alleged by the pleadings to have been made on a certain day, it is no variance to offer in evidence a written contract which took effect on a different day. United States v. Le Baron, 4 Wall. 642, 18 L. Ed. 309.

**57. Declaration purporting to be recital in hæc verba.**—Ferguson v. Harwood, 7 Cranch 408, 412, 3 L. Ed. 386.

do it, in letters and words. It will be sufficient to state the substance and legal effect.<sup>58</sup> Whatever, however, is alleged should be truly alleged; a contract substantially different in description or effect would not support the averment of the declaration.<sup>59</sup>

**D. Plea to Allegation of Performance.**—Under the Iowa Code, if the plaintiff's general allegation of performance of conditions precedent is controverted by the defendant, the general denial of performance of the conditions does not put it in issue, without specific statement of the facts.<sup>60</sup>

**E. Evidence**—1. **THE CONTRACT.**—The evidence of a contract is but the instrument by which the fact that the will of the parties met is shown.<sup>61</sup>

2. **EVIDENCE OF EXECUTION AND DELIVERY.**—The execution and delivery of a contract is sufficiently proven by showing a recognition and part performance thereof.<sup>62</sup>

3. **BEST AND SECONDARY EVIDENCE.**—It is a general rule that when a contract has been reduced to the form of a document or series of documents, no evidence can be given of the terms of such contract, except the document itself.<sup>63</sup> In Louisiana, when a contract, having subscribing witnesses to it, is proved to have been made out of the state, the state courts presume the witnesses reside at the place where the contract was made, and are not subject to process issued out of those courts; they, therefore, allow secondary evidence to prove the contract.<sup>64</sup>

4. **PAROL EVIDENCE.**—As to parol evidence to vary or explain the terms of a written contract, see the title **PAROL EVIDENCE**.

5. **DOCUMENTARY EVIDENCE.**—As to written communications as evidence in an action on a contract, see the title **DOCUMENTARY EVIDENCE**.

## XI. Interference with Contract.

It has been repeatedly held that, if one maliciously interferes in a contract between two parties, and induces one of them to break that contract to the injury of the other, the party injured can maintain an action against the wrongdoer.<sup>65</sup>

**58. Declaration setting forth material parts of instrument.**—*Ferguson v. Harwood*, 7 Cranch 408, 412, 3 L. Ed. 386. See, also, *Struthers v. Drexel*, 122 U. S. 487, 494, 30 L. Ed. 1216.

**59. Allegations must be true.**—*Ferguson v. Harwood*, 7 Cranch 408, 412, 3 L. Ed. 386; *Bell v. Cunningham*, 3 Pet. 69, 83, 7 L. Ed. 606.

**60. Plea to allegation of performance.**—*Halferty v. Wilmering*, 112 U. S. 713, 28 L. Ed. 858.

**61. Evidence.**—*Richmond, etc., R. Co. v. Patterson Tobacco Co.*, 169 U. S. 311, 314, 42 L. Ed. 759.

**62. Evidence of execution and delivery.**—*Dent v. Ferguson*, 132 U. S. 50, 57, 33 L. Ed. 242.

**63. Best and secondary evidence.**—*Baltzer v. Raleigh, etc., R. Co.*, 115 U. S. 634, 648, 29 L. Ed. 505. See the title **BEST AND SECONDARY EVIDENCE**, vol. 3, p. 214.

**64. Wilcox v. Hunt**, 13 Pet. 378, 10 L. Ed. 209.

**65. Interference with contract.**—*Angle v. Chicago, etc., R. Co.*, 151 U. S. 1, 13, 38 L. Ed. 55. See the titles **MASTER AND SERVANT**; **STRIKES**.

In *Angle v. Chicago, etc., R. Co.*, 151 U. S. 1, 13, 38 L. Ed. 55, the court said: "*Green v. Button*, 2 Cr. Mees. & R. 707, in which the defendants, by falsely pre-

tending to one party to a contract that he had a lien upon certain property, prevented such party from delivering it to the plaintiff, the other party to the contract, and was held responsible for the loss occasioned thereby. *Lumley v. Gye*, 2 El. & Bl. 216, in which a singer had entered into a contract to sing only at the theatre of the plaintiff, and the defendant maliciously induced her to break that contract, and was held liable to the damages sustained by the plaintiff in consequence thereof. *Bowen v. Hall*, 6 Q. B. D. 333, 337, in which it was held that an action lies against a third person who maliciously induces another to break his contract of exclusive personal service with an employer, which thereby would naturally cause, and did in fact cause, an injury to such employer. In the opinion of Brett, L. J., it was said 'that wherever a man does an act which in law and in fact is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie. This is the proposition to be deduced from the case of *Ashby v. White*. If these conditions are satisfied, the action does not the less lie because the natural and probable consequence of the act complained of is an act done by a third person; or because such act so done by the third person is a



**CONTRACTS OF AFFRIGHTMENT.**—See the title SHIPS AND SHIPPING.

**CONTRACTS OF HIRE.**—See the title BAILMENTS, vol. 2, p. 782.

**CONTRADICTION OF RECORD.**—See the title APPEAL AND ERROR, vol. 2, p. 255. As to contradiction of bill of exceptions, see the title EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL. As to contradiction of witnesses, see the title WITNESSES.

**CONTRARY TO LAW.**—See note 1.

## CONTRIBUTION AND EXONERATION.

BY R. E. MAXWELL.

I. Contribution, 595.

II. Exoneration, 597.

### CROSS REFERENCES.

See the titles BILLS, NOTES AND CHECKS, vol. 3, p. 257; EXECUTORS AND ADMINISTRATORS; GENERAL AVERAGE; INDEMNITY; INSURANCE; IMPROVEMENTS; JOINT TENANTS AND TENANTS IN COMMON; MORTGAGES AND DEEDS OF TRUST; PARTIES; PARTNERSHIP; PARTY WALLS; PRINCIPAL AND SURETY; STOCK AND STOCKHOLDERS; SUBROGATION; TORTS.

As to admiralty jurisdiction to allow contribution between vessels for damages caused by a collision, see the title ADMIRALTY, vol. 1, p. 142.

### I. Contribution.

**Between Cosureties.**—Cosureties are bound to contribute equally to the debt

breach of duty or contract by him, or an act illegal on his part, or an act otherwise imposing an actionable liability on him.' Walker v. Cronin, 107 Mass. 555, in which a manufacturer was held entitled to maintain an action against a third party who, with the unlawful purpose of preventing him from carrying on his business, willfully induced many of his employees to leave his employment, whereby the manufacturer lost their services, and the profits and advantages which he would have derived therefrom. Benton v. Pratt, 2 Wend. 385. Rice v. Manley, 66 N. Y. 82, in which a party had contracted to sell and deliver to plaintiffs a quantity of cheese, but having been made to believe through the fraud of the defendant that the plaintiffs did not want the cheese, sold and delivered it to him, and it was held that an action could be maintained against the defendant for the damages which the plaintiffs sustained from failing to get the cheese. Jones v. Stanley, 76 N. C. 355, 356, in which the court said: 'It was decided in Haskins v. Royster, 70 N. C. 601, that if a person maliciously entices laborers or croppers to break their contracts with their employer and desert his service, the employer may recover damages against such person. The same reasons cover every case where one person maliciously persuades another to break any contract with a third person. It is not confined to contracts for service.'

1. **Contrary to law.**—An indictment charged the defendant on the date named, "did knowingly, willfully and unlawfully import and bring into the United States, and did assist in importing and bringing into the United States, to wit, into the port of Philadelphia," diamonds of a stated value, 'contrary to law and the provisions of the act of congress in such cases made and provided, with intent to defraud the United States.'" The alleged offense averred in this count was charged substantially in the words of the statute. In holding the indictment insufficient, the court said: "The allegations of the count were obviously too general, and did not sufficiently inform the defendant of the nature of the accusation against him. The words 'contrary to law, contained in the statute, clearly relate to legal provisions not found in § 3082 itself, but we look in vain in the count for any indication of what was relied on as violative of the statutory regulations concerning the importation of merchandise. The generic expression, 'import and bring into the United States,' did not convey the necessary information, because importing merchandise is not per se contrary to law, and could only become so when done in violation of specific statutory requirements." Keck v. United States, 172 U. S. 434, 437, 43 L. Ed. 505. See, also, the titles INDICTMENTS, INFORMATION AND PRESENTMENTS; REVENUE LAWS.

they have jointly undertaken to pay; but the undertaking must be joint, not separate and successive.<sup>1</sup>

**Between Indorsers.**—But as a general rule there is no liability for contribution between indorsers, without a promise among themselves to be jointly bound.<sup>2</sup>

**Between Insurers.**—If an insured is to receive but one satisfaction, the several insurers shall all of them contribute pro rata, to satisfy that loss against which they have all insured.<sup>3</sup>

**Between Wrongdoers.**—The general principle of law is well settled that one of several wrongdoers cannot compel contribution from another wrongdoer, although he may have been compelled to pay all the damages for the wrong done;<sup>4</sup> but there is an exception to the rule that one wrongdoer cannot compel contribution against another. Where one is primarily responsible for an injury and damages are recovered from the other, the latter may compel contribution.<sup>5</sup>

**Between Contractors.**—Where a loss accrued to a public contractor, by an attempted fraud on the government, a bill for contribution will not lie by the contractor against his partner in the attempted fraud, a public agent.<sup>6</sup>

**1. Allowed between cosureties when undertaking joint.**—*McDonald v. Magruder*, 3 Pet. 470, 7 L. Ed. 744; *Lidde dale v. Robinson*, 12 Wheat. 594, 595, 6 L. Ed. 740. See the title PRINCIPAL AND SURETY.

**2. No contribution between indorsers.**—*McDonald v. Magruder*, 3 Pet. 470, 477, 7 L. Ed. 744. See the title BILLS, NOTES AND CHECKS, vol. 3, p. 344.

**Under the statute of Virginia** giving to debts due on protested bills of exchange the rank of judgment debts, a joint indorser, who has paid more than his proportion of the debt, has a right to satisfaction out of the assets of his coindorser, with the priority of a judgment creditor. *Lidderdale v. Robinson*, 12 Wheat. 594, 6 L. Ed. 740.

**3. Allowed between insurers.**—In cases of double insurance, the assured may, at his election, sue either set of underwriters, and recover a full indemnity; and if there be a recovery against one, the others are bound to contribute ratably, in proportion to the amount insured. *Thurston v. Koch*, 4 Dall. 348, 1 L. Ed. 862.

"It was ruled by Lord Mansfield, chief justice, and agreed to be the course of practice, that upon a double insurance, though the insured is not entitled to two satisfactions; yet, upon the first action, he may recover the whole sum insured, and may leave the defendant therein to recover a ratable satisfaction from the insurers." *Thurston v. Koch*, 4 Dall. 348, 352, 1 L. Ed. 862. See the title INSURANCE.

When two causes of loss concur, one at the risk of the assured and the other insured against, or one insured against by A and the other by B, if the damage caused by such peril can be discriminated, it must be born proportionably. *Insurance Co. v. Transportation Co.*, 12 Wall. 194, 20 L. Ed. 378.

**4. Generally not allowed between wrongdoers.**—*Union Stock Yard Co. v. Chicago, etc., R. Co.*, 196 U. S. 217, 49 L.

Ed. 453; *Selz v. Unna*, 6 Wall. 327, 18 L. Ed. 799. See, generally, the title TORTS.

Equal contribution among tortfeasors is not inequitable, although the law will not support an action to enforce contribution where the payments have been unequal. *Selz v. Unna*, 6 Wall. 327, 18 L. Ed. 799.

Thus where a marshal has received three-fourths of the amount of a judgment from three of four defendants, tortfeasors, he does nothing inequitable in collecting, under agreement with them that he shall do so, the residue from a fourth. *Selz v. Unna*, 6 Wall. 327, 18 L. Ed. 799.

**Instance.**—Where a railroad company delivered to a terminal company a car with a defective brake, which could have been discovered by inspection, and a person who is injured by the result of such defect recovered damages from the terminal company, it was held that the terminal company could not compel contribution; both companies were guilty of the same neglect. *Union Stock Yard Co. v. Chicago, etc., R. Co.*, 196 U. S. 217, 49 L. Ed. 453. See the title CARRIERS, vol. 3, p. 556.

**5. Exception to rule.**—*Union Stock Yard Co. v. Chicago, etc., R. Co.*, 196 U. S. 217, 49 L. Ed. 453.

**6. Between contractors.**—*Bartle v. Nutt*, 4 Pet. 184, 7 L. Ed. 825.

A contract was made for rebuilding Forth Washington, by M., a public agent, and a deputy quartermaster-general, with B., in the profits of which M. was to participate; false measures of the work were attempted to be imposed on the government, the success of which was prevented by the vigilance of the accounting officers of the treasury; a bill was filed to compel an alleged partner in the contract to account for and pay to one of the partners in the transaction one-half of the loss sustained in the execution of the contract. Held, that to state such a case is to decide it; public morals, public justice, and

**Between Coheirs, and Heirs and Purchasers from Heirs or Ancestors.**

—As a general rule contribution may be had between coheirs and between heirs and purchasers from coheirs;<sup>7</sup> but contribution cannot be had between heirs and purchasers from ancestors of the heirs.<sup>8</sup>

**Between Parties Having a Common Interest in Trust Fund.**—Where one of many parties having a common interest in a trust fund, at his own expense takes proper proceedings to save it from destruction and to restore it to the purposes of the trust, he is entitled to reimbursement, either out of the fund itself, or by proportional contribution from those who accept the benefit of his efforts.<sup>9</sup>

**II. Exoneration.**

A drawee of drafts, after acceptance for the accommodation of the drawer, may be exonerated by a subsequent agreement between the parties changing the liability thereon.<sup>10</sup>

the well-established principles of all judicial tribunals alike forbid the interposition of courts of justice to lend their aid to purposes like this; to enforce a contract which began with the corruption of a public officer, and progressed in the practice of known willful deception in its execution, can never be approved or sanctioned by any court. The law leaves the parties to such a contract as it found them; if either has sustained a loss by the bad faith of a particeps criminis, it is but a just infliction for premeditated and deeply practiced fraud; he must not expect that a judicial tribunal will degrade itself, by an exertion of its powers, to shift the loss from one to the other, or to equalize the benefits or burdens which may have resulted from the violation of every principle of morals and of law. *Bartle v. Nutt*, 4 Pet. 184, 7 L. Ed. 825. See the title **ILLEGAL CONTRACTS**.

**7. Between coheirs.**—If one parcener shall have contribution against another parcener, it is most clear that one coheir under our laws of decent shall have contribution against another coheir. *Graff v. Smith*, 1 Dall. 481, 485, 1 L. Ed. 232.

If judgment be obtained against a man that dies, leaving two daughters, who make partition, in this case, if only one is charged, she shall have contribution; for as one purchaser shall have contribution against another, so one heir shall have contribution against another heir, for they are in *æquali jure*. *Graff v. Smith*, 1 Dall. 481, 484, 1 L. Ed. 232.

**Between heir and purchaser of coheir.**—A distinction is made between a coheir and a purchaser under him. Every purchaser, except in some special cases, stands in the shoes of the person he purchased from, and cannot have a better title than he had; and as to contribution, he holding under one of the coheirs, must be considered as in *æquali jure* with the other coheirs. *Graff v. Smith*, 1 Dall. 481, 485, 1 L. Ed. 232.

Where one died intestate, indebted to several persons, and leaving several children, and after a sale of certain parts of his real estate, by order of the orphans'

court, for payment of debts, the remainder was divided among his children, and the eldest son sold his share to bona fide purchasers; the purchasers were bound to contribute in aid of the other heirs, whose lands remained unsold, to the payment of the remaining debts of the intestate. *Graff v. Smith* 1 Dall. 481, 1 L. Ed. 232.

**8. Not allowed between heir and purchaser from ancestor of heir.**—If a man is seized of three acres of land, and enters into a recognizance or statute, and enfeoffs A of one acre, and B of another, and the third descends to the heir; in this case, if execution is sued only against the heir, he shall not have contribution; for, coming to the land without consideration, he sits in the place of his ancestor, and shall not have contribution against any purchaser. But if execution be sued against one of the purchasers, he shall have contribution against the other purchaser and the heir. *Graff v. Smith*, 1 Dall. 481, 484, 1 L. Ed. 232.

The dictum that the heir shall not have contribution against any purchaser clearly means any purchaser from the ancestor, and cannot, consistently with the case stated in Coke, mean any other. *Graff v. Smith*, 1 Dall. 481, 484, 1 L. Ed. 232.

**9. Allowed between parties having a common interest in trust fund.**—*Trustees v. Greenough*, 105 U. S. 527, 532, 26 L. Ed. 1157. See, generally, the title **TRUSTS AND TRUSTEES**.

**10. Exoneration.**—*Collier* was in possession of two drafts drawn by King upon Groves and accepted by him for the accommodation of King. Collier pledged these drafts to the Farmers' Bank of Virginia, as collateral security for a debt which he owed the bank. The drafts not being paid at maturity, the bank sued both Groves and King, and recovered judgments against them, which were liens upon their property. Collier and King then agreed, that if Collier were to purchase King's property at a certain sum, he would return his drafts to him and free him from the bank. To this agreement Groves was a witness, and the purchase was accordingly made. Collier and the



**CONTRIBUTORY NEGLIGENCE.**—See, generally, the title **NEGLIGENCE**.

**CONTROL.**—See note 1.

**CONTROVERSY.**—See, also, the title **COURTS**. As to appellate jurisdiction of controversies arising in bankruptcy proceedings, see the title **BANKRUPTCY**, vol. 2, p. 828. As to controversies between states or to which a state is a party, see the title **COURTS**. As to controversies between citizens of different states, see the titles **COURTS**; **REMOVAL OF CAUSES**. See note 2.

**CONVENIENCE.**—See note 3.

bank then agreed that the bank should give him time and he should give additional collateral security to the bank and mortgage his property; first reducing the liens of prior mortgages down to a certain sum. The bank was moreover to surrender the collateral securities previously received. The mortgage was made by Collier and the collateral security surrendered to him by the bank. By the first agreement made between King and Collier, to which Groves was privy, Collier exonerated Groves, as far as it was in his power; and in consequence of the second agreement between Collier and the bank, Collier became reinvested with the whole control of the matter and his previous exoneratoin of Groves became immediately operative. Groves was, therefore, entirely discharged from all responsibility. The failure of Collier to comply with his contract with the bank did not prevent this exoneratoin of Groves from being effectual. *Farmers' Bank v. Groves*, 12 How. 51, 13 L. Ed. 889. See the title **BILLS, NOTES AND CHECKS**, vol. 3, p. 257.

1. **Control.**—A railroad company agreed with a sleeping car company to haul the cars of the sleeping car company on its line of road and on all roads which it **controlled** or might thereafter **control**. It was held that under this agreement the railroad company was not bound to haul the cars of the sleeping car company over a railroad in whose stock it had acquired a **controlling** interest. *Pullman's Palace Car Co. v. Missouri Pacific Railroad Co.*, 115 U. S. 587, 29 L. Ed. 499.

2. **Controversy.**—The term as used in the constitution has been held to refer to such only as are of a civil as distinguished from those of a criminal nature. *Ex parte Clark*, 100 U. S. 399, 408, 25 L. Ed. 715.

In *Prigg v. Pennsylvania*, 16 Pet. 539, 616, 10 L. Ed. 1060, it is said: "It is plain, then, that where a claim is made by the owner, out of possession, for the delivery of a slave, it must be made, if at all, against some other person; and inasmuch as the right is a right of property, capable of being recognized and asserted by proceedings before a court of justice, between parties adverse to each other, it constitutes, in the strictest sense, a **controversy** between the parties, and a case 'arising under the constitution' of the United States, within the express delegation of judicial power given by that instrument."

In *Schunk v. Moline, etc., Co.*, 147 U. S.

504, 37 L. Ed. 255, the court said: "In *Gaines v. Fuentes*, 92 U. S. 10, 20, 23 L. Ed. 524, this court said: 'A controversy was involved, in the sense of the statute, whenever any property or claim of the parties capable of pecuniary estimation was the subject of litigation and was presented by the pleadings for judicial determination.' *Hilton v. Dickinson*, 108 U. S. 165, 27 L. Ed. 688."

In *Florida v. Georgia*, 17 How. 478, 515, 15 L. Ed. 181, it is said: "Chief Justice Marshall, in describing the **controversies** to which the judicial power of the United States extends, says: 'The words are of well understood and limited signification. It is a **controversy** between parties which had taken a shape for judicial decision.' 'To come within the description of a case in law and equity, a question must assume a legal form for forensic litigation and judicial decision. There must be parties come into court who can be reached by its process and bound by its power, whose rights admit of ultimate decision by a tribunal to which they are bound to submit.' 5 Wheat. Ap. 16, 17."

In *Louisiana v. Texas*, 176 U. S. 1, 24, 44 L. Ed. 347, it is said: "The word **controversies** in the clauses extending the judicial powers of the United States to **controversies** 'between two or more states,' and to **controversies** 'between a state and citizens of another state,' and the word 'party' in the clause declaring that this court shall have original jurisdiction of all cases 'in which a state shall be party' refer to **controversies** or cases that are justiciable as between the parties thereto, and not to **controversies** or cases that do not involve either the property or powers of the state which complains in its sovereign or corporate capacity that its people are injuriously affected in their rights by the legislation of another state." See, also, *Rhode Island v. Massachusetts*, 12 Pet. 657, 723, 9 L. Ed. 1233. And see the title **STATES**.

3. **Convenience.**—In *Lake Shore, etc., Ry. Co. v. Smith*, 173 U. S. 684, 692, 43 L. Ed. 858, it is said: "The right to claim from the company transportation at reduced rates by purchasing a certain amount of tickets is classed as a **convenience**. As so defined it would be more **convenient** if the right could be claimed without any compensation whatever. But such a right is not a **convenience** at all within the meaning of the term as used in relation to the subject of furnishing

**CONVERSATIONS IN EVIDENCE.**—See the title DECLARATIONS AND ADMISSIONS.

**CONVERSION.**—See the title TROVER AND CONVERSION.

## CONVERSION AND RECONVERSION.

BY R. E. MAXWELL.

### CROSS REFERENCES.

See the titles: DESCENT AND DISTRIBUTION; EQUITY; EXECUTORS AND ADMINISTRATORS; MORTGAGES AND DEEDS OF TRUST; PARTITION; TROVER AND CONVERSION; TRUSTS AND TRUSTEES; WILLS.

As to equitable conversion of realty to money to prevent an escheat of realty devised to an alien, see the title ALIENS, vol. 1, p. 210.

**Statement of Doctrine.**—It is a well-settled rule in chancery, in the construction of wills, as well as other instruments, that when land is directed to be sold and turned into money, or money is directed to be employed in the purchase of lands, courts of equity, in dealing with the subject, will consider it that species of property into which it is directed to be converted.<sup>1</sup>

**Foundation of Doctrine.**—The rule is founded upon the principle, that courts of equity, regarding the substance, and not the mere form of contracts and other instruments, consider things directed or agreed to be done, as having been actually performed.<sup>2</sup>

**conveniences** to the public. And also the **convenience** which the legislature is to protect is not the **convenience** of a small portion only of the persons who may travel on the road, while refusing such alleged **convenience** to all others, nor is the right to obtain tickets for less than the general and otherwise lawful rate to be properly described as a **convenience**. If that were true, the granting of the right to some portion of the public to ride free on all trains and at all times might be so described. What is covered by the word **convenience** it might be difficult to define for all cases, but we think it does not cover this case. An opportunity to purchase a thousand mile ticket for less than the standard rate, we think is improperly described as a **convenience**." See, also, the title CARRIERS, vol. 3, p. 635.

**1. Statement of doctrine.**—Seymour v. Freer, 8 Wall. 202, 19 L. Ed. 306; Craig v. Leslie, 3 Wheat. 563, 4 L. Ed. 460; Copley v. Cooper, 19 Wall. 167, 174, 22 L. Ed. 109; Peter v. Beverly, 10 Pet. 532, 9 L. Ed. 522; Given v. Hilton, 95 U. S. 591, 24 L. Ed. 458.

In order to avoid an escheat, and carry out the wishes of the testator, a court of equity will, if necessary, consider land as money, where a testator, who is a trustee, has directed the land to be sold, and will direct the proceeds to be given to the cestui que trust. Taylor v. Benham, 5 How. 233, 12 L. Ed. 130.

Where the interest of the children then in being, or the enjoyment of the dower right of the widow, requires the conversion of real property, whereof the father of the children, died seized, into a personal fund, a child en ventre sa mere does not, until born, possess any estate therein

which can effect the power of the court to pass a decree directing such conversion. Whatever estate devolves upon such child at his birth is an estate in the property in its then condition. Knotts v. Stearns, 91 U. S. 638, 23 L. Ed. 252.

R. C., a citizen of Virginia, being seized of real property in that state, made his will: "In the first place, I give, devise and bequeath unto J. L.," and four others, "all my estate, real and personal, of which I may die seized and possessed, in any part of America, in special trust, that the aforementioned persons, or such of them as may be living at my death, will sell my personal estate to the highest bidder, on two years' credit, and my real estate on one, two and three years' credit, provided satisfactory security be given, by bond and deed of trust: In the second place, I give and bequeath to my brother T. C." an alien, "all the proceeds of my estate, real and personal, which I have herein directed to be sold, to be remitted to him, accordingly as the payments are made, and I hereby declare the aforesaid J. L." and the four other persons, "to be my trustees and executors for the purposes aforementioned;" Held, that the legacy given to T. C., in the will of R. C., was to be considered as a bequest of personal estate, which he was capable of taking for his own benefit, though an alien, on the principle of equitable conversion. Craig v. Leslie, 3 Wheat. 563, 4 L. Ed. 460.

Where a decedent's land is sold at a judicial sale, the funds realized therefrom in equity are of the same character as the property they represent. McLearn v. Wallace, 10 Pet. 625, 641, 9 L. Ed. 559.

**2. Foundation of doctrine.**—Peter v.

**Intention of Testator.**—In cases of resulting trusts, for the benefit of the heir-at-law, it is settled, that if the intent of the testator appears to have been, to stamp upon the proceeds of the land described to be sold, the quality of personalty, not only to subserve the particular purposes of the will, but to all intents, the claim of the heir-at-law to a resulting trust is defeated, and the estate is considered to be personal.<sup>3</sup>

**Limitation to Doctrine.**—It is undoubtedly established doctrine that when a will directs a conversion of realty only for certain purposes, which are limited, for example, for the payment of particular legacies, and follows the direction by a bequest of the residue of personal estate, the conversion takes place only so far as the proceeds of the sale are needed to pay the legacies prior to the residuary one, and the gift of the personalty will not carry the produce realized from the sale of the realty in the absence of a contrary intent plainly manifested.<sup>4</sup>

**Election.**—Where the whole beneficial interest in land or money directed to be employed belongs to the person for whose use it is given, a court of equity will permit the cestui que trust to take the money or the land, at his election, if he elect, before the conversion is made.<sup>5</sup>

**Conflict of Law.**—As to questions regarding the equitable conversion directed in a will of land into personalty being governed by the laws of the state in which the land is situated regardless of the testator's domicile, see the title CONFLICT OF LAWS, vol. 3, p. 1036.

Beverly, 10 Pet. 532, 563, 9 L. Ed. 522; Craig v. Leslie, 3 Wheat. 563, 577, 4 L. Ed. 460. See the title MAXIMS.

**3. Intention of testator.**—Craig v. Leslie, 3 Wheat. 563, 583, 4 L. Ed. 460. See, generally, the title TRUSTS AND TRUSTEES.

It is evident that the title of the heir to a resulting trust can never arise, except when something is left undisposed of, either by some defect in the will, or by some subsequent lapse, which prevents the devise from taking effect; and not even then, if it appears that the intention of the testator was to change the nature of the estate from land to money, absolutely and entirely, and not merely to serve the purposes of the will. Craig v. Leslie, 3 Wheat. 563, 584, 4 L. Ed. 460.

**4. Limitation to doctrine.**—Given v. Hilton, 95 U. S. 591, 596, 24 L. Ed. 458.

"It has been held that a general direction to sell and apply the proceeds indiscriminately to the payment of debts and legacies operates as a conversion out and out. Roper on Legacies, 341, 342, et seq.; King v. Woodhull, 3 Edw. (N. Y.) 82; Durour v. Motteux, 1 Ves. 320." Given v. Hilton, 95 U. S. 591, 596, 24 L. Ed. 458.

**5. Election.**—Where the whole beneficial interest in the money, in the one case, or in the land, in the other, belongs to the person for whose use it is given, a court of equity will not compel the trustee to execute the trust, against the wishes of the cestui que trust, but will permit him to take the money, on the land, if he elect to do so, before the conversion has actually been made; and this election he may make, as well by acts or declarations, clearly indicating a determination to that effect, as by application to a court of equity. Craig v. Leslie, 3 Wheat. 563, 578, 4 L. Ed. 460.

**Right to elect.**—The more just and correct rule would seem to be, that where the cestui que trust is incapable to take or to hold the land beneficially, the right of election does not exist, and consequently, that the property is to be considered as being of that species into which it is directed to be converted. Craig v. Leslie, 3 Wheat. 563, 588, 4 L. Ed. 460.

**Necessity for election.**—It is this election, and not the mere right to make it, which changes the character of the estate, so as to make it real or personal, at the will of the party entitled to the beneficial interest. Craig v. Leslie, 3 Wheat. 563, 578, 4 L. Ed. 460.

**What amounts to an election.**—In the case of Kirkman v. Mills (13 Ves. 338), which was a devise of real estate to trustees, upon trust to sell, and the moneys arising, as well as the rents and profits till the sale, to be equally divided between the testator's three daughters, A., B. and C.; the estate was, upon the death of A., B. and C., considered and treated as personal property, notwithstanding the cestui que trust, after the death of the testator, had entered upon, and occupied the land, for about two years prior to their deaths; but no steps had been taken by them, or by the trustees, to sell, nor had any requisition to that effect been made by the former to the latter. The master of the rolls was of opinion that the occupation of the land for two years was too short to presume an election. He adds, "the opinion of Lord Rosslyn, that property was to be taken as it happened to be at the death of the party from whom the representative claims, had been much doubted by Lord Eldon, who held, that without some act, it must be considered as being in the state in which it ought to be;" and the Lord Rosslyn's rule was new,



**CONVEYANCE.**—See note 1.

**CONVEYANCES.**—See the title ACCIDENT INSURANCE, vol. 1, p. 59.

**CONVEYED.**—See note 2.

**CONVICTION.**—See note 3.

**CONVICTS.**—See the titles CONTRACT LABOR LAW, ante, p. 549; PRISONS AND PRISONERS.

**CONVOY.**—See note 4.

**COPIES.**—As to copies in evidence, see the title DOCUMENTARY EVIDENCE. As to fees of clerk for, see the title CLERKS OF COURT, vol. 3, p. 860. As to return of copy of writ of error, see the title APPEAL AND ERROR, vol. 2, p. 145. As to copy of record, see the titles APPEAL AND ERROR, vol. 2, p. 194; RECORDS.

**COPPERED SHIP.**—See note 5.

and not according to the prior cases. *Craig v. Leslie*, 3 Wheat. 563, 579, 4 L. Ed. 460.

**Failure to elect.**—If this election be not made, in time to stamp the property with a character different from that which the will or other instrument gives it, the latter accompanies it, with all its legal consequences, into the hands of those entitled to it in that character. So that, in case of the death of the cestui que trust, without having determined his election, the property will pass to his heirs or personal representatives, in the same manner as it would have done had the trust been executed, and the conversion actually made in his lifetime. *Craig v. Leslie*, 3 Wheat. 563, 579, 4 L. Ed. 460.

**1. Conveyance.**—That the term conveyance includes a mortgage, see *Beals v. Hale*, 4 How. 52, 11 L. Ed. 865; *United States v. Hooe*, 3 Cranch 73, 89, 2 L. Ed. 370; *Conard v. Atlantic Ins. Co.*, 1 Pet. 386, 441, 7 L. Ed. 189; *United States v. Fisher*, 2 Cranch 358, 2 L. Ed. 304.

**2. Conveyed.**—In *Winona, etc., Land Co. v. Minnesota*, 159 U. S. 526, 531, 40 L. Ed. 247, it is said: "While it may be that the word 'conveyed' generally implies the passing of the legal title, it is not inaptly or incorrectly used to describe a transfer of title, legal or equitable, and whether it is used with a narrow and technical meaning, or in a broad and general sense, is to be determined by the context, and the circumstances under which the entire instrument or document, in which it is found, was framed."

**3. Conviction.**—In *Ammidon v. Smith*, 1 Wheat. 447, 461, 4 L. Ed. 132, it is said: "The law of Rhode Island enacts, that if any prisoner shall be convicted of having disposed of any part of his estate, contrary to his oath or affirmation, 'he shall not only be liable to the pains and penalties of willful perjury, but shall receive no benefit from said oath or affirmation.' Conviction is a technical term, applica-

ble to a judgment on a criminal prosecution, not to a proceeding on this bond. The act contemplates a prosecution on which the party may be adjudged to suffer the penalties of perjury, in addition to which he is to be deprived of all benefit from the oath or affirmation."

In *Ex parte Kearney*, 7 Wheat. 38, 44, 5 L. Ed. 391, quoting Lord Chief Justice De Gray, in *Brass Crosby*, Lord Mayor of London, it was said: "When the House of Commons adjudged anything to be a contempt, or a breach of privilege, their adjudication is a conviction, and their commitment, in consequence, is execution; and no court can discharge on bail, a person that is in execution by the judgment of any court. The House of Commons, therefore, having an authority to commit, and that commitment being an execution, what can this court do? It can do nothing, when a person is in execution by the judgment of a court having a competent jurisdiction. In such a case, this court is not a court of appeal."

**4. Convoy.**—In *The Atlanta*, 3 Wheat. 409, 43, 4 L. Ed. 422, it is said: "A convoy is an association for a hostile object; in undertaking it, a nation spreads over the merchant vessel an immunity from search, which belongs only to a national ship; and by joining a convoy, every individual ship puts off her pacific character, and undertakes for the discharge of duties which belong only to the military marine, and adds to the numerical, if not to the real, strength of the convoy."

**5. Coppered ship.**—Where the owner of a ship, a resident of New York, whose ship was lying in the harbor of New York took out insurance on the vessel in Boston and represented her as a coppered ship, it was held that he was bound as to the meaning of the term coppered ship by the usage of New York and not of Boston. *Hazard v. New England Marine Ins. Co.*, 8 Pet. 557, 8 L. Ed. 1043. See the titles MARINE INSURANCE; USAGES AND CUSTOMS.

# COPYRIGHT.

BY WALTER CARRINGTON.

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#### CROSS REFERENCES.

See the titles APPEAL AND ERROR, vol. 1, p. 333; BANKRUPTCY, vol. 2, p. 792; CREDITORS' SUITS; EXECUTIONS; PATENTS; TRADEMARKS, TRADENAMES AND UNFAIR COMPETITION.

#### I. Definition.

A copyright is "a property in a notion, and has no corporeal tangible substance."<sup>1</sup> According to the practice of legislation in England and America, the copyright is confined to the exclusive right secured to the author or proprietor of a writing or drawing which may be multiplied by the arts of printing in any of its branches.<sup>2</sup>

#### II. Literary Property at Common Law.

**A. In General.**—The right of an author, irrespective of statute, to his own productions and to a control of their publication, seems to have been recognized by the common law, but to have been so ill-defined that from an early period legislation was adopted to regulate and limit such right. In the eighth year of Queen Anne, the first copyright act was passed, which gave to authors a monopoly in the publication of their works for a period of from fourteen to twenty-eight years.<sup>3</sup> An act similar in its provisions to the statute of Anne was

**1. Definition.**—*Stephens v. Cady*, 14 How. 528, 530, 14 L. Ed. 528.

**2.** 2 Bouvier's Law Dict. 363, quoted in *Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53, 36, 28 L. Ed. 349.

**3. Literary property at common law.—Statute of 8 Anne.**—*Holmes v. Hurst*, 174 U. S. 82, 84, 43 L. Ed. 904.

The earliest recognition of this common-law right is to be found in the charter of the Stationers' Company, and certain decrees of the Star Chamber promulgated in 1556, 1585, 1623 and 1637, providing for licensing and regulating the manner of printing, and the number of presses throughout the Kingdom, and prohibiting

the publication of unlicensed books. Indeed, the Star Chamber seems to have exercised the power of search, confiscation and imprisonment without interruption from Parliament, up to its abolition in 1641. From this time the law seems to have been in an unsettled state—although Parliament made some efforts to restrain the licentiousness of the press—until the enactment of the copyright act of 8 Anne. *Holmes v. Hurst*, 174 U. S. 82, 84, 43 L. Ed. 904.

Notwithstanding that act the chancery courts continued to hold that, by the common law and independently of legislation, there was a property of unlimited duration



enacted by congress in 1790.<sup>4</sup> It seems now to be considered the settled law of this country and England that the right of an author to a monopoly of his publications is measured and determined by the copyright act—in other words, that while a right did exist at common law, it has been superseded by statute.<sup>5</sup> But independent of any statutory provision the right of an author in and to his unpublished manuscripts is full and complete.<sup>6</sup> It is his property,<sup>7</sup> and he may obtain redress against any one who deprives him of it, or by improperly obtaining a copy, endeavors to realize a profit by its publication.<sup>8</sup>

**B. Statistics of Crime.**—The statistics of crime are property to the same extent as any other statistics, even if collected by a criminal who furnishes some of the data.<sup>9</sup>

**C. Quotations of Prices on Sales for Future Delivery.**—A collection of quotations of prices on sales of grain and provisions for future delivery made and published by a board of trade is entitled to the protection of the law, on the same ground that a trade secret is entitled to protection.<sup>10</sup> The board does not lose its right by communicating the quotations to persons, even if many, in confidential relations to itself, under a contract not to make them public.<sup>11</sup> Nor will it affect the board's right to protection that its information concerns pretended and unlawful buying and selling in a place kept by it.<sup>12</sup>

**D. Assignment of Manuscript.**—An unpublished manuscript, like any other property, is subject to the author's disposal. He may assign a qualified interest in it, or make an absolute conveyance of the whole interest.<sup>13</sup> A parol transfer is sufficient to convey the title to such a manuscript prior to its being copyrighted.<sup>14</sup> The transfer of the manuscript will not, at common law, carry with it a right to print and publish the work, without the express consent of the author, as the property in the manuscript, and the right to multiply the copies, are two separate and distinct interests.<sup>15</sup> But under the copyright law the as-

in printed books. This principle was affirmed so late as 1769 by the court of King's Bench in the very carefully considered case of *Miller v. Taylor*, 4 Burrows 2303, in which the right of the author of "Thompson's Seasons," to a monopoly in this work, was asserted and sustained. *Holmes v. Hurst*, 174 U. S. 82, 85, 43 L. Ed. 904.

But a few years thereafter the House of Lords, upon an equal division of the judges, declared that the common-law right had been taken away by the statute of Anne, and that authors were limited in their monopoly by that act. *Donaldson v. Becket*, 4 Burrows 2408. This remains the law of England to the present day. *Holmes v. Hurst*, 174 U. S. 82, 85, 43 L. Ed. 904.

Notwithstanding the decision in *Millor v. Taylor*, 4 Burr. 2303, the question whether, by the common law in England, prior to the statute of 8 Anne, an author of a literary composition and his assigns, had the sole right of printing and publishing the same in perpetuity, is by no means free from doubt. *Wheaton v. Peters*, 8 Pet. 591, 657, 8 L. Ed. 1055.

Under the common law of Pennsylvania an author did not have a perpetual property in the copyright of his works. *Wheaton v. Peters*, 8 Pet. 591, 8 L. Ed. 1055.

**4. First copyright act enacted by congress in 1790.**—*Holmes v. Hurst*, 174 U. S. 82, 85, 43 L. Ed. 904.

**5. Common-law right to monopoly of publication superseded by statute.**—*Holmes v. Hurst*, 174 U. S. 82, 85, 43 L. Ed. 904; *Wheaton v. Peters*, 8 Pet. 591, 657, 8 L. Ed. 1055. See post, "In General," III, A.

**6. Common law still governs as to property in unpublished manuscripts.**—*Paige v. Banks*, 13 Wall. 608, 614, 20 L. Ed. 709; *Little v. Hall*, 18 How. 165, 170, 15 L. Ed. 328.

**7. Wheaton v. Peters.** 8 Pet. 591, 657, 8 L. Ed. 1055; *Paige v. Banks*, 13 Wall. 608, 614, 20 L. Ed. 709.

**8. Wheaton v. Peters.** 8 Pet. 591, 657, 8 L. Ed. 1055.

**9. Statistics of crime are property.**—*Board of Trade v. Christie, etc., Stock Co.*, 198 U. S. 236, 251, 49 L. Ed. 1031.

**10. Quotations of prices on sales for future delivery.**—*Board of Trade v. Christie, etc., Stock Co.*, 198 U. S. 236, 49 L. Ed. 1031.

**11. Board of Trade v. Christie, etc., Stock Co.**, 198 U. S. 236, 250, 49 L. Ed. 1031.

**12. Board of Trade v. Christie, etc., Stock Co.**, 198 U. S. 236, 250, 251, 49 L. Ed. 1031.

**13. Unpublished manuscript may be assigned.**—*Paige v. Banks*, 13 Wall. 608, 614, 20 L. Ed. 709.

**14. Parol transfer sufficient.**—*Callaghan v. Myers*, 128 U. S. 617, 658, 32 L. Ed. 547.

**15. Measure of assignee's rights.**—*Stephens v. Cady*, 14 How. 528, 530, 14 L. Ed. 528.

signee of the author may obtain a copyright.<sup>16</sup> The rights of the assignee will be protected by a court of chancery.<sup>17</sup>

### III. Copyright under the Constitution and Statutes of the United States.

**A. In General.**—A copyright cannot be sustained as a right existing at common law; but, as it exists in the United States, it depends wholly on the legislation of congress.<sup>18</sup> Power to promote the progress of science and useful arts by securing for limited times to authors the exclusive right to their writings is expressly vested in congress by the constitution.<sup>19</sup> By this provision of the constitution, and the act of 1790 passed in pursuance thereof, there was no recognition and sanction of an existing perpetual right of an author in his works, but a new right, secured for a limited time, was created.<sup>20</sup> Copyrights do not exist in any particular state, or district; they are co-extensive with the United States.<sup>21</sup>

**B. What May Be Copyrighted**—1. **WRITINGS.**—Under the constitution of the United States,<sup>22</sup> authorizing congress to promote the progress of science and useful arts, by securing, for limited times, to authors the exclusive right to their writings,<sup>23</sup> the word "writings" means the literary productions of authors, including all forms of writing, printing, engraving, etching, etc., by which the ideas in the mind of the author are given visible expression.<sup>24</sup> The provision, however, has reference only to such writings as are the result of intellectual labor.<sup>25</sup> While it has been held to include original designs for engravings, prints, etc., it embraces only such as are original, and are founded in the creative powers of the mind.<sup>26</sup>

It does not have any reference to labels which simply designate or describe the articles to which they are attached, and which have no value separated from the articles; and no possible influence upon science or the useful arts.<sup>27</sup> To be entitled to a copyright the article must have by itself some value as a

16. See post, "Assignee of the Author," III, C, 4.

17. Chancery will protect assignees rights.—*Wheaton v. Peters*, 8 Pet. 591, 661, 8 L. Ed. 1055.

18. Copyright depends wholly on legislation of congress.—*Banks v. Manchester*, 128 U. S. 244, 252, 32 L. Ed. 425; *Wheaton v. Peters*, 8 Pet. 591, 657, 8 L. Ed. 1055; *Thompson v. Hubbard*, 131 U. S. 123, 151, 33 L. Ed. 76; *Holmes v. Hurst*, 174 U. S. 82, 85, 43 L. Ed. 904.

"There being no common law of copyright in this country, whatever rights are possessed by the proprietor of the copyright must be derived from some grant thereof, in some act of congress, either nominatim or by a satisfactory implication." *Stevens v. Gladding*, 17 How. 447, 454, 15 L. Ed. 155. See ante, "In General," II, A.

19. Power to grant copyrights vested in congress by the constitution.—Constitution of the United States, art. 1, § 8, cl. 8; *Parks v. Booth*, 102 U. S. 96, 97, 26 L. Ed. 54; *Grant v. Raymond*, 6 Pet. 218, 3 L. Ed. 376; *Pennock v. Dialogue*, 2 Pet. 1, 16, 7 L. Ed. 327.

20. No recognition of an existing perpetual right.—*Wheaton v. Peters*, 8 Pet. 591, 660, 661, 8 L. Ed. 1055.

The word "secure" as used in the constitution and in the statute did not indicate an intention to protect an existing right. *Wheaton v. Peters*, 8 Pet. 591, 660,

661, 8 L. Ed. 1055. See ante, "In General," II, A.

21. Copyrights co-extensive with the United States.—*Stevens v. Gladding*, 17 How. 447, 451, 15 L. Ed. 155; *Ager v. Murray*, 105 U. S. 126, 130, 26 L. Ed. 942.

22. Art. 1, § 8, cl. 8.

23. See ante, "In General," III, A.

24. The term "writings" defined.—*Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53, 58, 28 L. Ed. 349.

25. Writings must be result of intellectual labor.—*Higgins v. Keuffel*, 140 U. S. 428, 431, 35 L. Ed. 470; *Trade-Mark Cases*, 101 U. S. 82, 25 L. Ed. 550.

26. Originality essential.—*Higgins v. Keuffel*, 140 U. S. 428, 431, 35 L. Ed. 470; *Trade-Mark Cases*, 100 U. S. 82, 25 L. Ed. 550.

27. Labels not embraced in term "writings."—*Higgins v. Keuffel*, 140 U. S. 428, 431, 35 L. Ed. 470.

Thus "a label on a box of fruit giving its name as 'grapes,' even with the addition of adjectives characterizing their quality as 'black,' or 'white,' or 'sweet,' or indicating the place of their growth, as 'Malaga or California,' does not come within the object of the constitutional provision. *Higgins v. Keuffel*, 140 U. S. 428, 431, 35 L. Ed. 470.

Nor is a label placed upon a bottle of ink containing the words "waterproof drawing ink" the subject of copyright. *Higgins v. Keuffel*, 140 U. S. 428, 430, 431, 432, 433, 35 L. Ed. 470.

composition, at least to the extent of serving some purpose other than as a mere advertisement or designation of the subject to which it is attached.<sup>28</sup>

**Photographs.**—But the constitutional provision is broad enough to cover an act authorizing copyright of photographs, so far as they are representatives of original intellectual conceptions of the author.<sup>29</sup>

2. **BOOKS.**—There is a clear distinction between a book as such, and the art which it is intended to illustrate, the former may be the subject of a copyright but the latter cannot be. Where the truths of a science or the methods of an art are the common property of the whole world, any author has the right to express the one, or explain and use the other, in his own way.<sup>30</sup> Where the art which a book teaches cannot be used without employing the methods and diagrams used to illustrate the book, or such as are similar to them, such methods and diagrams are to be considered as necessary incidents to the art, and given therewith to the public; not given for the purpose of publication in other works explanatory of the art, but for the purpose of practical application.<sup>31</sup> The copyright of a book, if not pirated from other works, is valid without regard to the novelty, or want of novelty, of its subject matter.<sup>32</sup>

3. **PAINTING AND ENGRAVING.**—It is not essential that painting or engraving shall be for a mechanical end to bring it among the useful arts, the progress of which congress is empowered by the constitution to promote. The constitution does not limit the useful to that which satisfies immediate bodily needs.<sup>33</sup>

4. **PICTORIAL ILLUSTRATIONS.**—Chromolithographs, used to advertise a circus, representing actual groups of persons, one of the pictures representing a ballet, composed from hints or description not from sight of a performance are "pictorial illustrations," within the meaning of the copyright law, and are entitled to copyright thereunder.<sup>34</sup>

28. Article must have some value as a composition.—*Higgins v. Keuffel*, 140 U. S. 428, 431, 35 L. Ed. 470.

29. Photographs.—*Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53, 58, 28 L. Ed. 349. In this case the photograph, for an infringement of the copyright in which the suit was bought, was held to be an original work of art, the production of plaintiff's intellectual invention. See, also, *Thornton v. Schreiber*, 124 U. S. 612, 613, 31 L. Ed. 577.

30. Truths of a science or methods of an art cannot be copyrighted.—*Baker v. Selden*, 101 U. S. 99, 102, 25 L. Ed. 841.

Thus a work on the subject of book-keeping, though only explanatory of well-known systems, may be the subject of a copyright. *Baker v. Selden*, 101 U. S. 99, 102, 25 L. Ed. 841.

But the system exhibited and explained in such a treatise is not the subject of copyright. *Baker v. Selden*, 101 U. S. 99, 102, 25 L. Ed. 841.

The same distinction may be predicated of every other art as well as that of book-keeping. A treatise on the composition and use of medicines, be they old or new; on the construction and use of ploughs, or watches, or churns; or on the mixture and application of colors for painting or dyeing; or on the mode of drawing lines to produce the effect of perspective, would be the subject of copyright; but the copyright of the treatise would not give the exclusive right to the art or manufacture described therein. *Baker v. Selden*, 101 U. S. 99, 102, 25 L. Ed. 841.

31. Methods and diagrams in a work explanatory of an art.—*Baker v. Selden*, 101 U. S. 99, 103, 25 L. Ed. 841.

The copyright of a book on book-keeping cannot secure the exclusive right to make, sell, and use account books prepared upon the plan set forth in such book. In using the art explained in such a work, the ruled lines and headings of accounts must necessarily be used as incident to it. *Baker v. Selden*, 101 U. S. 99, 104, 25 L. Ed. 841.

The copyright of a work on mathematical science cannot give to the author an exclusive right to the methods of operation which he propounds, or to the diagrams which he employs to explain them, so as to prevent an engineer from using them whenever occasion requires. *Baker v. Selden*, 101 U. S. 99, 103, 25 L. Ed. 841.

32. Novelty of subject matter not essential.—*Baker v. Selden*, 101 U. S. 99, 103, 25 L. Ed. 841.

33. Painting and engraving.—*Bleistein v. Donaldson Lithographing Co.*, 188 U. S. 239, 249, 47 L. Ed. 460.

34. Chromolithographs.—So held under Rev. Stat., § 4952, allowing a copyright to the author, etc., of any engraving, cut, print or chromo, construed in connection with the act of 1874, c. 301, § 3, 18 Stat. 78, 79, which provides that "in the construction of this act the words 'engraving,' 'cut,' and 'print' shall be applied only to pictorial illustrations or works connected with the fine arts." *Bleistein v. Donaldson Lithographing Co.*, 188 U. S. 239, 47 L. Ed. 460.



5. **WORDS AND IDEAS CONSIDERED AS SUBJECTS OF COPYRIGHT.**—The right secured by the copyright act is not a right to the use of certain words, because they are the common property of the human race, and are as little susceptible of private appropriation as air or sunlight; nor is it the right to ideas alone, since in the absence of means of communicating them they are of value to no one but the author. But the right is to that arrangement of words which the author has selected to express his ideas.<sup>35</sup>

6. **DRAWING FROM LIFE DOES NOT PRECLUDE COPYRIGHT.**—The fact that a picture is drawn from life does not preclude its being the subject of copyright.<sup>36</sup> Thus a portrait is the subject of copyright,<sup>37</sup> and so, it would seem, is a chromolithograph drawn from life.<sup>38</sup>

**C. Persons Entitled to Copyright.**—1. **THE AUTHOR.**—In that provision of the constitution before referred to,<sup>39</sup> which authorizes congress to secure, for limited times, to authors, the exclusive right to their writings, the word "author" is used in its broader sense, and involves originating, making and producing as the inventive or master mind the thing which is to be protected.<sup>40</sup>

2. **EMPLOYER OF PERSONS PRODUCING THE THING COPYRIGHTED.**—A person is entitled to a copyright on chromolithographs produced in his establishment by persons employed and paid by him to make them.<sup>41</sup>

3. **MATTER CONTAINED IN LAW REPORTS.**—Judicial officers can secure no copyright on the products of the labor done by them in the discharge of their judicial duties;<sup>42</sup> nor can a judge confer any title by assignment on the state,<sup>43</sup> or upon the court reporter,<sup>44</sup> sufficient to authorize it or him to take a copyright

**35. Words and ideas considered as subjects of copyright.**—*Holmes v. Hurst*, 174 U. S. 82, 86, 43 L. Ed. 904.

"Or, as Lord Mansfield describes it, 'an incorporeal right to print a set of intellectual ideas, or modes of thinking, communicated in a set of words or sentences, and modes of expression. It is equally detached from the manuscript, or any other physical existence whatsoever.' 4 Burrows 2396." *Holmes v. Hurst*, 174 U. S. 82, 86, 43 L. Ed. 904.

"The nature of this property is perhaps best defined by Mr. Justice Erle in *Jefferys v. Boosey*, 4 H. L. C. 815, 867: 'The subject of property is the order of words in the author's composition; not the words themselves, they being analogous to the elements of matter, which are not appropriated unless combined, nor the ideas expressed by those words, they existing in the mind alone, which is not capable of appropriation.'" *Holmes v. Hurst*, 174 U. S. 82, 86, 43 L. Ed. 904.

**36. Drawing from life does not preclude copyright.**—*Bleistein v. Donaldson Lithographing Co.*, 188 U. S. 239, 47 L. Ed. 460.

**37. *Bleistein v. Donaldson Lithographing Co.***, 188 U. S. 239, 249, 47 L. Ed. 460.

**38. *Bleistein v. Donaldson Lithographing Co.***, 188 U. S. 239, 47 L. Ed. 460.

**39. Art. 1, § 8, cl. 8.** See ante, "In General," III, A; "Writings," III, B, 1.

**40. Meaning of term "author" as used in constitution.**—*Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53, 61, 28 L. Ed. 349.

The author of a photograph "is the person who effectively is as near as he can be the cause of the picture which is pro-

duced, that is, the person who has superintended the arrangement, who has actually formed the picture by putting the persons in position, and arranging the place where the people are to be." *Bret, M. R.*, in *Notting v. Jackson*, 11 Q. B. D. 627, quoted in *Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53, 61, 28 L. Ed. 349.

In a suit for an infringement of a copyright in a photograph the plaintiff held to be its author. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53, 60, 28 L. Ed. 349.

**41. Employer of persons making chromolithographs.**—*Bleistein v. Donaldson Lithographing Co.*, 188 U. S. 239, 248, 47 L. Ed. 460.

**42. Judicial officers not entitled to copyright.**—*Banks v. Manchester*, 128 U. S. 244, 253, 32 L. Ed. 425; *Callaghan v. Myers*, 128 U. S. 617, 647, 32 L. Ed. 547.

**43. Judge cannot confer title on state.**—*Banks v. Manchester*, 128 U. S. 244, 253, 32 L. Ed. 425.

In no proper sense can a judge who, in his judicial capacity, prepares the opinion or decision, the statement of the case and the syllabus or headnote, be regarded as their author or proprietor in the sense of § 4952 of the Revised Statutes, so as to be able to confer any title by assignment on the state, sufficient to authorize it to take a copyright for such matter, under that section, as the assignee of the author or proprietor. *Banks v. Manchester*, 128 U. S. 244, 253, 32 L. Ed. 425.

**44. Judge cannot confer title upon court reporter.**—*Banks v. Manchester*, 128 U. S. 244, 253, 32 L. Ed. 425; *Wheaton v. Peters*, 8 Pet. 591, 668, 8 L. Ed. 1055.

for such matter. This rule is grounded on public policy.<sup>45</sup> But there is no ground of public policy on which a reporter who prepares a volume of law reports, can, in the absence of a prohibitory statute, be debarred from obtaining a copyright for the volume, which will cover the matter which is the result of his intellectual labor; and this though he is a sworn public officer and is paid a fixed salary for his labors.<sup>46</sup> The matter which may be copyrighted by the reporter includes the title page, table of cases, headnotes, statements of facts, arguments of counsel, index, order of arrangement of the cases, division of the reports into volumes, numbering and paging of the volumes, table of the cases cited in the opinions (where such table is made), and the subdivision of the index into appropriate, condensed titles, involving the distribution of the subjects of the various headnotes, and cross references, where such exist;<sup>47</sup> but the reporter cannot secure a copyright in the written opinions of the court.<sup>48</sup>

4. **ASSIGNEE OF THE AUTHOR.**—The legal assignee of the author is entitled to copyright.<sup>49</sup> Whether under an agreement or assignment the legal ownership of a manuscript passed so as to entitle the assignee to acquire a copyright, is to be determined from the terms of the agreement construed in the light of the relations of the parties, their subsequent action in regard thereto, and all the surrounding circumstances.<sup>50</sup> To prove such legal ownership by assignment, an

**45. Rule grounded upon public policy.**—*Banks v. Manchester*, 128 U. S. 244, 253, 32 L. Ed. 425.

As to the right of the assignee of the author to acquire a copyright, see post, "Assignee of the Author," III, C, 4.

**46. Right of reporter to copyright.**—*Callaghan v. Myers*, 128 U. S. 617, 647, 32 L. Ed. 547.

The reporter, in the absence of any inhibition forbidding him to take a copyright for that which is the lawful subject of copyright in him, or reserving a copyright to the government as the assignee of his work, is not deprived of the privilege of taking out a copyright which would otherwise exist. There is in such case a tacit assent by the government to his exercising such privilege. *Callaghan v. Myers*, 128 U. S. 617, 647, 32 L. Ed. 547.

**47.** *Callaghan v. Myers*, 128 U. S. 617, 649, 32 L. Ed. 547.

**48.** *Callaghan v. Myers*, 128 U. S. 617, 649, 32 L. Ed. 547; *Banks v. Manchester*, 128 U. S. 244, 253, 32 L. Ed. 425; *Wheaton v. Peters*, 8 Pet. 591, 668, 8 L. Ed. 1055.

**49. Assignee of author entitled to copyright.**—Rev. Stat., § 4952.

This was the rule under the act of Feb. 3, 1831, §§ 1, 4. *Miffin v. White Co.*, 190 U. S. 260, 47 L. Ed. 1040.

**50. Agreement held to convey full right of property in manuscript.**—Where in consideration of an agreement by publishers to pay him a certain sum of money, and the performance of specified duties in connection with the publication, a reporter of judicial decisions agreed in 1828 "to furnish in manuscript the reports of his court for publication," with an additional clause that the "publishers shall have the copyright of said reports, to them and their assigns forever," it was held, on a bill filed by the reporter's executrix for an injunction, and an account of profits after the expiration of twenty-

eight years from the entry of copyright (A. D. 1830), that the publishers had a full right of property in the manuscript; and accordingly that they could publish not only for the twenty-eight years during which the act of May 31st, 1790 (the only copyright act in force when the agreement was made), gave an author and his assigns the exclusive right to print, reprint, publish and vend, but also during the fourteen years granted by the act of February 3rd, 1831, subsequently passed, by which the exclusive right was continued to the author if alive, or if dead to his widow, child, or children. It was further held that this view was confirmed by the fact that a notice had been given in 1858, by the reporter to his publishers, that he himself claimed the right to publish on the expiration of the first twenty-eight years, and forbade them to publish further, and that they in reply denied his right and asserted their own, and that though the reporter lived till 1868, ten years after this correspondence, no further notice was taken of this subject, and no attempt made by the reporter, by act or protest, to interfere with the exercise of the right of the publishers to publish and sell. *Paige v. Banks*, 13 Wall. 608, 20 L. Ed. 709.

Evidence showing that the title had passed from author to plaintiff.—In a suit for infringement of copyright of a book, evidence held to show that by certain contracts the author had parted with the title to the book, and that such title had vested in the plaintiff. *Bedford v. Scribner*, 144 U. S. 488, 504, 505, 36 L. Ed. 514.

**Agreement held not to convey legal ownership of manuscript.**—On the 27th of December, 1847, C. was appointed state reporter, under a statute of the state of New York, which office he held until the 27th of December, 1851. During his term

express assignment need not be proved. The facts proved may give rise to a presumption of an assignment.<sup>51</sup>

**D. Proceedings to Obtain Copyright**—1. **IN GENERAL**.—Congress in vesting in authors the right to a monopoly of publication has the power to prescribe the conditions on which such right shall be enjoyed,<sup>52</sup> and no one can avail himself thereof, unless he, in substance at least, pursues the statutory method of securing it.<sup>53</sup> Under the copyright law a previous examination by a proper tribunal as to the originality of a book, map, or other matter offered for a copyright, is not required.<sup>54</sup>

2. **TIME OF APPLICATION**.—There is no fixed time within which an author must apply for a copyright, so that it be before publication.<sup>55</sup>

3. **NAME IN WHICH COPYRIGHT MAY BE TAKEN OUT**.—**Name under Which Persons Entitled Conduct Their Business**.—Copyright may be taken out in the name under which the persons entitled to it conduct their business.<sup>56</sup>

**Name of Assignee of Author**.—Under the act of February 3, 1831, the legal assignee of an author might take out the copyright in his own name.<sup>57</sup>

4. **DEPOSIT OF TITLE AND COPIES OF BOOK**—a. *Conditions Precedent to Perfection of Copyright*.—The copyright laws require, as conditions precedent to the perfection of a copyright in a book, that a printed copy of the title shall,

of office, viz, in 1850, he, in conjunction with the comptroller and secretary of state, acting under the authority of a statute, made an agreement with certain persons, that for five years to come they should have the publication of the decisions of the court of appeals and the exclusive benefit of the copyright. At the expiration of C.'s term, viz, on the 27th of December, 1851, he had in his possession sundry manuscript notes, and the decisions made at the ensuing January term were also placed in his hands to be reported. Out of these materials he made a volume, and sold it upon his own private account. It was held, that whatever remedy the assignees may have had against C. individually, they were not to be considered as the legal owners of the manuscript, under the copyright act, and were not entitled to an injunction to prevent the publication and sale of the volume. *Little v. Hall*, 18 How. 165, 15 L. Ed. 328.

**Evidence not showing authority of publishers to obtain copyright**.—Evidence held not to show that the author of a work appearing serially in a magazine authorized the publishers of the magazines to obtain a copyright in their own name. *Mifflin v. White Co.*, 190 U. S. 260, 262, 263, 47 L. Ed. 1040.

51. **Facts raising presumption of assignment by married woman**.—Where the author of certain books is a married woman and the proof shows that she from time to time settled with the owners of the copyright for her royalties, the court will presume that her legal title as the author of the books was in some due and proper manner conveyed to and vested in the person who secured the copyright thereof; and acquiescence for many years, by all the parties, in that claim of pro-

prietorship in the copyright, is enough to answer the suggestion of the husband's possible marital interest in his wife's earnings. *Belford v. Scribner*, 144 U. S. 488, 504, 36 L. Ed. 514.

52. **Power of congress to prescribe conditions to monopoly of publication**.—*Wheaton v. Peters*, 8 Pet. 591, 663, 8 L. Ed. 1055.

53. **Statutory method of securing copyright must be pursued**.—*Wheaton v. Peters*, 8 Pet. 591, 664, 8 L. Ed. 1055; *Mifflin v. White Co.*, 190 U. S. 260, 264, 47 L. Ed. 1040; *Banks v. Manchester*, 128 U. S. 244, 252, 32 L. Ed. 425.

In a suit for infringement of the copyright of a book, evidence held to show that the copyright was secured in accordance with law in both editions of the book. *Belford v. Scribner*, 144 U. S. 488, 36 L. Ed. 514.

54. **Examination as to originality not required**.—*Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53, 59, 28 L. Ed. 349.

55. **Time of application**.—*Holmes v. Hurst*, 174 U. S. 82, 43 L. Ed. 904. See, post, "Effect of Prior Publication," III, G.

56. **Name under which persons entitled to conduct their business**.—Copyrights of chromolithographs were held to be taken out in the proper names where one was taken out in the name of the Courier Company, an unincorporated joint-stock association formed under the laws of New York, Laws of 1894, c. 235, and made up of the persons entitled to the copyrights, and the others in the name of the Courier Lithographing Company, which was a trade variant on the name of the Courier Company. *Bleistein v. Donaldson Lithographing Co.*, 188 U. S. 239, 249, 47 L. Ed. 460. See, also, *Belford v. Scribner*, 144 U. S. 488, 36 L. Ed. 514.

57. **Name of assignee of author**.—*Mifflin v. White Co.*, 190 U. S. 260, 47 L. Ed. 1040.



before publication, be deposited in the prescribed office,<sup>58</sup> and that not later than the day of publication thereof, two copies of the book be deposited in such office.<sup>59</sup>

b. *What Constitutes Publication.*—A delivery by a state reporter of a number of copies of a state report to the secretary of state for the use of the state, as required by law, the reporter receiving the stipulated price for them, constitutes a publication of the volume within the meaning of the copyright law.<sup>60</sup>

c. *Purpose of Deposit.*—The copyright books deposited are quasi records, kept for public examination, one object no doubt being to enable other authors to inspect them in order to ascertain precisely what was the subject of copyright.<sup>61</sup>

d. *Certificate of Deposit as Evidence.*—The certificate of the officer in whose office a copy of the title of a book and copies of the book are required to be deposited that such deposits were made within the time specified, is competent evidence to show that deposits were duly made.<sup>62</sup>

**58. Deposit of printed copy of title.**—Thompson v. Hubbard, 131 U. S. 123, 151, 33 L. Ed. 76; Callaghan v. Myers, 128 U. S. 617, 651, 32 L. Ed. 547; Holmes v. Hurst, 174 U. S. 82, 87, 43 L. Ed. 904; Wheaton v. Peters, 8 Pet. 591, 644, 8 L. Ed. 1055.

**59. Deposit of copies of book.**—Rev. Stat., § 4956.

Revised Statute, § 4956, which prior to its amendment by the act of March 3, 1891, c. 565, § 3, required two copies of a book upon which a copyright was desired, to be delivered at the office of the librarian of congress or deposited in the mail addressed to the librarian, within ten days from the publication thereof, was substantially and sufficiently complied with where the deposit was made one day before the publication. Belford v. Scribner, 144 U. S. 488, 36 L. Ed. 514.

The deposit of two copies of the book, within ten days, after its publication, either with the librarian of congress, or in the mail addressed to him, was an essential condition of the proprietor's right. Merrell v. Tice, 104 U. S. 557, 560, 26 L. Ed. 854; Thompson v. Hubbard, 131 U. S. 123, 150, 33 L. Ed. 76.

Under the act of February 3, 1831, c. 16, § 4, 4 Stat. 436, the deposit of a copy of the book within three months after publication, was a condition precedent to the perfection of the copyright. Callaghan v. Myers, 128 U. S. 617, 651, 32 L. Ed. 547.

Although, under § 6 of this act the exclusive right to the copyright vested upon the recording of the title of the book and ran for the prescribed period from that date, and although the right of action for infringement, under § 6, also accrued at that time, yet, under § 4 of the act, in respect at least to suits brought after three months from the publication of the book, it was essential to show, as a condition precedent to the right to maintain the suit, that a copy of the book was delivered to the clerk of the district court within three months from the publication. Callaghan v. Myers, 128 U. S. 617, 651, 32 L. Ed. 547.

The act of 1790 required that within six months after the publication of a copyrighted book, a copy should be deposited in the department of state; and although a right undoubtedly accrued upon a deposit of the title of the book, and a record made and printed in the manner prescribed, yet such right was not perfect, the deposit of the copy of the book being essential to a perfect title. Wheaton v. Peters, 8 Pet. 591, 664, 8 L. Ed. 1055.

The acts of congress authorizing the appointment of a reporter of the decisions of the supreme court of the United States, required the delivery of eighty copies of each volume of the reports to the department of state. A compliance with this statutory requirement did not exonerate the reporter from the deposit of a copy in the department of state, required by the act of 1790; the eighty copies delivered under the reporter's act were delivered for a different purpose, and could not excuse the deposit of one volume as especially required by the copyright act. Wheaton v. Peters, 8 Pet. 591, 667, 8 L. Ed. 1055.

**60. Delivery of copies of state report to secretary of state.**—Callaghan v. Myers, 128 U. S. 617, 656, 32 L. Ed. 547.

Therefore, where a copy of such volume was not deposited in the office of the clerk of the United States district court until more than three months after such delivery to the secretary of state, the requirement of the act of February 3, 1831, ch. 16, § 4, 4 Stat. 436, requiring a deposit of a copy of a copyright book in the office of such clerk within three months after publication, was not complied with, and the copyright failed. Callaghan v. Myers, 128 U. S. 617, 656, 32 L. Ed. 547.

**61. Purpose of deposit.**—Merrell v. Tice, 104 U. S. 557, 561, 26 L. Ed. 854.

**62. Certificate of deposit as evidence.**—The certificate of the librarian of congress that two copies of a copyrighted book were received by him within ten days after publication, is competent evidence to show that such copies were duly deposited, as required by Rev. Stat., § 4956, prior to its amendment by the act of

e. *Presumption as to Time of Deposit*.—Generally, where it is shown that a copy of the title of a book and a copy of the book itself have been deposited in the place specified, it will be presumed, in the absence of evidence to the contrary, that the deposit was made within the required time.<sup>63</sup>

5. NOTICE OF COPYRIGHT—*a. Necessity of Notice*.—To entitle a person to the benefit of the copyright act he must give information of his copyright by causing to be inserted in the several copies of each and every edition published, during the term secured, a notice of such copyright.<sup>64</sup> This requirement has always been held, under all or the statutes, to be one of the conditions precedent to the perfection of the copyright.<sup>65</sup>

**The grantee of a copyright**, while he owns it, must give the required notice in the copies of every edition which he publishes.<sup>66</sup>

March 3, 1891, ch. 565, § 3, although such certificate is not under seal. *Belford v. Scribner*, 144 U. S. 488, 36 L. Ed. 514.

In an earlier case *Merrell v. Tice*, 104 U. S. 557, 561, 26 L. Ed. 854. *Bradley, J.*, who delivered the opinion of the court, had said that it might admit of considerable doubt whether the certificate of the librarian, even though under his official seal, would be competent evidence of the due deposit of copyrighted books.

A certificate, properly signed and sealed, given by the clerk of the district court of the United States certifying that a copy of the title of a book had been deposited in his office, was given in evidence in an action for infringement of a copyright. After the seal and signature was written "Work deposited Jan'y 17th, 1866. Wm. H. Bradley Cl'k." It was held, that it was a sufficient certificate by the clerk who signed, both of the fact and the date of deposit of the book, and prima facie evidence of the deposit of the title. *Callaghan v. Myers*, 128 U. S. 617, 625, 32 L. Ed. 547.

The certificate of the librarian of congress stated that the title of a book had been deposited in his office. This was signed and sealed and after the signature and seal was written, "Two copies of the above publication deposited December 6, 1876." It was held, that this memorandum was not admissible except as against the party making it. *Merrell v. Tice*, 104 U. S. 557, 560, 26 L. Ed. 854.

**63. Presumptions as to time of deposit**.—In the absence of evidence to the contrary it must be presumed that the deposit of the title of a book was made before publication, and where the work purports to have been deposited within three months after the date of the deposit of the title, that it was deposited within three months after publication. *Callaghan v. Myers*, 128 U. S. 617, 652, 32 L. Ed. 547.

But where it appears that a book was deposited five months and five days after the deposit of the title, it cannot be presumed that such deposit of the book was made within three months after publication. *Callaghan v. Myers*, 128 U. S. 617, 655, 32 L. Ed. 547.

Where the certificate of the deposit shows that the title of a book and the

book itself were deposited on the same date, it will be presumed, in the absence of evidence to the contrary, that the deposit of the title was made before publication, and that the deposit of the work, though made on the same day with the deposit of the title, was not made prior to publication. *Callaghan v. Myers*, 128 U. S. 617, 655, 32 L. Ed. 547.

On October 23, 1866, copies of state reports were delivered to the secretary of state, and the title and work were both deposited in the office of the clerk of the district court of the United States on that day. It was held that the presumption was, in the absence of evidence to the contrary, that the deposit of the title preceded the publication, and that the delivery of the copies to the secretary of state preceded the deposit of the work in the clerk's office. *Callaghan v. Myers*, 128 U. S. 617, 657, 32 L. Ed. 547.

**64. Notice of copyright**.—Act of June 18, 1874, c. 301, § 1; *Miffin v. Dutton*, 190 U. S. 265, 266, 47 L. Ed. 1043; *Thompson v. Hubbard*, 131 U. S. 123, 149, 33 L. Ed. 76.

**65. Notice a condition precedent to perfection of copyright**.—*Thompson v. Hubbard*, 131 U. S. 123, 150, 33 L. Ed. 76; *Callaghan v. Myers*, 128 U. S. 617, 651, 32 L. Ed. 547; *Wheaton v. Peters*, 8 Pet. 591, 8 L. Ed. 1055.

**66. Grantee of copyright must give required notice**.—*Thompson v. Hubbard*, 131 U. S. 123, 151, 33 L. Ed. 76.

It is not sufficient to protect the grantor in such case that the grantor, while he owned the copyright, gave the required notice in the copies of every edition he published, while it was his copyright. *Thompson v. Hubbard*, 131 U. S. 123, 148, 149, 150, 33 L. Ed. 76.

Under § 5 of the act of February 3, 1831, which provided that no person should be entitled to the benefit of the act unless he should give information of his copyright by causing to be inserted in the several copies of each and every edition published during the term secured a notice of such copyright, the copyright of a novel was vitiated by the subsequent publication of certain chapters thereof in a magazine, without other notice of copyright than the entry of the magazine by its publishers un-



b. *Object of Notice.*—The object of the statutory requirement is to give notice of the copyright to the public by placing upon each copy of the thing copyrighted, in some visible shape, the name of the author, the existence of the claim of exclusive right, and the date at which this right was obtained.<sup>67</sup>

c. *Form and Essential Requisites of Notice.*—The following is the form of notice which the owner of a copyright is required to give “‘entered according to act of congress in the year —, by A. B., in the office of the Librarian of Congress, at Washington’ or at his option the word ‘copyright,’ together with the year the copyright was entered, and the name of the party by whom it was taken out.”<sup>68</sup> Where the thing copyrighted is a book, this notice must be printed on the title page, or the page directly following it.<sup>69</sup> The statutory requirement is not complied with where the grantee of a copyright, in some of the books published by him, fails to give the name of the person by whom they were copyrighted, and in others, fails to give the date at which the copyright was entered.<sup>70</sup> Nor is there a sufficient compliance with the requirements of the statute where the fact of registration alone is placed on a copyrighted label, and the word copyright is not used.<sup>71</sup> In the case of a photograph of one Napoleon Sarony, the following notice found on each photograph, “copyright 1882, by N. Sarony,” was held to be a sufficient compliance with the statutory requirements.<sup>72</sup> A variance between the certificate of the deposit of the title of a work, and the notice of the entry of copyright in the work as published, as to the name of the person by whom the deposit was made,<sup>73</sup> or a variance as to the date of the entry of the copyright,<sup>74</sup> will not, unless it is material, vitiate the copyright. But in determining whether a notice of copyright is misleading the court is not bound to look beyond the face of the notice, and inquire whether under the facts of the particular case, it is reasonable to suppose an intelligent person could actually have been misled.<sup>75</sup>

der its own title. *Mifflin v. Dutton*, 190 U. S. 265, 266, 47 L. Ed. 1043. See post, “Effect of Prior Publication,” III, G.

67. *Object of notice.*—*Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53, 55, 28 L. Ed. 349.

68. *Form of notice.*—Act of June 18, 1874, ch. 301, 18 Stat. 78.

69. *Where notice must be printed.*—*Thompson v. Hubbard*, 131 U. S. 123, 148, 33 L. Ed. 76.

70. *Noncompliance with statutory requirements by grantee of copyright.*—*Thompson v. Hubbard*, 131 U. S. 123, 33 L. Ed. 76.

71. *Omission of word “copyright” fatal.*—*Higgins v. Keuffel*, 140 U. S. 428, 434, 35 L. Ed. 470.

72. *Sufficient notice of copyright of photograph.*—*Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53, 55, 28 L. Ed. 349. The court in this case said that if the name Sarony alone had been used it would have been a sufficient designation of the author until it was shown that there was some other Sarony.

73. *Variance as to name of person by whom copyright was entered, held immaterial.*—In regard to the volume of a book which was deposited in the office of the clerk of the district court of the United States, it was objected that the certificate of the clerk showed that the printed title was deposited by “E. B. Myers & Chandler,” and that the printed notice of the entry of copyright in the volume as pub-

lished purported to show that the copyright was entered by E. B. Myers alone. It was held that under the circumstances of the case, as the printed notice contained the name of E. B. Myers, the variance was immaterial, and the statute requiring the name of the person by whom the copyright is entered to be shown was substantially complied with. *Callaghan v. Myers*, 128 U. S. 617, 657, 32 L. Ed. 547.

74. *Immaterial variance as to date of entry of copyright.*—The title of a certain volume was deposited in the office of the clerk of the district court of the United States on January 28, 1867, and the notice printed in the book purported to show that the copyright was entered in 1866. The statute required that each copy of the book should have inserted in it a statement of the year the copyright was entered. It was held that the variance was immaterial, inasmuch as the statement that the title was recorded in an earlier year than the actual year, being conclusive on the person taking the copyright, could cause no injury to any person or to the public, because the copyright would expire in twenty-eight years from the expiration of the year stated in the notice in the book, and not in twenty-eight years from the time of the recording of the title. *Callaghan v. Myers*, 128 U. S. 617, 657, 32 L. Ed. 547.

75. *Whether notice is misleading determined from face thereof.*—*Mifflin v. White Co.*, 190 U. S. 260, 264, 47 L. Ed. 1040.



**E. Renewal of Copyright.**—A copyright may be renewed for the term of fourteen years by complying with the statutory requirements in regard thereto.<sup>76</sup>

**F. What the Copyright Protects and the Measure of Protection.**—It is the intellectual production of the author which the copyright protects and not the particular form which such production ultimately takes.<sup>77</sup>

**Measure of Protection.**—As has previously been stated, the constitution of the United States empowers congress to secure, "for limited times," to authors, the exclusive right to their writings.<sup>78</sup> It contemplates, therefore, that this exclusive right shall exist but for a limited period, and that the period shall be subject to the discretion of congress.<sup>79</sup> In pursuance of this authority congress has fixed the time during which the exclusive right shall be enjoyed at twenty-eight years, with a right of renewal for fourteen years longer.<sup>80</sup> During this period the owner of the copyright has the exclusive right of multiplying copies of the thing copyrighted.<sup>81</sup>

**G. Effect of Prior Publication.**—An author is only entitled to a copyright of books not printed and published.<sup>82</sup> If he permits his intellectual production to be published either serially or collectively, his right to a copyright is lost.<sup>83</sup>

**H. Transfer of Copyright**—1. **RIGHT TO TRANSFER.**—A copyright, which vests the sole and exclusive right of publishing and selling the thing in which the copyright is secured, in the person to whom it has been granted by the government, as against all persons not deriving title through him, is property capable of being assigned by him at his pleasure.<sup>84</sup> The property in the copyright is distinct from the property in the instruments by which copies of the thing copyrighted are multiplied, and each may be owned and transferred independent of the other;<sup>85</sup> and a sale on execution of such instruments does not

**76. Renewal of copyright.**—Rev. Stat., § 4954.

Under the acts of 1790 and 1802 a renewal of the copyright of a book for the term of fourteen years could only be obtained by having the title page recorded with the clerk of the district court, and the record published on the page next to that of the title, and public notice given, within six months before the expiration of the first term. *Wheaton v. Peters*, 8 Pet. 591, 664, 8 L. Ed. 1055.

**77. What the copyright protects.**—*Holmes v. Hurst*, 174 U. S. 82, 89, 43 L. Ed. 904.

**78. Const. U. S. art. 1, § 8, cl. 8.**—See, ante, "In General," III, A.

**79. Period of copyright.**—*Pennock v. Dialogue*, 2 Pet. 1, 16, 7 L. Ed. 327.

**80. Rev. Stat., §§ 4953, 4954.**

**81. Exclusive right of multiplying copies.**—*Perris v. Hexamer*, 99 U. S. 674, 675, 25 L. Ed. 308.

**82. Effect of prior publication.**—So held under the act of February 3, 1831, ch. 16, § 1, 4 Stat. 436. *Holmes v. Hurst*, 174 U. S. 82, 87, 43 L. Ed. 904.

**83. By such publication the right of the author to a copyright is lost as effectually as the right of an inventor to a patent upon an invention which he deliberately abandons to the public—and this, too, irrespective of his actual intention not to make such abandonment.** *Holmes v. Hurst*, 174 U. S. 82, 89, 43 L. Ed. 904.

"The serial publication of a book in a monthly magazine, prior to any steps taken toward securing a copyright, is

such a publication of the same within the meaning of the act of February 3, 1831, c. 16, § 4 Stat. 436, as to vitiate a copyright of the whole book, obtained subsequently but prior to the publication of the book as an entirety." *Holmes v. Hurst*, 174 U. S. 82, 84, 43 L. Ed. 904; *Mifflin v. White Co.*, 190 U. S. 260, 261, 47 L. Ed. 1040; *Mifflin v. Dutton*, 190 U. S. 265, 266, 47 L. Ed. 1043.

And in such case the copyright entry of the magazine by its publishers under the title of the magazine will not validate the subsequent entry of the book by the author under the title of work. *Mifflin v. White Co.*, 190 U. S. 260, 264, 47 L. Ed. 1040. See, also, *Mifflin v. Dutton*, 190 U. S. 265, 266, 47 L. Ed. 1043.

**84. A copyright is property capable of being assigned.**—Rev. Stat., §§ 4952, 4955. *Ager v. Murray*, 105 U. S. 126, 127, 26 L. Ed. 942; *Stevens v. Gladding*, 17 How. 447, 451, 15 L. Ed. 155.

**85. Copyright, and instruments by which copies of thing copyrighted are multiplied, may be transferred independently.**—*Stevens v. Gladding*, 17 How. 447, 452, 15 L. Ed. 155; *Patterson v. Kentucky*, 97 U. S. 501, 507, 24 L. Ed. 1115; *Stephens v. Cady*, 14 How. 528, 530, 14 L. Ed. 528.

Thus the property in the instruments or plate by which copies of a map are multiplied is distinct from the copyright of the map itself, and a transfer of the former may be made without transferring the latter. *Stevens v. Gladding*, 17 How. 447, 15 L. Ed. 155; *Patterson v. Kentucky*, 97 U. S. 501, 506, 24 L. Ed. 1115; *Stephens v. Cady*, 14 How. 528, 530, 14 L. Ed. 528.

pass the property in the copyright.<sup>86</sup> Whether the copyright will pass upon a sale of such instruments by their owner, who also owns the copyright, will depend on the intention of the parties, to be gathered from their contract and its attendant circumstances.<sup>87</sup>

**2. FORMALITIES ESSENTIAL TO TRANSFER.—Writing Signed in Presence of Witnesses.**—Under the act of Feb. 3, 1831, § 7, an assignment of a copyright to vest the assignee with a complete title to the property, must have been in writing, and signed in the presence of two witnesses.<sup>88</sup>

**Recording.**—An assignment of a copyright unless recorded in the office of the librarian of congress within six days after its execution is void against subsequent purchasers or mortgagees for a valuable consideration without notice.<sup>89</sup>

**3. CONVEYANCE OF MANUSCRIPT WILL NOT CARRY WITH IT THE COPYRIGHT.**—A conveyance of the manuscript of a copyrighted work will not carry with it the copyright unless the latter is included by express words in the transfer.<sup>90</sup>

**4. SALE NOT RESCINDED BY FAILURE OF BUYER TO PERFORM AN INDEPENDENT CONTRACT.**—Where a contract for the sale of a copyright has been executed and the consideration paid, the fact that an independent contract between the same parties is not performed by the purchaser, will not rescind the sale or re-vest the title to the copyright in the seller.<sup>91</sup>

**I. Infringement of Copyright—1. WHAT CONSTITUTES AN INFRINGEMENT.**—The right of an author or a publisher, under the copyright law, is infringed only when other persons produce a substantial copy of the whole or of a material part of the book or other thing for which he secured a copyright.<sup>92</sup>

**86. Sale on execution of instruments does not pass property in copyright.**—*Stevens v. Gladding*, 17 How. 447, 453, 15 L. Ed. 155; *Stevens v. Cady*, 14 How. 528, 14 L. Ed. 528. See the title EXECUTIONS.

**87. Whether sale of instruments will pass copyright depends on intention of parties.**—*Stevens v. Gladding*, 17 How. 447, 452, 15 L. Ed. 155.

It will not pass, it would seem, unless included by express words in the transfer. *Stevens v. Cady*, 14 How. 528, 14 L. Ed. 528.

**88. Writing signed in presence of witnesses.**—*Stevens v. Cady*, 14 How. 528, 531, 14 L. Ed. 528.

It would seem that even where a transfer was by sale, under a decree of a court of chancery, the title would not pass so as to protect the purchaser, unless by a conveyance, in conformity with the statutory requirement. *Stevens v. Cady*, 14 How. 528, 531, 14 L. Ed. 528.

**89. Recording.**—Rev. Stat., § 4955. *Ager v. Murray*, 105 U. S. 126, 128, 26 L. Ed. 942.

A formal transfer of a copyright, by the supplementary act of the 30th of June, 1834, was required to be proved and recorded as deeds for the conveyance of land, and such record operated as notice. *Little v. Hall*, 18 How. 165, 171, 15 L. Ed. 328.

**90. Conveyance of manuscript does not include copyright.**—*Stevens v. Cady*, 14 How. 528, 531, 14 L. Ed. 528.

**91. Sale not rescinded by failure of buyer to perform an independent contract.**—The parties each drew up an agreement

for the sale of the plates of a certain book including copyright, the originals of cuts, stamps for binding, and circular plates for a certain sum. There was also agreements for the delivery of the goods, and as to the territory in which the books could be sold; the buyer further agreeing to publish only two other books. Each party signed a copy of the agreement and delivered it to the other. There was a misunderstanding as to the exact territory over which the books could be sold under the agreement. Later the disagreement was settled and the goods were shipped and paid for and a receipt given by the seller acknowledging payment in full. It was held that the transaction between the parties in regard to the sale of the copyright of the books and the plates therefor, was a completed transaction, independently of all contracts or agreements in regard to other matters, that the consideration therefor was paid, and that the contract was not rescinded by the failure of the buyer to observe the agreement by him as to the publication of certain other books, and that the title to the copyright did not revert in the seller. *Thompson v. Hubbard*, 131 U. S. 123, 147, 33 L. Ed. 76.

**92. What constitutes an infringement.**—*Perris v. Hexamer*, 99 U. S. 674, 25 L. Ed. 308.

Where, therefore, the owner of a copyright for maps of certain wards of "the city of New York, surveyed under the direction of insurance companies of said city, which exhibit each lot and building, and the classes as shown by the different coloring and characters set forth in the

2. **REMEDIES AND PROCEDURE**—a. *In General*—(1) *Compliance with Statutory Requirements Prerequisite to Right of Action*.—The right to maintain an action for the infringement of a copyright is wholly statutory.<sup>93</sup> Such an action cannot be maintained unless there has been a compliance with all the statutory requirements in obtaining the copyright.<sup>94</sup>

(2) *Jurisdiction of Actions*.—The circuit courts of the United States have original jurisdiction of suits arising under the copyright laws.<sup>95</sup> But to give the circuit court jurisdiction of such a suit, it must appear from the plaintiff's own statement of his claim that the suit arises under the copyright laws.<sup>96</sup>

**Jurisdiction of the Supreme Court**.—In civil actions arising under the copyright laws if the matter in controversy exceeds \$1,000, besides costs, there is, as of right, an appeal or writ of error to bring the case to the supreme court of the United States.<sup>97</sup>

(3) *Leave to File Certified Copy of Copyright in Place of Such Proof Previously Filed and Lost*.—In a suit for infringement of copyright an order of the court granting a motion of the plaintiff "to file a certified copy of copyright in place of such proof heretofore filed and lost," is sustained by a finding by the court that a certified copy had been filed and lost, where there is nothing in the record to control such finding.<sup>98</sup>

reference," brought his bill to restrain the publication of similar maps of the city of Philadelphia, it was held that the bill could not be sustained. *Perris v. Hexamer*, 99 U. S. 674, 25 L. Ed. 308.

**In an action for the infringement of a copyright of state reports**, the infringing volumes were very much condensed as compared with the copyrighted volumes, yet the paging was substantially the same throughout so that cases in the corresponding volumes appeared on the same page, and the list of cases which preceded each report was the same. Men employed by defendants to annotate these reports stated that the work was independent of the copyrighted volumes, but it was evident that they were used. There was apparently independent labor done on the volumes but in some instances words and sentences were used without change, and in other instances changed only in form. There were also frequent cases of errors in the copyrighted volumes copied in the defendant's volumes. Under these circumstances it was held that the copyright of the plaintiffs had been infringed. *Callaghan v. Myers*, 128 U. S. 617, 660, 32 L. Ed. 547.

**93. Right to maintain action wholly statutory**.—*Thompson v. Hubbard*, 131 U. S. 123, 151, 33 L. Ed. 76.

**94. A deposit of two copies of a copyrighted book within the time prescribed is an essential prerequisite to a recovery in an action for infringement**. *Merrell v. Tice*, 104 U. S. 557, 560, 26 L. Ed. 854. See ante, "Deposit of Title and Copies of Book," III, D, 4.

The failure to give the notice of copyright in the mode prescribed will debar an action either at law or in equity for its infringement. *Thompson v. Hubbard*, 131 U. S. 123, 150, 33 L. Ed. 76; *Higgins v. Keuffel*, 140 U. S. 428, 434, 35 L. Ed. 470.

And this applies to editions published by the grantee of a copyright. *Thompson v. Hubbard*, 131 U. S. 123, 151, 33 L. Ed. 76.

The failure of such grantee to comply with the statute in this respect operates to prevent his right of action against his grantor for an infringement from coming into existence. *Thompson v. Hubbard*, 131 U. S. 123, 151, 33 L. Ed. 76. See ante, "Notice of Copyright," III, D, 5.

**95. Original jurisdiction of circuit courts**.—Rev. Stat., § 929, cl. 9; Act of August 13, 1888, ch. 866, § 1; 25 Stat. 433. *Press Pub. Co. v. Monroe*, 164 U. S. 105, 110, 41 L. Ed. 367.

**96.** *Press Pub. Co. v. Monroe*, 164 U. S. 105, 110, 41 L. Ed. 367.

**97. Jurisdiction of the supreme court**.—Act of March 3, 1891, c. 517, § 6; *Press Pub. Co. v. Monroe*, 164 U. S. 105, 111, 41 L. Ed. 367.

Under the law as it existed in 1854, if a case arose under the copyright act the supreme court of the United States had jurisdiction, though both the parties were citizens of the same state. But if the act did not give the remedy sought, the court could only take jurisdiction on the ground that the controversy was between citizens of different states. *Little v. Hall*, 18 How. 165, 171, 15 L. Ed. 328.

As to the jurisdiction on appeal of an action for an injunction and accounting, see post, "Jurisdiction on Appeal," III, I, 2, b, (5). As to the jurisdiction of an action for damages, see post, "Jurisdiction," III, I, 2, c, (1).

**98. Leave to file certified copy of copyright in place of such proof previously filed and lost**.—*Belford v. Scribner*, 144 U. S. 488, 506, 36 L. Ed. 514.

Where after such order the court overrules a motion of the defendants to strike from the record the certified copy of copyright filed in pursuance of the order, and



b. *Injunction and Accounting*—(1) *Right to*.—The violation of any right secured by the laws respecting copyrights will be restrained by injunction at the suit of the party aggrieved.<sup>99</sup> The right to an account of profits is incident to the right to an injunction, and where the bill states a case proper for an account, one may be ordered under the prayer for general relief.<sup>1</sup>

(2) *Usual Provision in Interlocutory Decree for an Accounting*.—A direction for an examination of the defendants in regard to the subject of inquiry, and for the production by them of their account books and papers, is the usual provision in an interlocutory decree for an accounting before a master in a copyright suit.<sup>2</sup>

(3) *Who May Be Held to an Account*.—Where a piratical work is printed by one person and published by another, both the printer and publisher will be held to an account to the owner of the copyright.<sup>3</sup>

(4) *Amount Recoverable*.—Although the entire copyrighted work be not copied in an infringement, but only portions thereof, if such portions are so intermingled with the rest of the piratical work that they cannot well be distinguished from it the plaintiff will be entitled to recover the entire profits on the sale of the work;<sup>4</sup> and the same is true if the infringing volume contains matter to which the copyright does not extend, incorporated with matter covered by the copyright.<sup>5</sup> The defendant should be charged with the profits on the re-

in such motion it was stated that "no other certificate having the like purport or effect had ever been offered in evidence nor lost from the bills," the court must necessarily find that a certificate copy had previously been filed and lost. *Belford v. Scribner*, 144 U. S. 488, 506, 36 L. Ed. 514. See the title LOST INSTRUMENTS AND RECORDS.

99. *Violation of right will be restrained by injunction*.—Rev. Stat., § 4970. *Stephens v. Cady*, 14 How. 528, 14 L. Ed. 528.

*Right to unpublished manuscripts protected by injunction*.—The act of Feb. 3, 1831, gives an author a remedy by injunction to protect his right to his unpublished manuscripts. *Little v. Hall*, 18 How. 165, 170, 15 L. Ed. 328.

*A board of trade is entitled to an injunction to restrain persons from using and distributing quotations of prices on sales of grain and provisions for future delivery, which are collected by it and which cannot be obtained by the defendants except through a known breach of the confidential terms on which the board communicates them*. *Board of Trade v. Christie, etc.*, *Stock Co.*, 198 U. S. 236, 49 L. Ed. 1031.

*Return of money paid for engraving not essential prerequisite to issuance of injunction*.—In an action by one having a copyright in a map, to enjoin the purchaser at execution sale of a copper plate engraving of the map, from engraving and selling copies of it, a return of the purchase money paid for the engraving is not an essential prerequisite to the issuance of the injunction. *Stephens v. Cady*, 14 How. 528, 14 L. Ed. 528.

1. *Account of profits may be ordered under prayer for general relief*.—*Stevens v. Gladding*, 17 How. 447, 455, 15 L. Ed. 155; *Root v. Railway Co.*, 105 U. S. 189, 194, 26 L. Ed. 975.

2. *Usual provision in interlocutory decree for an accounting*.—*Callaghan v. Myers*, 128 U. S. 617, 663, 32 L. Ed. 547.

It cannot be objected to such direction that the defendants are thereby compelled to produce evidence against themselves in aid of a forfeiture, although the original bill prayed for a decree that the alleged infringing books be forfeited to the plaintiff, as such forfeiture cannot be obtained in a suit in equity. *Callaghan v. Myers*, 128 U. S. 617, 662, 32 L. Ed. 547. See post, "Penalties Cannot Be Enforced in a Suit in Equity," III, I, 2, d, (2), (b).

3. *Piratical work printed by one person and published by another*.—Rev. Stat., § 4964. *Belford v. Scribner*, 144 U. S. 488, 507, 36 L. Ed. 514.

Where piratical books are printed by one person and published and sold by another, and profit results therefrom, it will be inferred that the printer made a profit from printing the books, and was, therefore, a sharer in the profits realized from their sale, and was participes criminis with the publisher in the infringement. *Belford v. Scribner*, 144 U. S. 488, 507, 36 L. Ed. 514.

Where two individuals and a corporation together printed and published certain piratical books, and were practically partners in doing it, the corporation doing one part and the two individuals the other part of the printing and publishing, all the parties concerned will be held to an account to the owner of the copyright in respect to the profits derived from the printing, publishing and selling. *Belford v. Scribner*, 144 U. S. 488, 507, 36 L. Ed. 514.

4. *Intermingling portions of copyrighted work with original matter*.—*Belford v. Scribner*, 144 U. S. 488, 508, 36 L. Ed. 514.

5. *Matter covered by copyright incor-*

sale of some of the infringing volumes, where after the original sale he purchased them second hand and resold them, even though the master had charged him with profits on the original sale.<sup>6</sup> Credit should not be allowed the defendant for the cost of stereotyping as it is not a necessary incident of printing as type-setting is; nor should credit be allowed to the different members of an infringing firm for their services, in the way of salaries, as a part of the expense of conducting their business in publishing the infringing volumes; nor should there be an allowance for the cost of producing copies of the volumes which the defendant did not sell, or for the amount paid by him for editorial work in preparing the infringing volumes.<sup>7</sup>

(5) *Jurisdiction on Appeal*.—From a decree of a circuit court of the United States granting a perpetual injunction against the violation of a copyright, an appeal will not lie directly to the supreme court.<sup>8</sup>

c. *Action for Damages*.—(1) *Jurisdiction*.—**Action for Infringement of Copyright in a Dramatic Composition**.—An action under Revised Statutes, § 4966, providing that “any person publicly performing or representing any dramatic composition for which a copyright has been obtained “without the consent of the proprietor thereof, or his heirs or assigns, shall be liable for damages, is not an action to recover a penalty or forfeiture and the circuit court has jurisdiction thereof by virtue of § 629, subdivision 9, which grants jurisdiction to the circuit courts “of all suits at law or in equity arising under the patent or copyright laws of the United States.”<sup>9</sup>

In an action in the circuit court for damages for the wrongful publication of an unpublished manuscript, where the complaint shows that the court has jurisdiction by reason of the parties being citizens of different states, and the plaintiff makes no claim under the copyright laws, but relies wholly upon his common-law right, there is no appeal to the supreme court from the judgment on appeal of the circuit court of appeals.<sup>10</sup>

(2) *Action Not Barred by Suit for Injunction and Accounting*.—A proceeding in equity by the owner of a copyright for an injunction and an accounting is not an election of an inconsistent remedy which will bar him from an action for the recovery of damages under Revised Statutes, § 4966, providing that “any person publicly performing or representing any dramatic composition for which a copyright has been obtained, without the consent of the proprietor thereof, or his heirs or assigns, shall be liable for damages.”<sup>11</sup>

porated with matter not covered by it.—*Callaghan v. Myers*, 128 U. S. 617, 665, 666, 32 L. Ed. 547.

In such case the matter covered by the copyright and that not covered by it necessarily going together when the volume is sold as a unit, and it being impossible to separate the profits on one from the profits on the other, the defendants who are responsible for having blended the lawful with the unlawful must abide the consequences. *Callaghan v. Myers*, 128 U. S. 617, 665, 32 L. Ed. 547.

6. **Profits on resale of infringing volumes**.—*Callaghan v. Myers*, 128 U. S. 617, 665, 32 L. Ed. 547.

7. **Credits not allowable**.—*Callaghan v. Myers*, 128 U. S. 617, 663, 32 L. Ed. 547.

8. **Appeal will not lie directly from circuit to supreme court**.—The mandate of the circuit court of appeals was sent down to the circuit court, and that court entered a decree in accordance therewith for a perpetual injunction against the violation of a copyright, and for costs, and referred

the case to a master to take and state an account. The case was again taken to the circuit court of appeals and the decree affirmed. The mandate of the circuit court of appeals was then filed in the circuit court and it was decreed by the judge of the circuit court that it be made a decree of that court. Under these conditions it was held that the supreme court of the United States did not have jurisdiction of the case on appeal under § 5 of the judiciary act of March 3, 1891, as it was an appeal direct from the circuit court and not from the circuit court of appeals. *Webster v. Daly*, 163 U. S. 155, 41 L. Ed. 111. See the title JURISDICTION.

9. **Action for infringement of copyright in a dramatic composition**.—*Brady v. Daly*, 175 U. S. 148, 152, 44 L. Ed. 109.

10. **Action for wrongful publication of unpublished manuscript**.—*Press Pub. Co. v. Monroe*, 164 U. S. 105, 111, 41 L. Ed. 367.

11. **Action not barred by suit for injunction and accounting**.—*Brady v. Daly*, 175 U. S. 148, 161, 44 L. Ed. 109.

d. *Penalties*—(1) *Penalty for False Notice of Copyright*.—A penalty of one hundred dollars is imposed for impressing a notice of copyright or words of the same purport upon any article, whether it be subject to copyright or not, for which no copyright has been obtained;<sup>12</sup> or for knowingly issuing or selling an article bearing a notice of United States copyright which has not been copyrighted in this country;<sup>13</sup> or for importing any article bearing such notice of copyright or words of the same import, which is not copyrighted in this country.<sup>14</sup> These provisions do not apply, however, to any importation or sale of such articles brought into the United States prior to March 3, 1897.<sup>15</sup>

(2) *Penalties for an Infringement of Copyright*—(a) *Rule Stated and Construed*.—Under the express provisions of the Revised Statutes if any person, after the recording of the title of any map, chart, musical composition, print, cut, engraving or photograph, shall, within the time limited, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, engrave, etch, work, copy, print, publish or import, either in whole or in part, or shall sell or expose to sale, any copy of such map or other article, he shall forfeit to the proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession.<sup>16</sup> This is clearly a penal statute in that it fixes a single and arbitrary measure of recompense to the plaintiff, irrespective of the damages actually sustained by him, or of the profits realized by the defendant; and in the further provision that one-half of the amount recovered shall be to the use of the United States.<sup>17</sup> It must, therefore, be construed with such strictness as to carefully safeguard the rights of the defendant and at the same time preserve the obvious intention of the legislature.<sup>18</sup> While the forfeiture is not limited as

**12. Impressings false notice of copyright.**—Rev. Stat., § 4963, as amended by act of March 3, 1897, 29 Stat. 694, ch. 392. *McLoughlin v. Raphael Tuck Co.*, 191 U. S. 267, 48 L. Ed. 178.

But under Rev. Stat., § 4963, prior to the amendment of March 3, 1897, the penalty was imposed only when the notice was untruthfully stamped upon an article which was subject to be copyrighted. *McLoughlin v. Raphael Tuck Co.*, 191 U. S. 267, 268, 48 L. Ed. 178.

And no penalty was imposed for affixing in a foreign country to a publication a false statement that it was copyrighted under the laws of the United States. *McLoughlin v. Raphael Tuck Co.*, 191 U. S. 267, 270, 48 L. Ed. 178.

**13. Knowingly issuing or selling article bearing false notice of copyright.**—Rev. Stat., § 4963, as amended by act of March 3, 1897, 29 Stat. 694, ch. 392. *McLoughlin v. Raphael Tuck Co.*, 191 U. S. 267, 48 L. Ed. 178.

But under Rev. Stat., § 4963, before the amendment of March 3, 1897, no penalty was imposed for selling an article in the United States which was untruthfully stamped as copyrighted. *McLoughlin v. Raphael Tuck Co.*, 191 U. S. 267, 268, 48 L. Ed. 178.

**14. Importing article bearing false notice of copyright.**—Rev. Stat., § 4963, as amended by act of March 3, 1897, 29 Stat. 694, ch. 392. *McLoughlin v. Raphael Tuck Co.*, 191 U. S. 267, 48 L. Ed. 178.

But under Rev. Stat., § 4963, before the amendment of March 3, 1897, there was

no penalty imposed for importing from a foreign country an article untruthfully stamped in such country as having been copyrighted in the United States. *McLoughlin v. Raphael Tuck Co.*, 191 U. S. 267, 268, 48 L. Ed. 178.

**15. Statute not applicable where articles imported prior to March 3, 1897.**—Rev. Stat., § 4963, as amended by act of March 3, 1897, 29 Stat. 694, ch. 392. *McLoughlin v. Raphael Tuck Co.*, 191 U. S. 267, 48 L. Ed. 178.

Evidence held to unquestionably establish that books sold after March 3, 1897, were imported prior to that date, and, therefore, to warrant the trial court in instructing a verdict for the defendant. *McLoughlin v. Raphael Tuck Co.*, 191 U. S. 267, 271, 48 L. Ed. 178.

**16. Forfeiture and penalty for infringement of copyright.**—Rev. Stat., § 4965; *Bolles v. Outing Co.*, 175 U. S. 262, 44 L. Ed. 156.

**17. Statute a penal one.**—*Bolles v. Outing Co.*, 175 U. S. 262, 264, 44 L. Ed. 156.

It is questionable, however, under the peculiar provisions of the statute whether the one-half of the amount recovered which is to go to the United States extends beyond the case of "a painting, statute, or statutory." *Thornton v. Schreiber*, 124 U. S. 612, 615, 31 L. Ed. 577; *Bolles v. Outing Co.*, 175 U. S. 262, 265, 44 L. Ed. 156.

**18. Statute strictly construed.**—*Bolles v. Outing Co.*, 175 U. S. 262, 265, 44 L. Ed. 156; *Backus v. Gould*, 7 How. 798, 811, 12 L. Ed. 919.



to the number of the copies, it is limited to such as are found in, and not simply traced to, the possession of the defendant.<sup>19</sup>

(b) *Penalties Cannot Be Enforced in a Suit in Equity*.—The penalties given by the statute cannot be enforced in a suit of equity.<sup>20</sup>

(c) *Against Whom Penalties Can Be Enforced*.—**Employee of Merchantile Firm**.—One cannot be held liable for violating the statute, when he is employed somewhat as business manager but principally as purchasing agent of a merchantile firm in whose store are found printed copies of a copyrighted article, where it is shown that he only had possession of them as an employee of the firm, subject always to their order and control, and never with any claim of right to control them except in the service of the firm.<sup>21</sup>

(d) *Abatement of Suit*.—A suit for penalties and forfeitures under the statute abates upon the death of the defendant.<sup>22</sup>

e. *Defenses*.—Abandonment of the copyright,<sup>23</sup> laches,<sup>24</sup> and the statute of limitations,<sup>25</sup> are among the defenses that may be set up in an action for infringement of copyright. But it cannot be interposed as a defense in such an action that under the law of the domicile of the author, a married woman, from whom the plaintiff claims as assignee, her husband is entitled to a part of her earnings, that being a matter to be settled between the husband and the proprietor of the copyright.<sup>26</sup>

**CORAM NOBIS AND CORAM VOBIS**.—See the titles *APPEAL AND ERROR*, vol. 1, p. 964; *JUDGMENTS AND DECREES*.

**CORNELL UNIVERSITY**.—See the title *PUBLIC LANDS*.

**19. Forfeiture limited to copies found in possession of defendant**.—*Bolles v. Outing Co.*, 175 U. S. 262, 266, 44 L. Ed. 156; *Thornton v. Schreiber*, 124 U. S. 612, 620, 621, 31 L. Ed. 577.

And this was the rule under the sixth section of the act of February 3, 1831, of which § 4965 of the Revised Statutes is a substantial copy. *Backus v. Gould*, 7 How. 798, 12 L. Ed. 919.

**20. Penalties cannot be enforced in a suit in equity**.—*Stevens v. Gladding*, 17 How. 447, 453, 15 L. Ed. 153; *Callaghan v. Myers*, 128 U. S. 617, 663, 32 L. Ed. 547; *Root v. Railway Co.*, 105 U. S. 189, 193, 26 L. Ed. 975.

**21. Employee of mercantile firm**.—*Thornton v. Schreiber*, 124 U. S. 612, 617, 31 L. Ed. 577.

**22. Abatement of suit**.—*Schreiber v. Sharpless*, 110 U. S. 76, 79, 80, 28 L. Ed. 65.

And this is so though the laws of the state in which the suit is brought allow suits on state penal statutes to be prosecuted after the death of the offender. *Schreiber v. Sharpless*, 110 U. S. 76, 80, 28 L. Ed. 65. See the title *ABATEMENT, REVIVAL AND SURVIVAL*, vol. 1, p. 23.

**23. Facts showing that plaintiff had not abandoned copyright**.—The defendant recognized the copyright to certain volumes by offering to purchase the right and there was considerable negotiation on that subject, but no agreement was reached. It was held that this fact, particularly as it was supported by other evidence in the case, showed that the plain-

tiff had not abandoned the copyright nor consented to the infringement of it. *Callaghan v. Myers*, 128 U. S. 617, 651, 659, 32 L. Ed. 547.

**24. Plaintiff not guilty of laches**.—Held, upon a consideration of all the evidence, that the plaintiff was not guilty of laches where he brought his suit more than three months after the infringement, he having complied with the condition precedent to the right to bring suit after three months by delivering a copy of the work to the clerk of the district court within three months from the publication. *Callaghan v. Myers*, 128 U. S. 617, 651, 569, 32 L. Ed. 547.

**25. Limitation of action for infringement of copyright in dramatic composition**.—An action under § 4966, Rev. Stat., which provides that "any person publicly performing or representing any dramatic composition for which a copyright has been obtained without the consent of the proprietor thereof or his heirs or assigns, shall be liable for damages," although not an action to recover a statutory penalty or forfeiture, will be limited, in the absence of any federal statute of limitation applicable thereto, by the limitation existing for the class of actions to which it belongs in the state where the action was brought. *Brady v. Daly*, 175 U. S. 148, 158, 44 L. Ed. 109. See, also, *Campbell v. Haverhill*, 155 U. S. 610, 614, 39 L. Ed. 280.

**26. That author's husband is entitled to part of her earnings no defense to suit by assignee**.—*Belford v. Scribner*, 144 U. S. 488, 36 L. Ed. 514.

**CORNERS.**—See, also, the title **BOUNDARIES**, vol. 3, p. 467. See note 1.

## CORONERS.

BY R. E. MAXWELL.

### CROSS REFERENCES.

As to a distringas, directed to a coroner, against a sheriff, to compel a sale of goods levied upon, see the titles **SHERIFFS AND CONSTABLES**; **VENDITIONI EX-PONAS**.

**Coroner's Fee.**—A coroner will not be entitled to a fee for viewing a body, when the death was not one for a coroner's view. But fees advanced by a coroner to jurors and witnesses, who were lawfully summoned, may be reimbursed to him, though the case of death in which they were summoned was strictly not one for a coroner's view.<sup>2</sup> From where such fees are paid depends upon the statute under which the proceedings were had.<sup>3</sup>

**CORPORAL PUNISHMENT.**—See the title **ARMY AND NAVY**, vol. 2, p. 522.

**CORPORATE.**—See, also, the titles **CORPORATIONS**; **MUNICIPAL CORPORATIONS**. See note 4.

**CORPORATION COMMISSION.**—See the titles **INTERSTATE AND FOREIGN COMMERCE**; **POLICE POWER**.

1. **Corners.**—See *Booth v. Illinois*, 184 U. S. 425, 430, 46 L. Ed. 623. And see the title **GAMBLING CONTRACTS**.

2. **Coroner's fee.**—*Levy Court v. Coroner*, 2 Wall. 501, 17 L. Ed. 851.

Jurors and witnesses summoned in form by the coroner's summons, regularly served, are so far "lawfully summoned" under the eighth section of the act of July 8, 1838, that they may be allowed their fees, though the case of death in which they were summoned was strictly not one for a coroner's view, and though the coroner himself would be entitled to none. Fees advanced by the coroner to jurors and witnesses in such a cause may be properly reimbursed to him, and consistently with a refusal to pay him those claimed as his own. *Levy Court v. Coroner*, 2 Wall. 501, 17 L. Ed. 851.

3. **Act of July 8, 1838.**—The fees allowed by the eighth section of the act of congress of July 8, 1838, to the coroners of the counties of Washington and Alexandria, and to jurors and witnesses who may be lawfully summoned by them to any inquest, are payable by the Levy Court of the county, not by the federal

government. *Levy Court v. Coroner*, 2 Wall. 501, 17 L. Ed. 851.

4. **Corporate purposes.**—The supreme court of Illinois, through Judge Lawrence, in an opinion of marked ability, sustained the validity of a tax for **corporate purposes** defining the phrase **corporate purposes** to mean "a tax to be expended in a manner which shall promote the general prosperity and welfare of the municipality which levies it." *Hackett v. Ottawa*, 99 U. S. 86, 93, 25 L. Ed. 363.

**Corporate authority.**—The city council were the **corporate authorities** of Quincy, upon whom, within the meaning of the constitution (of Illinois) of 1848, the legislature could confer, without the intervention of a popular vote, authority to make the subscription and issue the bonds in aid of a railroad. *Quincy v. Cooke*, 107 U. S. 549, 553, 27 L. Ed. 549.

"**Corporate body**," in a statute conferring authority on "the agent of any **corporate body**" to subscribe for stock in a railroad company, was held, in *Township of East Oakland v. Skinner*, 94 U. S. 255, 257, 24 L. Ed. 125, to mean private or business corporations alone, not municipal corporations.

# CORPORATIONS.

BY JAMES F. MINOR.

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MENT AND GARNISHMENT, vol. 2, p. 660; BAILMENTS, vol. 2, p. 782; BANKRUPTCY, vol. 2, p. 792; BANKS AND BANKING, vol. 3, p. 1; BENEFICIAL AND BENEVOLENT ASSOCIATIONS, vol. 3, p. 211; BEST AND SECONDARY EVIDENCE, vol. 3, p. 214; BILL OF LADING, vol. 3, p. 232; BILLS, NOTES AND CHECKS, vol. 3, p. 257; BONDS, vol. 3, p. 382; BRIDGES, vol. 3, p. 516; BUILDING AND LOAN ASSOCIATIONS, vol. 3, p. 542; CANALS, vol. 3, p. 546; CARRIERS, vol. 3, p. 556; CAR TRUST ASSOCIATIONS, vol. 3, p. 642; CEMETERIES, vol. 3, p. 647; CHARITIES, vol. 3, p. 675; CHATTEL MORTGAGES, vol. 3, p. 699; CITIZENSHIP, vol. 3, p. 788; COLLEGES AND UNIVERSITIES, vol. 3, p. 867; CONFLICT OF LAWS, vol. 3, p. 1020; CONSTITUTIONAL LAW, ante, p. 1; CONTRACTS, ante, p. 552; COSTS, COUNTIES; COURTS; COVENANT, ACTION OF; COVENANTS; CREDITORS' SUITS; DAMAGES; DEBENTURES; DECLARATIONS AND ADMISSIONS; DEED; DISCOVERY; DOMICILE; ELECTRICITY; ELEVATORS; EMINENT DOMAIN; EMPLOYERS' LIABILITY INSURANCE; EQUITY; ESTOPPEL; EVIDENCE; EXCHANGES; EXECUTIONS; EXEMPLARY DAMAGES; EXPRESS COMPANIES; FELLOW SERVANTS; FERRIES; FIDELITY AND GUARANTY INSURANCE; FOREIGN CORPORATIONS; FRAUD AND DECEIT; GAS; HOSPITALS AND ASYLUMS; ILLEGAL CONTRACTS; IMPLIED CONTRACTS; INJUNCTIONS; INSOLVENCY; IRRIGATION; JOINT-STOCK COMPANIES; JUDGMENTS AND DECREES; JUDICIAL NOTICE; JUDICIAL SALES; JURISDICTION; LEVEES; LIENS; LIMITATION OF ACTIONS AND ADVERSE POSSESSION; LIS PENDENS; LOAN, TRUST AND SAFE DEPOSIT COMPANIES; LOTTERIES, MANDAMUS; MARINE INSURANCE; MASTER AND SERVANT; MONOPOLIES AND CORPORATE TRUSTS; MORTGAGES AND DEEDS OF TRUST; MUNICIPAL, COUNTY, STATE AND FEDERAL AID; MUTUAL INSURANCE; NAMES; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS; PAROL EVIDENCE; PARTIES; PARTNERSHIP; PRESUMPTIONS AND BURDEN OF PROOF; PRINCIPAL AND AGENT; QUO WARRANTO; RAILROADS; RECEIVERS; RELIGIOUS SOCIETIES; REMOVAL OF CAUSES; RES ADJUDICATA; SEALS AND SEALED INSTRUMENTS; SPECIFIC PERFORMANCE; STATUTES; STOCK AND STOCKHOLDERS; STREET RAILWAYS; SUBSCRIPTIONS; SUMMONS AND PROCESS; TAXATION; TELEGRAPHS AND TELEPHONES; TITLE INSURANCE; TORTS; TRADEMARKS, TRADENAMES AND UNFAIR COMPETITION; TRUSTS AND TRUSTEES; TURNPIKES AND TOLLROADS; UNION DEPOTS; VENDOR AND PURCHASER; VENUE; VOTING TRUSTS; WAREHOUSES AND WAREHOUSEMEN; WATER COMPANIES AND WATERWORKS.

As to appearance for and by corporation, see the titles APPEARANCES, vol. 2, p. 429; ATTORNEY AND CLIENT, vol. 2, p. 703. As to change of venue as to corporation, see the title VENUE. As to competency of officer or stockholder as witness, see the title WITNESSES. As to corporate books as evidence, see the titles DOCUMENTARY EVIDENCE; PRODUCTION OF DOCUMENTS. As to corporate name as tradename, see the title TRADEMARKS, TRADENAMES AND UNFAIR COMPETITION. As to corporation commission, interference with interstate commerce by compelling delivery of cars to private siding, see the title INTERSTATE AND FOREIGN COMMERCE; fixing rates, see the titles CARRIERS, vol. 3, p. 622, et seq.; RAILROADS. As to criminal capacity, and purview of criminal statutes as to corporations, see the title CRIMINAL LAW. As to deprivation of property without compensation, see the title DUE PROCESS OF LAW. As to due process of law in appointment of agent to accept service, see the titles DUE PROCESS OF LAW; SUMMONS AND PROCESS. As to estoppel of corporations, see the title ESTOPPEL. As to conclusiveness of judgment against corporation generally, see the title JUDGMENTS AND DECREES. As to injunction to protect franchise, see the title INJUNCTIONS. As to insurance corporations, see the title INSURANCE. As to liability, and right to recover, for a nuisance, see the title NUISANCE. As to limitation of actions against, see the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION. Mandamus to, see the title MANDAMUS. Lien of employees, see the titles LIENS; MECHANICS' LIENS. As to power to refer to arbitration, see the title ARBITRATION AND AWARD, vol. 2, p. 464. As to production in court of corporate books and papers, see the title PRODUCTION OF



DOCUMENTS. As to public corporations generally, see the titles COUNTIES; IRRIGATION; MUNICIPAL CORPORATIONS; TOWNS AND TOWNSHIPS. As to regulation of rates, see the title CARRIERS, vol. 3, p. 622, et seq.; RAILROADS; WATER COMPANIES AND WATERWORKS. As to removal of causes, see the title REMOVAL OF CAUSES. As to resulting trust to corporation in property purchased by stockholders, see the title STOCK AND STOCKHOLDERS. As to right of visitation as to charitable corporation, see the title CHARITIES, vol. 3, p. 675. As to responsibility for libel and slander, see the title LIBEL AND SLANDER. As to searches and seizures, liability to, see the title SEARCHES AND SEIZURES. As to service of process on corporations, see the title SUMMONS AND PROCESS. As to taxation and power to tax, see the title TAXATION. As to taxation of corporations as affecting commerce, see the title INTERSTATE AND FOREIGN COMMERCE.

### I. Scope of Title.

This title includes private corporations generally, their characteristics, creation, organization, powers, duties and liabilities, consolidation, reorganization, dissolution, and the amendment and repeal of their charters. It excludes unincorporated associations; municipal corporations; incorporations for a particular purpose or business, such as railroads, street railroads, etc., for which see the specific titles; stock and stockholders, with the rights, duties, powers and liabilities of the latter; officers and agents, their duties, liabilities and responsibilities. It also excludes the taxation of corporations and corporate stocks, as to which see the title TAXATION. As to other matters excluded, see the table of cross references above.

### II. Definitions, Distinctions and General Considerations.

**A. Definitions**—1. CORPORATION.—A corporation, though very hard to define,<sup>1</sup> has been said to be "an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence."<sup>2</sup> It has been described as an

1. **Difficulty of definition.**—To attempt to define a corporation, or limit its powers by the rules which prevailed when they were rarely created for any other than municipal purposes, and generally by royal charter, is impossible in this country and at this time. Most of the states of the union have general laws by which persons associating themselves together, as the shareholders in this company have done, became a corporation. *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566, 575, 19 L. Ed. 1029.

2. **Definition.**—It was thus defined in the case of *Dartmouth College v. Woodward*, 4 Wheat. 518, 636, 4 L. Ed. 629, and the court there went on to say: "These are such as were supposed best calculated to effect the object for which it was created. Among the most important are immortality, and if the expression may be allowed, individuality—properties by which a perpetual succession of many persons are considered as the same and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men in succession with

these qualities and capacities that corporations were invented and are in use. By these means a perpetual succession of individuals are capable of acting for the promotion of the particular object like one immortal being." *Louisville, etc., R. Co. v. Letson*, 2 How. 497, 557, 11 L. Ed. 353. See, also, *Chisholm v. Georgia*, 2 Dall. 419, 448, 1 L. Ed. 440, per Iredell, J., dissenting; *Pinney v. Nelson*, 183 U. S. 144, 149, 46 L. Ed. 125; *United States Bank v. Deveaux*, 5 Cranch 61, 62, 88, 3 L. Ed. 38; *Bank v. Earle*, 13 Pet. 519, 588, 10 L. Ed. 274; *Runyan v. Coster*, 14 Pet. 122, 10 L. Ed. 382; *Marshall v. Baltimore, etc., R. Co.*, 16 How. 314, 14 L. Ed. 953; *Philadelphia, etc., R. Co. v. Quigley*, 21 How. 202, 210, 16 L. Ed. 73; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 352, 28 L. Ed. 173; *Shaw v. Quincy Min. Co.*, 145 U. S. 444, 449, 36 L. Ed. 768; *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 45, 44 L. Ed. 657; *New York Life Ins. Co. v. Cravens*, 178 U. S. 389, 396, 44 L. Ed. 1116; *Hancock, Mut. Life Ins. Co. v. Warren*, 181 U. S. 73, 77, 45 L. Ed. 755; *Fidelity Mut Life Ass'n v. Mettler*, 185 U. S. 308, 327, 46 L. Ed. 922. See post, "Such as Charter and Laws Confer," XI, A, 1.

"Corporations are a necessary feature

"association of persons,"<sup>3</sup> contributing a joint capital for a common purpose, with assignability of shares in perpetual succession,<sup>4</sup> and is a mere creature of

**of modern business activity**, and their aggregate capital has become the source of nearly all great enterprises." *Hale v. Henkel*, 201 U. S. 43, 76, 50 L. Ed. 652; *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 544, 24 L. Ed. 148, per Bradley, J., dissenting; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 205, 29 L. Ed. 158.

**Corporations sole** are not usually created for commercial business, and are different from corporations aggregate in comprising only a single individual. *Home Ins. Co. v. New York*, 134 U. S. 594, 599, 33 L. Ed. 1025; *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 312, 36 L. Ed. 164.

Any body politic (sole or aggregate), whether its power be restricted or transcendent, is, in the largest sense of the word, a corporation. *Chisholm v. Georgia*, 2 Dall. 419, 447, 1 L. Ed. 440; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 583, 9 L. Ed. 773. See the titles MUNICIPAL CORPORATIONS; STATES.

**But the United States** are not a corporation under the New York statute of wills. *United States v. Fox*, 94 U. S. 315, 321, 24 L. Ed. 192.

**3. Association of persons.**—"The words 'association of persons' are often, and not inaptly, employed to describe a corporation. An incorporated company is an association of individuals acting as a single person, and by their corporate name. As this court has said, 'private corporations are but associations of individuals united for some common purpose, and permitted by the law to use a common name, and to change its members without a dissolution of the association.' *Baltimore, etc., R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 330, 27 L. Ed. 739." *United States v. Trinidad Coal, etc., Co.*, 137 U. S. 160, 169, 34 L. Ed. 640. See *St. Clair v. Cox*, 106 U. S. 350, 355, 27 L. Ed. 222; *Kansas, etc., R. Co. v. Atchison, etc., R. Co.*, 112 U. S. 414, 28 L. Ed. 794; *Pembina, etc., Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 188, 31 L. Ed. 650; *McKinley v. Wheeler*, 130 U. S. 630, 633, 32 L. Ed. 1048; *Hale v. Henkel*, 201 U. S. 43, 76, 50 L. Ed. 652.

A corporation is said by Washington, J., in *Dartmouth College v. Woodward*, 4 Wheat. 518, 657, 4 L. Ed. 629, quoting *Bl. Com.* 37, to be a franchise. "It is," says he "a franchise for a number of persons, to be incorporated and exist as a body politic, with a power to maintain perpetual succession, and to do corporate acts, and each individual of such corporation is also said to have a franchise or freedom."

See, also, where it is said by Chief Justice Marshall in *Providence Bank v. Bill-*

*ings*, 4 Pet. 514, 562, 7 L. Ed. 939, the great object of an incorporation is, to bestow the character and properties of individuality on a collective and changing body of men. And see *Kansas, etc., R. Co. v. Atchinson, etc., R. Co.*, 112 U. S. 414, 415, 416, 28 L. Ed. 794; *Louisville, etc., R. Co. v. Letson*, 2 How. 497, 558, 11 L. Ed. 353; *Pembina, etc., Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 189, 31 L. Ed. 650; *Georgia, etc., Banking Co. v. Smith*, 128 U. S. 174, 179, 32 L. Ed. 377.

**"An aggregate corporation**, at common law, is a collection of individuals, united into one collective body, under a special name, and possessing certain immunities, privileges and capacities, in its collective character, which do not belong to the natural persons composing it. Among other things, it possesses the capacity of perpetual succession, and of acting by the collected vote or will of its component members, and of suing and being sued in all things touching its corporate rights and duties. It is, in short, an artificial person, existing in contemplation of law, and endowed with certain powers and franchises which, though they must be exercised through the medium of its natural members, are yet considered as subsisting in the corporation itself, as distinctly as if it were a real personage." *Dartmouth College v. Woodward*, 4 Wheat. 518, 667, 4 L. Ed. 629, per Story, J. See, also, *Louisville, etc., R. Co. v. Letson*, 2 How. 497, 551, 11 L. Ed. 553; *Northern Ind. R. Co. v. Michigan Cent. R. Co.*, 15 How. 233, 247, 14 L. Ed. 674. See post, "Corporation as Entity Distinct from Shareholders," II, C.

**4. Perpetual succession.**—"A corporation, like a partnership, is an association of natural persons who contribute a joint capital for a common purpose, and although the shares may be assigned to new individuals in perpetual succession, yet the number of shares and amount of capital cannot be increased, except in the manner expressly authorized by the charter or articles of association." *Railway Co. v. Allerton*, 18 Wall. 233, 235, 21 L. Ed. 902. See *Dartmouth College v. Woodward*, 4 Wheat. 518, 667, 4 L. Ed. 629; *Railroad Co. v. Soutter*, 13 Wall. 517, 525, 20 L. Ed. 543.

Continued succession is given to corporations to prevent embarrassment arising from the death of their members. *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 666, 24 L. Ed. 1036; *Railroad Co. v. Soutter*, 13 Wall. 517, 525, 20 L. Ed. 543.

As to assignment of shares generally, see the title STOCK AND STOCKHOLDERS.

the legislature.<sup>5</sup> And manufacturing corporations are no exception,<sup>6</sup> nor are banking associations.<sup>7</sup>

2. LIMITED PARTNERSHIP ASSOCIATION.—A limited partnership association is not a true corporation, but only a quasi corporation.<sup>8</sup>

3. CORPORATE FRANCHISE.—Corporate franchises are legal estates, and not mere naked powers granted to the corporation, but powers coupled with an interest which vest in the corporation by virtue of its charter, as soon as it is in esse.<sup>9</sup> And a grant of corporate existence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided) from individual liability.<sup>10</sup> The franchise of the company is the right to hold property

5. **Creature of legislature.**—"A corporation being the mere creature of the legislature, its rights, privileges and powers are dependent solely upon the terms of its charter. Its creation (except where the corporation is sole) is the investing of two or more persons with the capacity to act as a single individual, with a common name, and the privilege of succession in its members without dissolution, and with a limited individual liability." *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 312, 36 L. Ed. 164; *Home Ins. Co. v. New York*, 134 U. S. 594, 599, 33 L. Ed. 1025; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 352, 28 L. Ed. 173.

6. **Manufacturing corporations.**—"Manufacturing corporations are private corporations in the strictest sense, as they are created for the convenience of the corporation, and are charged with no public duties whatever." *Hamilton Co. v. Massachusetts*, 6 Wall. 632, 638, 18 L. Ed. 904.

7. **Banking associations.**—*State Bank v. Knoop*, 16 How. 369, 14 L. Ed. 977; *Nesmith v. Sheldon*, 7 How. 812, 816, 12 L. Ed. 925. See the title **BANKS AND BANKING**, vol. 3, pp. 5, 8, 10, 12, 14.

**Charitable institutions.**—See the title **CHARITIES**, vol. 3, p. 675.

**Churches and religious bodies.**—See the title **RELIGIOUS SOCIETIES**.

**Educational institutions.**—See the title **COLLEGES AND UNIVERSITIES**, vol. 3, p. 867.

**Joint-stock companies.**—See the title **JOINT-STOCK COMPANIES**.

**States.**—See the title **STATES**.

**State decisions as binding federal court.**—See the title **COURTS**.

8. **A limited partnership association**, created under the laws of Pennsylvania, is nothing more than a quasi corporation, at most, not a true corporation. *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449, 44 L. Ed. 842. See the title **PARTNERSHIP**.

**Joint-stock associations as corporations.**—See the title **JOINT-STOCK COMPANIES**.

9. **Corporate franchises.**—*Hamilton Co. v. Massachusetts*, 6 Wall. 632, 18 L. Ed. 904; *Society for Savings v. Coite*, 6 Wall. 594, 606, 18 L. Ed. 897. See *Miller v. State*, 15 Wall. 478, 488, 21 L. Ed. 98; *Dartmouth College v. Woodward*, 4

*Wheat*, 518, 700, 4 L. Ed. 629.

They vest in the corporation upon the possession of its franchises, and whatever may be thought of the corporation, it cannot be denied that the corporation itself has a legal interest in such franchises. *Society for Savings v. Coite*, 6 Wall. 594, 606, 18 L. Ed. 897; *Provident Institution v. Massachusetts*, 6 Wall. 611, 18 L. Ed. 907. See post, "Valuable Privileges and Franchises Conducing to Acceptance," VIII, C, 1, a, (4).

10. **Grant of special privileges.**—*Paul v. Virginia*, 8 Wall. 168, 181, 19 L. Ed. 357. See *Woods v. Lawrence County*, 1 Black 386, 409, 17 L. Ed. 122; *People's Railroad v. Memphis Railroad*, 10 Wall. 38, 19 L. Ed. 844.

"Franchises are special privileges conferred by the government upon individuals, and which do not belong to the citizens of the country generally of common right. It is essential to the character of a franchise that it should be a grant from the sovereign authority, and in this country, no franchise can be held, which is not derived from a law of the state." *Bank v. Earle*, 13 Pet. 519, 595, 10 L. Ed. 274. See *People's Railroad v. Memphis Railroad*, 10 Wall. 38, 19 L. Ed. 844; *California v. Central Pac. R. Co.*, 127 U. S. 1, 40, 32 L. Ed. 150.

"By the term 'corporate franchise or business,' as here used, we understand is meant (not referring to corporations sole, which are not usually created for commercial business) the right or privilege given by the state to two or more persons of being a corporation, that is, of doing business in a corporate capacity, and not the privilege or franchise which, when incorporated, the company may exercise. The right or privilege to be a corporation, or to do business as such body, is one generally deemed of value to the corporators, or it would not be sought in such numbers as at present. It is a right or privilege by which several individuals may unite themselves under a common name and act as a single person with a succession of members, without dissolution or suspension of business and with a limited individual liability." *Home Ins. Co. v. New York*, 134 U. S. 594, 599, 33 L. Ed. 1025; *Ashlev v. Ryan*, 153 U. S. 436, 442, 38 L. Ed. 773.



and exercise its corporate privileges,<sup>11</sup> covering all rights granted by the legislature.<sup>12</sup> The right and privilege, or franchise, of being a corporation, is of value to its members and is considered as property separate and distinct from the property which the corporation may acquire,<sup>13</sup> although incorporeal,<sup>14</sup> and is usually considered personal property.<sup>15</sup>

**As Contract.**—See post, "Charter as Contract and Amendment or Repeal Thereof," VIII, C.

**B. Classification.—Power of State to Make Classification.**—A state may make a classification of corporations, based upon reasonable grounds and not arbitrary selection, for the regulation of their conduct.<sup>16</sup>

**Private, Public and Quasi Public Corporations.**—Corporations are private, where the property of the corporation is private,<sup>17</sup> although the cor-

11. *New Jersey v. Anderson*, 203 U. S. 483, 491, 51 L. Ed. 284; *California v. Cent. Pac. R. Co.*, 127 U. S. 1, 41, 32 L. Ed. 150.

"The franchise to be is only one of the franchises of a corporation. The franchise to do is an independent franchise, or rather a combination of franchises, embracing all things which the corporation is given power to do." *Adams Express Co. v. Ohio*, 166 U. S. 185, 224, 41 L. Ed. 965; *Memphis, etc., R. Co. v. Railroad Commissioners*, 112 U. S. 609, 28 L. Ed. 837. See post, "To Alienate Franchise and Property Necessary Thereto," XI, C.

12. The word "franchise" is generic, covering all the rights granted by the legislature, as well as the mere right to be a corporation. *Railroad Co. v. Georgia*, 98 U. S. 359, 365, 25 L. Ed. 185. But it is said, in *Morgan v. Louisiana*, 93 U. S. 217, 223, 23 L. Ed. 860, the term "franchises," while often used as synonymous with rights, privileges and immunities, though of a personal and temporary character, must always be considered in connection with the corporation or property to which it is alleged to appertain, and strictly means the rights or privileges that are essential to the operations of the corporation.

13. **Franchise as property.**—*Central Pac. R. Co. v. California*, 162 U. S. 91, 127, 40 L. Ed. 903; *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 312, 36 L. Ed. 164; *Home Ins. Co. v. New York*, 134 U. S. 594, 599, 33 L. Ed. 1025; *West River Bridge Co. v. Dix*, 6 How. 507, 12 L. Ed. 535. *Gordon v. Appeal Tax Court*, 3 How. 133, 150, 11 L. Ed. 529.

Nothing is better settled than that the franchise of a private corporation is property, and of the most valuable kind, as it cannot be taken for public use, even, without compensation. *Wilmington Railroad v. Reid*, 13 Wall. 264, 268, 20 L. Ed. 568.

14. **Incorporeal.**—*Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 693, 41 L. Ed. 1165.

15. **Personal property.**—According to the law of most states, this franchise or privilege of being a corporation is deemed personal property. *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 312, 36 L. Ed. 164; *Home Ins. Co. v. New York*, 134 U. S. 594, 601, 33 L. Ed. 1025.

**Abeysance of franchise.**—See post, "Status before Incorporation," III, E.

**Conditional grant.**—See post, "Imposition of Conditions," IV, A, 1, c, (2).

**Construction.**—See post, "Construction," XI, A, 2.

**Exclusive franchise.**—See post, "Charters, and Their Amendment, Repeal and Extension," VIII.

**Grant of additional franchise by congress to state corporation.**—See post, "Power of Congress," IV, A, 1, d.

**Mortgage of franchises.**—See the title MORTGAGES AND DEEDS OF TRUST.

**Sale under judicial process.**—See the titles EXECUTIONS; JUDICIAL SALES.

**Sale and transfer generally.**—See post, "To Alienate Franchise or Property Necessary Thereto," XI, C.

16. **Power of state to make.**—"It is well settled that when prescribing a rule of conduct for persons or corporations a state may, consistently with the Fourteenth Amendment, make a classification among its people based 'upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.' *Gulf, etc., R. Co. v. Ellis*, 165 U. S. 150, 159, 160, 165, 41 L. Ed. 666. In *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 46 L. Ed. 92, there was a difference of opinion in the court as to what was necessary to be decided, but all agreed that a state enactment regulating the charges of a certain stock yards company, and which exempted other like companies from its operation, was a denial of the equal protection of the laws and forbidden by the Fourteenth Amendment." *Halter v. Nebraska*, 205 U. S. 34, 43, 51 L. Ed. 699. See the title CONSTITUTIONAL LAW, ante, p. 1.

17. **Private corporations.**—"Where the property of a corporation is private it gives the same character to the institution, and to this there is no exception." *State Bank v. Knoop*, 16 How. 369, 380, 14 L. Ed. 977. And private charters are such as are granted for the private benefit of the corporators. *Pennsylvania College Cases*, 13 Wall. 190, 214, 20 L. Ed. 550.

If the foundation be private, though

poration is engaged in a quasi public business, such as a railroad corporation,<sup>18</sup> and the fact that the state owns a portion of its stock does not change its character;<sup>19</sup> public;<sup>20</sup> and quasi public corporations, which are corporations exercising a public employment, and having duties to the public to perform.<sup>21</sup> Bur-

under the charter of the government, the corporation is private, however extensive the uses may be to which it is devoted, either by the bounty of the founder, or the nature and objects of the institution. *Dartmouth College v. Woodward*, 4 Wheat. 518, 668, 4 L. Ed. 629, per Story, J.

And a corporation created by the legislature in order to carry into effect the purposes of congress in reserving a township in a territorial land district for educational purposes, is not made a public corporation by the fact that its benefits would be enjoyed by the public generally. It is an eleemosynary private corporation. Trustees for Vincennes University *v. Indiana*, 14 How. 268, 14 L. Ed. 416. See, also, *Pennsylvania College Cases*, 13 Wall. 190, 214, 20 L. Ed. 550.

**A corporation for religious and charitable purposes**, which is endowed solely by private benefactions, is a private eleemosynary corporation, although it is created by a charter from the government. *Society for the Propagation of the Gospel v. New Haven*, 8 Wheat. 464, 5 L. Ed. 662.

A hospital or college founded by a private benefactor is in point of law a private corporation, although dedicated by its charter to general charity. The fact that the charity is public affords no proof that the corporation is also public. (Opinion of Story, J.) *Dartmouth College v. Woodward*, 4 Wheat. 518, 669, 671, 4 L. Ed. 629.

**Dartmouth College and Vincennes University.**—See the title COLLEGES AND UNIVERSITIES, vol. 3, pp. 867, 869.

**18. Quasi public business.**—*Railroad Co. v. Commissioners*, 103 U. S. 1, 26 L. Ed. 359. See post, this section. And see the title RAILROADS.

**19. State as stockholder.**—*Railroad Co. v. Commissioners*, 103 U. S. 1, 26 L. Ed. 359. See post, "State as Sole Stockholder," VIII. C. 1, a, (6). See the title STOCK AND STOCKHOLDERS.

**20. Public corporations.**—In *Dartmouth College v. Woodward*, 4 Wheat. 518, 629, 4 L. Ed. 629. Mr. Justice Story says: "Public corporations are generally esteemed such as exist for public political purposes only, such as towns, cities, parishes and counties; and, in many respects, they are so, although they involve some private interests; but, strictly speaking, public corporations are such only as are founded by the government for public purposes, where the whole interests belong to the government." Trustees for Vincennes University *v. Indiana*, 14 How. 268, 276, 14 L. Ed. 416. See the titles COLLEGES AND UNIVERSITIES, vol. 3,

p. 867; COUNTIES; MUNICIPAL CORPORATIONS; TOWNS AND TOWNSHIPS.

But a hospital or college, created and endowed by the government for general charity, or a bank whose stock is exclusively owned by the government, and which is created by the government for its own uses, is a public corporation. (Opinion of Story, J.) *Dartmouth College v. Woodward*, 4 Wheat. 518, 699, 4 L. Ed. 629.

**Bank of the United States.**—The old Bank of the United States, although endowed with the power to engage in the business of banking for its individual profit, was held to be a public corporation. *Osborn v. United States Bank*, 9 Wheat. 738, 6 L. Ed. 204. See, also, *McCulloch v. Maryland*, 4 Wheat. 316, 425, 4 L. Ed. 579; *Easton v. Iowa*, 188 U. S. 220, 229, 47 L. Ed. 452. See the title BANKS AND BANKING, vol. 3, p. 1.

**21. Quasi public corporations.**—Where the purpose of its incorporation, as defined in its charter and recognized and confirmed by the legislature, was the transportation of passengers, the plaintiff exercised a public employment, and was charged with the duty of accommodating the public in the line of that employment, exactly corresponding to the duty which a railroad corporation or a steamboat company, as a carrier of passengers, owes to the public, independently of possessing any right of eminent domain. The public nature of that duty was not affected by the fact that it was to be performed by means of cars constructed and of patent rights owned by the corporation, and over roads owned by others. The plaintiff was not a strictly private, but a quasi public corporation; and it must be so treated as regards the validity of any attempt on its part to absolve itself from the performance of those duties to the public, the performance of which by the corporation itself was the remuneration that it was required by law to make to the public in return for the grant of its franchise. —*Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 50, 35 L. Ed. 55, citing *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34, 29 L. Ed. 785; *New York, etc., R. Co. v. Winans*, 17 How. 30, 39, 15 L. Ed. 27; *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627; *Liverpool, etc., Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 32 L. Ed. 788; *Railroad Co. v. Commissioners*, 103 U. S. 1, 26 L. Ed. 359. See the titles CARRIERS, vol. 3, p. 556; MUNICIPAL CORPORATIONS; RAILROADS; STREET RAILWAYS, etc. As to quasi corporations generally, see post, "De Facto Corporations," V, A.



roughs and townships are such quasi public corporations.<sup>22</sup>

**C. Corporation as Entity Distinct from Shareholders.**—The corporation is legally distinct from its members,<sup>23</sup> and its debts are not their debts,<sup>24</sup> nor its contracts their contracts.<sup>25</sup>

**D. Governmental Regulation and Control**—1. IN GENERAL—*a. Visitation of Corporations.*—Visitation is the act of examining into the affairs of a corporation, but in the United States it is exercised only in the case of public or eleemosynary corporations, and then by the legislature.<sup>26</sup>

**22. Burroughs and townships.**—United States Bank *v.* Dandridge, 12 Wheat. 64, 75, 6 L. Ed. 552. See the title MUNICIPAL CORPORATIONS; TOWNS AND TOWNSHIPS.

**As federal and state corporations.**—See post, "Power to Create," IV, A.

**As ecclesiastical and lay.**—See the titles COLLEGES AND UNIVERSITIES, vol. 3, p. 867; RELIGIOUS SOCIETIES.

**Regulation.**—See post, "Implied Power," II, D, 2, a.

**23. Corporation as distinct entity.**—Merchants' Nat. Bank *v.* Wehrmann, 202 U. S. 295, 300, 50 L. Ed. 1036; Graham *v.* Railroad Co., 102 U. S. 148, 160, 26 L. Ed. 106; Humphreys *v.* McKissock, 140 U. S. 304, 312, 35 L. Ed. 473; Hollins *v.* Brierfield, etc., Iron Co., 150 U. S. 371, 382, 37 L. Ed. 1113; Park Bank *v.* Remsen, 158 U. S. 337, 346, 39 L. Ed. 1008. See, also, McDonald *v.* Williams, 174 U. S. 397, 402, 43 L. Ed. 1022; Hale *v.* Henkel, 201 U. S. 43, 76, 50 L. Ed. 652.

A corporation is constituted, it is true, of all its stockholders, but it has a legal existence separate from them—rights and obligations separate from them; and may have obligations to them. It can sue and be sued. Doctor *v.* Harrington, 196 U. S. 579, 585, 49 L. Ed. 606. See opinion of Marshall, C. J., dissenting in United States Bank *v.* Dandridge, 12 Wheat. 64, 92, 6 L. Ed. 552.

Assuming, in accordance with a favorite speculation of these days, that philosophically a partnership and a corporation illustrate a single principle, and even that the certificate of a share in one represents property in very nearly the same sense as does a share in the other, in either case the members could divide the assets after paying the debts. But from the point of view of the law there is a very important difference. The corporation is legally distinct from its members, and its debts are not their debts. Therefore, when a paid-up share in a corporation is taken, no liability is assumed, apart from statute, but simply a right equal in value to a corresponding share in the assets and good will of the concern after its debts are paid. If the right is worth something it is a proper security, and if it is worth nothing no harm is done. Merchants' Nat. Bank *v.* Wehrmann, 202 U. S. 295, 300, 50 L. Ed. 1036. And see ante, "Definitions," II, A; "To Acquire, Hold and

Dispose of Property," XI, B. See the title STOCK AND STOCKHOLDERS.

**24. Debts.**—Merchants' Nat. Bank *v.* Wehrmann, 202 U. S. 295, 300, 50 L. Ed. 1036.

**25. Contracts.**—The contract of a corporation is the contract of the legal entity, and not of its individual members. Its rights are those given to it in that character, and not the rights which belong to its constituent citizens. Waters-Pierce Oil Co. *v.* Texas, 177 U. S. 28, 43, 44 L. Ed. 657; Bank *v.* Earle, 13 Pet. 519, 10 L. Ed. 274.

**26. Visitation.**—"Visitation" is defined by Bouvier (Dic., vol. 2, p. 1199) as follows: "The act of examining into the affairs of a corporation. The power of visitation is applicable only to the ecclesiastical and eleemosynary corporations. 1 Black. Com. 480. The visitation of civil corporations is by the government itself, through the medium of the courts of justice. See 2 Kent 240. In the United States, the legislature is the visitor of all corporations founded by it for public purposes. 4 Wheat. 518." The origin and nature of "visitation" power received full discussion in the case cited by Bouvier from 4 Wheat. See opinion of Mr. Justice Story in Dartmouth College *v.* Woodward, 4 Wheat. 518, 673, 4 L. Ed. 629. Guthrie *v.* Harkness, 199 U. S. 148, 157, 50 L. Ed. 130.

"Visitation, in law, is the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce an observance of its laws and regulations. Burrill defines the word to mean 'inspection; superintendence; direction; regulation.'" At common law the right of visitation was exercised by the King as to civil corporations, and as to eleemosynary ones, by the founder or donor. 1 Cooley's Blackstone, 481. "In the United States the legislature is the visitor of all corporations created by it, where there is no individual founder or donor, and may direct judicial proceedings against such corporations for such abuses or neglects as would at common law cause forfeiture of their charters." 1 Cooley's Blackstone, 482, note. Guthrie *v.* Harkness, 199 U. S. 148, 158, 50 L. Ed. 130. See the titles CHARITIES, vol. 3, p. 675; COLLEGES AND UNIVERSITIES, vol. 3, p. 867; HOSPITALS AND ASYLUMS.



b. *Regulation Generally.*—See post, "Presumption against Immunity from Legislative Control," VIII, C, 2.

The legislative department of a government, charged with the duty of enacting such laws as may promote the health, the morals, and the prosperity of the people, may, when unrestrained by constitutional limitations upon its authority, provide, by reasonable regulations, against the misuse of special corporate privileges which it has granted, and which could not, except by its sanction, express or implied, have been exercised at all.<sup>27</sup> And an eleemosynary, like any other corporation, is subject to the general law of the land.<sup>28</sup> And when a corporation sells or encumbers its property, incurs debts or gives securities, it does business, and a statute regulating such transactions does not regulate the internal affairs of such corporation.<sup>29</sup>

**Creation of Sinking Fund.**—See post, "Examples of Valid Regulations," VIII, C, 4, e, (4).

c. *Rate Regulation.*—The power of the regulation of rates charged by private corporations enjoying a public franchise, for services rendered the public, is a power of government, continuing in its nature, and if it can be bargained

**27. Right of regulation generally.**—Chicago Life Ins. Co. v. Needles, 113 U. S. 574, 580, 28 L. Ed. 1084; Sinking-Fund Cases, 99 U. S. 700, 25 L. Ed. 496; Budd v. New York, 143 U. S. 517, 537, 36 L. Ed. 247; Eagle Ins. Co. v. Ohio, 153 U. S. 446, 455, 38 L. Ed. 778; New Orleans, Waterworks Co. v. Louisiana, 185 U. S. 336, 347, 46 L. Ed. 936. See post, "By State," II, D, 2.

Forfeiture of charter for misuser or nonuser, see post, "Misuser or Nonuser of Franchise," XVII, B, 4, b.

Under police power, see post, "Police Power and Right of Regulation," VIII, C, 3, b.

"While a legislature may prescribe regulations for the management of business of a public nature, even though carried on by private corporations with private capital and for private benefit, the language of such regulations will not be broadened by implication. In other words, there is no presumption of an intent to interfere with the management by a private corporation of its property any further than the public interests require, and so no interference will be adjudged beyond the clear letter of the statute." Chesapeake, etc., Tel. Co. v. Manning, 186 U. S. 238, 248, 46 L. Ed. 1144.

From the fact that a charter of incorporation has been granted, nothing can be inferred which changes the character of the institution, or transfers to the government any new power over it. The character of civil institutions does not grow out of their incorporation, but out of the manner in which they are formed, and the objects for which they are created. The right to change them is not founded on their being incorporated, but on their being the instruments of government, created for its purposes. The same institutions, created for the same objects, though not incorporated, would be public institutions, and, of course, be controllable by the legislature. The incorporat-

ing act neither gives nor prevents this control. Neither, in reason, can the incorporating act change the character of a private eleemosynary institution. Dartmouth College v. Woodward, 4 Wheat. 518, 638, 4 L. Ed. 629. See post, "Charters, and Their Amendment, Repeal and Extension," VIII.

As to general right of regulation, and reason therefor, see dissenting opinions in Dodge v. Woolsey, 18 How. 331, 375, 15 L. Ed. 401; Northern Securities Co. v. United States, 193 U. S. 197, 398, 48 L. Ed. 679. See, also, dissenting opinion of Iredel, J., in Chisholm v. Georgia, 2 Dall. 419, 448, 1 L. Ed. 440, where it is said that a corporation can do no act but what is subject to the revision of a court of justice or some other authority within the government.

**Of consolidated corporation.**—See post, "Consolidation and Succession," XV.

**28 Eleemosynary corporations.**—Dartmouth College v. Woodward, 4 Wheat. 518, 675, 4 L. Ed. 629.

When a private eleemosynary corporation was thus created, by the charter of the crown, it was subject to no other control on the part of the crown, than what was expressly or implicitly reserved by the charter itself. Unless a power was reserved for this purpose, the crown could not in virtue of its prerogative, without the consent of the corporation, alter or amend the charter, or divest the corporation of any of its franchises, or add to them, or add to, or diminish, the number of the trustees, or remove any of the members, or change or control the administration of the charity, or compel the corporation to receive a new charter. Story, J., in Dartmouth College v. Woodward, 4 Wheat. 518, 675, 4 L. Ed. 629. See the title CHARITIES, vol. 3, p. 695.

**29. Regulation of business distinguished from internal affairs.**—Williams v. Gaylord, 186 U. S. 157, 165, 46 L. Ed. 1102.

away at all it can only be by words of positive grant, or something which is in law equivalent. If there is reasonable doubt, it must be resolved in favor of the existence of the power.<sup>30</sup> A corporation, in the transaction of its business, has the same rights, and is subject to the same control, as private individuals under the same circumstances. In the absence of any legislative regulation upon the subject, the courts must decide for it, as they do for private persons, when controversies arise, what is reasonable. But when the legislature steps in and prescribes a maximum of charge, it operates upon this corporation the same as it does upon individuals engaged in a similar business.<sup>31</sup>

**30. Regulation of rates.**—Freeport Water Co. v. Freeport, 180 U. S. 587, 599, 45 L. Ed. 679; Railroad Co. v. Maryland, 21 Wall. 456, 22 L. Ed. 678; Chicago, etc., R. Co. v. Iowa, 94 U. S. 155, 24 L. Ed. 94; Smyth v. Ames, 169 U. S. 466, 545, 43 L. Ed. 819; Peik v. Chicago, etc., R. Co., 94 U. S. 164, 24 L. Ed. 97; Winona, etc., R. Co. v. Blake, 94 U. S. 180, 24 L. Ed. 99; Ruggles v. Illinois, 108 U. S. 526, 531, 27 L. Ed. 812; Spring Valley Waterworks v. Schottler, 110 U. S. 347, 28 L. Ed. 173; Stone v. Farmers', etc., Trust Co., 116 U. S. 307, 325, 335, 29 L. Ed. 636; Stone v. Illinois Cent. R. Co., 116 U. S. 347, 352, 29 L. Ed. 650; Wabash, etc., R. Co. v. Illinois, 118 U. S. 557, 30 L. Ed. 244; Dow v. Beidelman, 125 U. S. 680, 31 L. Ed. 841; Chicago, etc., R. Co. v. Minnesota, 134 U. S. 418, 33 L. Ed. 970; Chicago, etc., R. Co. v. Wellman, 143 U. S. 339, 36 L. Ed. 176; Budd v. New York, 143 U. S. 517, 537, 36 L. Ed. 247; Reagan v. Farmers', etc., Trust Co., 154 U. S. 362, 38 L. Ed. 1014; St. Louis, etc., R. Co. v. Gill, 156 U. S. 649, 39 L. Ed. 567; Covington, etc., Turnpike Road Co. v. Sandford, 164 U. S. 578, 585, 41 L. Ed. 560; San Diego Land, etc., Co. v. National City, 174 U. S. 739, 43 L. Ed. 1154; Chicago, etc., R. Co. v. Thompson, 176 U. S. 167, 44 L. Ed. 417; Cotting v. Kansas City Stock Yards Co., 183 U. S. 79, 85, 46 L. Ed. 92.

That a state may, in matters of proprietary rights, exclude itself from the right to make regulations of rates to be charged for services rendered the public, or authorize municipal corporations to do so, when the power is clearly conferred, has been too frequently declared to admit of doubt. Vicksburg v. Vicksburg Waterworks Co., 206 U. S. 496, 508, 51 L. Ed. 1155; S. C., 202 U. S. 453, 50 L. Ed. 1102; 185 U. S. 65, 46 L. Ed. 808; Los Angeles v. Los Angeles City Water Co., 177 U. S. 558, 44 L. Ed. 886; Walla Walla v. Walla Walla Water Company, 172 U. S. 1, 7, 43 L. Ed. 341; New Orleans Waterworks Co. v. Rivers, 115 U. S. 674, 29 L. Ed. 525; Freeport Water Co. v. Freeport, 180 U. S. 587, 593, 45 L. Ed. 679.

**31. Power of regulating rates.**—Chicago, etc., R. Co. v. Iowa, 94 U. S. 155, 162, 24 L. Ed. 94; Reagan v. Mercantile Trust Co., 154 U. S. 418, 419, 38 L. Ed. 1030.

"In the Sinking-Fund Cases, 99 U. S.

700, 25 L. Ed. 496, it was said that whatever rules for the government of the affairs of a corporation might have been put into the charter when granted could afterwards be established by the legislature under its reserved power of amendment. Long before the constitution of 1879 was adopted in California, statutes had been passed in many of the states requiring water companies, gas companies, and other companies of like character to supply their customers at prices to be fixed by the municipal authorities of the locality; and, as an independent proposition, we see no reason why such a regulation is not within the scope of legislative power, unless prohibited by constitutional limitations or valid contract obligations. Whether expedient or not is a question for the legislature, not the courts." Spring Valley Waterworks v. Schottler, 110 U. S. 347, 353, 28 L. Ed. 173.

But a legislature cannot ordinarily prescribe what an individual or corporation, engaged in a purely private business, shall charge for services, hence purely private business will be excluded by construction from such regulative acts, though broad enough in terms to include it. Chesapeake, etc., Tel. Co. v. Manning, 186 U. S. 238, 246, 46 L. Ed. 1144.

In the words of Chief Justice Marshall in Providence Bank v. Billings, 4 Pet. 514, 561, 7 L. Ed. 939, "its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear." This rule is elementary, and the cases in our reports where it has been considered and applied are numerous. Freeport Water Co. v. Freeport, 180 U. S. 587, 599, 45 L. Ed. 679. See the titles CARRIERS, vol. 3, pp. 622, 638. RAILROADS; TURNPIKES AND TOLL ROADS; STREET RAILWAYS, and other titles treating of public service corporations, such as ELECTRICITY; GAS; WATER COMPANIES AND WATERWORKS; etc.

**General provisions as to rates not amounting to contract.**—See post, "Provisions of General Law Not Amounting to Contract." VIII, C, 1, b, (3).

**Over foreign corporations within jurisdiction.**—See the title FOREIGN CORPORATIONS.

**Regulation of rates by city under contract with corporation.**—See the titles IMPAIRMENT OF OBLIGATION OF

d. *Presumption against Immunity*.—Grants of immunity from legitimate governmental control are never to be presumed, but the presumptions are all the other way.<sup>32</sup>

2. BY STATE<sup>33</sup>—a. *Implied Power*.—There is an impliedly reserved power in the state legislature which creates a corporation, to investigate it on occasion, and inquire whether it has properly exercised its franchises.<sup>34</sup> Equally implied is the condition that the corporation shall be subject to such reasonable regulations, in respect to the general conduct of its affairs, as the legislature may, from time to time, prescribe, which do not materially interfere with or obstruct the substantial enjoyment of the privileges the state has granted, and serve only to secure the ends for which the corporation was created,<sup>35</sup> and this power is paramount to the corporation's power to regulate its own affairs, by by-law or otherwise,<sup>36</sup>

## CONTRACTS; MUNICIPAL CORPORATIONS.

**Surrender of exemption by acceptance of new legislation.**—See post, "Acceptance of New Legislation as Surrender of Exemption," VIII, C, 4, d.

**Under reserved right.**—See post, "Examples of Valid Regulations," VIII, C, 4, e, (4).

**32. Presumption.**—*Ruggles v. Illinois*, 108 U. S. 526, 531, 27 L. Ed. 812; *Illinois Cent. R. Co. v. Illinois*, 108 U. S. 541, 27 L. Ed. 818. See post, "Presumption against Immunity from Legislative Control," VIII, C, 2.

**Under charter regarded as contract.**—See post, "Cannot Affect Inalienable Rights," VIII, C, 3.

**33. As to forfeiture for misuser of franchise.**—See post, "Misuser or Nonuser of Franchise," XVII, B, 4, b.

**Interference with power of congress.**—See post, "By Congress," II, D, 3.

**Conditional grant of franchise.**—See ante, "Corporate Franchise," II, A, 3.

**Regulation of rates.**—See ante, "Rate Regulation," II, D, 1, c.

**Regulation of insurance companies.**—See the title INSURANCE.

**Privilege as witness.**—See the titles CONSTITUTIONAL LAW, ante, p. 1; WITNESSES.

**34. Power to investigate.**—A corporation is a creature of the state. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the state and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a state, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that

purpose. *Hale v. Henkel*, 201 U. S. 43, 75, 50 L. Ed. 652. See the title PRODUCTION OF DOCUMENTS.

**35. Right of regulation.**—*Chicago Life Ins. Co. v. Needles*, 113 U. S. 574, 580, 28 L. Ed. 1084; *Railroad Co. v. Maryland*, 21 Wall. 456, 473, 22 L. Ed. 678; *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155, 162, 24 L. Ed. 94; *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 23, 24 L. Ed. 708; *Sinking-Fund Cases*, 99 U. S. 700, 25 L. Ed. 496; *Ruggles v. Illinois*, 108 U. S. 526, 27 L. Ed. 812; *Hill v. Merchants' Mut. Ins. Co.*, 134 U. S. 515, 526, 33 L. Ed. 994; *Budd v. New York*, 143 U. S. 517, 537, 36 L. Ed. 247; *Eagle Ins. Co. v. Ohio*, 153 U. S. 446, 455, 38 L. Ed. 778; *New York, etc., R. Co. v. Pennsylvania*, 153 U. S. 628, 642, 38 L. Ed. 846; *Corry v. Baltimore*, 196 U. S. 466, 473, 49 L. Ed. 566; *Northern Securities Co. v. United States*, 193 U. S. 197, 347, 398, 48 L. Ed. 679.

"It cannot be successfully contended that the state may not prescribe the liabilities under which corporations created by its laws shall conduct their business in the future, where no limitation is placed upon its power in this respect by their charters. Legislation to this effect is found in the statute books of every state." *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205, 208, 32 L. Ed. 107; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 566, 43 L. Ed. 552. See, also, ante, "Regulation Generally," II, D, 1, b.

**36. Paramount to corporate regulations.**—*Ruggles v. Illinois*, 108 U. S. 526, 27 L. Ed. 812, followed in *Illinois Cent. R. Co. v. Illinois*, 108 U. S. 541, 27 L. Ed. 818. See *Stone v. Farmers', etc., Trust Co.*, 116 U. S. 307, 29 L. Ed. 636.

Where the amending section to a corporate charter provides that the company "shall have power to make, ordain, and establish all such by-laws, rules, and regulations as may be deemed expedient and necessary to fulfill the purposes and carry into effect the provisions of this act, and for the well ordering, regulating, and securing the affairs, business and interest of the company; provided, that the same be not repugnant to the constitution and laws of the United States, or of this state, or repugnant to this act," and by another section all the powers of the company



and is not lost by nonuser,<sup>37</sup> or the pledge or lease of its property by the corporation, where the property remains within the state.<sup>38</sup> Such regulations are not to be broadened by implication.<sup>38a</sup>

**Quasi Public Corporations.**—Quasi public corporations do not hold their property and exercise their franchises strictly in a private right, but from the nature of their business and their relation to society they are public corporations in a sense and are subject to public control and regulation, though with their grant of power to traverse the state with their lines of railroad it cannot be said that their right of private property attaches to every highway and watercourse over which their roads may be constructed. To so hold would render such enterprises, which are designed for the benefit of the state, obstacles to its progress and a menace to its general welfare. \* \* \* Of course, in the exercise of the right of the public interest, as against such corporations, the demand must be reasonable and must clearly appear to be for the public welfare.<sup>39</sup>

b. *Reserved Power.*—And the power to prescribe regulations may be expressly reserved, to the extent that the legislature deems advisable, and is then very ample.<sup>40</sup>

c. *Effect of Federal Constitution and Laws.*—It may define the powers the

were vested in and could be exercised by the directors, clearly under this authority no by-law can be established by the directors that does not conform to the laws of the state, and this, whether the laws were in force when the amended charter was granted or came into operation afterwards. The power of the company for the regulation of its own affairs was thus in express terms subjected to the legislative control of the state. The corporate power was a continuing one and intended for the ordering of the affairs of the company as circumstances might from time to time require. The reserved control by the state was also continuing in its nature, and manifestly intended for the protection of the public whenever in the judgment of the legislative department of the government the necessity should arise. *Ruggles v. Illinois*, 108 U. S. 526, 532, 27 L. Ed. 812; *Illinois Cent. R. Co. v. Illinois*, 108 U. S. 541, 27 L. Ed. 818.

**37. Unaffected by nonuser.**—A power of government which actually exists is not lost by nonuser. This is true of the power of regulating private corporations. *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155, 162, 24 L. Ed. 94.

**38. Unaffected by pledge or lease.**—Where a corporation subject to state regulation and control, leases or pledges its property, and after the pledge and after the lease the property remained within the jurisdiction of the state, it continued subject to the same governmental powers that existed before. *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155, 163, 24 L. Ed. 94.

**38a. Not broadened by implication.**—*Chesapeake, etc., Tel. Co. v. Manning*, 186 U. S. 238, 248, 6 L. Ed. 1144.

**39. Quasi public corporations.**—*Chicago, etc., R. Co. v. Illinois*, 200 U. S. 561, 588, 50 L. Ed. 596. See ante, "Classification," II, B. See the title POLICE POWER.

**40. Reserved power.**—Where the stat-

ute reserves to the general assembly the power to prescribe in the government of corporations "such regulations and provisions as it may deem advisable," the language is very comprehensive. Regarding it alone, it is difficult to conceive what objects of legislation are not covered by it, and it is of greater import than the usual reservation of the power to alter and amend the charters of corporations. *Freeport Water Co. v. Freeport*, 180 U. S. 587, 596, 45 L. Ed. 679.

The power to prescribe the compensation the corporation may exact for services rendered may be so reserved. *Stone v. Wisconsin*, 94 U. S. 181, 185, 24 L. Ed. 102, per Field, J., dissenting.

It cannot be contended that it was not intended by the terms, "regulations and provisions," "to interfere with the internal business management of the corporation itself," but regulate "those classes of acts which control the relation existing between stockholders as individuals and the corporation as an entirety, and the relations between corporations and third persons; that is, the manner of carrying on their business or exercising the powers of a corporation." The construction is too narrow. The statute made no distinction between the internal and the external business of corporations between their relations to stockholders and their relations to third persons. Such are but special exertions of the power which the legislature possesses. *Freeport Water Co. v. Freeport*, 180 U. S. 587, 596, 45 L. Ed. 679; *Danville Water Co. v. Danville*, 180 U. S. 619, 45 L. Ed. 696. See *Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989.

As to reservations of right to amend or repeal in charter or general law, and their effect as conferring power of regulation, see post, "Where Power Is Reserved to Amend or Repeal," VIII, C, 4.

corporation shall exercise, so far as the federal constitution is concerned,<sup>41</sup> although such regulations must not contravene that constitution.<sup>42</sup>

**Federal Corporation.**—Conceding to congress the power to remove a corporation incorporated by itself in all its operations from the control of the state, its silence in this respect is satisfactory assurance that, in so far as this corporation should engage in business wholly within the state, it intended that it should be subjected to the ordinary control exercised by the state over such business.<sup>43</sup>

d. *Exemption from Regulation and Waiver Thereof.*—See post, "Charter as Contract, and Amendment or Repeal Thereof," VIII, C.<sup>44</sup>

3. BY CONGRESS.—Every corporation created by a state is necessarily subject to the supreme law of the land.<sup>45</sup>

**Acceptance of Powers and Privileges from Congress.**—When congress confers large additional powers and privileges upon a state corporation already existing, which were solemnly accepted by the corporation, with the implied assent of the state, in this way that corporation voluntarily submitted itself to such legislative control by congress as was reserved under the power of amendment in the congressional grant.<sup>46</sup>

**Interference by State.**—Of course, every state has, in a general sense, plenary power over its corporations. But a state, when exerting power over a corporation of its creation, may not prevent or embarrass the exercise by con-

41. *Northern Securities Co. v. United States*, 193 U. S. 197, 349, 48 L. Ed. 679.

42. **Must not contravene federal constitution.**—"The state of Wisconsin can regulate its own corporations \* \* \* in subordination, however, to the constitution of the United States." *Insurance Co. v. Morse*, 20 Wall. 445, 455, 22 L. Ed. 365.

**As interference with interstate commerce.**—See the title INTERSTATE AND FOREIGN COMMERCE.

43. **Federal corporation.**—*Reagan v. Mercantile Trust Co.*, 154 U. S. 418, 419, 38 L. Ed. 1030. See *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, 552, 31 L. Ed. 790; *Central Pac. R. Co. v. California*, 162 U. S. 91, 123, 40 L. Ed. 903; *Western Union Tel. Co. v. Taggart*, 163 U. S. 1, 17, 41 L. Ed. 49.

There is nothing in the act creating this corporation indicating the intention of congress to so remove it, and nothing in the enforcement by the state of reasonable rates for transportation wholly within the state which will disable the corporation from discharging all the duties and powers conferred by congress. *Reagan v. Mercantile Trust Co.*, 154 U. S. 418, 419, 38 L. Ed. 1030.

44. As to the waiver by acceptance of new legislation or submission to regulation, see post, "Acceptance of New Legislation as Surrender of Exemption," VIII, C, 4, d.

45. **Power of congress.**—*Northern Securities Co. v. United States*, 193 U. S. 197, 346, 48 L. Ed. 679.

Where the corporation was chartered under the laws of a state, and it receives its franchise from the legislature of that state; such franchises, so far as they involve questions of interstate commerce, must also be exercised in subordination to

the power of congress to regulate such commerce, and in respect to this the general government may also assert a sovereign authority to ascertain whether such franchises have been exercised in a lawful manner, with a due regard to its own laws. Being subject to this dual sovereignty, the general government possesses the same right to see that its own laws are respected as the state would have with respect to the special franchises vested in it by the laws of the state. The powers of the general government in this particular in the vindication of its own laws, are the same as if the corporation had been created by an act of congress. It is not intended to intimate, however, that it has a general visitatorial power over state corporations. *Hale v. Henkel*, 201 U. S. 43, 75, 50 L. Ed. 652. See the title INTERSTATE AND FOREIGN COMMERCE.

"The federal court may not have power to forfeit the charter of the securities company; it may not declare how its shares of stock may be transferred on its books, nor prohibit it from acquiring real estate, nor diminish or increase its capital stock. All these and like matters are to be regulated by the state which created the company. But to the end that effect be given to the national will, lawfully expressed, congress may prevent that company, in its capacity as a holding corporation and trustee, from carrying out the purposes of a combination formed in restraint of interstate commerce." *Northern Securities Co. v. United States*, 193 U. S. 197, 346, 48 L. Ed. 679. See the title MONOPOLIES AND CORPORATE TRUSTS.

46. **Acceptance of powers and privileges from congress.**—*Sinking-Fund Cases*, 99 U. S. 700, 728, 25 L. Ed. 496.

gress of any power with which it is invested by the constitution.<sup>47</sup>

**Federal Corporation.**—Where a corporation is a creature of the United States, and a private corporation created for public purposes, and its property is to a large extent devoted to public uses, it is, therefore, subject to federal legislative control so far as its business affects the public interests.<sup>48</sup>

4. BY MUNICIPALITY.—If a corporation, although engaged in the business of interstate commerce, so carries on its business as to justify, at the hands of any municipality, a police supervision of the property and instrumentalities used therein, the municipality is not bound to furnish such supervision for nothing, and may, in addition to ordinary property taxation, subject the corporation to a charge for the expense of the supervision.<sup>49</sup>

**E. Corporate Property as Trust Fund**—1. IN GENERAL.—Generally speaking, the property and assets of a corporation become, upon its insolvency, a trust fund for the benefit of its stockholders and creditors.<sup>50</sup>

47. **Interference by state.**—*Northern Securities Co. v. United States*, 193 U. S. 197, 347, 48 L. Ed. 679.

"The state cannot lawfully do anything to impair or cripple the franchise, rights and privileges derived from the United States." *Central Pac. R. Co. v. California*, 162 U. S. 91, 165, 40 L. Ed. 903, per Harlan, J., dissenting.

In *Railroad Co. v. Maryland*, 21 Wall. 456, 473, 22 L. Ed. 678, the court recognized the principle that a state has plenary powers "over its own territory, its highways, its franchises, and its corporations," and observed that "we are bound to sustain the constitutional powers and prerogatives of the states, as well as those of the United States, whenever they are brought before us for adjudication, no matter what may be the consequences." The court does not say, and it is not to be supposed that it will ever say, that any power exists in a state to prevent the enforcement of a lawful enactment of congress, or to invest any of its corporations, in whatever business engaged, with authority to disregard such enactment or defeat its legitimate operation. *Northern Securities Co. v. United States*, 193 U. S. 197, 347, 48 L. Ed. 679.

48. **Federal corporation.**—*Sinking-Fund Cases*, 99 U. S. 700, 719, 25 L. Ed. 496; *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155, 24 L. Ed. 94.

Its relationship to a federal corporation may bear a two-fold aspect, that of a sovereign and legislative power over its creature and that arising out of contract with such corporation. Such is the relation of the federal government to the Union Pacific Railroad Company. See *Sinking-Fund Cases*, 99 U. S. 700, 724, 25 L. Ed. 496, where it is said: "The United States occupy towards this corporation a two-fold relation—that of sovereign and that of creditor. *United States v. Union Pac. R. Co.*, 98 U. S. 569, 25 L. Ed. 143. Their rights as sovereign are not crippled because they are creditors, and their privileges as creditors are not enlarged by the charter because of their sovereignty. They cannot, as creditors, demand pay-

ment of what is due them before the time limited by the contract. Neither can they, as sovereign or creditors, require the company to pay the other debts it owes before they mature. But out of regard to the rights of the subsequent lienholders and stockholders, it is not only their right, but their duty, as sovereign, so see to it that the current stockholders do not, in the administration of the affairs of the corporation, appropriate to their own use that which in equity belongs to others." See post, "What Constitutes Impairment of the Contract," VIII, C. d.

"The government sustains two distinct relations to the railroad company, and, in considering her rights under this statute, it is important to keep them separate. The company is organized under, and owes its corporate existence to, an act of congress. The government has all the rights which belong to any other government as a sovereign and legislative power over this creation of that power. That this power should not be too much crippled by the doctrine that a charter is a contract, the eighteenth section declares that congress may at any time, having due regard for the rights of the companies named therein, add to, alter, amend, or repeal the act. The power of congress, therefore, in its sovereign and legislative capacity over this corporation is very great. The government, however, holds another very important relation, namely, that of contract." *United States v. Union Pac. R. Co.*, 98 U. S. 569, 613, 25 L. Ed. 143.

**Creation of sinking fund.**—See post, "Examples of Valid Regulations," VIII, C, 4, e. (4).

49. **Regulation by municipality.**—*Atlantic, etc., Tel. Co. v. Philadelphia*, 190 U. S. 160, 164, 47 L. Ed. 995. See the titles CONSTITUTIONAL LAW, ante, p. 1; INTERSTATE AND FOREIGN COMMERCE; LICENSES; MUNICIPAL CORPORATIONS; POLICE POWER.

50. **Corporate property as trust fund.**—*Mellen v. Moline, etc., Iron Works*, 131 U. S. 352, 366, 33 L. Ed. 178; *Wabash, etc., R. Co. v. Ham*, 114 U. S. 587, 594, 29



2. CREDITORS' PREFERENCE OVER STOCKHOLDERS.—The rule is well settled that stockholders are not entitled to any share of the capital stock nor to any dividend of the profits until all the debts of the corporation are paid, for the trust is first and primarily for creditors.<sup>51</sup>

L. Ed. 235; *Graham v. Railroad Co.*, 102 U. S. 148, 161, 26 L. Ed. 106; *Potts v. Wallace*, 146 U. S. 689, 700, 36 L. Ed. 1135; *McDonald v. Williams*, 174 U. S. 397, 401, 43 L. Ed. 1022; *Hollins v. Brierfield, etc.*, *Iron Co.*, 150 U. S. 371, 383, 385, 37 L. Ed. 1113; *Citizens' Savings, etc., Co. v. Illinois Cent. R. Co.*, 205 U. S. 46, 55, 51 L. Ed. 703. See *Peters v. Bain*, 133 U. S. 670, 691, 33 L. Ed. 696; *County of Morgan v. Allen*, 103 U. S. 498, 508, 26 L. Ed. 498; *Farrington v. Tennessee*, 95 U. S. 679, 24 L. Ed. 558; *Dewing v. Perdicaries*, 96 U. S. 193, 196, 24 L. Ed. 654; *New Albany v. Burke*, 11 Wall. 96, 106, 20 L. Ed. 155; *Sanger v. Upton*, 91 U. S. 56, 60, 23 L. Ed. 220; *Curran v. Arkansas*, 15 How. 304, 308, 14 L. Ed. 705; *Richmond v. Irons*, 121 U. S. 27, 48, 30 L. Ed. 864; *Meriwether v. Garrett*, 102 U. S. 472, 512, 26 L. Ed. 197; *Scammon v. Kimball*, 92 U. S. 362, 367, 23 L. Ed. 483; *Railroad Co. v. Howard*, 7 Wall. 392, 416, 19 L. Ed. 117; *Mumma v. Potomac Co.*, 8 Pet. 281, 286, 8 L. Ed. 945.

"In *Graham v. Railroad Co.*, 102 U. S. 148, 161, 26 L. Ed. 106, it was said by Mr. Justice Bradley, in the course of his opinion, that 'When a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors. And a court of equity, at the instance of the proper parties, will then make those funds trust funds, which, in other circumstances, are as much the absolute property of the corporation as any man's property is his.'" *McDonald v. Williams*, 174 U. S. 397, 401, 43 L. Ed. 1022. See, also, *Hollins v. Brierfield, etc.*, *Iron Co.*, 150 U. S. 371, 383, 385, 37 L. Ed. 1113; *Mumma v. Potomac Co.*, 8 Pet. 281, 286, 8 L. Ed. 945; *County of Morgan v. Allen*, 103 U. S. 498, 509, 26 L. Ed. 498; *Wabash, etc., R. Co. v. Ham*, 114 U. S. 587, 594, 29 L. Ed. 235; *Mellen v. Moline, etc.*, *Iron Works*, 131 U. S. 352, 366, 33 L. Ed. 178; *Richardson v. Green*, 133 U. S. 30, 44, 33 L. Ed. 516. See *Brown v. Lake Superior Iron Co.*, 134 U. S. 530, 534, 33 L. Ed. 1021; *Blake v. McClung*, 172 U. S. 239, 254, 43 L. Ed. 432, reaffirmed in *Blake v. McClung*, 176 U. S. 59, 44 L. Ed. 371; *Citizens' Savings, etc., Co. v. Illinois Cent. R. Co.*, 205 U. S. 46, 55, 51 L. Ed. 703.

"Not simply of stockholders and creditors residing in a particular state, but all stockholders and creditors of whatever state they may be citizens." *Blake v. McClung*, 172 U. S. 239, 254, 43 L. Ed. 432, reaffirmed in *Blake v. McClung*, 176 U. S. 59, 44 L. Ed. 371.

"Insolvency is a most important and material fact, not only with individuals

but with corporations, and with the latter as with the former the mere fact of its existence may change radically and materially its rights and obligations. Where there is no statute providing what particular act shall be evidence of insolvency or bankruptcy, it may be and it sometimes is quite difficult to determine the fact of its existence at any particular period of time. Although no trust exists while the corporation is solvent, the fact which creates the trust is the insolvency, and when that fact is established, at that instant the trust arises. To prove the instant of creation may be almost impossible, and yet its existence at some time may very easily be proved. What the precise nature and extent of the trust is, even in such case, may be somewhat difficult to accurately define, but it may be admitted in some form and to some extent to exist in a case of insolvency. Hence it must be admitted that the law does create a distinction between solvency and insolvency, and that from the moment when the latter condition is established the legality of acts thereafter performed will be decided by very different principles than in a case of solvency. And so of acts committed in contemplation of insolvency. The fact of insolvency must be proved in order to show the act was one committed in contemplation thereof." *McDonald v. Williams*, 174 U. S. 397, 404, 43 L. Ed. 1022.

"When a corporation is solvent, the theory that its capital is a trust fund upon which there is any lien for the payment of its debts has in fact very little foundation. No general creditor has any lien upon the fund under such circumstances, and the right of the corporation to deal with its property is absolute so long as it does not violate its charter or the law applicable to such corporation." *McDonald v. Williams*, 174 U. S. 397, 401, 43 L. Ed. 1022. See the titles CREDITORS' SUITS; DISMISSAL, DISCONTINUANCE AND NONSUIT.

**After dissolution.**—See post, "Effects and Consequences," XVII, C.

**Effect of consolidation or succession.**—See post, "Consolidation and Succession," XV.

**Capital stock and unpaid subscription as trust fund.**—See the title STOCK AND STOCKHOLDERS.

**Conveyance in fraud of creditors.**—See the title FRAUDULENT AND VOLUNTARY CONVEYANCES.

51. **Creditors' preference over stockholders.**—*Railroad Co. v. Howard*, 7 Wall. 392, 409, 19 L. Ed. 117; *Curran v. Arkansas*, 15 How. 304, 14 L. Ed. 705; *Barings v. Dabney*, 19 Wall. 1, 22 L. Ed. 90; *Scammon v.*

3. NATURE OF TRUST.—But the trust is not a direct or express trust in any true and complete sense,<sup>52</sup> and this doctrine does not give stockholders or simple contract creditors of the corporation, solvent or insolvent, any lien on its property or any direct trust charged thereon,<sup>53</sup> although the corporation has

Kimball, 92 U. S. 362, 23 L. Ed. 483; *Graham v. Railroad Co.*, 102 U. S. 148, 161, 26 L. Ed. 106; *Johnston v. Lafin*, 103 U. S. 800, 805, 26 L. Ed. 532; *Wabash, etc., R. Co. v. Ham*, 114 U. S. 587, 594, 595, 29 L. Ed. 235; *Richmond v. Irons*, 121 U. S. 27, 48, 30 L. Ed. 864; *Richardson v. Green*, 133 U. S. 30, 44, 33 L. Ed. 516; *Chicago, etc., R. Co. v. Third Nat. Bank*, 134 U. S. 276, 286, 33 L. Ed. 900. See, also, *Smith Middlings Purifier Co. v. McGroarty*, 136 U. S. 237, 241, 34 L. Ed. 346; *Hollins v. Brierfield, etc., Iron Co.*, 150 U. S. 371, 383, 37 L. Ed. 1113; *Blake v. McClung*, 172 U. S. 239, 254, 43 L. Ed. 432; *McDonald v. Williams*, 174 U. S. 397, 403, 43 L. Ed. 1022; *Blake v. McClung*, 176 U. S. 59, 63, 44 L. Ed. 371.

"Creditors are preferred to stockholders on account of the peculiar trust in their favor, and because the latter, as constituent members of the corporate body, are regarded as sustaining, in that aspect, the same relation to the former as that sustained by the corporation." This doctrine applies to a fund derived from a voluntary sale and transfer of the property and franchises. *Railroad Co. v. Howard*, 7 Wall. 392, 411, 19 L. Ed. 117.

The assets of an insolvent corporation are a fund for the payment of its debts. If they are held by the corporation itself, and so invested as to be subject to legal process, they may be levied on by such process. If they have been distributed among the stockholders, or gone into the hands of others than bona fide creditors or purchasers, leaving debts of the corporation unpaid, such holders take the property charged with the trust in favor of creditors, which a court of equity will enforce, and compel the application of the property to the satisfaction of their debts. The creditors have a lien or right of priority of payment over stockholders. *Curran v. Arkansas*, 15 How. 304, 307, 14 L. Ed. 705. See *Meriwether v. Garrett*, 102 U. S. 472, 533, 26 L. Ed. 197.

52. Qualified trust only.—While it is true language has been frequently used as in *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220; *Terry v. Anderson*, 95 U. S. 628, 24 L. Ed. 365; *Case v. Beauregard*, 101 U. S. 688, 25 L. Ed. 1004, to the effect that the assets of a corporation are a trust fund held by a corporation for the benefit of creditors, this has not been to convey the idea that there is a direct and express trust attached to the property. As said in 2 *Pomeroy's Equity Jurisprudence*, § 1046, they "are not in any true and complete sense trusts, and can only be called so by way of analogy or metaphor." To

the same effect are decisions of this court. The case of *Graham v. Railroad Co.*, 102 U. S. 148, 26 L. Ed. 106, was an action by a subsequent creditor to subject certain property, alleged to have been wrongfully conveyed by the corporation debtor, to the satisfaction of his judgment. And the very proposition here presented was then considered. *Hollins v. Brierfield, etc., Iron Co.*, 150 U. S. 371, 382, 37 L. Ed. 1113. See *Smith Middlings Purifier Co. v. McGroarty*, 136 U. S. 237, 241, 34 L. Ed. 346.

53. "In *Hollins v. Brierfield, etc., Iron Co.*, 150 U. S. 371, 385, 37 L. Ed. 1113, it was observed that a private corporation, when it becomes insolvent, holds its assets subject to somewhat the same kind of equitable lien and trust in favor of its creditors that exists in favor of the creditors of a partnership after becoming insolvent, and that in such case a lien and trust will be enforced by a court of equity in favor of creditors. These principles obtain, no doubt, in Tennessee, and will be applied by its courts in all appropriate cases between citizens of that state, without making any distinction between them." *Blake v. McClung*, 172 U. S. 239, 254, 43 L. Ed. 432.

"A party may deal with a corporation in respect to its property in the same manner as with an individual owner, and with no greater danger of being held to have received into his possession property burdened with a trust or lien. The officers of a corporation act in a fiduciary capacity in respect to its property in their hands, and may be called to an account for fraud or sometimes even mere mismanagement in respect thereto; but as between itself and its creditors the corporation is simply a debtor, and does not hold its property in trust, or subject to a lien in their favor, in any other sense than does an individual debtor. That is certainly the general rule, and if there be any exceptions thereto they are not presented by any of the facts in this case. Neither the insolvency of the corporation, nor the execution of an illegal trust deed, nor the failure to collect in full all stock subscriptions, nor all together gave to these simple contract creditors any lien upon the property of the corporation, nor charged any direct trust thereon." *Hollins v. Brierfield, etc., Iron Co.*, 150 U. S. 371, 385, 386, 37 L. Ed. 1113. quoted in *McDonald v. Williams*, 174 U. S. 397, 402, 43 L. Ed. 1022. See *Fogg v. Blair*, 133 U. S. 534, 541, 33 L. Ed. 721.

The cases of *Wabash, etc., R. Co. v. Ham*, 114 U. S. 587, 29 L. Ed. 235; *Hawkins v. Glenn*, 131 U. S. 319, 332, 33 L. Ed.



been dissolved by voluntary surrender or sale of its corporate franchises.<sup>54</sup>

4. UNAFFECTED BY TRANSFER OR LEASE.—Equity regards the property of a corporation as held in trust for the payment of the debts of the corporation, and recognizes the right of creditors to pursue it into whosoever possession it may be transferred, unless it has passed into the hands of a bona fide purchaser,<sup>55</sup> and a corporation in debt cannot transfer its entire property by lease, so as to prevent the application of the property, at its full value, to the sat-

184; *Fogg v. Blair*, 133 U. S. 534, 541, 33 L. Ed. 721, "negative the idea of any direct trust or lien attaching to the property of a corporation in favor of its creditors, and at the same time are entirely consistent with those cases in which the assets of a corporation are spoken of as a trust fund, using the term in the sense that we have said it was used." *Hollins v. Brierfield, etc., Iron Co.*, 150 U. S. 371, 385, 37 L. Ed. 1113.

"In *Wabash, etc., R. Co. v. Ham*, 114 U. S. 587, 594, 29 L. Ed. 235, Mr. Justice Gray, in delivering the opinion of the court, said: 'The property of a corporation is doubtless a trust fund for the payment of its debts, in the sense that when the corporation is lawfully dissolved and all its business wound up, or when it is insolvent, all its creditors are entitled in equity to have their debts paid out of the corporate property before any distribution thereof among the stockholders. It is also true, in the case of a corporation as in that of a natural person, that any conveyance of property of the debtor, without authority of law, and in fraud of existing creditors, is void as against them.' These cases, while not involving precisely the same question now before us, show there is no well-defined lien of creditors upon the capital of a corporation while the latter is a solvent and going concern, so as to permit creditors to question, at the time, the disposition of the property." *McDonald v. Williams*, 174 U. S. 397, 403, 43 L. Ed. 1022. See, also, *Blake v. McClung*, 172 U. S. 239, 254, 43 L. Ed. 432 quoting the first sentence of the above paragraph; reaffirmed in *Blake v. McClung*, 176 U. S. 59, 44 L. Ed. 371; *Richardson v. Green*, 133 U. S. 30, 44, 33 L. Ed. 516.

"The court does not attempt to determine who are proper parties to maintain a suit for the administration of the assets of an insolvent corporation. All that it decides is, that when a court of equity does take into its possession the assets of an insolvent corporation, it will administer them on the theory that they in equity belong to the creditors and stockholders rather than to the corporation itself. In other words, and that is the idea which underlies all these expressions in reference to 'trust' in connection with the property of a corporation, the corporation is an entity, distinct from its stockholders as from its creditors. Solvent, it holds its property as any individual holds his, free from the touch of a cred-

itor who has acquired no lien; free also from the touch of a stockholder who, though equitably interested in, has no legal right to the property. Becoming insolvent, the equitable interest of the stockholders in the property, together with their conditional liability to the creditors, places the property in a condition of trust, first, for the creditors, and then for the stockholders. Whatever of trust there is arises from the peculiar and diverse equitable rights of the stockholders as against the corporation in its property and their conditional liability to its creditors. It is rather a trust in the administration of the assets after possession by a court of equity than a trust attaching to property, as such, for the direct benefit of either creditor or stockholder." *Hollins v. Brierfield, etc., Iron Co.*, 150 U. S. 371, 383, 37 L. Ed. 1113, quoted in *McDonald v. Williams*, 174 U. S. 397, 402, 43 L. Ed. 1022.

54. "Moneys derived from the sale and transfer of the franchises and capital stock of an incorporated company are assets of the corporation, and as such constitute a fund for the payment of its debts, and if held by the corporation itself, and so invested as to be subject to legal process, the fund may be levied on by such process; but if the fund has been distributed among the stockholders, or passed into the hands of other than bona fide creditors or purchasers, leaving any debts of the corporation unpaid, the established rule in equity is, that such holders take the fund charged with the trust in favor of creditors, which a court of equity will enforce, and compel the application of the same to the satisfaction of their debts." *Railroad Co. v. Howard*, 7 Wall. 392, 410, 19 L. Ed. 117. See 2 *Storv's Eq.*, 9th Ed., § 1252; *Scammon v. Kimball*, 92 U. S. 362, 367, 23 L. Ed. 483; *Mumma v. Potomac Co.*, 8 Pet. 281, 286, 8 L. Ed. 945; *Curran v. Arkansas*, 15 How. 304, 307, 14 L. Ed. 705. See post, "Effects and Consequences." XVII, C, for rule of distribution on dissolution. As to distribution on insolvency, see post, "Distribution and Priorities." XVII, A, 2.

55. **Following transferred property.**—*Railroad Co. v. Howard*, 7 Wall. 392, 409, 19 L. Ed. 117; *Curran v. Arkansas*, 15 How. 304, 14 L. Ed. 705; *Bacon v. Robertson*, 18 How. 480, 486, 15 L. Ed. 499; *Scammon v. Kimball*, 92 U. S. 362, 367, 23 L. Ed. 483; *Wabash, etc., R. Co. v. Ham*, 114 U. S. 587, 594, 29 L. Ed. 235; *Bank v. Alden*, 129 U. S. 372, 379, 32 L. Ed. 725;



isfaction of its debts.<sup>56</sup> But the right to compel the application of property so transferred to the payment of debts, cannot be invoked by a stockholder who consented to and participated in such misappropriation.<sup>57</sup>

Chicago, etc., *R. Co. v. Third Nat. Bank*, 134 U. S. 276, 286, 33 L. Ed. 900.

"Regarded as the trustee of the corporate fund, the corporation is bound to administer the same in good faith for the benefit of creditors and stockholders, and all others interested in its pecuniary affairs, and any one receiving any portion of the fund by voluntary transfer, or without consideration, may be compelled to account to those for whose use the fund is held." *Railroad Co. v. Howard*, 7 Wall. 392, 411, 19 L. Ed. 117.

Its property constitutes the fund for payment of debts, and if the officers improperly attempt to divert it from its legitimate uses, they must be restrained. *Sinking-Fund Cases*, 99 U. S. 700, 722, 25 L. Ed. 496.

**State as stockholder.**—The fact that the capital stock of this corporation came from the state which was solely interested in the profits of the business, does not affect the complainant's right, as a creditor, to be paid out of its property; a right which follows the fund into the hands of every person, save a bona fide creditor or purchaser, and which a court of equity is bound to enforce by its decree against any party except such a creditor or purchaser capable by law of being brought within its jurisdiction. *Curran v. Arkansas*, 15 How. 304, 309, 14 L. Ed. 705. See, however, *Fogg v. Blair*, 133 U. S. 534, 541, 33 L. Ed. 721.

So far, as the property of the corporation has become vested in the state or gone to its use, it is so vested and used, charged with a trust in favor of this complainant, as an unpaid creditor, unless there is something in the character of the parties, or the consideration upon which, or the operation of the laws by force of which, it has been transferred, taking the case out of the principles above laid down. *Curran v. Arkansas*, 15 How. 304, 308, 14 L. Ed. 705, cited in *Hawthorne v. Calef*, 2 Wall. 10, 21, 17 L. Ed. 776; *Barings v. Dabney*, 19 Wall. 1, 9, 22 L. Ed. 90.

**56. Lease.**—*Chicago, etc., R. Co. v. Third Nat. Bank*, 134 U. S. 276, 286, 33 L. Ed. 900, citing *Central R., etc., Co. v. Pettus*, 113 U. S. 116, 124, 28 L. Ed. 915; *Mellen v. Moline, etc., Iron Works*, 131 U. S. 352, 366, 33 L. Ed. 178.

Where one corporation, from a loan secured on the property of another, leased to it, received nearly three millions of dollars, part of which it used for the benefit of the lessor company, and part it appropriated to its own benefit, it cannot do this, and let the lessor company's debt go unpaid, but must pay it itself. *Chicago, etc., R. Co. v. Third Nat. Bank*, 134 U. S. 276, 287, 33 L. Ed. 900.

Where by neglecting to pay the debts

of the lessor, it appropriated a large amount of the proceeds of the trust deed upon the lessor's property to its own benefit, and the improvement of its own property, here clearly was a diversion of funds, which the creditors of the lessor might follow in equity. This is only the application of familiar doctrine. The properties of a corporation constitute a trust fund for the payment of its debts; and, when there is a misappropriation of the funds of a corporation, equity, on behalf of the creditors of such corporation, will follow the funds so diverted. *Chicago, etc., R. Co. v. Third Nat. Bank*, 134 U. S. 276, 286, 33 L. Ed. 900.

Where the original bill alleged the misappropriation of funds and the answer to the amendment to the cross bill did not deny the fact of such misappropriation, or aver that it was less than the amount of complainant's claims; and as the principal officer of the company was unable to tell how much was thus expended, and did not know of any one who could furnish the information, the court did not err in assuming that the amount of such misappropriation was in excess of the bank's claims, and rendering a decree accordingly. *Chicago, etc., R. Co. v. Third Nat. Bank*, 134 U. S. 276, 290, 33 L. Ed. 900.

**57. Consenting stockholder cannot complain.**—It might be well contended that a conveyance of the corporate property constituting a trust fund to the stockholders, upon their resolution, could not deprive a creditor, not consenting thereto, of his right to compel the application of that fund to the payment of his demand, or of a ratable proportion with other creditors. But the right to compel such application cannot be invoked by a stockholder consenting to such disposition of the trust fund, and himself participating in its appropriation, as in the present case. *Bank v. Alden*, 129 U. S. 372, 379, 32 L. Ed. 725.

"That the property when reconveyed was sold by the holders at prices which, if the company could have obtained them, would have made its retention advisable, does not alter the transaction. The case of *Thompson v. Bemis Paper Co.*, 127 Mass. 595, supports this conclusion. There a judgment creditor of the corporation, unable to enforce his judgment by execution, filed a bill in equity on behalf of himself and all other creditors, against the corporation and certain stockholders, to enforce a personal liability of the latter, on the ground that the capital of the corporation had been withdrawn and paid to the stockholders. He had at that time contracted for eight shares of the stock, paid for them in part, and voted as owner

**F. Corporation as Person or Citizen**—1. **AS PERSON OR INHABITANT**—*a. As Person*.—A corporation, although a fiction of law, is recognized for some purposes as a person,<sup>58</sup> although a metaphysical one,<sup>59</sup> and the constant tendency of judicial decisions in modern times has been in the direction of putting corporations upon the same footing as natural persons in regard to the jurisdiction of suits by or against them.<sup>60</sup> And for purposes of jurisdiction as a citizen, it is not endowed with the inalienable rights of a natural person. It is an artificial person, created and existing only for the convenient transaction of business.<sup>61</sup>

at meetings of the stockholders. At one of the meetings the sum of \$16,528, being the amount of the cash assets of the corporation, was withdrawn from the capital of the corporation and divided among the stockholders in proportion to the amount of stock held by them respectively. The plaintiff was present and voted in favor of the division. Upon these facts it was held that the bill could not be sustained, although upon its filing the plaintiff was the absolute owner of the eight shares; and that he could not make the act which he had favored and voted for a ground for charging the stockholders with a personal liability for a debt due from the corporation to himself." *Bank v. Alden*, 129 U. S. 372, 380, 32 L. Ed. 725. See, generally, the title **FRAUDULENT AND VOLUNTARY CONVEYANCES**.

**58. Corporation as person**.—*Northern Securities Co. v. United States*, 193 U. S. 197, 362, 48 L. Ed. 679 (per Brewer, J., concurring). *Bank v. Earle*, 13 Pet. 519, 588, 10 L. Ed. 274; *United States v. Amedy*, 11 Wheat. 392, 412, 6 L. Ed. 502; *Beaston v. Farmers' Bank*, 12 Pet. 102, 135, 9 L. Ed. 1017; *Pinney v. Nelson*, 183 U. S. 144, 149, 46 L. Ed. 125; *United States Bank v. Deveaux*, 5 Cranch 61, 62, 88, 3 L. Ed. 38.

A corporation is in law, for civil purposes, deemed a person. *Railroad Co. v. Harris*, 12 Wall. 65, 81, 20 L. Ed. 354; *United States v. Amedy*, 11 Wheat. 392, 411, 6 L. Ed. 502.

The chief difference between the natural and the artificial person is that the former may do whatever is not forbidden by law, but the latter only what is authorized by its charter. *Railroad Co. v. Harris*, 12 Wall. 65, 81, 20 L. Ed. 354.

"It is, indeed, a mere artificial being, invisible and intangible; yet it is a person, for certain purposes, in contemplation of law, and has been recognized as such by the decisions of this court." *Bank v. Earle*, 13 Pet. 519, 588, 10 L. Ed. 274; *Louisville, etc., R. Co. v. Letson*, 2 How. 497, 555, 11 L. Ed. 353; *Ohio, etc., R. Co. v. Wheeler*, 1 Black. 286, 295, 17 L. Ed. 130; *United States Bank v. Deveaux*, 5 Cranch 61, 89, 3 L. Ed. 38, where it is said to be regarded, for the general purposes and objects of a law, as having corporeal qualities, though really incorporeal and invisible.

In *Beaston v. Farmers' Bank*, 12 Pet. 102, 134, 9 L. Ed. 1017, it is said: "No authority has been adduced to show that a

corporation may not, in the construction of statutes, be regarded as a natural person; while, on the contrary, authorities have been cited which show that corporations are to be deemed and considered as persons, when the circumstances in which they are placed are identical with those of natural persons, expressly included in such statutes."

**59. Metaphysical**.—*Bank v. Wister*, 2 Pet. 318, 323, 7 L. Ed. 437.

**60. For purposes of jurisdiction**.—*Barrow Steamship Co. v. Kane*, 170 U. S. 100, 106, 42 L. Ed. 964; *Northern Securities Co. v. United States*, 193 U. S. 197, 362, 48 L. Ed. 679 (per Brewer, J., concurring). See the titles **COURTS**; **JURISDICTION**.

**61. Artificial person**.—*Northern Securities Co. v. United States*, 193 U. S. 197, 362, 48 L. Ed. 679 (per Brewer, J., concurring).

In *Louisville, etc., R. Co. v. Letson*, 2 How. 497, 557, 11 L. Ed. 353, prior cases were reviewed; and this doctrine laid down: "That a corporation created by and doing business in a particular state, is to be deemed to all intents and purposes as a person, although an artificial person, \* \* \* capable of being treated as a citizen of that state, as much as a natural person." *Doctor v. Harrington*, 196 U. S. 579, 586, 49 L. Ed. 606. See post, "As Citizen." II. F. 2. And see the titles **COURTS**; **JURISDICTION**. As to venue of suit against, see the title **VENUE**.

**Statute giving priority to debts due United States**.—Corporations are to be deemed and considered persons, within the provisions of the fifth section of the act of congress of 1797; and the priority of the United States exists as to debts due by them to the United States. *Beaston v. Farmers' Bank*, 12 Pet. 102, 9 L. Ed. 1017.

Even though it cannot be brought within all the predicaments of the statute giving this priority, it can be brought within any one or more of them. *Beaston v. Farmers' Bank*, 12 Pet. 102, 135, 9 L. Ed. 1017.

**Under insolvent laws of Louisiana**.—A corporation, though a person in the legal sense of the term, is not embraced within the intent and meaning of the insolvent laws of Louisiana. *Holdane v. Sumner*, 15 Wall. 600, 21 L. Ed. 254.

**Under treaty of peace with England**.—A corporation is a person within the



**Penal Statutes.**—Corporations are deemed "persons" within the purview of the penal statutes.<sup>62</sup>

**Protection of Laws Generally.**—But the court, when necessary to afford the protection of the laws, will look beyond the name of a corporation to the individuals whom it represents.<sup>63</sup>

**Fourteenth Amendment.**—Private corporations are persons within the meaning of the fourteenth amendment to the federal constitution,<sup>64</sup> except in

meaning and protection of the treaty of peace with Great Britain after the revolution (1783), preventing the forfeiture of lands as a consequence of the revolution. *Society for the Propagation of the Gospel v. New Haven*, 8 Wheat. 464, 5 L. Ed. 662. See, also, *McKinley v. Wheeler*, 130 U. S. 630, 636, 32 L. Ed. 1048.

**62. In the purview of penal statutes.**—*United States v. Amedy*, 11 Wheat. 392, 6 L. Ed. 502; *Beaston v. Farmers' Bank*, 12 Pet. 102, 135, 9 L. Ed. 1017. See, also, *Bank v. Earle*, 13 Pet. 519, 588, 10 L. Ed. 274; *Pinney v. Nelson*, 183 U. S. 144, 149, 46 L. Ed. 125.

**Statute punishing destruction of vessel.**—The terms "any person or persons," in the crimes act of the 26th of March, 1804, c. 393, § 2, relating to destroying a vessel, with intent to prejudice the underwriters, extend to corporations and bodies politic, as well as to natural persons. *United States v. Amedy*, 11 Wheat. 392, 6 L. Ed. 502. See *Beaston v. Farmers' Bank*, 12 Pet. 102, 135, 9 L. Ed. 1017.

**63. Protection of laws.**—*McKinley v. Wheeler*, 130 U. S. 630, 636, 32 L. Ed. 1048; *Society for the Propagation of the Gospel v. New Haven*, 8 Wheat. 464, 491, 5 L. Ed. 662; *Insurance Co. v. Morse*, 20 Wall. 445, 455, 22 L. Ed. 365; *Hale v. Henkel*, 201 U. S. 43, 76, 50 L. Ed. 652, where it is said: "In organizing itself as a collective body, it waives no constitutional immunities appropriate to such body."

"On the same principle, provisions of law, in terms applicable to persons, securing to them the enjoyment of their property, or affording means for its protection, are held to embrace private corporations." *McKinley v. Wheeler*, 130 U. S. 630, 635, 32 L. Ed. 1048.

"A corporation has the same right to the protection of the laws as a natural citizen, and the same right to appeal to all the courts of the country. The rights of an individual are not superior in this respect to that of a corporation." *Insurance Co. v. Morse*, 20 Wall. 445, 455, 22 L. Ed. 365. See the title CONSTITUTIONAL LAW, ante, p. 352, et seq.

**64. Under 14th amendment.**—*Charlotte, etc., R. v. Gibbs*, 142 U. S. 386, 391, 35 L. Ed. 1051; *Santa Clara County v. Southern Pac. R. Co.*, 118 U. S. 394, 30 L. Ed. 118; *Pembina, etc., Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 189, 31 L. Ed. 650; *Missouri Pac. R. Co. v. Mckeay*, 127 U. S. 205, 209, 32 L. Ed. 107; *Minneapolis, etc., R. Co. v. Beckwith*, 129 U.

S. 26, 32 L. Ed. 585; *Home Ins. Co. v. New York*, 134 U. S. 594, 606, 33 L. Ed. 1025; *Covington, etc., Turnpike Road Co. v. Sandford*, 164 U. S. 578, 592, 41 L. Ed. 560; *Gulf, etc., R. Co. v. Ellis*, 165 U. S. 150, 154, 41 L. Ed. 666; *Smyth v. Ames*, 169 U. S. 466, 522, 43 L. Ed. 819; *Blake v. McClung*, 172 U. S. 239, 259, 43 L. Ed. 432; *Lake Shore, etc., R. Co. v. Smith*, 173 U. S. 684, 690, 43 L. Ed. 858; *Hale v. Henkel*, 201 U. S. 43, 76, 50 L. Ed. 652. See the title CONSTITUTIONAL LAW, ante, p. 1, for full treatment and citation of cases.

The provision in the fourteenth amendment to the constitution, which forbids a state to deny to any person within its jurisdiction the equal protection of the laws, applies to corporations. *Santa Clara County v. Southern Pac. R. Co.*, 118 U. S. 394, 396, 30 L. Ed. 118; *Philadelphia Fire Ass'n v. New York*, 119 U. S. 110, 120, 30 L. Ed. 342 per Harlan, J., dissenting. *Pembina, etc., Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. Ed. 650; *Minneapolis, etc., R. Co. v. Beckwith*, 129 U. S. 26, 28, 32 L. Ed. 585; *Covington, etc., Turnpike Road Co. v. Sandford*, 164 U. S. 578, 592, 41 L. Ed. 560; *Gulf, etc., R. Co. v. Ellis*, 165 U. S. 150, 41 L. Ed. 666; *Smyth v. Ames*, 169 U. S. 466, 522, 43 L. Ed. 819; *New York v. Roberts*, 171 U. S. 658, 683, 43 L. Ed. 323, per Harlan, J., dissenting; *Hale v. Henkel*, 201 U. S. 43, 76, 50 L. Ed. 652.

But in *Pembina, etc., Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. Ed. 650, it was held, following *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357, that § 1 of the fourteenth amendment to the constitution, declaring that no state shall "deny to any person within its jurisdiction the equal protection of the laws" does not prohibit a state from imposing such conditions upon foreign corporations as it may choose, as a condition of their admission within its limits. See, also, *Philadelphia Fire Ass'n v. New York*, 119 U. S. 110, 30 L. Ed. 342; *Norfolk, etc., R. Co. v. Pennsylvania*, 136 U. S. 114, 118, 34 L. Ed. 394. See the title FOREIGN CORPORATIONS.

The inhibition of the fourteenth amendment that no state shall deprive any person within its jurisdiction of the equal protection of the laws designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. Under the designation of person there is no doubt that a private corporation is con-



the view of the clause guaranteeing against deprivation of liberty without due process of law.<sup>65</sup>

b. *As Inhabitant.—Corporate Domicile.*—To be an inhabitant of a state other than that of its incorporation, it must be doing business there. The mere individual domicile of an officer there is insufficient.<sup>66</sup> The cases must be regarded as establishing the doctrine that a domestic corporation is both a citizen and an inhabitant of the state in which it is incorporated; but in none of them is there any intimation that, where a state is divided into two districts, a corporation shall be treated as an inhabitant of every district of such state, or of every district in which it does business, or, indeed, of any district other than that in which it has its head-quarters, or such offices as answer in the case of a corporation to the dwelling of an individual.<sup>67</sup> It resides where, by or under author-

cluded. The equal protection of the laws which these bodies may claim is only such as is accorded to similar associations within the jurisdiction of the state. *Pembina, etc., Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 188, 31 L. Ed. 650.

And so with the due process of law clause as far as property is concerned. *Covington, etc., Turnpike Road Co. v. Sandford*, 164 U. S. 578, 41 L. Ed. 560; *Chicago, etc., R. Co. v. Minnesota*, 134 U. S. 418, 456, 33 L. Ed. 970; *Smyth v. Ames*, 169 U. S. 466, 43 L. Ed. 819; *Hale v. Henkel*, 201 U. S. 43, 76, 50 L. Ed. 652; *Blake v. McClung*, 172 U. S. 239, 259, 43 L. Ed. 432, where it was held that the denial to a foreign corporation of the right to participate on equal terms with domestic creditors in the assets of another corporation (insolvent) doing business in the state, did not infringe upon this clause. Reaffirmed in *Blake v. McClung*, 176 U. S. 59, 65, 44 L. Ed. 371.

65. *Western Turf Ass'n v. Greenberg*, 204 U. S. 359, 363, 51 L. Ed. 520; *Northwestern Nat. Life Ins. Co. v. Riggs*, 203 U. S. 243, 51 L. Ed. 168. See the title DUE PROCESS OF LAW.

*Suit for abandoned and captured property and capacity of disloyalty.*—See the title ABANDONED AND CAPTURED PROPERTY, vol. 1, p. 7.

"Corporations may have rendered very substantial aid to the armed resistance to the laws of the United States. They may have made loans or contributions to the Confederate government. They may even have fitted out companies or regiments of soldiers. If they have rendered no aid, the fact is quite capable of proof." *United States v. Insurance Companies*, 22 Wall. 99, 104, 22 L. Ed. 816.

66. *Inhabitancy.*—*Conley v. Mathieson Alkali Works*, 190 U. S. 406, 411, 47 L. Ed. 1113; *Galveston, etc., R. Co. v. Gonzales*, 151 U. S. 496, 504, 38 L. Ed. 248; *Louisville, etc., R. Co. v. Letson*, 2 How. 497, 557, 11 L. Ed. 353.

"The residence of an officer of a corporation does not necessarily give the corporation a domicile in the state. He must be there officially—there representing the corporation in its business. *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222. In other words, a corporation must be

doing business there." *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 411, 47 L. Ed. 1113. See the title SUMMONS AND PROCESS.

67. *In state of incorporation.*—*Galveston, etc., R. Co. v. Gonzales*, 151 U. S. 496, 503, 38 L. Ed. 248. See *United States Bank v. Deveaux*, 5 Cranch 61, 62, 89, 3 L. Ed. 38.

"In the case of a corporation the question of inhabitancy must be determined, not by the residence of any particular officer, but by the principal offices of the corporation, where its books are kept and its corporate business is transacted, even though it may transact its most important business in another place." *Galveston, etc., R. Co. v. Gonzales*, 151 U. S. 496, 504, 38 L. Ed. 248.

"There are doubtless reasons of convenience for saying that a corporation should be considered an inhabitant of every district in which it does business, and so the statutes of the several states generally provide; but the law contemplates that every person or corporation shall have but one domicile, and in the case of the latter, it shall be in that state by whose laws it was created, and in that district where its general offices are located." *Galveston, etc., R. Co. v. Gonzales*, 151 U. S. 496, 506, 38 L. Ed. 248.

The habitation or domicile of a corporation is and must be in the state that created it. *Jellenik v. Huron Copper Min. Co.*, 177 U. S. 1, 13, 44 L. Ed. 647; *Insurance Co. v. Francis*, 11 Wall. 210, 216, 20 L. Ed. 77.

It was held in *Shaw v. Quincy Min. Co.*, 145 U. S. 444, 36 L. Ed. 768, that the domicile, the home, the habitat, the residence, the citizenship of a corporation, could only be in the state by which it was created, although it might do business in other states whose laws permitted it and it was finally decided that under these acts of congress "a corporation incorporated in one state only, cannot be compelled to answer, in a circuit court of the United States held in another state in which it has a usual place of business, to a civil suit, at law or in equity, brought by a citizen of a different state." *Galveston, etc., R. Co. v. Gonzales*, 151 U. S. 496, 502, 38 L. Ed. 248. See *New York, etc.,*

ity of its charter, its principal office is.<sup>68</sup>

2. **AS CITIZEN.—For Jurisdictional Purposes.**—A corporation created by a state to perform its functions under the authority of that state and only suable there, though it may have members out of the state, is a person, though an artificial one, inhabiting and belonging to that state, and therefore entitled, for the purpose of suing and being sued, to be deemed a citizen of that state.<sup>69</sup>

**Under Federal Constitution.**—But the artificial being created by an act of incorporation cannot be a citizen of a state in the sense in which that word is used in the constitution of the United States.<sup>70</sup>

**Under Privilege and Immunity Clause of Federal Constitution.**—A corporation is not a citizen within the meaning of the constitutional provision that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." Art. IV, § 3, cl. 1,<sup>71</sup> and of course the same is true of foreign corporations.<sup>72</sup> And this rule is unchanged by the

*R. Co. v. Estill*, 147 U. S. 591, 37 L. Ed. 292.

As to venue of suit against corporation, see the title **VENUE**.

As to change of domicile, see post, "Incorporation in More than One State," II, H. 1, a. And see the title **FOREIGN CORPORATIONS**.

68. *Railroad Co. v. Koontz*, 104 U. S. 5, 12, 26 L. Ed. 643.

**Existence in more than one jurisdiction.**—See post, "Dual Incorporation and Existence Out of State Granting Charter," II, H.

69. **Corporation as citizen for jurisdictional purposes.**—*Louisville, etc., R. Co. v. Letson*, 2 How. 497, 555, 11 L. Ed. 353; *Railroad Co. v. Koontz*, 104 U. S. 5, 12, 26 L. Ed. 643; *Galveston, etc., R. Co. v. Gonzales*, 151 U. S. 496, 503, 38 L. Ed. 248; *Thomas v. Board of Trustees*, 195 U. S. 207, 210, 49 L. Ed. 160; *Doctor v. Harrington*, 196 U. S. 579, 586, 49 L. Ed. 606; *St. Louis v. Ferry Co.*, 11 Wall. 423, 429, 20 L. Ed. 192, where it is said that in the jurisprudence of the United States a corporation is regarded as in effect a citizen of the state which created it. See the title **COURTS**, for discussion of this point and citation of cases.

As to venue of suit against, see the title **VENUE**.

70. **Limitation of rule.**—*Covington Drawbridge Co. v. Shepherd*, 20 How. 227, 233, 234, 15 L. Ed. 896; *Lafayette Ins. Co. v. French*, 18 How. 404, 405, 15 L. Ed. 451. See *United States Bank v. Deveaux*, 5 Cranch 61, 3 L. Ed. 38; *Ohio, etc., R. Co. v. Wheeler*, 1 Black 286, 295, 17 L. Ed. 130; *Rundle v. Delaware, etc., Canal Co.*, 14 How. 80, 98, 14 L. Ed. 335, per Daniel, J., dissenting; *Railway Co. v. Whitton*, 13 Wall. 270, 20 L. Ed. 571.

The supreme court does not hold that either a voluntary association of persons, or an association into a body politic, created by law, is a citizen of a state within the meaning of the constitution. *Lafayette Ins. Co. v. French*, 18 How. 404, 405, 15 L. Ed. 451.

71. **Right to privileges and immunities of citizens.**—*Blake v. McClung*, 172 U. S.

239, 259, 43 L. Ed. 432; *In re Blake*, 175 U. S. 114, 116, 44 L. Ed. 94; *Bank v. Earle*, 13 Pet. 519, 10 L. Ed. 274; *Lafayette Ins. Co. v. French*, 18 How. 404, 407, 15 L. Ed. 451; *Paul v. Virginia*, 8 Wall. 168, 178, 179, 19 L. Ed. 357; *Ducat v. Chicago*, 10 Wall. 410, 415, 19 L. Ed. 972; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566, 573, 19 L. Ed. 1029; *Slaughter-House Cases*, 16 Wall. 36, 98, 21 L. Ed. 394, per Field, J., dissenting; *Philadelphia Fire Ass'n v. New York*, 119 U. S. 110, 117, 30 L. Ed. 342; *Pembina, etc., Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 187, 31 L. Ed. 650; *Norfolk, etc., R. Co. v. Pennsylvania*, 136 U. S. 114, 34 L. Ed. 394; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 561, 43 L. Ed. 552; *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 45, 44 L. Ed. 657; *Anglo-American Prov. Co. v. Davis Prov. Co.*, 191 U. S. 373, 48 L. Ed. 225; *Northwestern Nat. Life Ins. Co. v. Riggs*, 203 U. S. 243, 51 L. Ed. 168; *Western Turf Ass'n v. Greenberg*, 204 U. S. 359, 363, 51 L. Ed. 520.

"The term citizens as used in the clause, applies only to natural persons, members of the body politic owning allegiance to the state, not to artificial persons created by the legislature, and possessing only such attributes as the legislature has prescribed." *Pembina, etc., Min. & Mill. Co. v. Pennsylvania*, 135 U. S. 181, 187, 31 L. Ed. 650. See *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 44 L. Ed. 657. See the title **CONSTITUTIONAL LAW**, ante, p. 467, et seq., for general treatment of this clause.

72. *Blake v. McClung*, 172 U. S. 239, 43 L. Ed. 432; *In re Blake*, 175 U. S. 114, 116, 44 L. Ed. 94 and cases cited to preceding statement.

As to admission of foreign corporations to do business, and discrimination against them by state, see the title **FOREIGN CORPORATIONS**.

**Foreign joint-stock association.**—A joint-stock association, incorporated in Great Britain, and which by its deed of settlement and certain acts of parliament, possesses: First, a distinctive artificial name by which it can make contracts;



fourteenth amendment to the federal constitution, defining "citizens."<sup>73</sup>

**Citizen of United States.**—Congress has frequently in its legislation, as also the treaty-making power, used the words "citizens of the United States" in the broadest sense, and as embracing corporations created by state law, as well as corporations chartered by congress.<sup>74</sup>

**Under Indian Depredation Claims Act.**—A state as well as a federal corporation has been held to be a citizen of the United States within the purview of an act providing compensation for Indian depredations.<sup>75</sup>

**Public Lands Act.**—A state corporation is entitled to the benefit of § 5 of the act of 1887, giving to bona fide purchasers of a railroad's title to public lands, after failure of such title, the privilege of purchasing from the government at the ordinary price, which names as beneficiaries "citizens of the United States," or "persons who have declared their intentions to become such citizens." In a remedial statute like this, the term "citizen" is to be considered as including state corporations, unless there be something beyond the mere use of the word to indicate an intent on the part of congress to exclude them.<sup>76</sup>

**G. Corporate Seal and Deed.**—1. **NECESSITY FOR SEAL.**—A corporation may bind itself by a contract not under its corporate seal, made by authorized

second, a statutory authority to sue and be sued in the name of its officers as representing the association; third, a statutory recognition of the association as an entity distinct from its members, by allowing them to sue it and be sued by it; fourth, a provision for its perpetuity by transfers of its shares, so as to secure succession of membership—will be held in this country to be a corporation within the meaning of this constitutional provision, and it is immaterial that its shareholders are individually responsible for the debts of the corporation. *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566, 19 L. Ed. 1029. See the title **JOINT-STOCK COMPANIES**.

**73. Under fourteenth amendment.**—A corporation is not a citizen within the meaning of the fourteenth amendment, and hence has not "privileges and immunities" secured to "citizens" against state legislation. This was decided in *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357, against a corporation upon which were imposed conditions for doing business in the state of Virginia, and has been repeated in many cases since, including one at the present term. *Blake v. McClung*, 172 U. S. 239, 43 L. Ed. 432; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 561, 43 L. Ed. 552; *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 45, 44 L. Ed. 657; *Western Turf Ass'n v. Greenberg*, 204 U. S. 359, 51 L. Ed. 520.

"In *Blake v. McClung*, a Virginia corporation was legally denied the right to participate upon terms of equality with Tennessee creditors in the distribution of the assets of a British corporation in the hands of a Tennessee court. In *Orient Insurance Co. v. Daggs*, the right of the company, a Connecticut corporation, to limit by contract its liability to the actual damages caused by fire, notwithstanding a provision in a state of Missouri making the measure of damages in case of

total loss the value of the property stated in the policy, was denied." *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 45, 44 L. Ed. 657. See, also, *Pembina, etc., Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. Ed. 650.

**74. As citizen of United States.**—*United States v. Northwestern Express, etc., Co.*, 164 U. S. 686, 688, 41 L. Ed. 599; *Johnson v. United States*, 160 U. S. 546, 40 L. Ed. 529. See *Ramsey v. Tacoma Land Co.*, 196 U. S. 360, 362, 49 L. Ed. 513.

**75. Indian depredation claims act.**—Under the act of March 3, 1891, c. 538, 26 Stat. 851, entitled "An act to provide for the adjudication and payment of claims arising from Indian depredations," under a proper construction thereof, a corporation of a state, for the purpose of the act, is embraced within the designation "citizens of the United States." *United States v. Northwestern Express, etc., Co.*, 164 U. S. 686, 41 L. Ed. 599. See, also, *Ramsey v. Tacoma Land Co.*, 196 U. S. 360, 362, 49 L. Ed. 513.

The act was considered in *Johnson v. United States*, 160 U. S. 546, 40 L. Ed. 529, and it was there held that a person who was not a citizen of the United States at the time of an alleged appropriation of his property by a tribe of Indians was not entitled to maintain an action in the court of claims under the act in question. There was not in that case, however, any assertion that the claimant was a citizen of a state as distinguished from a citizen of the United States. It was also declared that as the court of claims had no general jurisdiction over claims against the United States, it could take cognizance only of such matters as by the terms of the act of congress were committed to it. *United States v. Northwestern Express, etc., Co.*, 164 U. S. 686, 688, 41 L. Ed. 599. See the title **UNITED STATES**.

**76. Under act relating to public lands.**—*Ramsey v. Tacoma Land Co.*, 196 U. S.



officer or agent, when the law does not require the contract to be evidenced by a sealed instrument,<sup>77</sup> whether the agent was appointed under seal or no,<sup>78</sup> and it is now firmly established, both in England and America, that a corporation may be bound by a promise, express or implied, resulting from the acts of its authorized agent, although such authority be only by virtue of a corporate vote, unaccompanied with the corporate seal.<sup>79</sup> But if the law in any case would re-

360, 362, 49 L. Ed. 513. See, generally, the title PUBLIC LANDS.

**Under mining claim laws.**—See post, "Power to Acquire and Hold Lands," XI, B, 2.

**Corporation of more than one state.**—See post, "Dual Incorporation and Existence Out of State Granting Charter," II, H.

**Jurisdictional allegations as to citizenship.**—See the title COURTS.

**77. Necessity for seal.**—*Bank v. Patterson*, 7 Cranch 299, 3 L. Ed. 351; *Fleckner v. United States Bank*, 8 Wheat. 338, 5 L. Ed. 631; *Chesapeake, etc., Canal Co. v. Knapp*, 9 Pet. 541, 9 L. Ed. 222; *Gottfried v. Miller*, 104 U. S. 521, 527, 26 L. Ed. 851; *United States Bank v. Dandridge*, 12 Wheat. 64, 68, 6 L. Ed. 552. See *Planters' Bank v. Sharp*, 6 How. 301, 322, 12 L. Ed. 447; *Bacon v. Robertson*, 18 How. 480, 485, 15 L. Ed. 499.

"The old rule was, that a corporation can make no contract which shall bind it except under its seal. That doctrine has long since been overruled, and it is now fully established, that the agents of a corporation may bind it by parol." *Fanning v. Gregoire*, 16 How. 524, 532, 14 L. Ed. 1043; *Chesapeake, etc., Canal Co. v. Knapp*, 9 Pet. 541, 9 L. Ed. 222; *Weightman v. Washington*, 1 Black 39, 50, 17 L. Ed. 52.

A corporation may be bound by contracts, not executed under the common seal, and by the acts of its officers, in the course of their official duties. *Bank v. Guttschlick*, 14 Pet. 19, 10 L. Ed. 335.

"In ancient times, it was held, that corporations aggregate could do nothing but by deed under their common seal. But this principle must always have been understood with many qualifications; and seems inapplicable to acts and votes passed by such corporations at corporate meetings. It was probably, in its origin, applied to aggregate corporations at the common law, and limited to such solemn proceedings as were usually evidenced under seal, and to be done by those persons who had the custody of the common seal, and had authority to bind the corporation thereby, as their permanent official agents. Be this as it may, the rule has been broken in upon in a vast variety of cases, in modern times, and cannot now, as a general proposition, be supported." *United States Bank v. Dandridge*, 12 Wheat. 64, 67, 74, 6 L. Ed. 552. See, also, *Bank v. Patterson*, 7 Cranch 299, 305, 3 L. Ed. 351, where the history of the rule is traced.

And courts of equity, in this respect

seeming to follow the law, have decreed a specific performance of an agreement made by a major part of a corporation, and entered in the corporation books, although not under the corporate seal. 1 Fonbl. 305 (Phila. Ed.) note o. The sole ground upon which such an agreement can be enforced must be the capacity of the corporation to make an unsealed contract. *Bank v. Patterson*, 7 Cranch 299, 305, 3 L. Ed. 351.

See *quære*, whether, in Kentucky, a corporation can only assume under seal, whereas the assumption here laid is general, and without seal, although it is admitted that every other court in the United States has decided otherwise. *Bank v. Wister*, 2 Pet. 318, 324, 7 L. Ed. 437.

**Appointment of attorney.**—An attorney for a corporation must be appointed, but *quære* if this authority need be under seal. *Osborn v. United States Bank*, 9 Wheat. 738, 829, 6 L. Ed. 204, citing *Bank v. Patterson*, 7 Cranch 299, 3 L. Ed. 351. See, generally, the titles APPEARANCES, vol. 2, p. 429; ATTORNEY AND CLIENT, vol. 2, p. 703.

**Answer in equity.**—See the titles EQUITY; PLEADING; PAROL CONTRACTS. See post, "To Contract," XI, G.

**78. Appointment under seal unnecessary.**—*Bank v. Guttschlick*, 14 Pet. 19, 10 L. Ed. 335. See the title ASSUMPSIT, vol. 2, p. 638.

**79. Modern rule stated.**—*United States Bank v. Dandridge*, 12 Wheat. 64, 68, 6 L. Ed. 552; *Bank v. Patterson*, 7 Cranch 299, 306, 3 L. Ed. 351; *Weightman v. Washington*, 1 Black 39, 50, 17 L. Ed. 52.

"Where corporations have no specific mode of acting prescribed, the common-law mode of acting may be properly inferred; but every corporation created by statute may act as the statute prescribes, and the common law cannot control by implication that which the legislature has expressly sanctioned. Indeed, this very point has been repeatedly under the consideration of this court; and in the case of *Bank v. Patterson* (7 Cranch 299, 3 L. Ed. 351), and *Mechanics' Bank v. Bank* (5 Wheat. 326, 5 L. Ed. 100), principles were established which settle the point, that the corporation may be bound by contracts not authorized or executed under its corporate seal, and by contracts made in the ordinary discharge of the official duty of its agents and officers." *Fleckner v. United States Bank*, 8 Wheat. 338, 358, 5 L. Ed. 631, cited, with approval, in *Bank*

quire a seal, as to a deed or mortgage, it must be affixed,<sup>80</sup> and by a duly authorized person.<sup>81</sup>

2. **SUFFICIENCY AND FORCE OF SEALING**—a. *Presumption and Proof of Due Authority*.—The presumption is, that the corporate seal was rightfully affixed to a deed, or other instrument, on which it appears; but that presumption is not conclusive, and may be repelled by parol evidence.<sup>82</sup>

**Evidence of Private Understanding Qualifying Effect of Sealing**.—The evidence of the president of the company, to show that there was an understanding between himself and the plaintiff, that another person should also sign the paper before it became obligatory, was not admissible, because the understanding alluded to did not refer to the time when the corporate seal was affixed, but to some prior time.<sup>83</sup>

b. *Form of Seal and Recognition Thereof*.—A corporation may adopt any seal, and it need not be called the common seal, nor need it be such, if attached with intent to seal. Twenty may seal at one time with the same seal.<sup>84</sup> An ordinary scroll or rectangle seal may be a proper seal,<sup>85</sup> and a contract in writing

*v. Guttschlick*, 14 Pet. 19, 27, 10 L. Ed. 335. And see post, "Representation by Officers and Agents," XI, A, 3, a.

80. **Seal required by law**.—*Koehler v. Black River Falls Iron Co.*, 2 Black 715, 17 L. Ed. 339; *Bank v. Guttschlick*, 14 Pet. 19, 29, 10 L. Ed. 335. See dissenting opinion of Marshall, C. J., in *United States Bank v. Dandridge*, 12 Wheat. 64, 105, 6 L. Ed. 552. See the title DEEDS.

An instrument purporting to be a mortgage, made by a corporation, is not a legal mortgage, and a bill to foreclose it as such cannot be sustained unless it be sealed with the corporate seal of the mortgagor. *Koehler v. Black River Falls Iron Co.*, 2 Black 715, 17 L. Ed. 339.

A paper having been executed, having the form of a deed, it was altogether proper, then, to give it in evidence, to show that, being sealed, not with the corporate seal, but with that of the president of the bank, it was no deed; and thus sustain the allegation, that no deed had been made. It is clear, beyond doubt, that a paper such as this, not under the corporate seal, is not the deed of the corporation, in contemplation of law. *Bank v. Guttschlick*, 14 Pet. 19, 29, 10 L. Ed. 335.

81. **Authority to affix**.—The mere fact that a deed or mortgage has the corporate seal attached to it, does not make it the act of the corporation if the seal was not affixed by a person duly authorized. *Koehler v. Black River Falls Iron Co.*, 2 Black 715, 17 L. Ed. 339. See post, "Presumption and Proof of Due Authority," II, G, 2, a.

82. **Due authority presumed**.—*Koehler v. Black River Falls Iron Co.*, 2 Black 715, 17 L. Ed. 339.

Where it is proved that the officers who executed a mortgage did not seal it then nor afterwards; that the officer who had the seal in his custody never affixed it nor authorized another to do so, and that the mortgage was recorded without a seal, the burden is thrown on the mortgagee to prove that it was properly sealed, and if he fails, the conclusion of law is, that the

seal was wrongfully and fraudulently affixed. *Koehler v. Black River Falls Iron Co.*, 2 Black 715, 17 L. Ed. 339. See ante, "Necessity for Seal," II, G, 1.

83. **Private understanding of officer affixing seal**.—*Philadelphia, etc., R. Co. v. Howard*, 13 How. 307, 14 L. Ed. 157.

"If the offer had been to prove that at the time the corporate seal was affixed, it was agreed the instrument should not be the deed of the company, unless, or until, Hiram Howard should execute it, the evidence might have been admissible." *Philadelphia, etc., R. Co. v. Howard*, 13 How. 307, 334, 14 L. Ed. 157; *Pawling v. United States*, 4 Cranch 219, 2 L. Ed. 601. See, also, the title DOCUMENTARY EVIDENCE.

84. **Adoption of seal**.—*District of Columbia v. Camden Iron Works*, 181 U. S. 453, 460, 45 L. Ed. 948.

"As to private corporations, where authority is shown to execute a contract under seal, the fact that a seal is attached with intent to seal on behalf of the corporation, is enough, though some other seal than the ordinary common seal of the company should be used." *District of Columbia v. Camden Iron Works*, 181 U. S. 453, 460, 45 L. Ed. 948; *Jacksonville, etc., R. & Nav. Co. v. Hooper*, 160 U. S. 514, 40 L. Ed. 515. See post, "Responsibility of Corporation for Acts Generally," XI, A, 3, a, (2).

**Reference to seal in instrument**.—Whether there should have been an averment on the face of the instrument that the seal attached, on behalf the company, was its common or corporate seal, or not, however, there was an averment that the parties had set their hands and seals to the paper, and the attesting clause alleged that the railroad company had signed, sealed, and delivered in the presence of two witnesses, who signed their names thereto. On demurrer this was plainly sufficient. *Jacksonville, etc., R. & Nav. Co. v. Hooper*, 160 U. S. 514, 518, 40 L. Ed. 515.

85. **Scroll**.—"In the absence of evidence

may be binding on a corporation though a private seal of one of its officers was used instead of the corporate seal, and though no record may be found authorizing the officer to make the contract, if other evidence proves that he had such authority, or that the company ratified his act afterwards.<sup>86</sup> But its use must be authorized or adopted by the corporation.<sup>87</sup>

**Prima Facie Evidence of Execution Sufficient.**—Prima facie evidence of the due execution of a sealed instrument by a corporation is sufficient to admit same in evidence, but this does not relieve the plaintiff introducing such instrument from the burden of sustaining its due execution by a preponderance of evidence.<sup>88</sup>

c. *Makes Instrument a Specialty.*—It makes the instrument to which it is affixed a specialty.<sup>89</sup>

## H. Dual Incorporation and Existence Out of State Granting Charter—

1. DUAL INCORPORATION—*a. Incorporation in More than One State—*(1) *Statement of Principle.*—A corporation of one state may also become incorporated in another state, and is and should be in law a corporation of the latter state although having one and the same organization with the corporation of the same

to the contrary, the scroll or rectangle containing the word 'seal' will be deemed to be the proper and common seal of the company. A seal is not necessarily of any particular form or figure." *Jacksonville, etc., R. & Nav. Co. v. Hooper*, 160 U. S. 514, 518, 40 L. Ed. 515.

"Whether, therefore, the instrument put in evidence was merely a copy, in which event it would not be expected that a paper or stamped seal of the company would appear upon it, but merely a scroll, representing the original seal, or whether the so-called copy was really the original paper, as certified by one of defendant's witnesses, would not \* \* \* be material. The presumption would be, if the paper were a copy, that the original was duly sealed, or, if it were the original, that the scroll was adopted and used by the company as its seal, for the purpose of executing the contract in question." *Jacksonville, etc., R. & Nav. Co. v. Hooper*, 160 U. S. 514, 519, 40 L. Ed. 515.

86. *Private seal of officer.*—*Eureka Co. v. Bailey Co.*, 11 Wall. 488, 20 L. Ed. 209.

87. An agreement which is not under seal of the corporation, but the seals of the committee of the corporation, is not the deed of the corporation, so as to merge a prior agreement. *Bank v. Patterson*, 7 Cranch 299, 303, 3 L. Ed. 351.

**Recognition as seal in former suit.**—Where the question was, whether or not the paper declared upon bore the corporate seal of the defendants (an incorporated company), evidence was admissible to show that, in a former suit, the defendants had treated and relied upon the instrument, as one bearing the corporate seal. And it was admissible, although the former suit was not between the same parties; and although the former suit was against one of three corporations, which had afterwards become merged into one, which one was the present defendant. *Philadelphia, etc., R. Co. v. Howard*, 13 How. 307, 14 L. Ed. 157.

The admission of the paper as evidence only left the question to the jury. The burden of proof still remained upon the plaintiff. The evidence does not derive its validity from any privity of parties, but tends to prove an admission by the corporation. *Philadelphia, etc., R. Co. v. Howard*, 13 How. 307, 332, 14 L. Ed. 157.

**Deposition of deceased officer who affixed seal.**—In order to show that the paper in question bore the seal of the corporation, it was admissible to read in evidence the deposition of the deceased officer of the corporation, who had affixed the seal, and which deposition had been taken by the defendants in the former suit. *Philadelphia, etc., R. Co. v. Howard*, 13 How. 307, 14 L. Ed. 157.

"The evidence was admissible upon two grounds; to prove that in that case the defendant had asserted this instrument to be the deed of the corporation, and relied on it as such; and also, because the witness being dead, his deposition, regularly taken in a suit in which both the plaintiff and defendant were parties, touching the same subject matter in issue in this case, was competent evidence on its trial." *Philadelphia, etc., R. Co. v. Howard*, 13 How. 307, 334, 14 L. Ed. 157.

88. **Prima facie evidence of execution.**—*Philadelphia, etc., R. Co. v. Howard*, 13 How. 307, 333, 14 L. Ed. 157.

89. **As specialty.**—*Marine Ins. Co. v. Young*, 1 Cranch 332, 2 L. Ed. 126. See the title ASSUMPSIT, vol. 2, p. 637.

**Sealed promissory note.**—See the title BILLS, NOTES AND CHECKS, vol. 3, p. 257.

Where a corporate bond is indorsed with an agreement, by the corporation by its proper officers, to pay the amount thereof to bearer, this indorsement is, in effect, a negotiable promissory note, although the corporate seal is attached thereto. *Manufacturing Co. v. Bradley*, 105 U. S. 175, 26 L. Ed. 1034.



name previously established by the legislature of the first state of its incorporation.<sup>90</sup>

(2) *Co-Operative Legislation Creating Corporations.*—There is no reason why several states cannot, by competent legislation, unite in creating the same corporation, or in combining several pre-existing corporations into a single one.<sup>91</sup> And this may be the result of an act consolidating a corporation of one

**90. Dual incorporation by states.**—*Memphis, etc., R. Co. v. Alabama*, 107 U. S. 581, 584, 27 L. Ed. 518; *Railway Co. v. Whitton*, 13 Wall. 270, 20 L. Ed. 571; *Railroad Co. v. Vance*, 96 U. S. 450, 24 L. Ed. 752; *Clark v. Barnard*, 108 U. S. 436, 452, 27 L. Ed. 780; *Graham v. Boston, etc., R. Co.*, 118 U. S. 161, 167, 30 L. Ed. 196; *Stone v. Farmers', etc., Trust Co.*, 116 U. S. 307, 29 L. Ed. 636.

"This court has often recognized that a corporation of one state may be made a corporation of another state by the legislature of that state, in regard to property and acts within its territorial jurisdiction. *Ohio, etc., R. Co. v. Wheeler*, 1 Black 286, 297, 17 L. Ed. 130; *Railroad Co. v. Harris*, 12 Wall. 65, 82, 20 L. Ed. 354; *Railway Co. v. Whitton*, 13 Wall. 270, 283, 20 L. Ed. 571; *Railroad Co. v. Vance*, 96 U. S. 450, 457, 24 L. Ed. 752; *Memphis, etc., R. Co. v. Alabama*, 107 U. S. 581, 27 L. Ed. 518; *Clark v. Barnard*, 108 U. S. 436, 451, 452, 27 L. Ed. 780; *Stone v. Farmers', etc., Trust Co.*, 116 U. S. 307, 334, 29 L. Ed. 636; *Graham v. Boston, etc., R. Co.*, 118 U. S. 161, 169, 30 L. Ed. 196; *Martin v. Baltimore, etc., R. Co.*, 151 U. S. 673, 677, 38 L. Ed. 311. But this court has repeatedly said that, in order to make a corporation, already in existence under the laws of one state, a corporation of another state, 'the language used must imply creation or adoption in such form as to confer the power usually exercised over corporations by the state, or by the legislature, and such allegiance as a state corporation owes to its creator. The mere grant of privileges or powers to it as an existing corporation, without more, does not do this.'" *Louisville, etc., R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 562, 43 L. Ed. 1081, reaffirmed in *Walters v. Chicago, etc., R. Co.*, 186 U. S. 479, 46 L. Ed. 1266; *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 296, 30 L. Ed. 83; *Goodlett v. Louisville, etc., Railroad*, 122 U. S. 391, 405, 408, 30 L. Ed. 1230; *St. Louis, etc., R. Co. v. James*, 161 U. S. 545, 561, 40 L. Ed. 802; *Canada Southern R. Co. v. Gebhard*, 109 U. S. 527, 537, 27 L. Ed. 1020; *Allen v. Louisiana*, 103 U. S. 80, 26 L. Ed. 318; *Stone v. Farmers', etc., Trust Co.*, 116 U. S. 307, 20 L. Ed. 636; *Railroad Co. v. Koontz*, 104 U. S. 5, 9, 26 L. Ed. 643; *Railroad Co. v. Harris*, 12 Wall. 65, 20 L. Ed. 354; *Southern R. Co. v. Allison*, 190 U. S. 326, 337, 47 L. Ed. 1078, reaffirmed in *Southern R. Co. v. Beach*, 193 U. S. 667, 668, 48 L. Ed. 839, where domestication, by filing copy of

charter and by-laws, was held not to affect the character and citizenship of the corporation, at least as to federal jurisdiction. See, also, *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 297, 30 L. Ed. 83. And see post, "Status of Resulting Entity," II, H, 1, a, (3).

The acts done by the company, under the statutes of the second state, while affording ample evidence that it had accepted the grants thereby made, can hardly affect the question whether the terms of those statutes were sufficient to make the company a corporation of that state. *Louisville, etc., R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 562, 43 L. Ed. 1081, reaffirmed in *Walters v. Chicago, etc., R. Co.*, 186 U. S. 479, 46 L. Ed. 1266.

As said in *Clark v. Barnard*, 108 U. S. 436, 452, 27 L. Ed. 780: "'Nor do we see any reason' (as was said by this court, Mr. Justice Swayne delivering its opinion, in *Railroad Co. v. Harris*, 12 Wall. 65, 82, 20 L. Ed. 354), 'why one state may not make a corporation of another state, as there organized and conducted, a corporation of its own, quo ad any property within its territorial jurisdiction. That this may be done was distinctly held in *Ohio, etc., R. Co. v. Wheeler*, 1 Black 286, 297, 17 L. Ed. 130.'" See, also, *Railroad Co. v. Vance*, 96 U. S. 450, 457, 24 L. Ed. 752; *Railroad Co. v. Harris*, 12 Wall. 65, 82, 20 L. Ed. 354.

"The statutes of West Virginia of 1872, c. 227, § 16, and 1882, c. 97, § 30, by which all railroad corporations, 'doing business in this state under charters granted and laws passed by the state of Virginia of this state,' are declared to be domestic corporations, were evidently aimed at those companies which had been made corporations by either state, whether under special charters or general laws; and were probably intended to make sure that corporations, created by Virginia before the separation of West Virginia, and doing business within the territory of the latter, should be considered corporations of this state; and cannot reasonably be construed as including corporations created by some other state only." *Martin v. Baltimore, etc., R. Co.*, 151 U. S. 673, 680, 38 L. Ed. 311. See, also, *Railroad Co. v. Koontz*, 104 U. S. 5, 10, 26 L. Ed. 643.

**Conditional grant.**—See post, "Imposition of Conditions," IV, A, 1, c, (2).

**91. Co-operative legislation of different states.**—*Railroad Co. v. Harris*, 12 Wall. 65, 82, 20 L. Ed. 354; *Philadelphia, etc., R. Co. v. Maryland*, 10 How. 376, 13 L. Ed.

state with one of another, authorizing the former to acquire latter's property and franchises.<sup>92</sup> But such legislation must be first accepted by the corporation,<sup>93</sup> and merely owning property and doing business in the state by permission is not enough.<sup>94</sup>

(3) *Status of Resulting Entity*.—See ante, "Statement of Principle," II, H, 1, a, (1). A corporation of the one state has no existence in another state as a legal entity or person, except under and by force of its incorporation by the latter state; and, although also incorporated in another state, must, as to all its doings within the former state, be considered a citizen of it.<sup>95</sup>

461; *Clark v. Barnard*, 108 U. S. 436, 452, 27 L. Ed. 780.

"So far as there is anything in the language of the court in the case of *Ohio, etc., R. Co. v. Wheeler*, 1 Black 286, 17 L. Ed. 130, in conflict with what has been here said, it is intended to be restrained and qualified by this opinion." However, as the case appears in the report, the judgment of the court was correctly given. *Railroad Co. v. Harris*, 12 Wall. 65, 83, 20 L. Ed. 354.

**92. Consolidating act.**—*Graham v. Boston, etc., R. Co.*, 118 U. S. 161, 167, 30 L. Ed. 196; *Muller v. Dows*, 94 U. S. 444, 447, 24 L. Ed. 207; *Clarke v. Barnard*, 108 U. S. 436, 448, 27 L. Ed. 780; *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 298, 30 L. Ed. 83; *Nashua, etc., R. Corporation v. Boston, etc., R. Corporation*, 136 U. S. 356, 378, 34 L. Ed. 363. See post, "Status of Resulting Entity," II, H, 1, a, (3); "Consolidation," XV, A.

**93. Acceptance necessary.**—"In a case where the corporation already exists, even if adopted by the law of another state and invested with full corporate powers, it does not thereby become such new corporation of another state, until it does some act which signifies its acceptance of this legislation and its purpose to be governed by it." *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 296, 30 L. Ed. 83. See, also, *St. Louis, etc., R. Co. v. James*, 161 U. S. 545, 40 L. Ed. 802; *Louisville, etc., R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 563, 43 L. Ed. 1081, reaffirmed in *Walters v. Chicago, etc., R. Co.*, 186 U. S. 479, 46 L. Ed. 1266.

**Presumption of acceptance.**—"That a private act of incorporation cannot affect the rights of individuals who do not assent to it, and that in this respect it is considered in the light of a contract, is a position too clear to admit of controversy. But in the present case, this objection seems not to have been made in the court below; where proof of the assent, if necessary, might have been submitted to the jury. From the nature of the right asserted, and the circumstances under which it was originated, this court cannot doubt that the assent of the proprietors may be fairly presumed, both to the act of Connecticut and to that of Ohio. Rights have been protected and regulated under those laws, and to the provisions of the latter are the claimants indebted, in a great degree, for the present value of the remain-

der of the land, which they still hold; and, as has been well argued, if they participate in the benefits of the law, they can set up no exemption from its penalties." *Beatty v. Knowler*, 4 Pet. 152, 167, 7 L. Ed. 813.

**94. Owning property and doing business insufficient alone.**—*Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 295, 30 L. Ed. 83; *Allen v. Louisiana*, 103 U. S. 80, 26 L. Ed. 318; *Railroad Co. v. Koontz*, 104 U. S. 5, 13, 26 L. Ed. 643; *Canada Southern R. Co. v. Gebhard*, 109 U. S. 527, 537, 27 L. Ed. 1020; *Goodlett v. Louisville, etc., Railroad*, 122 U. S. 391, 405, 30 L. Ed. 1230; *St. Louis, etc., R. Co. v. James*, 161 U. S. 545, 560, 40 L. Ed. 802. See, also, ante, "Statement of Principle," II, H, 1, a, (1).

**95. Status as citizen or resident.**—*Memphis, etc., R. Co. v. Alabama*, 107 U. S. 581, 585, 27 L. Ed. 518; *Muller v. Dows*, 94 U. S. 444, 447, 24 L. Ed. 207; *Railroad Co. v. Vance*, 96 U. S. 450, 457, 24 L. Ed. 752; *Graham v. Boston, etc., R. Co.*, 118 U. S. 161, 169, 30 L. Ed. 196; *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 297, 30 L. Ed. 83; *Nashua, etc., R. Corporation v. Boston, etc., R. Corporation*, 136 U. S. 356, 378, 34 L. Ed. 363. See *St. Louis, etc., R. Co. v. Terre Haute, etc., R. Co.*, 145 U. S. 393, 405, 36 L. Ed. 738; *Louisville, etc., R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 563, 43 L. Ed. 1081; *St. Louis, etc., R. Co. v. James*, 161 U. S. 545, 562, 40 L. Ed. 802, where it is said that such corporations may be treated by each of the states whose legislative grants they accept as domestic corporations.

And where a railroad corporation passing through two states is incorporated in each, the corporation created by each state is, for all the purposes of local government, a domestic corporation, and its railroad within each state a matter of domestic concern. Each state government may govern it as a domestic corporation in respect to every act and thing within the state which is the lawful subject of state government. *Stone v. Farmers', etc., Trust Co.*, 116 U. S. 307, 333, 29 L. Ed. 636. See, also, *Memphis, etc., R. Co. v. Alabama*, 107 U. S. 581, 27 L. Ed. 518; *St. Louis, etc., R. Co. v. James*, 161 U. S. 545, 40 L. Ed. 802; *St. Joseph, etc., R. Co. v. Steele*, 167 U. S. 659, 663, 42 L. Ed. 315.

"However closely two corporations of different states may unite their interests, and though even the stockholders of the



**Co-Operating Legislation of Two States.**—A corporation endued with the capacities and faculties it possesses by the co-operating legislation of two states, cannot have one and the same legal being in both states. Neither state could confer on it a corporate existence in the other, nor add to or diminish the powers to be there exercised.<sup>96</sup> A corporation consolidated and made up of distinct corporations, chartered by the legislatures of different states, with a capital stock which is a unit, and one set of shareholders, is, in its organization and action, and the practical management of its property, one corporation, but, in its relations to any state, is a separate corporation,<sup>97</sup> although whether a cor-

one may become the stockholders of the other and their business be conducted by the same directors, the separate identity of each, as a corporation of the state by which it was created, and as a citizen of that state, is not thereby lost." *Nashua, etc., R. Corporation v. Boston, etc., R. Corporation*, 136 U. S. 356, 375, 34 L. Ed. 363. See, also, *St. Louis, etc., R. Co. v. James*, 161 U. S. 545, 561, 40 L. Ed. 802.

Where there were two corporations under the same name, chartered in different states, it is doubtless true that, for the purposes of jurisdiction in the federal courts, these corporations are deemed to be citizens of the states in which they were organized, and where there was no formal merger of the two corporations into one, they remained in law two separate legal persons, and each was entitled to corresponding rights, but courts will sometimes look beyond the formal and corporate differences. Especially is this true of courts of equity. Substantial rights will be regarded rather than the mere matter of organization, where the principles of equity and justice require it. *Lehigh Min., etc., Co. v. Kelly*, 160 U. S. 327, 40 L. Ed. 444, illustrates this. *Riverdale Cotton Mills v. Alabama, etc., Mfg. Co.*, 198 U. S. 188, 199, 49 L. Ed. 1008.

**96. Co-operative legislation.**—Ohio, etc., *R. Co. v. Wheeler*, 1 Black 286, 17 L. Ed. 130; *St. Joseph, etc., R. Co. v. Steele*, 167 U. S. 659, 663, 42 L. Ed. 315.

A corporation may become a corporate body under the laws of more than one state. And although as a corporation of one state for certain purposes, it may have no capacity to act or exist in another state for these purposes, and no capacity by virtue of its first charter, to accept and exercise any franchises not contemplated by it, yet the natural persons, who were incorporators, might as well be a corporation in the second as in the first state, and, by accepting charters from both states, could well become a corporate body, by the same name and acting through the same organization, officers and agencies, in each, with such faculties in the two jurisdictions as they might severally confer. The same association of natural persons would thus be constituted into two distinct corporate entities in the two states, acting in each according to the powers locally bestowed, as distinctly as though they had nothing in common either as to name, capital, or membership.

Such was in fact the case in regard to this company, so that in the second state of incorporation it was exclusively a corporation of that state, subject to its laws and competent to do within its territory whatever its legislation might authorize. *Clark v. Barnard*, 108 U. S. 436, 452, 27 L. Ed. 780.

**97. Consolidated corporation.**—Where a statute of the state of New York professes, in its title, to be an act to consolidate three companies, and authorizes the sale to one of them, the Boston, Hartford and Erie Company, of the franchises and property of the other two corporations (which were New York corporations), and provides that such sale shall pass the title to such franchises and property, and that the purchasing company shall thereby "become possessed of the rights of charter and property sold," and thereafter have, hold, and use the same in "its own name and right," it was held that, as a purchaser of what this act authorized to be sold to it, the company purchasing became a New York corporation, by its then existing name, it being prior to this a corporation of another or other states. The case is directly within the ruling of this court in *Clark v. Barnard*, 108 U. S. 436, 448, 27 L. Ed. 780. *Graham v. Boston, etc., R. Co.*, 118 U. S. 161, 167, 30 L. Ed. 196.

"There (in *Clark v. Barnard*, 108 U. S. 436, 448, 27 L. Ed. 780) this same company had, as a Connecticut corporation, purchased the franchises and railroad of the Hartford, Providence and Fishkill Railroad Company, a consolidated corporation under the laws of Connecticut and Rhode Island. Afterwards the legislature of Rhode Island ratified the sale, so far as the railroad was situated in Rhode Island, by an act which proceeded to declare that the 'said Boston, Hartford and Erie Railroad Company, by that name, shall and may have, use, exercise, and enjoy all the rights, privileges, and powers heretofore granted and belonging to said Hartford, Providence and Fishkill Railroad Company, and be subject to all the duties and liabilities imposed upon the same by its charter and the general laws of this state.' On this state of facts, this court said: 'The Hartford, Providence and Fishkill Railroad Company was, without question, so far as it owned and operated a railroad within the state of Rhode Island, a corporation in and of that state;



poration created by the laws of one state is also a corporation of another state within whose limits it is permitted, under legislative sanction, to exert its corporate powers, is often difficult to determine.<sup>98</sup>

and the Boston, Hartford and Erie Railroad Company became its legal successor in that state, as owner of its property and exercising its franchises therein, and became, therefore, in respect to its railroad in Rhode Island, a corporation in and of that state; and the case of Railroad Co. v. Harris, 12 Wall. 65, 82, 20 L. Ed. 354; and other cases in this court, were cited to the effect that one state may make a corporation of another state, as there organized and conducted, a corporation of its own, quoad any property within its territorial jurisdiction." *Graham v. Boston, etc., R. Co.*, 118 U. S. 161, 167, 30 L. Ed. 196.

"The Boston, Hartford and Erie Company, therefore, though made up of distinct corporations, chartered by the legislatures of different states, had a capital stock which was a unit, and only one set of shareholders, who had interest, by virtue of their ownership of shares of such stock, in all of its property everywhere. In its organization and action, and the practical management of its property, it was one corporation, having one board of directors, though, in its relations to any state, it was a separate corporation, governed by the laws of that state as to its property therein. It, therefore, had a domicile in each state, and the corporations or shareholders could, in the absence of any statutory provision to the contrary, hold meetings and transact corporate business in any one state, so as to bind the corporation in respect to its property everywhere." *Graham v. Boston, etc., R. Co.*, 118 U. S. 161, 169, 30 L. Ed. 196.

The consolidated corporation preserves its identity as a corporation of each state. In each of them it is a domestic corporation created by that state. *Muller v. Dows*, 94 U. S. 444, 447, 24 L. Ed. 207; *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 298, 30 L. Ed. 83; *Nashua, etc., R. Corporation v. Boston, etc., R. Corporation*, 136 U. S. 356, 378, 34 L. Ed. 363.

**A corporation created by the laws of Iowa**, although consolidated with another of the same name in Missouri, under the authority of a statute of each state, is, nevertheless, in Iowa, a corporation existing there under the laws of that state alone. *Muller v. Dows*, 94 U. S. 444, 24 L. Ed. 207; *Railway Co. v. Whitton*, 13 Wall. 270, 20 L. Ed. 571. See post, "Consolidation," XV, A.

**98. Question for determination.**—*Goodlett v. Louisville, etc., Railroad*, 122 U. S. 391, 401, 30 L. Ed. 1230; *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 295, 30 L. Ed. 83.

"In Ohio, etc., *R. Co. v. Wheeler*, 1 Black 286, 293, 297, 17 L. Ed. 130, it was

a question whether that company was not a corporation both of Indiana and Ohio. The company, claiming in its declaration to be 'a corporation created by the laws of the states of Indiana and Ohio, and having its principal place of business in Cincinnati, in the state of Ohio, a citizen of the state of Ohio,' sued Wheeler, a citizen of Indiana, in the circuit court of the United States for the district of Indiana. It was incorporated by an act of the legislature of Indiana. Subsequently the legislature of Ohio passed an act reciting the incorporation of the company in Indiana, and declared that 'the corporate powers granted to said company by the act of Indiana, incorporating the same, be recognized.' At a later date the legislature of Ohio passed an act authorizing the extension of the company's road to Cincinnati, declaring that the intention of the previous act 'was to recognize, affirm, and adopt the charter of the said Ohio and Mississippi Railroad Company, as enacted by the legislature of the state of Indiana.' In the opinion of the court it is said 'that a corporation by the name and style of the plaintiff appears to have been chartered by the states of Indiana and Ohio,' and, therefore, that the company was 'a distinct and separate corporate body in Indiana from the corporate body of the same name in Ohio.'" *Goodlett v. Louisville, etc., Railroad*, 122 U. S. 391, 401, 30 L. Ed. 1230. See, also, *Railroad Co. v. Vance*, 96 U. S. 450, 458, 24 L. Ed. 752.

In *Memphis, etc., R. Co. v. Alabama*, 107 U. S. 581, 584, 27 L. Ed. 518, the question was as to the citizenship of the corporation against which that suit was brought by the state of Alabama. The state of Tennessee, in 1846, created a corporation by the name of the Memphis and Charleston Railroad Company. The legislature of Alabama subsequently passed an act entitled "An act to incorporate the Memphis and Charleston Railroad Company." That act referred to the act of Tennessee legislature, and granted to said company a right of way through Alabama, to construct its road between certain points named, declaring that it should have all the rights and privileges granted to it by the said act of incorporation, subject to the restrictions therein imposed. It was held that, the whole of the latter act, taken together, the court said, manifests the understanding and intention of the legislature of Alabama that the corporation, which was thereby granted a right of way to construct through that state a railroad, "was and should be in law a corporation of the state of Alabama, although having one and the same organization with the

**Identity of name** is not conclusive evidence of identity.<sup>99</sup> The essential

corporation of the same name previously established by the legislature of Tennessee." *Goodlett v. Louisville, etc., Railroad*, 122 U. S. 391, 404, 30 L. Ed. 1230.

In *Railroad Co. v. Harris*, 12 Wall. 65, 83, 20 L. Ed. 354, it appeared that the Baltimore & Ohio Railroad Company was incorporated by the state of Maryland for the purpose of securing the construction of a railroad from Baltimore to some suitable point on the Ohio River. It was held that subsequent legislation by Virginia and by congress neither expressly or by implication created a new corporation. *Goodlett v. Louisville, etc., Railroad*, 122 U. S. 391, 403, 30 L. Ed. 1230. See *Railroad Co. v. Koontz*, 104 U. S. 5, 9, 26 L. Ed. 643.

"A Maryland corporation, by taking from the Virginia corporation, with the unconditional assent of Virginia, a lease of a railroad which could only be operated by the use in Virginia of the corporate franchises of the lessor, did not make itself a corporation of Virginia, or part with any of the rights it had under the constitution and laws of the United States as a corporation of Maryland. The state of Virginia has not granted to it any special powers or privileges, beyond allowing it to transact its corporate business in Virginia. Its powers within the state come from its Maryland charter and the Virginia corporation. That corporation had certain franchises and privileges which it held by grant from its state. These franchises and privileges were a species of property which, we must presume for all the purposes of this case, it had the right to allow the corporation of another state to use. The Virginia authorities have impliedly assented to all that has been done. This assent having been given and the contract entered into between the companies, all Virginia can now require is that the Maryland company, in carrying on its business under the contract and using the franchises of the Virginia company, shall be subject to all obligations which the charter imposes on that corporation." *Railroad Co. v. Koontz*, 104 U. S. 5, 13, 26 L. Ed. 643.

Nor does it seem that an act of legislature conferring upon a corporation of Illinois, by its Illinois corporate name, such powers to enable it to use and control that part of the road within the state of Indiana, as have been conferred on it by the state which created it, constitutes it a corporation of Indiana. It may not be easy in all such cases to distinguish between the purpose to create a new corporation, which shall owe its existence to the law or statute under consideration, and the intent to enable the corporation already in existence, under the laws of another state, to exercise its functions in the state where it is so received. *Good-*

*lett v. Louisville, etc., Railroad*, 122 U. S. 391, 405, 30 L. Ed. 1230.

Where the property of a corporation was sold out under foreclosure of a mortgage to parties who, under an act of the Illinois legislature, reorganized the purchasers into the corporation which is the present company, and which, by the Illinois statute, succeeded to all the franchises of the original company, as these included all the powers necessary to operate the few miles of the road in Indiana under the act of February 11, 1851, it was unnecessary to seek an act of incorporation from that state. It appears, however, that these parties did file in the office of the secretary of state of Indiana a certificate of the organization of the new company, with the names of the first directors of it who were to serve until 1863; and it is argued that this made the new company a corporation of the state of Indiana. A critical examination of this certificate renders it very doubtful whether that was its purpose, but rather indicates that it was intended to secure and perpetuate the rights granted to the old company by the act of February 11, 1851. At all events, no evidence exists of the agreement of the new Illinois company to accept of or act under this attempt at organization under Indiana laws. They never held an election for directors of the Indiana corporation, if one existed, and they never in any other manner recognized the existence of an Indiana corporation of the same name. *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 297, 30 L. Ed. 83.

"A corporation may be made what is termed a domestic corporation, or in form a domestic corporation, of a state in compliance with the legislation thereof, by filing a copy of its charter and by-laws with the secretary of state, yet such fact does not affect the character of the original corporation. It does not thereby become a citizen of the state in which a copy of its charter is filed, so far as to affect the jurisdiction of the federal courts upon a question of diverse citizenship." *Southern R. Co. v. Allison*, 190 U. S. 326, 337, 47 L. Ed. 1078, reaffirmed in *Southern R. Co. v. Beach*, 193 U. S. 667, 668, 48 L. Ed. 839. See the title COURTS.

**99. Effect of identity of name.**—Where an Illinois act ratifying the lease of a domestic road to an Indiana railroad corporation, declares that the lessees, their associates, successors, and assigns, shall be a railroad corporation in the state of Illinois, and gives the style by which that corporation shall be known, and does not authorize the complainant corporation to exercise, in Illinois, the corporate powers granted by the laws of Indiana; but confers, by affirmative lan-



inquiry is, whether a mere license is granted to a previously existing corporation, or a new corporation established.<sup>1</sup>

(4) *Powers*.—The question of the powers of the company, as a corporation in the latter state, and the legal effect of its acts and transactions performed in

guage, upon the corporation, which it declares shall be a railroad corporation in Illinois, "the same or as large powers as are possessed" by an Illinois corporation, and, in addition, such other powers as are usual to railroad corporations, there was thus created, by apt words, a corporation in Illinois. The fact that it bears the same name as that given to the company incorporated by Indiana cannot change the fact that it is a distinct corporation, having a separate existence derived from the legislation of another state. *Railroad Co. v. Vance*, 96 U. S. 450, 457, 24 L. Ed. 752, approved in *Goodlett v. Louisville, etc., Railroad*, 122 U. S. 391, 403, 30 L. Ed. 1230.

"Identity of name, powers and purposes does not create an identity of origin or existence, any more than any other statutes, alike in language, passed by different legislative bodies, can properly be said to owe their existence to both. To each statute and to the corporation created by it there can be but one legislative pater-nity." *Nashua, etc., R. Corporation v. Boston, etc., R. Corporation*, 136 U. S. 356, 373, 34 L. Ed. 363; *St. Louis, etc., R. Co. v. James*, 161 U. S. 545, 561, 569, 40 L. Ed. 802.

*Railroad Co. v. Harris*, 12 Wall. 65, 20 L. Ed. 354, distinguished on the ground that there is no substantial analogy between that case and this. The Virginia act did not purport to make the Maryland corporation a corporation of Virginia, nor did it contain any language from which could be inferred a purpose to create thereby a new and distinct corporation in Virginia. *Railroad Co. v. Vance*, 96 U. S. 450, 458, 24 L. Ed. 752.

**Formal subscription and organization unnecessary.**—Notwithstanding that there was no formal subscription to the capital stock, or any formal organization of the corporation created by the act of March 11, 1869, the state board had the right, for the purposes of taxation, to regard the corporation authorized by that act to exercise the powers of the lessor corporation, as a corporation created under the laws of Illinois. *Railroad Co. v. Vance*, 96 U. S. 450, 458, 24 L. Ed. 752.

**1. Essential inquiry.**—*Goodlett v. Louisville, etc., Railroad*, 122 U. S. 391, 405, 30 L. Ed. 1230.

And it was held in *Goodlett v. Louisville, etc., Railroad*, 122 U. S. 391, 409, 30 L. Ed. 1230, taking the whole of that act together, that it was not within the mind of the legislature of Tennessee to create a new corporation, but only to give the assent of that state to the exercise by the defendant, within her limits, and subject

to certain conditions, of some of the powers granted to it by the state creating it.

"It does not seem to admit of question that a corporation of one state, owning property and doing business in another state by permission of the latter, does not thereby become a citizen of this state also." *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 295, 30 L. Ed. 83; *Allen v. Louisiana*, 103 U. S. 80, 26 L. Ed. 318; *St. Louis, etc., R. Co. v. James*, 161 U. S. 545, 560, 40 L. Ed. 802; *Canada Southern R. Co. v. Gebhard*, 109 U. S. 527, 537, 27 L. Ed. 1020; *Goodlett v. Louisville, etc., Railroad*, 122 U. S. 391, 405, 30 L. Ed. 1230.

And so a corporation of Illinois, authorized by its laws to build a railroad across the state from the Mississippi River to its eastern boundary, may by the permission of the state of Indiana, extend its road a few miles within the limits of the latter, or, indeed, through the entire state, and may use and operate the line as one road by the permission of the state, without thereby becoming a corporation or a citizen of the state of Indiana. Nor does it seem that an act of the legislature conferring upon this corporation of Illinois, by its Illinois corporate name, such powers to enable it to use and control that part of the road within the State of Indiana, as have been conferred on it by the state which created it, constitutes it a corporation of Indiana. It may not be easy in all such cases to distinguish between the purpose to create a new corporation which shall owe its existence to the law or statute under consideration, and the intent to enable the corporation already in existence under laws of another state to exercise its functions in the state where it is so received. *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 295, 30 L. Ed. 83.

"The latter class of laws are common in authorizing insurance companies, banking companies and others to do business in other states than those which have chartered them. To make such a company a corporation of another state, the language used must imply creation or adoption in such form as to confer the power usually exercised over corporations by the state, or by the legislature, and such allegiance as a state corporation owes to its creator. The mere grant of privileges or powers to it as an existing corporation, without more, does not do this, and does not make it a citizen of the state conferring such powers." *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 296, 30 L. Ed. 83.



that state, is to be determined exclusively by the laws of that state, and not by those of the first state, which have no force beyond its own territory.<sup>2</sup>

b. *State and Federal Incorporation*.—See post, "Power of Congress," IV, A, 1, d.

c. *Territorial Corporation and Effect of Admission as State*.—See post, "Power of Territorial Legislature—Admission as State," IV, A, 1, e.

2. EXISTENCE OUT OF STATE GRANTING CHARTER.—See the title FOREIGN CORPORATIONS.

I. **Taxation of Corporations and Corporate Stock**.—See the title TAXATION.

### III. Promoters and Acts Prior to Incorporation.

A. **Promoter Defined**.—A promoter is one who brings together the persons who become interested in the enterprise, aids in procuring subscriptions and sets in motion the machinery which leads to the formation of the corporation itself.<sup>3</sup> He is an agent, with all an agent's disabilities.<sup>4</sup>

B. **Promoter's Profits**.—A promoter is entitled to reasonable compensation for services and expenses, if those interested in the corporation are kept informed of the steps taken.<sup>5</sup> But promoters are bound to exercise good faith, with full disclosure of facts as to property they sell to the corporation,<sup>6</sup> and in the selection of directors must act honestly in the shareholders' interest.<sup>7</sup>

2. **Powers of resulting corporation**.—*Clark v. Barnard*, 108 U. S. 436, 452, 27 L. Ed. 780; *Ohio, etc., R. Co. v. Wheeler*, 1 Black 286, 17 L. Ed. 130; *St. Joseph, etc., R. Co. v. Steele*, 167 U. S. 659, 663, 42 L. Ed. 315. And see the title CONFLICT OF LAWS, vol. 3, p. 1020.

3. **Definition**.—Cook on Stock and Stockholders, § 651. Or, as defined by the English statute of 7 and 8 Vict., ch. 110, § 3, "every person acting, by whatever name, in the forming and establishing of a company at any period prior to the company becoming fully incorporated. See, also, Lloyd on Corporate Liability for Acts of Promoters, 17. He is treated as standing in a confidential relation to the proposed company, and is bound to the exercise of the utmost good faith." *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 203, 44 L. Ed. 423.

4. **As agent**.—"The promoter is the agent of the corporation and subject to the disabilities of an ordinary agent. His acts are scrutinized carefully, and he is precluded from taking a secret advantage of the other stockholders. Cook on Stock and Stockholders, § 651." *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 204, 44 L. Ed. 423.

5. **Compensation**.—*Dickerman v. Northern Trust Co.*, 176 U. S. 181, 205, 44 L. Ed. 423.

6. **Good faith and full disclosure essential**.—"It has been held that, if persons start a company, and induce others to subscribe for shares, for the purpose of selling property to the company when organized, they must faithfully disclose all facts relating to the property which would influence those who form the company in deciding upon the judiciousness of the purchase. If the promoters are guilty of any misrepresentation of facts, or sup-

pression of the truth in relation to the character and value of the property, or their personal interest in the proposed sale, the company will be entitled to set aside the transaction or recover compensation for any loss which it has suffered. *Morawetz on Corporations*, §§ 291, 294, 546." *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 204, 44 L. Ed. 423.

7. **Selection of directors**.—"In those cases where the scheme of organization gives the promoters the power of selecting the directors who are to represent the company in the proposed purchase, they are bound to select competent and trustworthy persons who will act honestly in the interest of the shareholders. A purchase made from the promoters under these circumstances will not bind the company unless it was a fair and honest bargain." *Morawetz on Corp.*, § 546. *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 204, 44 L. Ed. 423.

As said in this case: "Bound as these promoters were to deal fairly and honestly with the stockholders in the new corporation, they were guilty of apparently inexcusable conduct in excluding the mill owners (who had given options on their mills at a certain price in cash, stock and notes, for the purpose of conveying same to a corporation to be formed), from all participation in organizing the new corporation, putting in their own clerks as directors, and paying off the mill owners in stock which was really of little more than half the value they must have expected to receive." *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 205, 44 L. Ed. 423.

In this case the promoters had transferred the option contracts to one of their number, as a nominally independent owner, who then sold back to the corpo-

**C. Liability for Misrepresentation.**—When the promoters of a mining company get out prospectuses, which are circulated as an inducement to take stock in the enterprises, a court is bound to interpret them by the effect they would produce upon an ordinary mind, and in estimating the probability of subscribers being misled by these prospectuses, a court may take into consideration not only the facts stated, but the facts suppressed.<sup>8</sup>

**D. Contract to Secure Subscriber against Loss.**—A collateral contract, perfectly fair and honest in itself, and untainted with any actual fraud upon any person, entered into by a subscriber of stock with other subscribers, to the effect that they will purchase the same, and pay to him the amount paid by him, if at a time specified he chooses to sell the same, is not contrary to public policy, and can be enforced against the parties to it.<sup>9</sup>

**E. Status before Incorporation.—Exercise of Franchise.**—A conditional franchise may be conferred upon a corporation to be created by an act of legislation to be passed in the immediate future,<sup>10</sup> and if such a franchise or property is so conferred it will be in abeyance until the corporation is brought into existence by such future action, when they instantaneously attach.<sup>11</sup> And

ration the same properties at a greatly increased price, the corporation being controlled entirely by directors acting for the promoters under the instructions of the promoters, who held a majority of the stock issued to themselves acting as a majority of the stockholders. *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 44 L. Ed. 423. See, also, the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

**8. Misrepresentation.**—*Wiser v. Lawler*, 189 U. S. 260, 264, 47 L. Ed. 802.

But the vendors from whom the property being promoted was purchased, where it does not appear that they were promoters or interested in the organization of the corporation, or in the sale of the capital stock of such company, although they knew that vendee's intention was to incorporate a company, and, to use the language of one of the defendants, "work it for all there was in it," as they were not concerned in the methods used to procure subscriptions to stock, or in the statements made in the prospectuses, cannot be held responsible, unless they are made so by the fact that they knew and connived at the misstatements as to the title of the company. But while they might have known that the prospectuses were being issued, they were under no obligation to read them or contradict their exaggerated statements and promises. They had a right to rely on the record of their legal title to the property, as notice to every one of their rights, and it was not incumbent on them to personally inform subscribers thereof. *Wiser v. Lawler*, 189 U. S. 260, 265, 47 L. Ed. 802.

The mere fact that the vendors knew that a prospectus was to be issued; that they furnished a report (not shown to be false), to which was appended a map indicating (though not to their knowledge) that the mines belonged to the company, and that they might have informed themselves, if they had chosen to do so, of the contents of the prospectus, and did

actually receive a large amount of money without knowing the source from which it came, did not render them liable as participants in the fraud perpetrated by the circulation of the prospectus. *Wiser v. Lawler*, 189 U. S. 260, 269, 47 L. Ed. 802. See, generally, the title FRAUD AND DECEIT.

**9. Contract to purchase stock subscribed.**

—When a man purchases or subscribes to shares of stock in an incorporated joint-stock company, there is not upon him, in addition to the express terms of the subscription contract, an implied obligation, incident to the common enterprise, which restrains him from making any engagement with other individuals to secure his own stock against risk, unless the other subscribers are informed of it and put upon an equal footing as to such security. *Morgan v. Struthers*, 131 U. S. 246, 252, 33 L. Ed. 132. See, generally, the title ILLEGAL CONTRACTS.

**10. Exercise of franchise.**—"A franchise is a privilege conferred in the United States by the immediate or antecedent legislation of an act of incorporation, with conditions expressed, or necessarily inferential from its language, as to the manner of its exercise and for its enjoyment. To ascertain how it is to be brought into existence, the whole charter must be consulted and compared." *Woods v. Lawrence County*, 1 Black 386, 409, 17 L. Ed. 122. See post, "Imposition of Conditions," IV, A, 1, c, (2).

**11. Abeyance of franchise or property.**—*Woods v. Lawrence County*, 1 Black 386, 17 L. Ed. 122; *Trustees for Vincennes University v. Indiana*, 14 How. 268, 274, 14 L. Ed. 416.

"It is true, when a charter is given for franchises or property to a corporation, which is to be brought into existence by some future acts of the corporators, that such franchises or property are in abeyance until such acts shall have been done, and then they instantaneously attach. But not to distinguish the acts enjoined or

the consent of a municipal corporation to the exercise of a franchise by a corporation to be formed, given to the promoters, will not avail the corporation when formed, as the performance of a condition precedent, under the charter, that the corporation should obtain such consent before it should exercise the franchise.<sup>12</sup>

**Contracts.**—A corporation, by recognizing as valid a contract entered into before its organization was complete, or it was authorized to commence business, may make it binding;<sup>13</sup> if such action is not declared void by the statute, it is a simple inhibition, and no one but the state could object.<sup>14</sup>

**F. Liability as Partners.**—See the title PARTNERSHIP.

#### IV. Creation and Organization.

**A. Power to Create**—1. IN GENERAL—*a. Objects and Consideration.*—The objects for which a corporation is created are universally such as the gov-

permitted, to give to the corporation its intended purpose and object, is to confound the franchises with such acts, and would nullify the means by which the franchises are to be produced." *Woods v. Lawrence County*, 1 Black 386, 409, 17 L. Ed. 122. See ante, "Definitions," II, A.

"There is no difference between the case of a grant of land or franchises to an existing corporation, and a grant to a corporation brought into life for the very purpose of receiving the grant. As soon as it is in esse, and the franchise and property become vested and executed in it, it is as much an executed contract, as if its prior existence had been established for a century." *Trustees for Vincennes University v. Indiana*, 14 How. 268, 274, 14 L. Ed. 416; *Dartmouth College v. Woodward*, 4 Wheat. 518, 693, 4 L. Ed. 629. See post, "Charter as Contract Inviolable by Legislature," VIII, C, 1. See the title IMPAIRMENT OF OBLIGATION OF CONTRACTS.

**Priority between existence of corporation and grant of franchise.**—If the corporation has no existence, so as to become a contracting party, neither has it, for the purpose of receiving a grant of the franchises. The truth is, that there may be a priority of operation of things in the same grant; and the law distinguishes and gives such priority, wherever it is necessary to effectuate the objects of the grant. From the nature of things, the artificial person called a corporation must be created before it can be capable of taking anything. When, therefore, a charter is granted, and it brings the corporation into existence, without any act of the natural persons who compose it, and gives such corporation any privileges, franchises or property, the law deems the corporation to be first brought into existence, and then clothes it with the granted liberties and property. When, on the other hand, the corporation is to be brought into existence, by some future acts of the corporators, the franchises remain in abeyance, until such acts are done, and when the corporation is brought into life, the franchises instantaneously attach

to it. There may be, in intendment of law, a priority of time, even in an instant, for this purpose. *Dartmouth College v. Woodward*, 4 Wheat. 518, 691, 4 L. Ed. 629.

**12. Consent of municipality to exercise of franchise.**—Where it seems clear that the franchise described in the charter was granted subject to the condition precedent, that the respondents should obtain the consent of the city to use the streets for the purpose therein described, if granted on that condition, the charter would not avail the respondents in this case even if it appeared that the consent to that effect had been given to the two persons who made the bid and conducted the negotiations antecedent to the act of incorporation. *People's Railroad v. Memphis Railroad*, 10 Wall. 38, 55, 19 L. Ed. 844.

**13. Subsequent ratification.**—Where a corporation, organized pursuant to the provisions of a statute, but before its articles of association were filed with the county clerk, entered into a contract for certain machinery to enable it to carry on its business, held, that its subsequent recognition of the validity of the contract was binding upon it, although the statute declares that a corporation so organized shall not commence business before such articles are so filed. *Whitney v. Wyman*, 101 U. S. 392, 25 L. Ed. 1050.

**14.** "The restriction imposed by the statute is a simple inhibition. It did not declare that what was done should be void, nor was any penalty prescribed. No one but the state could object. The contract is valid as to the plaintiff, and he has no right to raise the question of its invalidity." *Whitney v. Wyman*, 101 U. S. 392, 397, 25 L. Ed. 1050; *National Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188.

The corporation having assumed, by entering into the contract with the plaintiff, to have the requisite power, both parties are estopped to deny it. *Whitney v. Wyman*, 101 U. S. 392, 397, 25 L. Ed. 1050. See post, "Right to Complain or Set Up Defense," XII, C.



ernment wishes to promote. They are deemed beneficial to the country; and this benefit constitutes the consideration, and, in most cases, the sole consideration of the grant.<sup>15</sup> The power is an attribute of sovereignty,<sup>16</sup> but it is an incidental, not a substantive and independent power.<sup>17</sup> The illegality of the object for which a corporation was formed is not a material inquiry in a suit to foreclose a mortgage given by the corporation. So long as it existed it had power to create a mortgage, and when it fell due, the trustee had a right to foreclose.<sup>18</sup>

*b. Necessity for Legislative Authority.*—No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise.<sup>19</sup>

**Presumption of Grant.**—But the grant of a charter may be presumed, where persons have long acted as a corporation and exercised corporate powers; such is the case with corporations by prescription.<sup>20</sup> It is an unbend-

**15. Object and consideration of grant.**

—*Dartmouth College v. Woodward*, 4 Wheat. 518, 637, 4 L. Ed. 629. See *New Orleans, etc., Co. v. Louisiana*, 180 U. S. 320, 330, 45 L. Ed. 550; *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *Home of the Friendless v. Rouse*, 8 Wall. 430, 19 L. Ed. 495; *Washington University v. Rouse*, 8 Wall. 439, 19 L. Ed. 498. See post, "Charter Not Protected Unless It Embodies a True Contract," VIII, C, 1, b.

For this purpose it matters not how trifling the consideration may be, nor need it be a benefit to the grantor. It is sufficient if it import damage or loss, or forbearance of benefit, or any act done or to be done, on the part of the grantee. *Dartmouth College v. Woodward*, 4 Wheat. 518, 684, 4 L. Ed. 629.

"The formation of a corporation as an effective form of business enterprise was not only reasonable in itself, but the usual means in the obtaining of needed capital." *Howe Scale Co. v. Wyckoff*, 198 U. S. 118, 138, 49 L. Ed. 972.

The great object of an incorporation is to bestow the character and property of individuality on a collective and changing body of men. *Providence Bank v. Billings*, 4 Pet. 514, 7 L. Ed. 939. See ante, "Definitions," II, A.

**Conformity to nature and objects.**—See post, "In General," XI, A, 1, a.

**16. Attribute of sovereignty.**—*Farrington v. Tennessee*, 95 U. S. 679, 683, 24 L. Ed. 558; *McCulloch v. Maryland*, 4 Wheat. 316, 411, 4 L. Ed. 579; *Luxton v. North River Bridge Co.*, 153 U. S. 525, 529, 38 L. Ed. 808.

**17.** "The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished." *McCulloch v. Maryland*, 4 Wheat. 316, 411, 4 L. Ed. 579; *Luxton v.*

*North River Bridge Co.*, 153 U. S. 525, 529, 38 L. Ed. 808.

**18. Effect of illegality.**—*Dickerman v. Northern Trust Co.*, 176 U. S. 181, 196, 44 L. Ed. 423. See post, "Defective and Irregular Incorporation," V.

**Reorganization.**—See post, "Reorganization," XVI.

**19. Legislative authority essential.**—*Central Pac. R. Co. v. California*, 162 U. S. 91, 125, 40 L. Ed. 903; *California v. Central Pac. R. Co.*, 127 U. S. 1, 38, 41, 32 L. Ed. 150; *Ashley v. Ryan*, 153 U. S. 436, 441, 38 L. Ed. 773; *Oregon R., etc., Co. v. Oregonian R. Co.*, 130 U. S. 1, 20, 32 L. Ed. 837; *Oregon R., etc., Co. v. Oregonian R. Co.*, 145 U. S. 52, 36 L. Ed. 620; *McDonogh v. Murdock*, 15 How. 367, 406, 14 L. Ed. 732, where this was said to be the law of Louisiana.

"That the right to be a state corporation depends solely upon the grace of the state, and is not a right inherent in the parties is settled. Thus, in *California v. Central Pac. R. Co.*, 127 U. S. 1, 40, 32 L. Ed. 150, speaking through Mr. Justice Bradley, the court said: 'A franchise is a right, privilege, or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration. \* \* \* Under our system, their existence and disposal are under the control of the legislative department of the government, and they cannot be assumed or exercised without legislative authority. \* \* \*' *Ashley v. Ryan*, 153 U. S. 436, 441, 38 L. Ed. 773. See *Central R., etc., Co. v. Georgia*, 92 U. S. 665, 670, 23 L. Ed. 757; *Memphis, etc., R. Co. v. Railroad Commissioners*, 112 U. S. 609, 618, 28 L. Ed. 837; *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, 548, 31 L. Ed. 790. See *Detroit v. Detroit Citizens' St. R. Co.*, 184 U. S. 368, 394, 46 L. Ed. 592.

**Upon transfer of franchise and property.**—See post, "To Alienate Franchise or Property Necessary Thereto," XI, C.

**20. Presumptive grant of charter.**—"A charter may be presumed to have been given to persons who have long acted as

ing rule that a grant of corporate existence is never implied, and in the construction of a statute every presumption is against it. This is true both as to an original creation of a corporate body, and of the transfer, by assignment, of a previously existing charter and of the right to exist as a corporation under it.<sup>21</sup>

**Exhaustion by Exercise.**—The franchise to organize a corporation can only be exerted once for all; for the simple act of organization exhausts the authority, and having once been effected, is legally incapable of repetition.<sup>22</sup>

*c. Power of State*—(1) *In General.*—A state may grant acts of incorporation for the attainment of those objects which are essential to the interests of society. This power is incident to sovereignty.<sup>23</sup> And wherever a legislature has the right to accomplish a certain result, and that result is best attained by means of a corporation, it has the right to create such a corporation, and to endow it with the powers necessary to effect the desired and lawful purpose.<sup>24</sup> But it cannot enact laws regulating foreign or interstate commerce.<sup>25</sup>

(2) *Imposition of Conditions.*—See ante, "Corporate Franchise," II, A, 3; "Status before Incorporation," III, E.

A state, in granting a corporate privilege to its own citizens, or, what is equivalent thereto, in permitting a foreign corporation to become one of the constituent elements of a consolidated corporation organized under its laws, may impose such conditions as it deems proper, and the acceptance of the franchise in either case implies a submission to the conditions without which the fran-

a corporation, and assumed the exercise of the powers of a corporate body, whether of an ordinary or extraordinary nature. This is the case in respect to all corporations existing by prescription. Yet the very case supposes that no written proof can be adduced of a charter, or of a vote of the corporators to accept the charter. Yet, both a charter and acceptance are vital to the existence of the corporation. They are, however, presumed, not merely from the lapse of time, but from the continued exercise of corporate powers, which presuppose their existence." *United States Bank v. Dandridge*, 12 Wheat. 64, 71, 6 L. Ed. 552.

21. *Memphis, etc., R. Co. v. Railroad Commissioners*, 112 U. S. 609, 618, 28 L. Ed. 837; *Jenkins v. Neff*, 186 U. S. 230, 234, 46 L. Ed. 1140; *Central R., etc., Co. v. Georgia*, 92 U. S. 665, 670, 23 L. Ed. 757. See post, "To Alienate Franchise, or Property Necessary Thereto," XI, C.

22. **Exhaustion.**—*Memphis, etc., R. Co. v. Railroad Commissioners*, 112 U. S. 609, 621, 28 L. Ed. 837.

23. **Power of state.**—And there is no limitation in the federal constitution on its exercise by the states, in respect to the incorporation of banks. (Opinion of McLean, J.) *Briscoe v. Bank*, 11 Pet. 257, 317, 9 L. Ed. 709. See, also, *Young v. Bank*, 4 Cranch 384, 397, 2 L. Ed. 655.

"So far as the constitution of the United States is concerned, a state may, indeed, create a corporation, define its powers, prescribe the amount of its stock and the mode in which it may be transferred." *Northern Securities Co. v. United States*, 193 U. S. 197, 394, 48 L. Ed. 679. See dissenting opinion of Story, J., in *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 644, 9 L. Ed. 773.

24. *Slaughter-House Cases*, 16 Wall. 36, 64, 21 L. Ed. 394; *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *Davidson v. New Orleans*, 96 U. S. 97, 101, 24 L. Ed. 616; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 29 L. Ed. 516; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 680, 29 L. Ed. 525; *Covington, etc., Bridge Co. v. Kentucky*, 154 U. S. 204, 219, 38 L. Ed. 962.

And whether the purpose is a lawful one is usually a question of local law, and a decision by the state court upon that question is not in such cases reviewable by the federal supreme court. *New Orleans, etc., Co. v. Louisiana*, 180 U. S. 320, 330, 45 L. Ed. 550. See the titles APPEAL AND ERROR, vol. 1, p. 333; COURTS.

Article X. § 7, of the constitution of Texas of 1876, which provided that "no law shall be passed by the legislature granting the right to construct and operate a street railway within any city, town or village, or upon any public highway, without first acquiring the consent of the local authorities having control of the street or highway proposed to be occupied by said railway," merely requires such consent, and does not take away the power of granting such charters from the legislature. *San Antonio Traction Co. v. Altgelt*, 200 U. S. 304, 305, 50 L. Ed. 491.

25. "A state may undoubtedly create corporations for the purpose of building and running steamships to foreign ports, but it would hardly be claimed that an attempt to fix a scale of charges for the transportation of persons or property to and from such foreign ports would not be a regulation of commerce and beyond the constitutional power of the state." *Covington, etc., Bridge Co. v. Kentucky*,



chise could not have been obtained;<sup>26</sup> and its grant rests entirely in the discretion of the legislative body.<sup>27</sup> The same rule applies to corporations of other states seeking reincorporation by a state.<sup>28</sup> And it must have the right to determine through its courts whether these conditions have been complied with.<sup>29</sup>

(3) *Impairment of Contract*.—It cannot be claimed that the incorporation of a previously existing voluntary association or subordinate branch of a national

154 U. S. 204, 219, 38 L. Ed. 962. See the title INTERSTATE AND FOREIGN COMMERCE.

**26. Conditional grant.**—*Ashley v. Ryan*, 153 U. S. 436, 443, 38 L. Ed. 773.

The state which creates a corporation has the right to fix the terms of its existence. *New Jersey v. Anderson*, 203 U. S. 483, 493, 51 L. Ed. 284; *New Orleans, etc., Co. v. Louisiana*, 180 U. S. 320, 330, 45 L. Ed. 550. See, also, *Van Allen v. Assessors*, 3 Wall. 573, 582, 18 L. Ed. 229.

Such as the compensation it may receive for services rendered. *Stone v. Wisconsin*, 94 U. S. 181, 185, 24 L. Ed. 102.

"The granting of the rights and privileges which constitute the franchises of a corporation being a matter resting entirely within the control of the legislature, to be exercised in its good pleasure, it may be accompanied with any such conditions as the legislature may deem most suitable to the public interests and policy." *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 313, 36 L. Ed. 164; *Woods v. Lawrence County*, 1 Black 386, 409, 17 L. Ed. 122. See *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. Ed. 773; *Clark v. Barnard*, 108 U. S. 436, 461, 27 L. Ed. 780; *Home Ins. Co. v. New York*, 134 U. S. 594, 599, 33 L. Ed. 1025.

The legislature granting a charter may impose duties and obligations upon the company and inflict penalties and forfeitures as a punishment for its disobedience, which provisions may not be mere matters of contract; as, for example, a provision requiring a railway company to locate its line upon a certain route, and imposing a penalty or forfeiture in the event of its failure to do so. *Maryland v. Baltimore, etc., R. Co.*, 3 How. 534, 552, 11 L. Ed. 714.

**Payment of bonus.**—"So, the state has an undoubted power to exact a bonus for the grant of a franchise, payable in advance or the future; and yet that bonus will necessarily affect the charge upon the public which the donee of the franchise will be obliged to impose." *Railroad Co. v. Maryland*, 21 Wall. 456, 473, 22 L. Ed. 678.

Or the payment of a specific sum each year or month, etc., or a certain proportion of its profits or gross receipts, may be required as a condition of the grant. *Home Ins. Co. v. New York*, 134 U. S. 594, 600, 33 L. Ed. 1025; *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 313, 36 L. Ed. 164.

**Implied condition against abuse.**—See post. "Misuser or Nonuser of Franchise," XVII, B, 4, b.

**27. Discretion of legislature.**—In *Home Ins. Co. v. New York*, 134 U. S. 594, 599, 33 L. Ed. 1025, it is said: "The granting of such right or privilege rests entirely in the discretion of the state." *Ashley v. Ryan*, 153 U. S. 436, 442, 38 L. Ed. 773. See, also, *Bank v. Earle*, 13 Pet. 519, 10 L. Ed. 274; *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. Ed. 451; *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357; *Ducat v. Chicago*, 10 Wall. 410, 19 L. Ed. 972.

**28.** "Nor is the question at issue affected by the fact that some of the constituent elements which entered into the consolidated company were corporations owning and operating property in another state. The power of corporations of other states to become corporations, or to constitute themselves a consolidated corporation under the Ohio statutes, and thus avail of the rights given thereby, is as completely dependent on the will of that state as is the power of its individual citizens to become a corporate body, or the power of corporations of its own creation to consolidate under its laws." *Ashley v. Ryan*, 153 U. S. 436, 442, 38 L. Ed. 773; *Bank v. Earle*, 13 Pet. 519, 10 L. Ed. 274; *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. Ed. 451; *Paul v. Virginia*, 8 Wall. 168, 181, 19 L. Ed. 357.

As it was within the discretion of the state to withhold or grant the privilege of exercising corporate existence, it was, as a necessary resultant, also within its power to impose whatever conditions it might deem fit as prerequisite to corporate life. The act of filing, constituting, as it did, a claim of a right to the franchise granted by the state law, carried with it a voluntary assumption of any burden with which the privilege was accompanied, and without which the right of corporate existence could not have been procured. Voluntary because, as the claim to the franchise was voluntary, the assumption of the privilege which resulted from it partook necessarily of the nature of the claim for corporate existence. Having thus accepted the act of grace of the state and taken the advantages which sprang from it, the company cannot be permitted to hold on to the privilege or right granted, and at the same time repudiate the condition by the performance of which it could alone obtain the privilege which it sought. *Ashley v. Ryan*, 153 U. S. 436, 441, 38 L. Ed. 773. And see, generally, ante, "Incorporation in More than One State," II, H, 1, a.

**29.** *New Orleans, etc., Co. v. Louisiana*, 180 U. S. 320, 330, 45 L. Ed. 550. See the title QUO WARRANTO.



order incorporated in another state, by the state in which it was operating, with exclusive right to the use of its name and to grant subcharters in that state, impaired any contract between the national organization or council and either the new corporation or its constituent members before its incorporation, for no such contract existed.<sup>30</sup>

(4) *Impairment of Vested Rights of Citizens.*—The abridgment of the rights of its citizens by an incorporating act of a state legislature, which does not infringe upon the constitution or laws of the United States, is a matter between the state and its citizens only, of which the federal courts take no cognizance.<sup>31</sup>

d. *Power of Congress.*—The power of establishing a corporation is not a distinct sovereign power or end of government, but only the means of carrying into effect other powers which are sovereign. Whenever it becomes an appropriate means of exercising any of the powers given by the constitution to the government of the Union, it may be exercised by that government.<sup>32</sup> And

**30. Impairment of contract.**—*National Council v. State Council*, 203 U. S. 151, 51 L. Ed. 132.

A benevolent association was incorporated under the laws of Pennsylvania, as the national council of the order, and the state council thereof, which had been established in Virginia, under a charter from the national council, as the result of dissension, its charter having been withdrawn, was incorporated as a Virginia corporation, under the same name, except as to local designation. The act of incorporation declared it the supreme head of the order in Virginia, with exclusive right to its name and exclusive power to charter subordinate councils and revoke same for cause. Upon a suit for an injunction by the Virginia corporation against the national council of Pennsylvania corporation, and another voluntary state organization established by it in Virginia, to enjoin them from carrying on their operations in Virginia in competition with the Virginia corporation and using plaintiff's name, etc., it was held that the Virginia act of incorporation impaired no contract and was constitutional, and the plaintiffs were entitled to an injunction to enforce the exclusive rights given them thereby against such foreign corporation, except as to rights accrued before the date of the Virginia charter. *National Council v. State Council*, 203 U. S. 151, 51 L. Ed. 132.

"The contract, if any there was, was not that they would not become incorporated, but must be supposed to be that they would retain their subordination to the National Council, or something of that sort. It is going very far to say that they contracted not to secede, but whether they did so or not, it was a matter outside the purview of the charter. There was nothing in that to hinder their returning to their allegiance." *National Council v. State Council*, 203 U. S. 151, 161, 51 L. Ed. 132.

If the legislation of a state undertook to appropriate to the use of its own creature a tradename of known commercial value,

of course the argument would be very strong that an act of incorporation could not interfere with the existing property rights. And no doubt within proper limits the argument would be as good for a foreign corporation as for a foreign person. But that is not what has been done in this case. *National Council v. State Council*, 203 U. S. 151, 161, 51 L. Ed. 132.

**Impairment of obligation.**—See the title TRADEMARKS, TRADENAMES AND UNFAIR COMPETITION.

**31. Vested rights.**—The act of the legislature of Delaware incorporating the Blackbird Creek Marsh Company is not repugnant to the constitution, so far as it authorized a dam across the creek. The plea states the creek to be navigable, in the nature of a highway, through which the tide ebbs and flows. The act of assembly by which the plaintiffs were authorized to construct their dam, shows plainly that this is one of those many creeks, passing through a deep level marsh, adjoining the Delaware, up which the tide flows for some distance. The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the states. But the measure authorized by this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgement, unless it comes in conflict with the constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognizance. *Willson v. Blackbird Creek Marsh Co.*, 2 Pet. 245, 251, 7 L. Ed. 412. See the title CONSTITUTIONAL LAW, ante, p. 1.

**32. Power of congress.**—*McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579.

"The congress of the United States, be-

where two or more state corporations are consolidated into one corporation under and by virtue of acts of congress, the resulting corporation is a federal one succeeding to all the rights of the original corporations.<sup>33</sup>

ing empowered by the constitution to regulate commerce among the several states, and to pass all laws necessary or proper for carrying into execution any of the powers specifically conferred, may make use of any appropriate means for this end. As said by Chief Justice Marshall, "The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished. Congress, therefore, may create corporations as appropriate means of executing the powers of government, as, for instance, a bank for the purpose of carrying on the fiscal operations of the United States, or a railroad corporation for the purpose of promoting commerce among the states." *Luxton v. North River Bridge Co.*, 153 U. S. 525-529, 38 L. Ed. 808; *McCulloch v. Maryland*, 4 Wheat. 316, 411, 422, 4 L. Ed. 579; *Osborn v. United States Bank*, 9 Wheat. 738, 861, 873, 6 L. Ed. 204; *Pacific Railroad Removal Cases*, 115 U. S. 1, 18, 29 L. Ed. 319; *California v. Central Pac. R. Co.*, 127 U. S. 1, 39, 32 L. Ed. 150; *Georgetown v. Alexandria Canal Co.*, 12 Pet. 91, 9 L. Ed. 1012; *Sinking-Fund Cases*, 99 U. S. 700, 727, 25 L. Ed. 496; *United States v. Stanford*, 161 U. S. 412, 432, 40 L. Ed. 751. See ante, "By Congress," II, D, 3; "De Facto Corporations," V, A.

**In District of Columbia.**—When Virginia and Maryland ceded to congress the portions of the territory embracing the Potomac river within their limits, whatever the legislatures of Virginia and Maryland could have done by their joint will, after that cession, could be done by congress, subject only to the limitations imposed by the acts of cession. The act of congress, which granted the charter to the Alexandria Canal Company, was in no degree a violation of the compact between the states of Virginia and Maryland; or of any of the rights that the citizens of either, or both states, claimed as being derived from it. *Georgetown v. Alexandria Canal Co.*, 12 Pet. 91, 9 L. Ed. 1012.

**Deprivation of property without just compensation.**—The grant of a corporate franchise by the federal government cannot authorize the taking, by the corporation, of either private or public property within a state without just compensation. *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92 101, 37 L. Ed. 380. See post, "Appropriation of Property," XI, B, 1, c.

**33. Consolidation under federal law.**—*United States v. Central Pac. R. Co.*, 99 U. S. 449, 25 L. Ed. 287; *Union Pac. R. Co. v. United States*, 99 U. S. 402, 25 L. Ed. 274. See, also, *Ames v. Kansas*, 111 U. S. 449, 28 L. Ed. 482; *United States v. Union Pac. R. Co.*, 91 U. S. 72, 23 L. Ed. 224.

Where a consolidated corporation was formed, by agreement under authority of acts of congress, out of several existing companies, and all the said companies, before the said consolidation, had received large donations of land, subsidies, powers and privileges from congress, and had accepted and were subject to important duties to the United States government, and were subject to a wide control of said government both in the construction and management of their roads and works; and one of said companies was originally incorporated and organized under said acts, and was strictly a corporation of the United States, subject to the acts of congress, and having important duties to perform to the government in the prosecution of its business, the facts that the last named company is one of the constituent elements of the consolidated company, and that the entire system of roads now in its possession and under its charge and control constitutes one of the most comprehensive and important mediums of interstate commerce in the country, and that in all its transactions it is subject to the supervision and control of the government of the United States, are sufficient to make the consolidated corporation a United States corporation organized under federal laws, at least de facto. Such is the *Union Pacific Railroad Company*. *Pacific Railroad Removal Cases*, 115 U. S. 1, 2, 15, 29 L. Ed. 319.

The whole being, capacities, authority and obligations of the company thus consolidated are so based upon, permeated by and enveloped in the acts of congress referred to, that it is impracticable, so far as the operations and transactions of the company are concerned, to disentangle those qualities and capacities, which have their source and foundation in these acts, from those which are derived from state or territorial authority. With regard to transactions occurring in Nebraska, on the original line of the *Union Pacific Railroad Company*, it is not disputed that the *Union Pacific Railway Company* derives all its corporate and other powers from the acts of Congress and is strictly and purely a United States corporation. *Pacific Railroad Removal Cases*, 115 U. S. 1, 16, 29 L. Ed. 319. See, also, *Central Pac. R. Co. v. California*, 162 U. S. 91, 165, 40 L. Ed. 903, per Harlan, J., dissenting;



**Grants by Congress to State Corporations.**—And it is well settled that congress has power to grant to a corporation created by a state, additional franchises—at least franchises of a similar nature,<sup>34</sup> but this does not make it a federal corporation.<sup>35</sup>

e. *Power of Territorial Legislature—Admission as State.*—Where, under the ordinance, the legislature of a territory was vested with general legislative powers, restricted only by the articles contained in that instrument, it had power to grant an act of incorporation, with all the functions necessary to effectuate its objects. And these powers were not affected, and could not be affected, by the constitution of the state, which provided that “all rights, contracts, and claims, both as respects individuals and bodies corporate, shall continue as if no change had taken place in the government.”<sup>36</sup>

Oregon Short Line, etc., R. Co. v. Skottowe, 162 U. S. 490, 494, 40 L. Ed. 1048.

And the Texas and Pacific Railway Company stands in the same predicament and occupies the same position in Texas, in relation to consolidation with state organizations, as the Union Pacific does in Kansas, and the same considerations apply to both. Pacific Railroad Removal Cases, 115 U. S. 1, 16, 29 L. Ed. 319.

Railroad Co. v. Peniston, 18 Wall. 5, 21 L. Ed. 787, shows that the Union Pacific R. R. Company is not a mere creature of the United States, but that while it owes duties to the government, the performance of which may, in a proper case, be enforced, it is still a private corporation, the same as other railroad companies, and, like them, subject to the laws of taxation and the other laws of the states in which the road lies, so far as they do not destroy its usefulness as an instrument for government purposes. United States v. Union Pac. R. Co., 98 U. S. 569, 619, 25 L. Ed. 143. See, also, the title RAILROADS.

**34. Grant to state corporations.**—Southern Pac. R. Co. v. United States, 183 U. S. 519, 527, 46 L. Ed. 307; Sinking-Fund Cases, 99 U. S. 700, 727, 25 L. Ed. 496; Pacific Railroad Removal Cases, 115 U. S. 1, 15, 29 L. Ed. 319; California v. Central Pac. R. Co., 127 U. S. 1, 32 L. Ed. 150; United States v. Stanford, 161 U. S. 412, 431, 40 L. Ed. 751; Central Pac. R. Co. v. California, 162 U. S. 91, 118, 123, 40 L. Ed. 903.

“Congress has frequently conferred upon railway companies, existing under territorial or state laws, additional corporate franchises, rights and privileges, and its right to do so cannot be doubted. Thus it was held, in California v. Central Pac. R. Co., 127 U. S. 1, 39, 32 L. Ed. 150, that congress possessed and validly exercised the power to create a system of railroads connecting the east with the Pacific coast, traversing states as well as territories, and to employ the agency of state as well as federal corporations.” Oregon Short Line, etc., R. Co. v. Skottowe, 162 U. S. 490, 494, 40 L. Ed. 1048, followed in Oregon Short Line, etc., R. Co. v. Mullan, 162 U. S. 498, 40 L. Ed. 1051; Oregon Short Line, etc., R. Co. v. Conlin, 162 U. S. 498, 40 L. Ed. 1051. See, also, Pensa-

cola Tel. Co. v. Western Union Tel. Co., 96 U. S. 1, 18, 24 L. Ed. 708.

**35. Acceptance of federal assistance and franchises.**—Where a company is a corporation of California, made up of two California corporations consolidated by articles of association entered into under the laws of California, and recognized as a California corporation by the acts of congress through which it obtained federal assistance and federal franchises, subsequently to its incorporation in 1861 (act of July 1, 1862, c. 120, 12 Stat. 489; act of July 2, 1864, c. 216, 13 Stat. 356; act of March 3, 1865, c. 88, 13 Stat. 504; act of May 7, 1878, c. 96, 20 Stat. 56), and never otherwise regarded in the legislation of the state, severance of the allegiance of the corporation to the state that created it, and deprivation or transfer of the powers and privileges conferred by the state, were not the object of the grant by the United States, nor the consequence of the acceptance of that grant by the corporation as thereto authorized by the state (Pennsylvania R. Co. v. St. Louis, etc., R. Co., 118 U. S. 290, 296, 30 L. Ed. 83). But it was not contended at the bar that the company ever became a corporation of the United States, or that it is other than a state corporation. Central Pac. R. Co. v. California, 162 U. S. 91, 118, 40 L. Ed. 903.

Reception of aid from federal government does not make a federal corporation out of a corporation created by a state. Central Pac. R. Co. v. California, 162 U. S. 91, 122, 40 L. Ed. 903; Thomson v. Pacific Railroad, 9 Wall. 579, 590, 19 L. Ed. 792. See, also, United States v. Stanford, 161 U. S. 412, 432, 40 L. Ed. 751; Pennsylvania R. Co. v. St. Louis, etc., R. Co., 118 U. S. 290, 296, 30 L. Ed. 83.

And the fact that a state corporation acquired, under mortgage foreclosure, the property of a preceding corporation chartered by the United States, does not make it a holder of United States franchises. Chicago, etc., R. Co. v. Babcock, 204 U. S. 585, 597, 51 L. Ed. 636.

**Right of regulation.**—See post, “Powers of Congress and State Compared,” VIII, C, 4, d. (3).

**36. Territorial legislature.**—Trustees for Vincennes University v. Indiana, 14 How. 268, 272, 14 L. Ed. 416; Kansas Pac. R. Co.



2. BY SPECIAL ACT.—The constitutions of many of the states forbid the creation of private corporations, or the granting of corporate powers and franchises, by special acts.<sup>37</sup>

The construction of such a provision is for the state supreme court.<sup>38</sup> And this results in a tendency to construe special acts not to confer corporate powers, when possible, rather than to hold them invalid,<sup>39</sup> or to construe them to be within the exceptions to the prohibition, where such exist, and the prohibition has not been strictly observed by the legislature generally.<sup>40</sup>

*v. Atchison, etc., R. Co.*, 112 U. S. 414, 28 L. Ed. 794; *Rogers v. Burlington*, 3 Wall. 654, 662, 18 L. Ed. 79.

The admission of a territory into the Union as a state, and the consequent change in the form of government, in no respect affects the essential character of the territorial corporations or their powers or rights. They are to be considered as corporations of the state, as much as if created by its legislation. *Kansas Pac. R. Co. v. Atchison, etc., R. Co.*, 112 U. S. 414, 28 L. Ed. 794. See post, "In Statutes or Constitution," VIII, C, 4, a, (2).

**37. Prohibition of special legislation.**—(Alabama) *Wallace v. Loomis*, 97 U. S. 146, 24 L. Ed. 895; *School District v. Insurance Co.*, 103 U. S. 707, 709, 26 L. Ed. 601; (California) *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 352, 28 L. Ed. 173; (Georgia) *Jones v. Habersham*, 107 U. S. 174, 188, 27 L. Ed. 401; (Illinois) *Railroad Co. v. Vance*, 96 U. S. 450, 458, 24 L. Ed. 752; (Kansas) *Scovill v. Thayer*, 105 U. S. 143, 148, 26 L. Ed. 968; (Nebraska) *Read v. Plattsmouth*, 107 U. S. 568, 27 L. Ed. 414; *Sherman County v. Simons*, 109 U. S. 735, 27 L. Ed. 1093; (Oregon) *Oregon R., etc., Co. v. Oregonian R. Co.*, 130 U. S. 1, 25, 32 L. Ed. 837, followed in *Oregon R., etc., Co. v. Oregonian R. Co.*, 145 U. S. 52, 36 L. Ed. 620; (Ohio) *Thomas v. Board of Trustees*, 195 U. S. 207, 215, 49 L. Ed. 160.

These have in this country, until within recent years, always been conferred by special acts of the legislative body under which they claim to exist. *Oregon R., etc., Co. v. Oregonian R. Co.*, 130 U. S. 1, 20, 32 L. Ed. 827, followed in *Oregon R., etc., Co. v. Oregonian R. Co.*, 145 U. S. 52, 36 L. Ed. 620.

See the *Telephone Cases*, 126 U. S. 1, 571, 31 L. Ed. 863, where the incorporation of the persons named in a special act of the Massachusetts legislature was held a valid incorporation, conferring the authority to select a corporate name as well.

The constitution of Kansas forbids special charters. Art. 12, § 1. All corporations in that state are, therefore, organized under general laws. *Scovill v. Thayer*, 105 U. S. 143, 148, 26 L. Ed. 968.

**Constitution of Oregon—Legislation necessary.**—Of course any authority for the exercise of corporate powers, derived from the laws of Oregon, must be in accord with the constitution of that state and its statutes upon that subject. A constitutional provision, that corporations

shall not be created by special laws, but may be formed under general laws, implies that no private corporation can be created thereafter until such general law has been enacted, and that it thereupon became the fundamental law of the state in regard to all corporations formed under it. It is idle to say, therefore, that any corporation could assume to itself powers of action by the mere declaration in its articles or memorandum that it possessed them. *Oregon R., etc., Co. v. Oregonian R. Co.*, 130 U. S. 1, 25, 32 L. Ed. 837, followed in *Oregon R., etc., Co. v. Oregonian R. Co.*, 145 U. S. 52, 36 L. Ed. 620.

**38. Decision of question by state court and force thereof.**—*Railroad Co. v. Vance*, 96 U. S. 450, 459, 24 L. Ed. 752; *Thomas v. Board of Trustees*, 195 U. S. 207, 217, 49 L. Ed. 160. See the titles APPEAL AND ERROR, vol. 1, p. 333; COURTS.

**39. Construction in favor of validity.**—*Thomas v. Board of Trustees*, 195 U. S. 207, 215, 49 L. Ed. 160.

As the statute creating the board of trustees of the Ohio State University was clearly a special, as distinguished from a general act, and the constitution of Ohio forbade the passage of any special act conferring corporate powers (Const. Ohio, Art. XIII, § 1), the board of trustees cannot be held to have been made a corporation or endowed with corporate powers without holding that the act by which it was created was invalid under the constitution of Ohio; whereas, the supreme court of Ohio have adjudicated that the act was valid as not conferring, and as not intended to confer, corporate powers on the board. *Thomas v. Board of Trustees*, 195 U. S. 207, 215, 49 L. Ed. 160.

Accepting the above decision of the supreme court of Ohio as correctly interpreting the constitution and laws of that state, while the board of trustees is clothed with some, it is not clothed with all, of the functions belonging to technical corporations. *Thomas v. Board of Trustees*, 195 U. S. 207, 217, 49 L. Ed. 160.

**40. Discretion of legislature to make exception—Construction.**—It cannot be objected that an act of incorporation, being a special act, and containing nothing to show that the corporation therein named might not have been organized under the general laws of Illinois, cannot be construed as creating a new corporation, without bringing it into conflict with the fol-

**Effect on Right to Alter or Amend Existing Charters.**—Such a provision merely prevents the creation of private corporations of the character inhibited, and does not prevent the legislature from amending existing charters so as to modify or enlarge corporate powers, either by repealing former restrictions or otherwise,<sup>41</sup> or to an act changing the name of an existing corporation and conferring an additional power.<sup>42</sup>

**Does Not Exclude Foreign Corporations So Created.**—And the fact that a state forbids the creation of corporations by special enactment does not prevent corporations so created by another state from doing business therein, when not specially prohibited from doing so.<sup>43</sup>

**Effect on Existing Contract.**—When, at the time a contract with a corporation was made, the state constitution permitted a grant of special franchises to corporations, this law was part of such contract, and could not be affected by subsequent decisions.<sup>44</sup>

**By Reference to Previous Charter.**—A corporate charter may be conferred by an act declaring a company incorporated, with the powers, privileges and restrictions of another corporation previously chartered, or with such modifications thereof as the legislature sees fit to enact.<sup>45</sup>

lowing clause of the Illinois constitution of 1848, then in force; viz, "Corporations not possessing banking powers or privileges may be formed under general laws, but shall not be created by special acts, except for municipal purposes, and in cases where, in the judgment of the general assembly, the objects of the corporation cannot be attained under general laws," where the clause has been wholly disregarded, and it would now produce farspread ruin to declare such acts unconstitutional and void. It is now safer, and more just to all parties, to declare that it must be understood that, in the opinion of the general assembly, at the time of passing the special act, its objects could not be attained under the general law; and this without any recital by way of preamble. *Railroad Co. v. Vance*, 96 U. S. 450, 458, 24 L. Ed. 752.

**41. Right of amendment.**—*Jones v. Hathersham*, 107 U. S. 174, 188, 27 L. Ed. 401. See post, "Procedure," IV, B.

Such a prohibition in a state constitution does not include under "corporate powers and privileges" which may not be granted by the legislature, every separate power and privilege. It does not prevent amendment of existing charters so as to modify or enlarge the powers thereunder enjoyed. *Jones v. Hathersham*, 107 U. S. 174, 188, 27 L. Ed. 401.

**42. Change of name—Alabama provision.**—The provision in the constitution of Alabama, which declares that "corporations may be formed under general laws, but shall not be created by special acts, except for municipal purposes," does not prohibit the legislature from passing a special act changing the name of an existing railroad corporation, and giving it power to purchase additional property. *Wallace v. Loomis*, 97 U. S. 146, 24 L. Ed. 895.

**43. Foreign corporations so created.**—*Cowell v. Springs Co.*, 100 U. S. 55, 59,

25 L. Ed. 547. See the title FOREIGN CORPORATIONS.

**44. Impairment of contract rights.**—*Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558, 575, 44 L. Ed. 886.

At the time of the contract of 1868 between the city of Los Angeles, Cal., and private parties, leasing them its water-works for a term of years, with the intention that they should become incorporated and assign their rights under the lease to the corporation, as was afterwards done, and of the passage of the ratifying act of 1870, it was established by the decision of the highest court of the state of California that the constitution of the state permitted a grant of special franchises to persons and corporations, and permitted the latter to receive assignments of them from such persons, or grants of them directly from the legislature! This law was part of the contract of 1868, as confirmed by the act of 1870, and could not be affected by subsequent decisions (*Rowan v. Runnels*, 5 How. 134, 12 L. Ed. 85; *Ohio Life Ins., etc., Co. v. Debolt*, 16 How. 416, 14 L. Ed. 997; *Havemeyer v. Iowa County*, 3 Wall. 294, 18 L. Ed. 38; *Chicago v. Sheldon*, 9 Wall. 50, 19 L. Ed. 594; *Olcott v. Supervisors*, 16 Wall. 678, 21 L. Ed. 382; *McCullough v. Virginia*, 172 U. S. 102, 43 L. Ed. 382). Nor by the new constitution of 1879 (*New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 29 L. Ed. 516; *Fisk v. Jefferson Police Jury*, 116 U. S. 131, 29 L. Ed. 587; *St. Tammany Water Works v. New Orleans Water Works*, 120 U. S. 64, 30 L. Ed. 563). *Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558, 575, 44 L. Ed. 886.

**45. Reference and adoption.**—The *Binghamton Bridge*, 3 Wall. 51, 18 L. Ed. 137; *Railroad Co. v. Maine*, 96 U. S. 499, 24 L. Ed. 836. See *Williams v. Wingo*, 177 U. S. 601, 603, 44 L. Ed. 905; *Chesapeake, etc., R. Co. v. Miller*, 114 U. S.



3. UNDER GENERAL LAWS.—A corporation which is organized under a general law is as much "chartered by law" as one whose organization is provided for by special act.<sup>46</sup> And most of the states now have constitutions which require all private corporations, with varying exceptions, to be organized under general laws.<sup>47</sup>

**B. Procedure**—1. IN GENERAL.—A corporation may be formed in any manner that a state sees fit to adopt;<sup>48</sup> and when the highest court of a state decides that by certain legislation, a corporation has been created, such decision concludes not only the courts of the state, but also those of the United States.<sup>49</sup> The creation of an entity, with power to act as a corporation, though it is not so called, is enough.<sup>50</sup>

2. GIFT OF NEW POWERS.—The gift of new powers to a corporation has never been thought to destroy its identity, much less to change it into a new being. Such a gift is not a grant of corporate existence. It assumes corporate life already existing.<sup>51</sup>

3. ACCEPTANCE OF CHARTER.—The acceptance of a charter, by a corporation or the incorporators, while essential, may be evidenced by acts thereunder, as well as by documentary or record evidence.<sup>52</sup>

176, 188, 29 L. Ed. 121. See, also, the titles BRIDGES, vol. 3, p. 516; STATUTES.

**46. Effect.**—Lindsay, etc., Co. v. Mulen, 176 U. S. 126, 136, 44 L. Ed. 400.

**47. Constitutional requirements.**—Scovill v. Thayer, 105 U. S. 143, 148, 26 L. Ed. 968; Oregon R., etc., Co. v. Oregonian R. Co., 130 U. S. 1, 25, 32 L. Ed. 837, followed in Oregon R., etc., Co. v. Oregonian R. Co., 145 U. S. 52, 36 L. Ed. 620; Railroad v. Vance, 96 U. S. 450, 459, 24 L. Ed. 752; McKinley v. Wheeler, 130 U. S. 630, 633, 32 L. Ed. 1048; Spring Valley Waterworks v. Schottler, 110 U. S. 347, 352, 28 L. Ed. 173. See ante, "By Special Act," IV, A, 2.

State constitutions, formed or remodelled in recent years, have come to have a provision like that which is now to be found in the constitution of the state of Oregon, article 11, § 2: "Corporations may be formed under general laws, but shall not be created by special laws, except for municipal purposes. All laws passed pursuant to this section may be altered, amended, or repealed, but not so as to impair or destroy any vested corporate rights." Oregon R., etc., Co. v. Oregonian R. Co., 130 U. S. 1, 21, 32 L. Ed. 837.

**48. Discretionary with state.**—Hancock v. Louisville, etc., R. Co., 145 U. S. 409, 415, 36 L. Ed. 755. See post, "Beginning of Corporate Existence," IV, C, 1.

In many states they are formed under general laws, by a very simple proceeding—by an instrument signed by the proposed members agreeing to thus unite themselves, stating their number, the object of their incorporation, the proposed capital, the number of shares, the period of duration and the officers under whose direction their business is to be conducted. Such a document being acknowledged by the parties and filed in certain designated offices, a corporation is created. McKinley v. Wheeler, 130 U. S. 630, 633, 32

L. Ed. 1048. See Tregoe v. Modesto Irrigation District, 164 U. S. 179, 188, 41 L. Ed. 395, where different procedures are mentioned.

**49. Decision of state supreme court conclusive.**—Hancock v. Louisville, etc., R. Co., 145 U. S. 409, 415, 36 L. Ed. 755; Seecombe v. Railroad Co., 23 Wall. 108, 23 L. Ed. 67. See post, "Beginning of Corporate Existence," IV, C, 1. And see the title COURTS.

**50. Creation of entity with corporate powers.**—"Giving to it power to issue bonds and create indebtedness, is the creation of an entity with power to act, and if this entity has power to create a debt, it becomes subject to suit. That this entity was not, in terms, named a corporation is not decisive. It is enough that an artificial entity was created, with power to exercise the functions of a corporation." Hancock v. Louisville, etc., R. Co., 145 U. S. 409, 415, 36 L. Ed. 755.

**51. Gift of new powers.**—Central R., etc., Co. v. Georgia, 92 U. S. 665, 673, 23 L. Ed. 757. See ante, "By Special Act," IV, A, 2.

**52. Evidence of acceptance of charter.**—United States Bank v. Dandridge, 12 Wheat. 64, 71, 6 L. Ed. 552.

"So, in relation to the question of acceptance of a particular charter, by an existing corporation, or by the incorporators already in the exercise of corporate functions, the acts of the corporate officers are admissible evidence from which the fact of acceptance may be inferred. It is not indispensable to show a written instrument or vote of acceptance on the corporation books. It may be inferred from other facts which demonstrate that it must have been accepted. United States Bank v. Dandridge, 12 Wheat. 64, 71, 6 L. Ed. 552.

See, to the effect that acceptance of a charter is a necessary step to incorporation, Planters' Ins. Co. v. Tennessee, 161 U. S. 193, 198, 40 L. Ed. 667; Railway Co.



**De Facto Incorporation.**—See post, “De Facto Corporation,” V, A.<sup>53</sup>

**C. Beginning, Duration and Termination of Corporate Existence**—1. **BEGINNING OF CORPORATE EXISTENCE.**—See ante, “Status before Incorporation,” III, E; “Procedure,” IV, B. The question whether a corporation has actually been created and is in existence depends on the legal effect of the words of its charter. Where these manifest the purpose of the legislature to create a corporation, one is created immediately on the approval of the charter, by the proper authorities as required by law. The fact that it was not allowed to commence business before a certain amount of stock was taken and paid in, did not affect its existence.<sup>54</sup> Where there cannot be perceived any clear legislative in-

*v. Philadelphia*, 101 U. S. 528, 25 L. Ed. 912; *Tomlinson v. Jessup*, 15 Wall. 454, 21 L. Ed. 204; *Beaty v. Knowler*, 4 Pet. 152, 167, 7 L. Ed. 813; *Stone v. Wisconsin*, 94 U. S. 181, 24 L. Ed. 102, where it is said that an unaccepted charter remains a mere naked proposition until accepted. See, also, *Frost v. Frostburg Coal Co.*, 24 How. 278, 16 L. Ed. 637. See the title **PRESUMPTIONS AND BURDEN OF PROOF**.

And where a corporation seeks incorporation under the laws of more than one state, while the assent of the corporators to each act of incorporation is necessary to corporate existence in each, such assent may be presumed from circumstances. *Beaty v. Knowler*, 4 Pet. 152, 167, 7 L. Ed. 813. See ante, “Co-Operative Legislation Creating Corporations,” II, H, 1, a, (2).

Thus it was held in *Planters' Ins. Co. v. Tennessee*, 161 U. S. 193, 198, 40 L. Ed. 667, that where an act of incorporation was passed, but no corporation organized by acceptance thereof for twenty-four years, there was no corporation in existence until such acceptance, even if it could have been accepted validly after such unreasonable delay, without a new authority or recognition by the legislature. In this case there was such recognition by a subsequent act.

Where it might possibly have been held, in a direct attack of the state upon the charter, that there had been an unreasonable delay in accepting it, and that consequently there was in law no corporation under the charter, but that course was not taken, and the legislature, after the assumed organization under the charter, after the long delay, passed an act changing the name of the corporation and permitting it to change its situs, it might, therefore, be claimed that it thereby recognized the existence of the corporation under the charter, but in subordination to the constitution and laws existing at the time when the charter was accepted. *Planters' Ins. Co. v. Tennessee*, 161 U. S. 193, 198, 40 L. Ed. 667.

**53. Sufficiency of title and passage of incorporating statute.**—See the titles **BANKS AND BANKING**, vol. 3, p. 10; **STATUTES**.

**Jurisdictional allegations as to incorporation.**—See post, “Averment and Proof of Incorporation,” XIV, D. See, also, the title **COURTS**.

**54. When corporate existence begins.**—*Wells Co. v. Gastonia Cotton Mfg. Co.*, 198 U. S. 177, 182, 49 L. Ed. 1003; *People's Railroad v. Memphis Railroad*, 10 Wall. 38, 49, 19 L. Ed. 844; *Minor v. Mechanics' Bank*, 1 Pet. 46, 63, 7 L. Ed. 47.

In Mississippi individuals may become incorporated for certain purposes under general laws. The first step there towards incorporation is to apply to the governor for a charter, stating the purposes for which the corporation is to be created. That officer then takes the advice of the attorney general as to the constitutionality and legality of the provisions of the proposed charter. If the governor approves the charter, and causes the Great Seal of the state to be affixed thereto by the secretary of state, it would seem that the process of incorporation then becomes complete. Charters of incorporation in that state are required to be recorded in the office of the secretary of state and in the office of the clerk of the chancery court of the county in which the corporation does business. Anno. Code of Miss. 1892, c. 25. *Wells Co. v. Gastonia Cotton Mfg. Co.*, 198 U. S. 177, 182, 49 L. Ed. 1003.

See *People's Railroad v. Memphis Railroad*, 10 Wall. 38, 49, 19 L. Ed. 844, where it was held that upon the question whether a corporation was ever legally incorporated, there does not appear to be any substantial ground of doubt, as the persons named in the act, and their associates, are expressly constituted a body politic and corporate under the name therein set forth, and the first section also provides that they may have succession for the term of twenty-five years, may sue and be sued, plead and be impleaded, may have and use a common seal, purchase and hold real and personal estate, create stock, elect directors and other officers, and may make all necessary by-laws, subject to the usual condition that they shall not be inconsistent with the laws of the state.

The words “are hereby created a body politic and corporate,” etc., manifest the purpose of the legislature to create a corporation. “Under the general statutes of the state (Miss.) it came into existence as a corporation immediately upon its charter being approved by the governor, and such approval certified by the secretary of state under

tention to make the subscription of the whole capital stock a condition precedent to corporate existence, unless it is so made by the charter, the matter of the plea that there was no valid incorporation falls, and cannot sustain the defense.<sup>55</sup> But if the law requires the performance of certain acts before corporate existence commences, it must be complied with or there is no corporation.<sup>56</sup>

**For Purpose of Consolidation.**—A corporation may “exist” so far as capacity to consolidate with another is concerned, without being a full-fledged corporation.<sup>57</sup>

the Great Seal of the state. If the commencing of the business for which it was incorporated before a certain amount of capital stock was subscribed and paid for was in violation of the company's charter, that was a matter for which it could be called to account by the state, and did not affect the existence in law of the company as a corporation.” *Wells Co. v. Gastonia Cotton Mfg. Co.*, 198 U. S. 177, 185, 49 L. Ed. 1003.

And upon the acceptance, by the persons named in a charter and declared to be incorporated and made a body politic and corporate, with such others as might be associated with them, the charter took effect immediately, and the subsequent steps, such as the subscription of the stock, election of officers and organization, were to enable it to use the powers and privileges conferred for the purposes for which they were granted. They were capable of taking and holding real estate from the beginning. *Frost v. Frostburg Coal Co.*, 24 How. 278, 281, 16 L. Ed. 637.

The words, “and such other persons as may be associated,” etc., contained in a subsequent section, in connection with the four persons named in the first section, did not import that other persons must be associated with the four, before the charter could take effect; but, probably merely conferred the privilege of associating other persons in the enterprise, if desired. *Frost v. Frostburg Coal Co.*, 24 How. 278, 282, 16 L. Ed. 637.

The same observation is also applicable to the second section, which declares that the capital stock shall consist of 5,000 shares of one hundred dollars each, of which the lands of the four persons named in the first section may be one part, and those who may associate with them, and constitute the corporation by subscription for stock, payable in money, the other. It merely confers the privilege of payment in land on these four. *Frost v. Frostburg Coal Co.*, 24 How. 278, 282, 16 L. Ed. 637.

**55. Subscription of stock.**—*Minor v. Mechanics' Bank*, 1 Pet. 46, 65, 7 L. Ed. 47; *Wells Co. v. Gastonia Cotton Mfg. Co.*, 198 U. S. 177, 188, 49 L. Ed. 1003.

Where it is not clear from the charter that there was any limitation intended as to the number of subscribers necessary to constitute the corporation, none is to be implied. When the legislature intends to restrict the capital stock, or to require any

portion of stock or stockholders to be indispensable for its legal existence and operations, it is not uncommon to incorporate such a restriction into the charter. The omission to do so is quite as significant, that the legislature did not deem such a restriction subservient to any manifest public policy. The legislature might well presume, after prescribing the maximum to which the capital stock should extend, that the actual capital to be employed might safely be left to the discretion of the stockholders, or its agents. *Minor v. Mechanics' Bank*, 1 Pet. 46, 64, 7 L. Ed. 47.

“Under the statutes of Mississippi and independently of the subscription of a certain amount of stock and its payment, the plaintiff became, in law, a corporation when the governor approved its charter and the fact of such approval was certified by the secretary of state under the Great Seal of Mississippi. It could not thereafter dispute its liability for acts done by it in its corporate name nor be denied the right to sue in that name.” *Wells Co. v. Gastonia Cotton Mfg. Co.*, 198 U. S. 177, 188, 49 L. Ed. 1003.

**56. Mandatory provisions.**—The supreme court of Mississippi has decided that where acts are required to be performed before the corporation comes into existence, no corporation is created or can exist until those acts are performed. In this general view the supreme court of the United States entirely concurs. *Wells Co. v. Gastonia Cotton Mfg. Co.*, 198 U. S. 177, 187, 49 L. Ed. 1003.

If the charter of the company had made it a condition precedent to its becoming a corporation that a certain amount of capital stock should be subscribed and paid for, a compliance with that condition would have been necessary before the company would have become a corporation entitled to sue and be sued in the courts of the United States. But the charter in question prescribed no such condition. If the legislature had intended to withhold corporate existence until a given amount of capital stock was subscribed and paid for, that intention would have been manifested by clear language. *Wells Co. v. Gastonia Cotton Mfg. Co.*, 198 U. S. 177, 186, 49 L. Ed. 1003. And see, generally, the title STOCK AND STOCKHOLDERS.

**57. Qualified corporate existence.**—A corporation may be an “existing” corpora-

**Acceptance of Charter Essential.**—See ante, "Acceptance of Charter," IV, B, 3.

**Estoppel to Deny Existence.**—See post, "Corporations by Estoppel," V, B.

**Irregularities and Their Effect.**—See post, "Defective and Irregular Incorporation," V.

**Priority between Existence of Corporation and Grant of Franchise.**—See ante, "Status before Incorporation," III, E.

2. DURATION AND TERMINATION OF CORPORATE EXISTENCE.—See post, "Insolvency, Winding Up, Dissolution and Forfeiture," XVII.

**Grant of Franchise.**—By analogy to the rule of the common law, that a grant to a natural person, without words of inheritance, creates only an estate for his life, a grant of a franchise, without words of perpetuity, to a corporation aggregate, whose duration is limited, creates only an estate for its life.<sup>58</sup> The period fixed by the charter for the determination of the existence of a corporation cannot be extended by implication beyond the prescribed term, except for the purposes contained in the charter.<sup>59</sup>

**D. Incorporation of Partnership.**—See the title PARTNERSHIP.

## V. Defective and Irregular Incorporation.

**A. De Facto Corporations.—What Constitutes.**—If the corporation has acted as such and exercised its franchises, then it is a corporation de facto, and in such case any irregularity in its organization is immaterial;<sup>60</sup> or that it was

tion, in the sense of a statute allowing existing similar corporations to consolidate, although it may not have the right to exercise the main function for which it was created until a fixed future date, where it has the power to act in other important respects as a corporation. *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 656, 29 L. Ed. 516.

**58. Duration of franchise.**—*Turnpike Co. v. Illinois*, 96 U. S. 63, 24 L. Ed. 651.

**59. Extension.**—*Turnpike Co. v. Illinois*, 96 U. S. 63, 69, 24 L. Ed. 651.

The extension by a city of the term of a franchise beyond the limit of the term of corporate life, cannot in any manner affect that term, although the corporation might take the same for the remainder of its term of life. *Detroit v. Detroit Citizens St. R. Co.*, 184 U. S. 368, 394, 46 L. Ed. 592.

**Prolongation for purposes of suit.**—See post, "As to Suits by and against," XVII, C, 4.

**60. Definition.**—*Whitney v. Wyman*, 101 U. S. 392, 395, 25 L. Ed. 1050; *Frost v. Frostburg Coal Co.*, 24 How. 278, 16 L. Ed. 637; *Smith v. Sheeley*, 12 Wall. 358, 361, 20 L. Ed. 430; *Leavenworth County v. Barnes*, 94 U. S. 70, 73, 24 L. Ed. 63; *Chubb v. Upton*, 95 U. S. 665, 24 L. Ed. 523; *Fritts v. Palmer*, 132 U. S. 282, 292, 33 L. Ed. 317; *Comanche County v. Lewis*, 133 U. S. 198, 202, 33 L. Ed. 604; *Baltimore, etc., R. Co. v. Fifth Baptist Church*, 137 U. S. 568, 571, 34 L. Ed. 784; *Tulare Irrigation District v. Shepard*, 185 U. S. 1, 13, 46 L. Ed. 773; *New Orleans, etc., Co. v. Louisiana*, 180 U. S. 320, 327, 45 L. Ed. 550.

From the authorities it appears that the requisites to constitute a corporation de

facto are three: (1) A charter or general law under which such a corporation as it purports to be might be lawfully organized; (2) an attempt to organize thereunder; and (3) actual user of the corporate franchise. The case at bar contains these requisites. There was a general valid law under which a corporation, such as the defendant is claimed to be, could be formed; there was undoubtedly a bona fide attempt to organize thereunder, and there has been actual user of the corporate franchise. *Tulare Irrigation District v. Shepard*, 185 U. S. 1, 13, 46 L. Ed. 773.

"The rule as stated by Cooley in Constitutional Limitations, 6th edition, 309, is as follows: 'In proceedings where the question whether a corporation exists or not arises collaterally, the courts will not permit its corporate character to be questioned, if it appear to be acting under color of law, and recognized by the state as such \* \* \* And the rule, we apprehend, would be no different, if the constitution itself prescribed the manner of incorporation. Even in such a case, proof that the corporation was acting as such, under legislative action, would be sufficient evidence of right, except as against the state, and private parties could not enter upon any question of regularity. And the state itself may justly be precluded, on principles of estoppel, from raising any such objection, where there has been long acquiescence and recognition.'" *Tulare Irrigation District v. Shepard*, 185 U. S. 1, 15, 46 L. Ed. 773.

Where the parties named in the act of incorporation accepted the charter, and proceeded to act as a corporate body under it, by the corporate name opened



not organized within the time limited by its charter.<sup>61</sup>

**Legislative Recognition.**—And a legislative act recognizing a de facto corporation as a valid and legal one, operates to make it a de jure as well as de facto corporation.<sup>62</sup> And so with a grant from the sovereign, recognizing the existence of the corporation and its capacity to take.<sup>63</sup>

**Who May Question Validity.**—The state alone can call in question the validity of such incorporation,<sup>64</sup> and the legality of its constitution cannot be collaterally attacked.<sup>65</sup>

coal mines, transported the coal to market, borrowed money on the credit of the company, and made large and costly improvements on the lands in controversy, during all which time the ancestor of plaintiffs acted as one of the directors, he having conveyed the land sued for by plaintiffs to the corporation, the plaintiffs cannot recover on the ground that the corporation was not then validly incorporated. *Frost v. Frostburg Coal Co.*, 24 How. 278, 16 L. Ed. 637.

**61.** *County of Macon v. Shores*, 97 U. S. 272, 277, 24 L. Ed. 889; *County of Ralls v. Douglass*, 105 U. S. 728, 730, 26 L. Ed. 957.

**Tenure of property.**—See post, "In General," XI, B, 1.

**Quasi corporation.**—"What is meant by the words 'quasi corporation,' as used in the authorities, is not always very clear. It is a phrase generally applied to a body which exercises certain functions of a corporate character, but which has not been created a corporation by any statute, general or special." *School District v. Insurance Co.*, 103 U. S. 707, 708, 26 L. Ed. 601.

**62. Legislative recognition as curing defects.**—*Comanche County v. Lewis*, 133 U. S. 198, 33 L. Ed. 604; *Society for the Propagation of the Gospel v. Pawlet*, 4 Pet. 480, 502, 7 L. Ed. 927; *Davis v. Gray*, 16 Wall. 203, 222, 21 L. Ed. 447; *Street v. United States*, 133 U. S. 299, 307, 33 L. Ed. 631; *Mormon Church v. United States*, 136 U. S. 1, 44, 34 L. Ed. 481; *Andes v. Ely*, 158 U. S. 312, 39 L. Ed. 996.

It is universally affirmed that when a legislature has full power to create corporations, its acts recognizing as valid a de facto corporation, whether private or municipal, operate to cure all defects in steps leading up to the organization and make a de jure out of what before was only a de facto corporation, although it is true that there must be a de facto organization upon which this recognition may act. *Comanche County v. Lewis*, 133 U. S. 198, 202, 33 L. Ed. 604. See, also, *Planters' Ins. Co. v. Tennessee*, 161 U. S. 193, 198, 40 L. Ed. 667.

The noncompliance with conditions subsequent, involving the existence of a corporation, may be condoned and waived by subsequent action of the legislature, and is waived by a clear implied affirmation, by legislative act, of the existence of the corporation, and of its possession of the

rights, franchises and property conferred by its charter. *Davis v. Gray*, 16 Wall. 203, 223, 21 L. Ed. 447.

**63. Grant from sovereign.**—*Society for the Propagation of the Gospel v. Pawlet*, 4 Pet. 480, 502, 7 L. Ed. 927.

**64. State alone can question validity.**—*Whitney v. Wyman*, 101 U. S. 392, 52 L. Ed. 1050; *Smith v. Sheeley*, 12 Wall. 358, 361, 20 L. Ed. 430; *Davis v. Gray*, 16 Wall. 203, 223, 21 L. Ed. 447; *Fritts v. Palmer*, 132 U. S. 282, 292, 33 L. Ed. 317; *Tulare Irrigation District v. Shepard*, 185 U. S. 1, 13, 46 L. Ed. 773.

The state can treat a de facto corporation as such, for the purpose of calling it into court and asking for a decree enjoining it from acting as a corporation, on the ground of the nullity of the organization; in other words, on the ground that it has no right to be a corporation, and that it is not a corporation de jure. For that purpose it is not necessary that the individuals who were corporators or officers of the company be made defendants and service of process be made upon them. The company itself may be brought into court by service upon its officer appointed pursuant to the charter under which it assumed to act, and in which it is provided that the president shall be served with process against the corporation. *New Orleans, etc., Co. v. Louisiana*, 180 U. S. 320, 328, 45 L. Ed. 550; *Minor v. Mechanics' Bank*, 1 Pet. 46, 63, 7 L. Ed. 47. See the title QUO WARRANTO.

The courts are bound to regard it as a corporation, so far as third persons are concerned, until it is dissolved by a judicial proceeding on behalf of the government that created it. *Frost v. Frostburg Coal Co.*, 24 How. 278, 16 L. Ed. 637.

Although conditions subsequent, involving the existence of a corporation, have not been complied with, to make them effectual there must be judgment of ouster and dissolution through the proper judicial action. *Davis v. Gray*, 16 Wall. 203, 223, 21 L. Ed. 447.

**65. Collateral attack.**—*Pacific Railroad Removal Cases*, 115 U. S. 1, 15, 29 L. Ed. 319; *Smith v. Sheeley*, 12 Wall. 358, 361, 20 L. Ed. 430; *Fritts v. Palmer*, 132 U. S. 282, 292, 33 L. Ed. 317; *Commissioners v. Bolles*, 94 U. S. 103, 106, 24 L. Ed. 46. See *Tulare Irrigation District v. Shepard*, 185 U. S. 1, 17, 46 L. Ed. 773. See post, "Corporations by Estoppel," V, B.

**Right of Eminent Domain.**—But the right of eminent domain cannot be exercised by a corporation *de facto*. It must be *de jure* as well.<sup>66</sup>

**Corporation Consolidated under Federal Laws.**—Where a consolidated corporation, under the authority of acts of congress, was by agreement formed out of several pre-existing corporations, one of them a federal corporation, which consolidated corporation assumed a corporate name, and under it and said agreement of consolidation, took possession and ownership of all the property of said constituent companies, and operated and managed its corporate affairs under and by virtue of said acts of congress, such corporation is, to all intents and purposes and in fact, a corporation formed and organized under an act of congress, and is a *de facto* corporation at the least.<sup>67</sup>

**Corporations Created by De Facto State Government.**—Such corporations, created by the legislature of a state in arms against the United States, relating only to domestic concerns and unconnected with the war, are validly incorporated.<sup>68</sup> And so with a corporation created by an ordinance of the so-called state of Deseret, prior to its confirmation by the territorial legislature of Utah.<sup>69</sup>

**B. Corporations by Estoppel.—Statement of Rule.**—It is familiar law that one who contracts with a corporation as such cannot afterwards avoid the obligations assumed by such contract on the ground that the supposed corporation was not one *de jure*.<sup>70</sup> And one who deals with a corporation as existing in fact is estopped to deny as against the corporation that it has been legally

<sup>66.</sup> **Eminent domain.**—*Tulare Irrigation District v. Shepard*, 185 U. S. 1, 17, 46 L. Ed. 773. See the title EMINENT DOMAIN.

<sup>67.</sup> **Consolidation under federal laws.**—*Pacific Railroad Removal Cases*, 115 U. S. 1, 14, 15, 29 L. Ed. 319. See ante, "Power of Congress," IV, A, 1, d.

<sup>68.</sup> **Incorporation by a de facto state government.**—Corporations created by the legislature of a state while the state was in armed rebellion against the government of the United States, are to be considered as validly incorporated, if the acts of incorporation had no relation to anything else than the domestic concerns of the state, and they were neither in their apparent purpose nor in their operation hostile to the Union or in conflict with the constitution; but were mere ordinary legislation, such as might have been had there been no war or no attempted secession, and such as is of yearly occurrence in all the states. *United States v. Insurance Companies*, 22 Wall. 99, 22 L. Ed. 816.

<sup>69.</sup> **Ordinance of "State of Deseret."**—*Mormon Church v. United States*, 136 U. S. 1, 44, 34 L. Ed. 481.

**Illegality of object and its effect.**—See ante, "Objects and Consideration," IV, A, 1, a.

<sup>70.</sup> **Corporation by estoppel.**—*Andes v. Ely*, 158 U. S. 312, 322, 39 L. Ed. 996; *Leavenworth County v. Barnes*, 94 U. S. 70, 24 L. Ed. 63; *Commissioners v. Bolles*, 94 U. S. 104, 24 L. Ed. 46; *Casey v. Galli*, 94 U. S. 673, 24 L. Ed. 168; *Chubb v. Upton*, 95 U. S. 665, 24 L. Ed. 523; *Handley v. Stutz*, 139 U. S. 417, 35 L. Ed. 227. See *McCormick v. Market Bank*, 165 U. S. 538, 552, 41 L. Ed. 817.

Where a corporation has exercised the usual functions of such a corporation, and has been a corporation *de facto* at least, if not *de jure*, from the date of its organization, its corporate existence, therefore, and its ability to contract cannot be called in question in a suit brought upon evidences of debt given to it. *Commissioners v. Bolles*, 94 U. S. 104, 106, 24 L. Ed. 46; *Tulare Irrigation District v. Shepard*, 185 U. S. 1, 46 L. Ed. 773.

"The corporation having assumed by entering into the contract with the plaintiff to have the requisite power both parties are estopped to deny it." *Whitney v. Wyman*, 101 U. S. 392, 397, 25 L. Ed. 1050.

Where the evidence showed that the company in fact did business under its charter and amendments for several years as a corporation, and claimed to be legally organized as such, and it also appeared from the evidence that its stock was subscribed for by various individuals, and was issued to such subscribers or their assigns, that it also issued its debentures and did business in accordance with the charter, and, as claimed, under and by the authority of the act of the legislature above mentioned; that it made contracts and elected officers who thereafter acted as such and assumed to represent the company as a corporation doing business under the laws of the state, held that it was thus a *de facto* corporation, and those who contracted with it as such could not set up as a defense, when sued by it upon those contracts, that it was not a corporation or that its organization was a nullity. None but the state could call its existence in question. *New Orleans, etc., Co. v. Louisiana*, 180 U. S.

organized.<sup>71</sup> Even if some irregularities occurred in the organization of the company, where no act made a condition precedent to the existence of the corporation has been omitted or its nonperformance shown, a party dealing with the company is not permitted to set up the irregularity.<sup>72</sup>

**Assignee in Bankruptcy Represents Corporation.**—An assignee in bankruptcy of a corporation represents it and its creditors, and the defense of its irregular organization cannot be set up against him by such subscriber.<sup>73</sup>

## VI. Stock and Stockholders.

See the title STOCK AND STOCKHOLDERS.

## VII. Officers and Agents.

See the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

320, 327, 45 L. Ed. 550; *Chubb v. Upton*, 95 U. S. 665, 24 L. Ed. 523; *Baltimore, etc., R. Co. v. Fifth Baptist Church*, 137 U. S. 568, 571, 34 L. Ed. 784; *Handley v. Stutz*, 139 U. S. 417, 424, 35 L. Ed. 227.

And where the acting president for many years, of a corporation, the organization of which was never perfected or stock issued, made conveyances in the name of the corporation, representing to the purchaser its existence, he is estopped to deny the existence of the corporation. *Close v. Glenwood Cemetery*, 107 U. S. 466, 27 L. Ed. 408.

71. *Close v. Glenwood Cemetery*, 107 U. S. 466, 477, 27 L. Ed. 408; *Chubb v. Upton*, 95 U. S. 665, 24 L. Ed. 523; *Wallace v. Loomis*, 97 U. S. 146, 24 L. Ed. 895; *Commissioners v. Bolles*, 94 U. S. 104, 106, 24 L. Ed. 46.

Where a shareholder of a corporation is called upon to respond to a liability as such, and where a party has contracted with a corporation, and is sued upon the contract, neither is permitted to deny the existence or the legal validity of such corporation. To hold otherwise would be contrary to the plainest principles of reason and of good faith, and involve a mockery of justice. Parties must take the consequences of the position they assume. They are estopped to deny the reality of the state of things which they have made appear to exist, and upon which others have been led to rely. Sound ethics require that the apparent, in its effects and consequences, should be as if it were real, and the law properly so regards it. *Casey v. Galli*, 94 U. S. 673, 680, 24 L. Ed. 168; *Chubb v. Upton*, 95 U. S. 665, 24 L. Ed. 523; *Handley v. Stutz*, 139 U. S. 417, 424, 35 L. Ed. 227; *Scovill v. Thayer*, 105 U. S. 143, 149, 26 L. Ed. 968.

The same rule applies where the stock of a corporation has been increased, and the question arises upon the liability of a subscriber for the increased stock. *Chubb v. Upton*, 95 U. S. 665, 24 L. Ed. 523.

**Purchaser of land from corporation.**—And where, the defendant, in an action to recover land, went into possession of the

premises in controversy under the deed of the plaintiff corporation, and took his title from the company, with a condition that if he manufactured or sold intoxicating liquors, to be used as a beverage, at any place of public resort on the premises, the title should revert to his grantor, he is therefore estopped, when sued by the grantor for the premises, upon breach of the condition, from denying the corporate existence of the plaintiff, or the validity of the title conveyed by its deed. Upon obvious principles, he cannot be permitted to retain the property which he received upon condition that it should be restored to his grantor on a certain contingency, by denying, when the contingency has happened, that his grantor ever had any right to it. *Cowell v. Springs Co.*, 100 U. S. 55, 61, 25 L. Ed. 547.

**Holder of corporate bonds.**—A party is estopped from denying the corporate existence of a company when, by holding its bonds, he acquires a locus standi in the suit brought to foreclose the mortgage made to secure their payment. *Wallace v. Loomis*, 97 U. S. 146, 24 L. Ed. 895. See, also, the title ESTOPPEL.

72. **Irregularity in organization.**—*Frost v. Frostburg Coal Co.*, 24 How. 278, 16 L. Ed. 637. And so is a stockholder who has participated in its acts as a de facto corporation. *Sanger v. Upton*, 91 U. S. 56, 64, 23 L. Ed. 220.

"*Chubb v. Upton*, 95 U. S. 665, 24 L. Ed. 523, was to the familiar point that one who has contracted with a de facto corporation cannot set up irregularity in its organization in defense of a suit upon the contract. *Smith v. Sheeley*, 12 Wall. 358, 20 L. Ed. 430, merely held that when land had been conveyed for full value to a de facto corporation, the grantor and those claiming under him could not afterwards deny its capacity to take the title." *McCormick v. Market Bank*, 165 U. S. 538, 552, 41 L. Ed. 817, reaffirmed in *McCreery Realty Corporation v. Equitable Nat. Bank*, 203 U. S. 584, 51 L. Ed. 328.

73. **Representation by assignee in bankruptcy.**—*Chubb v. Upton*, 95 U. S. 665, 24 L. Ed. 523.



### VIII. Charters, and Their Amendment, Repeal and Extension.

**A. Charter Defined and Effect as Notice.**—A charter, in the sense here used, is an instrument or authority from the sovereign power, bestowing rights or privileges; as it is briefly expressed, it is an act of incorporation,<sup>74</sup> and an amendment thereto may be treated as part thereof.<sup>75</sup>

**Charter as Notice.**—A corporation cannot vary from the object of its creation, and persons dealing with a company must take notice of whatever is contained in the law of its organization.<sup>76</sup>

**Law of Existence.**—Every corporation necessarily carries its charter wherever it goes, for that is the law of its existence.<sup>77</sup>

**B. Corporation Takes Charter Subject to General Laws.**—See post, "Presumption against Immunity from Legislative Control," VIII, C, 2. By accepting incorporation under the laws of a state, the corporation submits itself to the laws of the state then in force, not inconsistent with the express provisions of its charter.<sup>78</sup> And the general incorporation act of a state under

**74. Definition.**—*Humphrey v. Pegues*, 16 Wall. 244, 248, 21 L. Ed. 326.

**75.** An amendment to a charter may be treated as part of the charter, in a subsequent statute giving certain privileges "granted by the charter." *Humphrey v. Pegues*, 16 Wall. 244, 21 L. Ed. 326. And see post, "Supplementary Charters and Amendments," VIII, C, 1, a, (3).

**Restrictions in charter of predecessor corporation.**—See post, "Succession," XV, B.

**76. Charter as notice.**—*Scovill v. Thayer*, 105 U. S. 143, 150, 26 L. Ed. 968; *Zabriskie v. Cleveland, etc., R. Co.*, 23 How. 381, 16 L. Ed. 488; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 42, 35 L. Ed. 55; *Louisville, etc., R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 43 L. Ed. 1081; *Canada Southern R. Co. v. Gebhard*, 109 U. S. 527, 27 L. Ed. 1020.

"When the corporation is created by a charter granted by the legislature, any person dealing with it is bound to take notice of the terms of the charter, and of the general laws restricting or defining the powers of the corporation. *Pearce v. Madison, etc., R. Co.*, 21 How. 441, 16 L. Ed. 184; *Zabriskie v. Cleveland, etc., R. Co.*, 23 How. 381, 398, 16 L. Ed. 488; *Thomas v. Railroad Co.*, 101 U. S. 71, 25 L. Ed. 950; *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 630, 30 L. Ed. 83. In like manner, when the corporation is formed under general laws, by the recording or filing in a public office of the required articles of association and certificate, any person dealing with the association is bound to take notice of the documents recorded or filed, upon which, as authorized and controlled by the general laws, depend the existence of the corporation, the extent of its corporate powers, and its capacity to act as a corporation." *McCormick v. Market Bank*, 165 U. S. 538, 550, 41 L. Ed. 817, reaffirmed in *McCreery Realty Corporation v. Equitable Nat. Bank*, 203 U. S. 584, 51 L. Ed. 328; *Oregon R., etc., Co. v. Oregonian R. Co.*, 130 U. S. 1, 25, 32 L. Ed. 837; *Central Transp. Co. v. Pullman's Palace Car Co.*,

139 U. S. 24, 48, 35 L. Ed. 55; *De La Vergne, etc., Mach. Co. v. German Sav. Institution*, 175 U. S. 40, 59, 44 L. Ed. 65. See, also, *Pittsburg, etc., R. Co. v. Keokuk, etc., Bridge Co.*, 131 U. S. 371, 384, 33 L. Ed. 157; *Salt Lake City v. Hollister*, 118 U. S. 256, 263, 30 L. Ed. 176. See post, "Such as Charter and Laws Confer," XI, A, 1.

But this rule does not apply to cases where a corporation acts within the range of its general authority, but fails to comply with some formality or regulation which it should not have neglected, but has. *Zabriskie v. Cleveland, etc., R. Co.*, 23 How. 381, 398, 16 L. Ed. 488; *Louisville, etc., R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 571, 43 L. Ed. 1081. See post, "Ultra Vires Acts," XII. See, also, the title NOTICE.

Every creditor of a corporation must be presumed to understand the nature and incidents of such a body politic, and to contract with reference to them. *Mumma v. Potomac Co.*, 8 Pet. 281, 8 L. Ed. 945; *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574, 584, 28 L. Ed. 1084.

**Provisions in charter of foreign corporation.**—See the titles FOREIGN CORPORATIONS; INSURANCE.

**Judicial notice.**—See the title EVIDENCE.

**77. Charter as law of existence.**—*Relfe v. Rundle*, 103 U. S. 222, 26 L. Ed. 337; *Railroad Co. v. Koontz*, 104 U. S. 5, 11, 26 L. Ed. 643; *Canada Southern R. Co. v. Gebhard*, 109 U. S. 527, 537, 27 L. Ed. 1020. See *Nashua Sav. Bank v. Anglo-American Land, etc., Co.*, 189 U. S. 221, 230, 47 L. Ed. 782; *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357. See the title FOREIGN CORPORATIONS.

**Authentication as private act.**—See the title STATUTES.

**Construction.**—See post, "Presumption against Immunity from Legislative Control," VIII, C, 2.

**78. Subjection to general law.**—*Chicago, etc., R. Co. v. Zernecke*, 183 U. S. 582, 46 L. Ed. 339; *Pennsylvania R. Co. v. Miller*, 132 U. S. 75, 83, 33 L. Ed. 267; *Corry v.*

which a corporation was incorporated, must be regarded as entering into and forming part of the charter of the corporation,<sup>79</sup> when not inconsistent with the express provisions of the charter.<sup>80</sup>

**C. Charter as Contract, and Amendment or Repeal Thereof**—1. **CHARTER AS CONTRACT INVIOABLE BY LEGISLATION**—a. *In General*—(1) *Statement of Rule*.—A charter from the state to a private corporation creates a contract within the protection of the clause of the federal constitution prohibiting its impairment by state legislation.<sup>81</sup> It is now too late to contend that the

Baltimore, 196 U. S. 466, 477, 49 L. Ed. 566; *Relfe v. Rundle*, 103 U. S. 222, 26 L. Ed. 337. See post, "In Statutes or Constitution," VIII, C, 4, a, (2).

A corporation takes its charter subject to the general law of the state, and to such changes as may be made in such general law, and subject to future constitutional provisions or future general legislation, when there was no prior contract with the corporation exempting it from liability to such future general legislation, in respect of the subject matter involved. *Pennsylvania R. Co. v. Miller*, 132 U. S. 75, 83, 33 L. Ed. 267, citing *Baltimore, etc., R. Co. v. Nesbit*, 10 How. 395, 399, 400, 13 L. Ed. 469; *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 20 L. Ed. 557; *Railroad Co. v. Hecht*, 95 U. S. 168, 170, 24 L. Ed. 423; *Beer Co. v. Massachusetts*, 97 U. S. 25, 32, 33, 24 L. Ed. 989; *Newton v. Commissioners*, 100 U. S. 548, 557, 25 L. Ed. 710; *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 29 L. Ed. 463; 1 *Hare's American Const. Law*, 609, 610; 2 *Morawetz on Private Corporations*, 2d ed., §§ 1062, 1065, 1067; *Cooley's Const. Limit.*, 4th Ed. 574, 716. See the same principle laid down in *Chicago, etc., R. Co. v. Minnesota*, 134 U. S. 418, 455, 33 L. Ed. 970; *Minneapolis, etc., R. Co. v. Minnesota*, 134 U. S. 467, 33 L. Ed. 985; *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155, 161, 24 L. Ed. 94. See, also, *Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677, 692, 40 L. Ed. 849.

"In *Salt Co. v. East Saginaw*, 13 Wall. 373, 20 L. Ed. 611, it was said by Mr. Justice Bradley, in delivering the opinion of the court, page 378, that: 'Corporations formed under general laws in place of special charters, like the Ohio banks under the general banking law of that state, are entitled to the benefit of specific provisions and exemptions contained in those laws, which are regarded in the same light as if inserted in special charters.'" *Stanislaus County v. San Joaquin, etc., Irrigation Co.*, 192 U. S. 201, 206, 48 L. Ed. 406. See, also, *State Bank v. Knoop*, 16 How. 369, 380, 14 L. Ed. 977.

**Where a corporation changes its business**, under the provisions of a general law authorizing it to do so, when it assumes to make use of the privileges granted to it under the act last named, it must do so subject to the constitution and laws existing at the time when that act was passed, and its rights and privileges must be exercised in subordination thereto.

*Memphis City Bank v. Tennessee*, 161 U. S. 186, 192, 40 L. Ed. 664.

**79. General incorporation**.—*Freeport Water Co. v. Freeport City*, 180 U. S. 587, 596, 45 L. Ed. 679.

**80.** Although one section of the charter subjected the company to the general act, yet the provision is to be construed as subject only when not inconsistent with the express provisions of the charter. *Frost v. Frostburg Coal Co.*, 24 How. 278, 283, 16 L. Ed. 637.

But if the provisions of a special charter or a special authority derived from the legislature, can reasonably well consist with general legislation whose words are not absolutely harmonious with it, the two are to be deemed to stand together; one as the general law of the land, the other as the law of the particular case. *State v. Stoll*, 17 Wall. 425, 21 L. Ed. 650. See the title **BANKS AND BANKING**, vol. 3, p. 1.

**Reserved right of amendment or repeal in constitution or statute**.—See post, "Where Power Is Reserved to Amend or Repeal," VIII, C, 4.

**81. Charter as inviolable contract**.—*Looker v. Maynard*, 179 U. S. 46, 51, 45 L. Ed. 79; *Terrett v. Taylor*, 9 Cranch 43, 52, 3 L. Ed. 650; *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. Ed. 773; *Providence Bank v. Billings*, 4 Pet. 514, 7 L. Ed. 939; *Gordon v. Appeal Tax Court*, 3 How. 133, 137, 11 L. Ed. 529; *West River Bridge Co. v. Dix*, 6 How. 507, 531, 542, 12 L. Ed. 535; *Woodruff v. Trapnall*, 10 How. 190, 13 L. Ed. 383; *Paup v. Drew*, 10 How. 218, 13 L. Ed. 394; *Richmond, etc., R. Co. v. Louisa R. Co.*, 13 How. 71, 82, 14 L. Ed. 55; *Trustees for Vincennes University v. Indiana*, 14 How. 268, 14 L. Ed. 416; *State Bank v. Knoop*, 16 How. 369, 380, 14 L. Ed. 977; *Ohio Life Ins. etc., Co. v. Debolt*, 16 How. 416, 14 L. Ed. 997; *Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401; *Mechanics', etc., Bank v. Debolt*, 18 How. 380, 15 L. Ed. 458; *Mechanics', etc., Bank v. Thomas*, 18 How. 384, 15 L. Ed. 460; *Ohio Life Ins., etc., Co. v. Debolt*, 16 How. 416, 14 L. Ed. 997; *Jefferson Branch Bank v. Skelly*, 1 Black 436, 17 L. Ed. 173; *Franklin Branch Bank v. Ohio*, 1 Black 474, 17 L. Ed. 180; *Wright v. Sill*, 2 Black 544, 17 L. Ed. 333; *The Binghamton Bridge*, 3 Wall. 51, 73, 18 L. Ed. 137; *Home of the Friendless v. Rouse*, 3 Wall. 430, 19 L. Ed. 495; *Pennsylvania*



charter of a corporation is not a contract within the meaning of that clause in the constitution of the United States which prohibits a state from passing any law impairing the obligation of a contract. Whatever is granted is secured, subject only to the limitations and reservations in the charter, or in the laws or constitutions which govern it.<sup>82</sup> Nor does it make any difference that the uses

College Cases, 13 Wall. 190, 218, 20 L. Ed. 550; *Wilmington Railroad v. Reid*, 13 Wall. 264, 266, 20 L. Ed. 568; *Raleigh, etc., R. Co. v. Reid*, 13 Wall. 269, 20 L. Ed. 570; *Salt Co. v. East Saginaw*, 13 Wall. 373, 378, 20 L. Ed. 611; *Tomlinson v. Jessup*, 15 Wall. 454, 21 L. Ed. 204; *Miller v. The State*, 15 Wall. 478, 488, 21 L. Ed. 98; *Holyoke Co. v. Lyman*, 15 Wall. 500, 511, 21 L. Ed. 133; *Davis v. Gray*, 16 Wall. 203, 232, 21 L. Ed. 447; *Humphrey v. Pegues*, 16 Wall. 244, 21 L. Ed. 326; *Delaware Railroad Tax*, 18 Wall. 206, 225, 21 L. Ed. 888; *Pacific R. Co. v. Maguire*, 20 Wall. 36, 43, 22 L. Ed. 282; *Bailey v. Maguire*, 22 Wall. 215, 22 L. Ed. 850; *Morgan v. Louisiana*, 93 U. S. 217, 223, 23 L. Ed. 860; *Callaway County v. Foster*, 93 U. S. 567, 23 L. Ed. 911; *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155, 24 L. Ed. 94; *Stone v. Wisconsin*, 94 U. S. 181, 185, 24 L. Ed. 102, per Field, J., dissenting; *New Jersey v. Yard*, 95 U. S. 104, 24 L. Ed. 352; *Railroad Co. v. Hecht*, 95 U. S. 168, 24 L. Ed. 423; *Farrington v. Tennessee*, 95 U. S. 679, 24 L. Ed. 558; *Railroad Co. v. Maine*, 96 U. S. 499, 507, 24 L. Ed. 836; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 672, 24 L. Ed. 1036; *University v. People*, 99 U. S. 309, 25 L. Ed. 387; *Newton v. Commissioners*, 100 U. S. 548, 557, 25 L. Ed. 710; *Stone v. Mississippi*, 101 U. S. 814, 25 L. Ed. 1079; *United States v. Knox*, 102 U. S. 422, 424, 26 L. Ed. 216; *Bank v. Tennessee*, 104 U. S. 493, 26 L. Ed. 810; *Greenwood v. Freight Co.*, 105 U. S. 13, 17, 26 L. Ed. 961; *Asylum v. New Orleans*, 105 U. S. 362, 26 L. Ed. 1128; *Ruggles v. Illinois*, 108 U. S. 526, 536, 27 L. Ed. 812; *Susquehanna Boom Co. v. West Branch Boom Co.*, 110 U. S. 57, 28 L. Ed. 69; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 660, 29 L. Ed. 516; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. Ed. 525; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683, 29 L. Ed. 510; *Tennessee v. Whitworth*, 117 U. S. 129, 29 L. Ed. 830; *Pennsylvania R. Co. v. Miller*, 132 U. S. 75, 83, 33 L. Ed. 267; *New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79, 35 L. Ed. 943; *Hamilton Gas Light, etc., Co. v. Hamilton City*, 146 U. S. 258, 270, 36 L. Ed. 963; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 344, 37 L. Ed. 463; *People v. Cook*, 148 U. S. 397, 407, 37 L. Ed. 498; *Bank v. Tennessee*, 161 U. S. 134, 40 L. Ed. 645; *Shelby County v. Union, etc., Bank*, 161 U. S. 149, 155, 40 L. Ed. 650; *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 660, 40 L. Ed. 838; *Citizens' Bank v. Parker*, 192 U. S. 73, 48 L. Ed. 346; *Cleveland v. Cleveland City R. Co.*,

194 U. S. 517, 48 L. Ed. 1102; *Cleveland v. Cleveland Electric R. Co.*, 201 U. S. 529, 540, 50 L. Ed. 854; *Blair v. Chicago*, 201 U. S. 400, 472, 50 L. Ed. 801. See, generally, the title CONSTITUTIONAL LAW. See, also, *United States v. Stockslager*, 129 U. S. 470, 477, 32 L. Ed. 785; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 475, 36 L. Ed. 1018 (dissenting opinion), *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92, 103, 37 L. Ed. 380; *Reagan v. Farmers' Loan, etc., Co.*, 154 U. S. 362, 392, 38 L. Ed. 1014.

**As to vested rights generally in charter or franchise.**—See the title CONSTITUTIONAL LAW, ante, p. 1.

As showing general trend of opinion in the supreme court on the subject of corporate charters and vested rights, see epitome of previous cases in the opinion of the court in *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 647, 664, 40 L. Ed. 838.

82. *Ruggles v. Illinois*, 108 U. S. 526, 536, 27 L. Ed. 812; *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155, 24 L. Ed. 94; *Greenwood v. Freight Co.*, 105 U. S. 13, 26 L. Ed. 961; *Delaware Railroad Tax*, 18 Wall. 206, 225, 21 L. Ed. 888; *Central R., etc., Co. v. Georgia*, 92 U. S. 665, 23 L. Ed. 757.

"Such a charter, when accepted by the corporations, is undoubtedly a contract that the powers, privileges and franchises granted shall not be restrained, controlled or destroyed without their consent, unless a power for that purpose is reserved to the legislature in the act of incorporation or in some prior general law, in operation at the time the act of incorporation was passed." *Holyoke Co. v. Lyman*, 15 Wall. 500, 21 L. Ed. 133.

"By the decision in the leading case of *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629, it was established that a charter from the state to a private corporation created a contract, within the meaning of the clause in the constitution of the United States forbidding any state to pass any law impairing the obligation of contracts; and consequently that a statute of the state of New Hampshire, increasing the number of the trustees of Dartmouth College as fixed by its charter, and providing for the appointment of a majority of the trustees by the executive government of New Hampshire, instead of by the board of trustees as the charter provided, was unconstitutional and void." *Looker v. Maynard*, 179 U. S. 46, 51, 45 L. Ed. 79.

"The whole doctrine of vested rights as applied to the charters of corporations is based upon *Dartmouth College v.*



of the corporation are public, if the corporation itself be private.<sup>83</sup>

(2) *Executed Contracts*.—Charters of private corporations are executed contracts,<sup>84</sup> even though the corporation is not in esse at the date of the grant,<sup>85</sup>

Woodward, 4 Wheat. 518, 4 L. Ed. 629, in which the broad proposition was laid down that such charters were contracts within the meaning of the constitution, and hence that an act of the state legislature altering a charter in any material respect was unconstitutional and void. The doctrine of this case has been subjected to more or less criticism by the courts and the profession, but has been reaffirmed and applied so often as to have become firmly established as a canon of American jurisprudence." *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 660, 40 L. Ed. 838.

"Subsequent cases have settled the law that, wherever property rights have been acquired by virtue of a corporate charter, such rights, so far as they are necessary to the full and complete enjoyment of the main object of the grant, are contracts, and beyond the reach of destructive legislation. Even before the Dartmouth College case was decided, it was held by this court that grants of land made by the Crown to colonial churches were irrevocable, and that property purchased by, or devised to them, prior to the adoption of the constitution, could not be diverted to other purposes by the states which succeeded to the sovereign power of the colonies. *Terrett v. Taylor*, 9 Cranch 43, 3 L. Ed. 650; *Pawlet v. Clark*, 9 Cranch 292, 3 L. Ed. 735; *Society for the Propagation of the Gospel v. New Haven*, 8 Wheat. 464, 5 L. Ed. 662. Indeed, the sanctity of charters vesting in grantees the title to lands or other property has been vindicated in a large number of cases." *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 661, 40 L. Ed. 838, citing *Davis v. Gray*, 16 Wall. 203, 21 L. Ed. 447; *Fletcher v. Peck*, 6 Cranch 87, 137, 3 L. Ed. 162; *Moore v. Robbins*, 96 U. S. 530, 24 L. Ed. 848; *United States v. Schurz*, 102 U. S. 378, 26 L. Ed. 167; *Noble v. Union River Logging R. Co.*, 147 U. S. 165, 37 L. Ed. 123.

**Charters acquired in America from the crown**, before the revolution, were unaffected by it. *Dartmouth College v. Woodward*, 4 Wheat. 518, 707, 4 L. Ed. 629. See *Society for the Propagation of the Gospel v. New Haven*, 8 Wheat. 464, 481, 5 L. Ed. 662; *Terrett v. Taylor*, 9 Cranch 43, 3 L. Ed. 650.

**The charter of a private eleemosynary corporation** is a franchise, or incorporeal hereditament, or a contract or a grant, in which it is not competent for the legislature to interfere, unless the state has reserved the power to do so. (Opinion of Washington, J.) *Dartmouth College v. Woodward*, 4 Wheat. 518, 662, 4 L. Ed. 629; *Terrett v. Taylor*, 9 Cranch 43, 3 L. Ed. 650.

**Charter of railroad corporation**.—The cases of *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155, 24 L. Ed. 94; *Peik v. Chicago, etc., R. Co.*, 94 U. S. 164, 24 L. Ed. 97; *Winona, etc., R. Co. v. Blake*, 94 U. S. 180, 24 L. Ed. 99, establish, among others, the principle that the charter of a railroad corporation is a contract within the meaning of the contract clause of the federal constitution. *Ruggles v. Illinois*, 108 U. S. 526, 537, 27 L. Ed. 812. See *Peoples' Railroad v. Memphis Railroad*, 10 Wall. 38, 19 L. Ed. 844.

"A railroad corporation is a private corporation, though its uses are public, and a contract embodied in terms in its provisions, or necessarily implied by them, is within the constitutional clause prohibiting legislation impairing the obligation of contracts." *Georgia R., etc., Co. v. Smith*, 128 U. S. 174, 182, 32 L. Ed. 377. See, generally, the title RAILROADS.

**83. Uses may be public if corporation be private**.—*Delaware Railroad Tax*, 18 Wall. 206, 225, 21 L. Ed. 888; *Georgia, R., etc., Co. v. Smith*, 128 U. S. 174, 182, 32 L. Ed. 377.

The contract is equally protected from the legislative interference, whether the public be intrusted with the exercise of its franchise or the charter be granted for the sole benefit of the corporators. *Delaware Railroad Tax*, 18 Wall. 206, 225, 21 L. Ed. 888.

**84. As executed contracts**.—"Charters of private corporations are regarded as executed contracts between the state and the corporators, and the rule is well settled that the legislature, if the charter does not contain any reservation or other provision modifying or limiting the nature of the contract, cannot repeal, impair, or alter such a charter against the consent or without the default of the corporation, judicially ascertained and declared. Subsequent legislation, altering or modifying such a charter, where there is no such reservation, is plainly unauthorized, if it is prejudicial to the rights of the corporators, and was passed without their assent." *Miller v. The State*, 15 Wall. 478, 488, 21 L. Ed. 98. See *Holyoke Co. v. Lyman*, 15 Wall. 500, 511, 21 L. Ed. 133; *Railway Co. v. Philadelphia*, 101 U. S. 528, 539, 25 L. Ed. 912; *Pennsylvania College Cases*, 13 Wall. 190, 212, 20 L. Ed. 550. See ante, "Statement of Rule." VIII, C, 1, a, (1); post, "Consideration of Contract," VIII, C, 1, b, (2).

**85.** It is not necessary in order to render the grant of the charter or franchise a contract, that the corporation upon which it was bestowed should be in existence at the date of the grant. It is sufficient that the corporation should upon

between the lawmaking body and the corporators.<sup>86</sup>

(3) *Supplementary Charters and Amendments.*—A charter authorizing a turnpike company to build a pike road and collect tolls is a contract; but it relates only to the turnpike then authorized to be constructed. Any subsequent donations or franchises granted by the state stand upon their own considerations and depend for their continuance upon their own terms.<sup>87</sup> But an amendment of a corporate charter when accepted, forms a part of the contract from the date of acceptance, and becomes obligatory in its character.<sup>88</sup>

(4) *Valuable Privileges and Franchises Conducing to Acceptance.*—See post, "What Constitutes Impairment of the Contract," VIII, C, 1, d.

(a) *In General.*—Every valuable privilege given by a corporate charter, and which conduced to an acceptance of it and an organization under it, is a contract which cannot be changed by the legislature, where the power to do so is not reserved in the charter.<sup>89</sup> Such corporate franchises partake of the nature

coming into existence accept the grant of the charter or franchise. As soon as it is in esse, and the franchises and property become vested and executed in it, the grant is just as much an executed contract as if its prior existence had been established for a century. (Opinion of Story, J.) *Dartmouth College v. Woodward*, 4 Wheat. 518, 691, 693, 4 L. Ed. 629. See ante, "Status before Incorporation," III, E.

86. *Between legislature and the corporators.*—"The charter of a private corporation is a contract between the lawmaking power and the corporators, and the rights and obligations of the latter are to be measured accordingly." *United States v. Knox*, 102 U. S. 422, 424, 26 L. Ed. 216; *State Bank v. Knoop*, 16 How. 369, 14 L. Ed. 977.

87. *Supplementary franchise.*—*Turnpike Co. v. Illinois*, 96 U. S. 63, 68, 24 L. Ed. 651. See post, "Scope and Construction of Clause Reserving Right," VIII, C, 4, b; "Repeal of Charter or Franchise," VIII, C, 1, d, (4). See the title BRIDGES, vol. 3, p. 529.

As to consideration generally, see post, "Consideration of Contract," VIII, C, 1, b, (2).

88. *Amendment of charter.*—*Tomlinson v. Jessup*, 15 Wall. 454, 458, 21 L. Ed. 204; *Maryland v. Baltimore*, etc., R. Co., 3 How. 534, 552, 11 L. Ed. 714.

The statute of a state may make a contract as well by reference to a previous enactment making one, and extending the rights, etc., granted by such enactment to a new party, as by direct enactment setting forth the contract in all its particular terms. And a third contract may be made in a subsequent statute by importation from the previously imported contract, in the former statute, and a fourth contract by importation from a third. *The Binghamton Bridge*, 3 Wall. 51, 18 L. Ed. 137.

*Consideration for amendment granting exclusive privileges.*—Where it is argued, that, as the old charter conferred upon it no exclusive privileges, the granting of such privileges in an amendment thereof

was without consideration, and is to be deemed a mere gratuity, to this it is sufficient to answer that, apart from the public services to be performed, the obligations of the company were enlarged by the later act, and its rights under the former materially lessened and burdened in the following particulars: The amended charter limited the profits of the company as they were not limited under the original charter; limited the amount to be annually charged the city per lamp to \$35, no matter what its actual cost was, while, under the original charter, the company was entitled to charge the city for the actual cost of supplying, lighting and extinguishing lamps, not, however, exceeding the average charges in certain cities; and by the amended charter, the company was required to extend its mains when its income from lights would amount to seven per cent. on such extensions, while under the original charter such extensions were not required unless its income therefrom would pay eight per cent. These concessions upon the part of the company seem to be of a substantial character, and constituted a sufficient consideration to uphold the grant of exclusive privileges. If the consideration appears now to be inadequate, upon the money basis, that was a matter for legislative determination, behind which the courts should not attempt to go. *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683, 698, 29 L. Ed. 510. See post, "Exclusive Franchise," VIII, C, 1, a, (4), (b).

89. *Chartered rights and privileges.*—*State Bank v. Knoop*, 16 How. 369, 380, 14 L. Ed. 977; *Jefferson Branch Bank v. Skelly*, 1 Black 436, 17 L. Ed. 173; *West River Bridge Co. v. Dix*, 6 How. 507, 12 L. Ed. 535; *Holyoke Co. v. Lyman*, 15 Wall. 500, 511, 21 L. Ed. 133; *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 662, 40 L. Ed. 838; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 9, 43 L. Ed. 341; *Hamilton Gas Light, etc., Co. v. Hamilton City*, 146 U. S. 258, 36 L. Ed. 963. See, also, *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 29 L. Ed. 516; *New Orleans Waterworks Co. v. Rivers*,



of legal estates.<sup>90</sup>

(b) *Exclusive Franchise*.—An exclusive franchise, granted to a private or quasi public corporation by its charter, where such a grant is not prohibited by a constitutional provision, may be a contract within the protection of the federal constitution.<sup>91</sup> But a valid contract must have resulted from such a grant of a

115 U. S. 674, 29 L. Ed. 525; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683, 29 L. Ed. 510; *City R. Co. v. Citizens' Street R. Co.*, 166 U. S. 557, 41 L. Ed. 1114.

Although it is a quasi public corporation. *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 29 L. Ed. 516; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. Ed. 525; *St. Tammany Waterworks v. New Orleans Waterworks*, 120 U. S. 64, 30 L. Ed. 563; *Stein v. Bienville Water Supply Co.*, 141 U. S. 67, 77, 35 L. Ed. 622.

Implied as well as express. *Stone v. Wisconsin*, 94 U. S. 181, 186, 24 L. Ed. 102, per Field, J., dissenting.

"In *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629, decided in 1819, this court announced principles on the subject of the protection that the charters of private corporations were entitled to claim, under the clause of the federal Constitution against impairing the obligation of contracts, which, though received at the time with some dissatisfaction, have never been overruled in this court. The opinion in that case carried the protection of the constitutional provision somewhat in advance of what had been decided in *Fletcher v. Peck*, 6 Cranch 87, 3 L. Ed. 162, and the preceding cases, and held that it applied not only to contracts between individuals, and to grants of property made by the state to individuals or to corporations, but that the rights and franchises conferred upon private as distinguished from public corporations by the legislative acts under which their existence was authorized, and the right to exercise the functions conferred upon them by the statute, were, when accepted by the corporators, contracts which the state could not impair." *Greenwood v. Freight Co.*, 105 U. S. 13, 20, 26 L. Ed. 961.

And the grant of the franchise on that account can no more be resumed by the legislature or its benefits diminished or impaired without the assent of the corporators than any other grant of property or legal estate, unless the right to do so is reserved in the act of incorporation or in some general law of the state which was in operation at the time the charter was granted. *Pennsylvania College Cases*, 13 Wall. 190, 214, 20 L. Ed. 550. See *Salt Co. v. East Saginaw*, 13 Wall. 373, 378, 20 L. Ed. 611.

And a grant to an incorporated trustee for the benefit of a particular *cestui que trust*, or for any special, private or public charity, cannot be the less a contract because the trustee takes nothing for his own benefit. *Dartmouth College v. Wood-*

ward, 4 Wheat. 518, 697, 4 L. Ed. 629; *Cleveland v. Cleveland City R. Co.*, 194 U. S. 517, 48 L. Ed. 1102; *Cleveland v. Cleveland Electric R. Co.*, 201 U. S. 529, 540, 50 L. Ed. 854.

**A chartered right.**—The right not merely to improve the river, but to exact tolls for the use of the improvement, created by an act of incorporation, as long ago settled in this court in *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629, is a contract which cannot be set aside by either party to it. *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 344, 37 L. Ed. 463.

**Franchises granted by municipalities.**—See the title **MUNICIPAL CORPORATIONS**. And see the titles treating of the various public service corporations.

**90. As legal estates.**—"Corporate franchises, granted to private corporations, if duly accepted by the corporators, partake of the nature of legal estates, and the grant, under such circumstances, if it be absolute in its terms, and without any condition or reservation, importing a different intent, becomes a contract within the protection of that clause of the constitution which ordains that no state shall pass any law impairing the obligation of contracts." *Miller v. The State*, 15 Wall. 478, 488, 21 L. Ed. 98. See *Pennsylvania College Cases*, 13 Wall. 190, 212, 20 L. Ed. 550; *West River Bridge Co. v. Dix*, 6 How. 507, 541, 12 L. Ed. 535. See ante, "Corporate Franchise," II, A, 3.

**91. Exclusive franchise a contract.**—*New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 660, 29 L. Ed. 516; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683, 29 L. Ed. 510; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. Ed. 525; *Farrington v. Tennessee*, 95 U. S. 679, 683, 24 L. Ed. 558; *Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453, 50 L. Ed. 1102.

The remaining class (after the right to the tangible property of the corporation, and the right to exercise the franchises) is of those rights which flow from exclusive provisions in the charter—the right to prevent others from doing the same things. It cannot be doubted that such a right is valuable. *Bienville Water Supply Co. v. Mobile*, 186 U. S. 212, 223, 46 L. Ed. 1132.

"The charter of the Crescent City Gas-Light Company—to whose rights and franchises the present plaintiff has succeeded—so far as it created a corporation with authority to manufacture gas and to distribute the same by means of pipes, mains, and conduits, laid in the streets and other public ways of New Orleans,



franchise,<sup>92</sup> and the grant must be exclusive, in terms (or by necessary impli-

constituted, to use the language of this court in the case of the Delaware Railroad Tax, 18 Wall. 206, 'a contract between the state and its corporators, and within the provision of the constitution prohibiting legislation impairing the obligation of contracts,' and therefore 'equally protected from legislative interference, whether the public be interested in the exercise of its franchise, or the charter be granted for the sole benefit of its corporators.' See, also, *Greenwood v. Freight Co.*, 105 U. S. 13, 20, 26 L. Ed. 961; *New Jersey v. Yard*, 95 U. S. 104, 113, 24 L. Ed. 352." *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 660, 29 L. Ed. 516. See, in accord, *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683, 29 L. Ed. 510; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. Ed. 525.

And the grant to the Louisville Gas Company, by the act of January 22, 1869, amendatory of the act of January 30, 1867, of the exclusive privilege of erecting and establishing gas works in the city of Louisville during the continuance of its charter, and of vending coal, gas light, and supplying that municipality and its people with gas by means of public works, that is, by means of pipes, mains, and conduits placed in and under its streets and public ways, constitutes a contract between the state and that company, the obligation of which was impaired by the charter of the Citizens' Gas Light Company. *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683, 699, 29 L. Ed. 510. See, in accord, *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 29 L. Ed. 516; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. Ed. 525. See the titles GAS; MUNICIPAL CORPORATIONS.

**Exclusive water privileges.**—*New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 681, 29 L. Ed. 525, which involved the validity of a municipal ordinance granting to one Rivers the privilege of bringing water from the Mississippi River into his hotel, in the city of New Orleans, by means of mains and pipes laid in its streets and in which it was adjudged that so much of the company's charter as gave it the exclusive privilege before mentioned was, within the meaning of the constitution of the United States, a contract protected against impairment, in respect of its obligation, by that provision of the state constitution of 1879 abolishing the monopoly features in the charters of all then existing corporations other than railroad corporations; consequently, that that ordinance was void as interfering with the contract rights of the company. Followed in *St. Tammany Waterworks v. New Orleans Waterworks*, 120 U. S. 64, 65, 30 L. Ed. 563.

Upon the authority of the latter case (*New Orleans Waterworks v. Rivers*) it

must be held that the carrying out by appellant of its scheme for a system of waterworks in New Orleans would be in violation of the rights of the appellee, and that the state constitution of 1879, so far as it assumes to withdraw the exclusive privileges granted to the appellee, is inconsistent with the clause of the national constitution forbidding a state from passing any law impairing the obligation of contracts. *St. Tammany Waterworks v. New Orleans Waterworks*, 120 U. S. 64, 67, 30 L. Ed. 563. But see, *Bienville Water Supply Co. v. Mobile*, 186 U. S. 212, 218, 46 L. Ed. 1132, where the franchise was held not to be exclusive. See the title WATER COMPANIES AND WATERWORKS.

**Exclusive toll bridge right.**—*The Binghamton Bridge*, 3 Wall. 51, 18 L. Ed. 137; *West River Bridge Co. v. Dix*, 6 How. 507, 531, 12 L. Ed. 535; *Railroad Commission Cases*, 116 U. S. 307, 326, 29 L. Ed. 636. See the title BRIDGES, vol. 3, p. 521.

**Turnpike charter.**—And so with turnpike charters. *Turnpike Co. v. Illinois*, 96 U. S. 63, 68, 24 L. Ed. 651. See the title TURNPIKES AND TOLL ROADS.

**Consideration for exclusive franchise.**—See ante, "Supplementary Charters and Amendments," VIII, C, 1, a, (3). See, also, post, "Charter Not Protected unless It Embodies a True Contract," VIII, C, 1, b.

**Relinquishment of right to regulate rates.**—See post, "Alteration, Restriction or Regulation," VIII, C, 1, d, (2).

**Passage under consolidation or succession.**—See post, "Consolidation and Succession," XV.

92. "If there is no contract, there is nothing in the grant on which the constitution could act. The element of a contract by the state with the complainant company did not enter into the grant of its franchise to establish and operate a system of waterworks in Mobile." *Bienville Water Supply Co. v. Mobile*, 186 U. S. 212, 219, 46 L. Ed. 1132; *Stone v. Mississippi*, 101 U. S. 814, 25 L. Ed. 1079; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. Ed. 773.

In *Bienville Water Supply Co. v. Mobile*, 186 U. S. 212, 220, 46 L. Ed. 1132, it was said, quoting approvingly from the opinion of the Alabama court of appeals, that under a constitutional provision prohibiting the legislature from "making any irrevocable grants of special privileges or immunities." "The exclusive right of the appellee to the privilege claimed, in our opinion, cannot be sustained. The general assembly would itself have no power under the constitution to make such a grant." See post, "Charter Not Protected unless It Embodies a True Contract," VIII, C, 1, b.

cation), for the presumption is against such grants.<sup>93</sup>

**Grant by Municipal Ordinance.**—See the titles IMPAIRMENT OF OBLIGATION OF CONTRACTS; MUNICIPAL CORPORATIONS; STATUTES. See, also, the titles treating of the various public service corporations.

(5) *Property Rights*.—Wherever property rights have been acquired by virtue of a corporate charter, such rights, so far as they are necessary to the full and complete enjoyment of the main object of the grant, are contracts and beyond the reach of destructive legislation.<sup>94</sup>

**Grant of Lands by Charter.**—Where a state, in incorporating a railroad company, made a large grant of lands, defeasible if certain things were not done within a certain time by the company, such charter was a contract within the protection of the federal constitution.<sup>95</sup>

(6) *State as Sole Stockholder*.—But where the state itself is the sole stockholder in the corporation, as in case of a state bank, the corporation cannot complain of any course of action which the legislature may see fit to prescribe, such as the repeal of the charter. Otherwise as to the creditors of such corporation.<sup>96</sup>

**93. Presumption against such grant.**  
—*Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453, 469, 50 L. Ed. 1102; *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 65, 46 L. Ed. 808; *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 50 L. Ed. 353. See post, "Presumption against Immunity from Legislative Control," VIII, C, 2.

But if a state grant no exclusive privileges to one company which it has incorporated, it impairs no contract by incorporating a second one which the state largely manages and profits by to the injury of the first. *Turnpike Co. v. State*, 3 Wall. 210, 18 L. Ed. 180.

A water company cannot claim that it received the exclusive right to supply a city (Mobile) with water, where a proviso in the charter reserved to the state the power to charter other companies for such purpose. Obviously the legislature contemplated the fact that in the future other sources of supply and other companies might be necessary in order to furnish an adequate supply for the growing city, and reserved to itself the right to make such provision as it should deem expedient therefor. It is true the companies which might be chartered were not to "interfere with the property rights or the rights of obtaining water pertaining" to the plaintiff. But manifestly "property rights" refer to rights in respect to tangible property, and thus construed the proviso forbade any interference by any new company with the plant of the plaintiff. In addition, it also forbade interference with the "rights of obtaining water pertaining" to the plaintiff, which included only rights already acquired. *Bienville Water Supply Co. v. Mobile*, 186 U. S. 212, 218, 46 L. Ed. 1132.

**What constitutes impairment.**—See post, "What Constitutes Impairment of the Contract," VIII, C, 1, d; "Extent of Right to Amend and What Constitutes Impairment," VIII, C, 4, e.

**94. Property rights under charter.**—*Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 661, 40 L. Ed. 838; *Davis v. Gray*, 16 Wall. 203, 21 L. Ed. 447; *Fletcher v. Peck*, 6 Cranch 87, 137, 3 L. Ed. 162; *Moore v. Robbins*, 96 U. S. 530, 24 L. Ed. 848; *United States v. Schurz*, 102 U. S. 378, 26 L. Ed. 167; *Noble v. Union River Logging R. Co.*, 147 U. S. 165, 37 L. Ed. 123. And see ante, "Valuable Privileges and Franchises Conducing to Acceptance," VIII, C, 1, a, (4); post, "Property and Vested Rights," VIII, C, 4, e, (5).

**95. Charter grant of lands.**—*Davis v. Gray*, 16 Wall. 203, 21 L. Ed. 447; *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 662, 40 L. Ed. 838; *Houston, etc., R. Co. v. Texas*, 170 U. S. 243, 42 L. Ed. 1023. See, also, *Wilkinson v. Leland*, 2 Pet. 627, 657, 7 L. Ed. 542; *Rice v. Railroad Co.*, 1 Black 358, 373, 17 L. Ed. 147.

The fact that the performance of the conditions imposed by the charter was made impossible by the action of the state of Texas entering the Southern Confederacy and engaging in the war between the states, abrogated conditions, and subsequent statutory and constitutional enactments of the state, declaring a forfeiture of the lands granted upon the ground that the company had not complied with the conditions of the grant and disposing of them to these persons, were unconstitutional as impairing the obligation of the contract. *Davis v. Gray*, 16 Wall. 203, 21 L. Ed. 447. See the titles PUBLIC LANDS; RAILROADS.

**96. Barings v. Dabney**, 19 Wall. 1, 8, 22 L. Ed. 90; *Curran v. Arkansas*, 15 How. 304, 310, 314, 14 L. Ed. 705. See post, "Rights of Third Parties," VIII, C, 1, c.

**State sole stockholder.**—Where a corporation had no other stockholders than the state, it is not doubted that the state might repeal its charter; but that the effect of such a repeal would be entirely to destroy the executory contracts of the corporation, and to withdraw its property



(7) *Charter Exemption from Taxation as a Contract*.—See the title TAXATION.

b. *Charter Not Protected unless It Embodies a True Contract*.—(1) *In General*.—It is not the charter which is protected, but only any contract the charter may contain. If there is no contract, there is nothing in the grant on which the constitution can act. Consequently, the first inquiry in this class of cases always is, whether a contract has in fact been entered into, and if so, what its obligations are.<sup>97</sup>

**Requisites of Valid Contract Essential**.—A corporate charter constitutes a contract, where supported by a valuable consideration and having the other requisites of a valid contract, and may not be repealed or altered, where the power to do so was not reserved and did not exist under the general laws.<sup>98</sup>

(2) *Consideration of Contract*.—Private charters are held to be contracts, because they are based for their consideration on the liabilities and duties which the incorporators assume by accepting the terms therein specified.<sup>99</sup> And the

from the just claims of its creditors, cannot be admitted. *Curran v. Arkansas*, 15 How. 304, 310, 14 L. Ed. 705; *Barings v. Dabney*, 19 Wall. 1, 8, 22 L. Ed. 90.

*In bank*.—See the title BANKS AND BANKING, vol. 3, pp. 10, 180, 182.

**97. True contracts alone protected**.—*Stone v. Mississippi*, 101 U. S. 814, 816, 25 L. Ed. 1079; *Bienville Water Supply Co. v. Mobile*, 186 U. S. 212, 219, 46 L. Ed. 1132; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. Ed. 773. Any contract which a state actually enters into when granting a charter to a private corporation is within the protection of the clause in the constitution of the United States that prohibits states from passing laws impairing the obligation of contracts. *Stone v. Mississippi*, 101 U. S. 814, 816, 25 L. Ed. 1079; *Susquehanna Boom Co. v. West Branch Boom Co.*, 110 U. S. 57, 28 L. Ed. 69.

Whether the alleged contract exists, or not, depends on the authority of the legislature to bind the state and the people of the state in that way. *Stone v. Mississippi*, 101 U. S. 814, 817, 25 L. Ed. 1079.

**98. Necessity for consideration and elements of valid contract**.—*Asylum v. New Orleans*, 105 U. S. 362, 366, 26 L. Ed. 1128. See ante, "Objects and Consideration," IV, A, 1, a.

**99. Consideration**.—*Holyoke Co. v. Lyman*, 15 Wall. 500, 511, 21 L. Ed. 133; *Dartmouth College v. Woodward*, 4 Wheat. 518, 688, 4 L. Ed. 629. See, also, *Tucker v. Ferguson*, 22 Wall. 527, 22 L. Ed. 805; *West Wisconsin R. Co. v. Board of Supervisors*, 93 U. S. 595, 23 L. Ed. 814; *Pennsylvania College Cases*, 13 Wall. 190, 214, 20 L. Ed. 550; *Stone v. Wisconsin*, 94 U. S. 181, 185, 24 L. Ed. 102, per Fields, J., dissenting.

*In Asylum v. New Orleans*, 105 U. S. 362, 26 L. Ed. 1128, involving the right to repeal an exemption from taxation granted in a charter, it was said, that the cases of *Tucker v. Ferguson*, 22 Wall. 527, 22 L. Ed. 805, and *West Wisconsin R. Co. v. Board of Supervisors*, 93 U. S. 595, 23

L. Ed. 814, do not apply to the case now under consideration. In the first place, the constitutions of Michigan and Wisconsin, in which states those cases arose, reserved to their legislatures, respectively, the power to alter, amend, and repeal charters of incorporation. In the next place, in those cases, the exemption granted was held to be gratuitous on the part of the state, no consideration passing therefor from the companies. It was no part of their charters of incorporation, and, therefore, formed no consideration for their acceptance. Whereas, in the present case, the exemption was expressed in the charter itself, and was one of the inducements offered for its acceptance, and for making donations for the establishment of the institution. *Asylum v. New Orleans*, 105 U. S. 362, 368, 26 L. Ed. 1128. See the titles CONTRACTS, ante, p. 552; TAXATION.

The contract protected by this clause must be founded upon a good consideration. If it be a mere nude pact, a bare promise to allow a certain thing to be done, it will be construed as a revocable license. *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 667, 40 L. Ed. 838, citing *Christ Church v. Philadelphia County*, 24 How. 300, 16 L. Ed. 602; *Newton v. Commissioners*, 100 U. S. 548, 561, 25 L. Ed. 710. For supplementary charter and amendment, see ante, "Supplementary Charters and Amendments," VIII, C, 1, a, (3).

"There is no necessity of looking for the consideration for a legislative contract outside of the objects for which the corporation was created. These objects were deemed by the legislature to be beneficial to the community, and this benefit constitutes the consideration for the contract, and no other is required to support it. This has been the well-settled doctrine of this court on this subject since the case of *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629." *Home of the Friendless v. Rouse*, 8 Wall. 430, 19 L. Ed. 495; *Washington University v. Rouse*, 8 Wall. 439, 19 L. Ed. 498.



consideration may be executory as well as executed.<sup>1</sup>

(3) *Provisions of General Law Not Amounting to Contract.*—Provisions in acts of incorporation, however special, which are matters of general law and not of contract, are subject to modification or repeal,<sup>2</sup> unless they have been acted upon and contract rights acquired thereunder.<sup>3</sup> Such would be the character of the right of corporate mortgage bondholders, or purchasers under a sale thereunder, to organize as a corporation. Such organization must be subject to laws existing when it is sought to be perfected. So with a statutory provision for an incorporation to be made in futuro. It cannot constitute a contract.<sup>4</sup> And so with general provisions of law, in force when charter was

1. "A charter may be granted upon an executory, as well as an executed or present consideration. When it is granted to persons who have not made application for it, until their acceptance thereof, the grant is yet in fieri. Upon the acceptance, there is an implied contract on the part of the grantees, in consideration of the charter, that they will perform the duties, and exercise the authorities conferred by it." *Dartmouth College v. Woodward*, 4 Wheat. 518, 688, 4 L. Ed. 629. See ante, "Status before Incorporation," III, E.

2. *Provisions of general law.*—*People v. Cook*, 148 U. S. 397, 407, 37 L. Ed. 498; *Hill v. Merchants' Mut. Ins. Co.*, 134 U. S. 515, 525, 33 L. Ed. 994; *Memphis, etc., R. Co. v. Railroad Commissioners*, 112 U. S. 609, 28 L. Ed. 837; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 375, 28 L. Ed. 173; *Bank v. Okely*, 4 Wheat. 235, 4 L. Ed. 559; *Aspinwall v. Board of Commissioners*, 22 How. 364, 16 L. Ed. 296.

This last case holds that provisions authorizing county or municipal subscriptions to aid the corporation, are of this character. But see *Callaway County v. Foster*, 93 U. S. 567, 23 L. Ed. 911. And see the title MUNICIPAL, COUNTY, STATE AND FEDERAL AID.

A grant of power to a county or municipal corporation to lend its credit in aid of a railroad or other enterprise, or to subscribe to the stock of such company upon such terms and under such formalities as are valid under an existing constitution, but which remains unacted upon until the adoption of a new constitution which forbids such aid or subscription except upon different terms and conditions and after compliance with other requirements as to the form and manner of the subscription, is absolutely superseded and revoked by such new constitutional provision. *Norton v. Board of Commissioners*, 129 U. S. 479, 32 L. Ed. 774; *Aspinwall v. Board of Commissioners*, 22 How. 364, 16 L. Ed. 296; *Wadsworth v. Supervisors*, 102 U. S. 534, 537, 26 L. Ed. 221; *Concord v. Portsmouth Sav. Bank*, 92 U. S. 625, 23 L. Ed. 628; *Railroad Co. v. Falconer*, 103 U. S. 821, 26 L. Ed. 471. See, also, *Moran v. Commissioners*, 2 Black 722, 726, 17 L. Ed. 342; *County of Moultrie v. Rockingham Ten-Cent Savings-Bank*, 92 U. S. 631, 635, 23 L. Ed. 631; *Concord*

*v. Robinson*, 121 U. S. 165, 171, 30 L. Ed. 885; *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 666, 40 L. Ed. 838; *McKittrick v. Arkansas Cent. R. Co.*, 152 U. S. 473, 495, 38 L. Ed. 518; *Wilkes County v. Coler*, 180 U. S. 506, 531, 45 L. Ed. 642.

These cases illustrate the distinction between the operation of a constitutional limitation upon the power of the legislature, and of a constitutional inhibition upon the municipality itself. In the former case, past legislative acts are not necessarily affected, while in the latter it is annulled. If, however, an entirely new organic law is adopted, provision in the schedule or some other part of the instrument must be made for keeping in force all laws not inconsistent therein. But such provision does not perpetuate a law enabling a municipality to do that which it is subsequently forbidden to do by the constitution. *Norton v. Board of Commissioners*, 129 U. S. 479, 490, 32 L. Ed. 774.

3. *But a contract made under the power*, while it was in existence, is valid and its obligation continues after the power to enter into such contracts is withdrawn. *County of Moultrie v. Rockingham Ten-Cent Savings-Bank*, 92 U. S. 631, 635, 23 L. Ed. 631.

*Deprivation or limitation of right to aid by public subscription.*—See the title MUNICIPAL, COUNTY, STATE AND FEDERAL AID.

*Right to special remedy under charter provision.*—And that provision of the Maryland act of 1793, ch. 30, incorporating the bank of Columbia, which gives to the corporation a summary process by execution in the nature of an attachment, against its debtors who have by an express consent, in writing, made the bonds, bills or notes by them drawn or indorsed negotiable at the bank, is not part of its corporate franchises, and may be repealed or altered at pleasure by the legislative will. *Bank v. Okely*, 4 Wheat. 235, 4 L. Ed. 559. See, in accord, *Young v. Bank*, 4 Cranch 384, 2 L. Ed. 655.

4. *Statutory permission to become a corporation in futuro.*—*People v. Cook*, 148 U. S. 397, 407, 37 L. Ed. 498; *Grand Rapids, etc., R. Co. v. Osborn*, 193 U. S. 17, 29, 48 L. Ed. 598; *Memphis, etc., R. Co. v. Railroad Commissioners*, 112 U. S. 609, 28 L. Ed. 837; *Chesapeake, etc., R.*

granted, relating to rates to be charged by a corporation for services rendered.<sup>5</sup>

**Right to Consolidate as Contract.**—See post, "Right to Consolidate and Validity of Consolidation," XV, A, 1.

**Change of Remedy for Enforcement of Stockholders' Liability.**—See the title STOCK AND STOCKHOLDERS.

c. *Rights of Third Parties.*—Third parties may, by contract with the corporation, entered into with especial reference to existing provisions of its charter, acquire such rights thereunder as to entitle them, if not to have the charter remain unchanged, to refuse to comply with their contract with such corporation, where these provisions have been materially changed.<sup>6</sup>

**Vested Rights of Third Persons Generally.**—The rights acquired by third persons, and which have become vested under the charter, in the legitimate exercise of its powers by the corporation, stand upon a different footing from those of the corporation and corporators. Quære, as to the right of the legislature, under a reservation in a general statute of the right of amendment and repeal, to affect such rights.<sup>7</sup>

*Co. v. Miller*, 114 U. S. 176, 189, 29 L. Ed. 121. See *Mercantile Bank v. Tennessee*, 161 U. S. 161, 164, 173, 40 L. Ed. 656; *Dartmouth College v. Woodward*, 4 Wheat. 518, 691, 693, 4 L. Ed. 629. See post, "Private Corporations Generally," XI, C, 1.

5. **Regulation of rates.**—*Minneapolis, etc., R. Co. v. Minnesota*, 134 U. S. 467, 481, 33 L. Ed. 985. See the title *CARRIERS*, vol. 3, pp. 622, 638.

6. **Third parties' rights.**—*Curran v. Arkansas*, 15 How. 304, 314, 14 L. Ed. 705; *Barings v. Dabney*, 19 Wall. 1, 8, 22 L. Ed. 90; *Stone v. Wisconsin*, 94 U. S. 181, 186, 24 L. Ed. 102, per Field, J., dissenting; *Miller v. The State*, 15 Wall. 478, 499, 21 L. Ed. 98, per Bradley, J., dissenting.

**Right to relief from obligation of contract.**—*Printing House v. Trustees*, 104 U. S. 711, 26 L. Ed. 902.

A corporation was created in one state for the purpose of raising and collecting funds for charitable purposes, and its charter provided that auxiliary corporations, to be created in other states, should exercise certain visitatorial powers of control over it. One such corporation of another state, chartered for the express purpose of collecting funds to aid the first corporation, having raised and collected such fund, refused to pay it over to the first corporation on the ground that its charter had been materially altered in a manner subversive of the rights which the board of the second corporation were entitled to enjoy in the administration of the scheme, they being expressly named in their charter as a condition of taking part therein, and being sued therefor by the first corporation, set up the above defense. It was held that a material change in the charter had been made, changing entirely the government of the institution, which affected so materially the rights of the auxiliary boards or corporations in regard to control of the institution, as to absolve them from any duty to pay over to the first corporation the funds raised by them as above. The relation was one

of contract to pay over on certain conditions, and these having been violated by the change of the charter, they were relieved. *Printing House v. Trustees*, 104 U. S. 711, 26 L. Ed. 902.

"The general doctrine of charities has nothing to do with its decision." *Printing House v. Trustees*, 104 U. S. 711, 727, 26 L. Ed. 902. See the title *CHARITIES*, vol. 3, p. 675.

7. **Vested rights in general.**—*Tomlinson v. Jessup*, 15 Wall. 454, 459, 21 L. Ed. 204.

**Contractors with corporation.**—Persons making contracts with a private corporation know that the legislature, even without the assent of the corporation, may amend, alter, or modify their charters in all cases where the power to do so is reserved in the charter or in any antecedent general law in operation at the time the charter was granted, and they also know that such amendments, alterations, and modifications may, as a general rule, be made by the legislature with the assent of the corporation, even in cases where the charter is unconditional in its terms and there is no general law of the state containing any such reservation. Such contracts made between individuals and the corporation do not vary or in any manner change or modify the relation between the state and the corporation in respect to the right of the state to alter, modify, or amend such a charter, as the power to pass such laws depends upon the assent of the corporation or upon some reservation made at the time, as evidenced by some pre-existing general law or by an express provision incorporated into the charter. *Pennsylvania College Cases*, 13 Wall. 190, 218, 20 L. Ed. 550; *Mumma v. Potomac Co.*, 8 Pet. 281, 8 L. Ed. 945; *New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 336, 348, 46 L. Ed. 936. See *Lake Shore, etc., R. Co. v. Smith*, 173 U. S. 684, 690, 43 L. Ed. 858.

Although cases arise undoubtedly where a court of equity will enjoin a corporation, not to proceed under an amendment to



**Rights of Creditors.**—That the corporation is one in which the state is the sole stockholder, and that the state has, therefore, the power to repeal its charter and thereby destroy the corporation, without impairing the obligation of a contract between the state and the corporation, is wholly immaterial. Such powers do not warrant the state to destroy the rights and remedies of the creditors of the corporation. The destruction of such corporation by the repeal of its charter is no more an impairment of the obligation of the contract of the company, than the death of a private person can be said to impair the obligation of his contract. The obligation of its contracts still survives, and the creditors may enforce their claims against any of its property which has not passed into the hands of the bona fide purchasers for value and without notice.<sup>8</sup>

d. *What Constitutes Impairment of the Contract*—(1) *In General*—*Construction*.—The only question for serious inquiry, where legislation affecting the charter is the subject of complaint, is whether it does in fact impair the obligation of the contract; for there may be legislation touching the powers of the corporation which will not have that result.<sup>9</sup> And there need be no peculiar liberality of construction in favor of the corporation, but rather the contrary.<sup>10</sup>

(2) *Alteration, Restriction or Regulation*.—Any act of a legislature which takes away any powers or franchises vested by its charter in a private corporation, or which restrains or controls the legitimate exercise of them, or transfers them to other persons, without its assent, is a violation of the obligation of that charter. If the legislature mean to claim such an authority, it must be reserved in the grant.<sup>11</sup>

their charter passed by their assent, as where the effect would be to enable the corporation to violate their contracts with third persons. *Pennsylvania College Cases*, 13 Wall. 190, 219, 20 L. Ed. 550. See post, "What Constitutes Impairment of the Contract," VIII, C. 1, d.

8. **Creditors' rights.**—*Curran v. Arkansas*, 15 How. 304, 311, 14 L. Ed. 705. See, in accord, *Mumma v. Potomac Co.*, 8 Pet. 281, 8 L. Ed. 945; *Barings v. Dabney*, 19 Wall. 1, 8, 22 L. Ed. 90. See ante, "State as Sole Stockholder," VIII, C. 1, a, (6); post, "As to Debts, Contracts and Other Liabilities," XVII, C. 2.

**Upon succession.**—See post, "Liability of Successor Corporation for Contracts and Obligations of Predecessor," XV, B, 2.

9. **What constitutes impairment.**—*Railroad Co. v. Maine*, 96 U. S. 499, 507, 24 L. Ed. 836.

As to when such contract exists, see ante, the preceding subdivisions of this section, "Charter as Contract Inviolable by Legislation," VIII, C. 1.

10. **Construction.**—In considering the question, whether any contract with a corporation arising out of its charter has had its obligation impaired by an act of the legislature, no peculiar liberality of construction in favor of a corporation, so as to render that an encroachment on its rights which is not clearly so, seems to be demanded by any more sacredness in the character of a corporation or its rights than in that of an individual; but rather, that its charter as a public grant is not to be construed beyond its natural import. (*Wheaton v. Peters*, 8 Pet. appx. 725, 738; *Jackson v. Lamphire*, 3 Pet. 280, 289, 7 L. Ed. 679; *Beaty v. Knowler*, 4 Pet.

152, 168, 7 L. Ed. 813.) The inviolability of contracts, however, and the faithful protection of vested rights, are due to the one no less than the other. *Planters' Bank v. Sharp*, 6 How. 301, 318, 12 L. Ed. 447.

11. **In general.**—*Dartmouth College v. Woodward*, 4 Wheat. 518, 712, 4 L. Ed. 629; *Sinking-Fund Cases*, 99 U. S. 700, 748, 25 L. Ed. 496. See *East Hartford v. Hartford Bridge Co.*, 10 How. 511, 535, 13 L. Ed. 518; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 582, 9 L. Ed. 773; *Inglis v. Sailor's Snug Harbour*, 3 Pet. 99, 153, 7 L. Ed. 617; *Pennsylvania College Cases*, 13 Wall. 190, 213, 20 L. Ed. 550; *Miller v. The State*, 15 Wall. 478, 493, 21 L. Ed. 98; *Railway Co. v. Philadelphia*, 101 U. S. 528, 539, 25 L. Ed. 912; *Greenwood v. Freight Co.*, 105 U. S. 13, 20, 26 L. Ed. 961; *Spring Valley Waterworks Co. v. Schottler*, 110 U. S. 347, 352, 28 L. Ed. 173.

"Subsequent legislation altering or modifying the provisions of such a charter, where there is no such reservation, is certainly unauthorized if it is prejudicial to the rights of the corporators, and was passed without their assent." *Pennsylvania College Cases*, 13 Wall. 190, 213, 20 L. Ed. 550.

**Impairment of exclusive franchise of railroad.**—The legislature of Virginia incorporated the stockholders of the Richmond, Fredericksburg and Potomac Railroad Company, and in the charter pledged itself not to allow any other railroad to be constructed between those places, or any portion of that distance; the probable effect of which would be to diminish the number of passengers traveling between



**A material alteration, without the assent of the corporation,** is an impairment of the obligation of its contract, and the degree can make no difference in the construction of the constitutional provisions against the impairment of the obligations,<sup>12</sup> except by the assent of the corporation or corporators.<sup>13</sup> Or in the exercise of an inalienable right of the legislature, such as that of eminent domain.<sup>14</sup> Or the imposition of a liability for damages for its acts causing injury to others.<sup>15</sup>

the one city and the other upon the railroad authorized by that act, or to compel the said company, in order to retain such passengers, to reduce the passage money. Afterwards the legislature incorporated the Louisa Railroad Company, whose road came from the West and struck the first-named company's track nearly at right angles, at some distance from Richmond; and the legislature authorized the Louisa Railroad Company to cross the track of the other, and continue their road to Richmond. The act authorizing the extension of the line of the Louisa Railroad Company into Richmond was silent as to a grant of power to transport passengers, so as to interfere with the pledge given to the Richmond, Fredericksburg and Potomac Railroad Company. Held, that the grant of authority to the Louisa Railroad Company to extend its road from the junction into the city of Richmond did not per se impair the obligation of the contract between the state and the Richmond, Fredericksburg and Potomac Railroad Company; that the provisions in the charter of the last-named company with reference to the protection of its passenger traffic did not restrain the legislature from authorizing the construction of another railroad for any purpose, parallel or near to its tracks, and that an injunction was properly refused. *Richmond, etc., R. Co. v. Louisa R. Co.*, 13 How. 71, 82, 14 L. Ed. 55. See ante, "Exclusive Franchise," VIII, C, 1, a, (4), (b).

As to infringement of exclusive privileges and franchises generally, see the titles BRIDGES, vol. 3, p. 516; ELECTRICITY; GAS; IMPAIRMENT OF OBLIGATION OF CONTRACTS; IRRIGATION; MUNICIPAL CORPORATIONS; RAILROADS; STREET RAILWAYS; WATER COMPANIES AND WATERWORKS.

**Regulation of rates.**—See ante, "Rate Regulation," II, D, 1, c. See the titles CARRIERS, vol. 3, p. 556, and the titles referred to.

**Creation of sinking fund.**—See ante, "Regulation Generally," II, D, 1, b.

**Statutes prohibiting bank from negotiating notes owned by it.**—See the title BANKS AND BANKING, vol. 3, p. 60.

**12. Material alteration.**—Opinion of Washington, J., in *Dartmouth College v. Woodward*, 4 Wheat. 518, 665, 4 L. Ed. 629.

In the *Dartmouth College* case some of the alterations in the charter held to be material were: a new corporation was

created, including the old corporators, with new powers, and subject to a new control; the board of trustees was increased from 12 to 21, the college was transformed into a university; property vested in the old trustees was transferred to the new board of trustees in their corporate capacities, the quorum was changed from 7 to 9; the old trustees were deprived of their sole right to perpetuate their succession by electing their trustees, power being conferred upon the governor and council to appoint 9 new trustees, and the new board to elect their successors; power was conferred upon the new board to suspend or remove any member so that a minority of the old board, might, with the aid of the new members, remove the majority of the old board; the powers, too, of the corporation are varied, as to its management and control, employment of instructors, and in many other respects were materially altered. (Opinion of Story, J.) *Dartmouth College v. Woodward*, 4 Wheat. 518, 519, 710, 4 L. Ed. 629. See *Looker v. Maynard*, 179 U. S. 46, 51, 45 L. Ed. 79.

**13. Pennsylvania College Cases**, 13 Wall. 190, 20 L. Ed. 550. See post, "Consent of Corporation," VIII, C, 5.

**14. Exercise of inalienable right.**—*Richmond, etc., R. Co. v. Louisa R. Co.*, 13 How. 71, 14 L. Ed. 55. See post, "Cannot Affect Inalienable Rights," VIII, C, 3.

**15. Imposition of liability for damages.**—The imposition of liability by law, for consequential damages consequent upon the exercise of the right of eminent domain, or for damages for injuries causing death resulting from negligence, which did not exist under their charters, does not impair any contract. *Pennsylvania R. Co. v. Miller*, 132 U. S. 75, 33 L. Ed. 267; *Louisville, etc., R. Co. v. Kentucky*, 183 U. S. 503, 518, 46 L. Ed. 298. See, also, *Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677, 40 L. Ed. 849; *Louisville Water Co. v. Clark*, 143 U. S. 1, 36 L. Ed. 55. See the titles DEATH BY WRONGFUL ACT; EMINENT DOMAIN.

**Provision making railroad company liable for property injured in exercise of eminent domain power.**—*Pennsylvania* acts of April 13, 1846 (laws of 1846, No. 262, p. 312), together with the supplementary acts, incorporating the *Pennsylvania* railroad, and requiring it to make due compensation for all property taken by it in the exercise of its delegated power of eminent domain did not constitute a

(3) *Imposition of Additional Duty or Burden.*—See post, "Examples of Valid Regulations," VIII, C, 4, e, (4). And the imposition, in the interests of the public of additional duties or burdens upon a corporation enjoying an exclusive franchise, at its own expense, is not an impairment of any contract, obligation under such exclusive franchise.<sup>16</sup> Nor does the imposition of such a burden upon any corporation enjoying a privilege under a contract with the state or a municipality, impair any contract right.<sup>17</sup> Examples of such burdens are: imposing on a gas company the cost of changes in its pipes and mains;<sup>18</sup> compelling a railroad company to repair a viaduct erected under contract with a city;<sup>19</sup> requiring a street railroad, at its own expense, to lower a tunnel under a navigable river built under contract with a city;<sup>20</sup> requiring electric companies to pay the cost of a board of supervision;<sup>21</sup> making railroad company liable for damages by fire.<sup>22</sup>

**A statute which prescribes a mode of serving process** upon railroad companies different from that provided for in a charter previously granted to a particular company, does not impair the obligation of the contract between such company and the state.<sup>23</sup>

(4) *Repeal of Charter or Franchise.*—That the legislature can repeal statutes creating private corporations, or confirming to them property already acquired

contract between the state and the company that the company should not be subject to subsequent general laws or constitutional amendments requiring all corporations within the state both municipal and private, to thereafter make due compensation for all property injured or destroyed as well as for property actually taken. *Pennsylvania R. Co. v. Miller*, 132 U. S. 75, 33 L. Ed. 267; *Louisville, etc., R. Co. v. Kentucky*, 183 U. S. 503, 518, 46 L. Ed. 298.

The imposition of such a liability is of the same purport as the imposition of a liability for damages for injuries causing death, which result from negligence, upon corporations which had not been previously subjected by their charters to such liability. *Georgia R., etc., Co. v. Smith*, 128 U. S. 174, 32 L. Ed. 377; *Cooley's Const. Lim't.*, 4th Ed. 581, 724; 1 *Hare's American Const. Law* 421. *Pennsylvania R. Co. v. Miller*, 132 U. S. 75, 83, 33 L. Ed. 267.

"But the defendant took its original charter subject to the general law of the state, and to such changes as might be made in such general law, and subject to future constitutional provisions or future general legislation, since there was no prior contract with the defendant, exempting it from liability to such future general legislation, in respect of the subject matter involved." *Pennsylvania R. Co. v. Miller*, 132 U. S. 75, 83, 33 L. Ed. 267; *Louisville, etc., R. Co. v. Kentucky*, 183 U. S. 503, 518, 46 L. Ed. 298. See, also, *Louisville Water Co. v. Clark*, 143 U. S. 1, 36 L. Ed. 55; *Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677, 40 L. Ed. 849.

Regulation not amounting to impairment, see ante, "Governmental Regulation and Control," II, D; post, "Cannot Affect Inalienable Rights," VIII, C, 3.

**16. Imposition of additional duty or**

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**burden.**—*New Orleans Gas Light Co. v. Drainage Commission*, 197 U. S. 453, 49 L. Ed. 831; *West Chicago St. R. Co. v. Illinois*, 201 U. S. 506, 50 L. Ed. 845; *New York v. Squire*, 145 U. S. 175, 36 L. Ed. 666. See *State v. Stoll*, 17 Wall. 425, 436, 21 L. Ed. 650.

**17.** *St. Louis, etc., R. Co. v. Mathews*, 165 U. S. 1, 41 L. Ed. 611; *Chicago, etc., R. Co. v. Nebraska*, 170 U. S. 57, 42 L. Ed. 948.

**18. Examples.**—*New Orleans Gas Light Co. v. Drainage Commission*, 197 U. S. 453, 49 L. Ed. 831. See the title GAS.

**19.** *Chicago, etc., R. Co. v. Nebraska*, 170 U. S. 57, 42 L. Ed. 948. See the titles BRIDGES, vol. 3, p. 516; RAILROADS.

**20.** *West Chicago St. R. Co. v. Illinois*, 201 U. S. 506, 50 L. Ed. 845. See the title STREET RAILWAYS.

**21.** *New York v. Squire*, 145 U. S. 175, 36 L. Ed. 666. See the title ELECTRICITY.

**22.** *St. Louis, etc., R. Co. v. Mathews*, 165 U. S. 1, 41 L. Ed. 611. See the title FIRES. See, generally, ante, "Government Regulation and Control," II, D; post, "Police Power and Right of Regulation," VIII, C, 3, b.

**Act reorganizing corporation.**—See post, "Reorganization," XVI.

**Change or repeal of liability of stockholders.**—See the title STOCK AND STOCKHOLDERS.

**Impairment of contract rights of bank billholders or creditors.**—See the title BANKS AND BANKING, vol. 3, pp. 11; 70; 180, 181.

**Impairment of contract by law prescribing distribution.**—See ante, "Corporate Property as Trust Fund," II, E.

**23. Changing mode of serving process.**—*Railroad Co. v. Hecht*, 95 U. S. 168, 24 L. Ed. 423. See the title SUMMONS AND PROCESS.



under the faith of previous laws, and by such repeal, can vest the property of such corporations exclusively in the state, or dispose of the same to such purposes as they may please, without the consent or default of the corporators, is not true,<sup>24</sup> although compensation is provided for.<sup>25</sup> But where the irrevocable period has expired, so that the franchise is redeemable by the state, an additional franchise, granted by a supplement to the original charter, may be revoked without compensation made, as it is not a part of the charter, and did not continue beyond the term of that charter.<sup>26</sup>

**Forfeiture of Permission of Foreign Corporation to Do Business in State.**—See the title FOREIGN CORPORATIONS.<sup>27</sup>

**On Change of Government.**—But, upon a change of government, such exclusive privileges attached to a private corporation as are inconsistent with the new government may be abolished.<sup>28</sup>

(5) *By Constitutional Amendment.*—A change of its constitution cannot release a state from a contract validly made under the prior constitution by the grant of a corporate charter. Its obligation as a contract cannot be impaired by a subsequent constitutional amendment.<sup>29</sup>

*e. Right of Congress to Repeal Federal Charter.*—But congress has power to repeal the act of incorporation of a territorial or federal corporation, such as the Mormon Church of Utah or "Deseret."<sup>30</sup>

**24. Power of repeal.**—*Terrett v. Taylor*, 9 Cranch 43, 52, 3 L. Ed. 650; *Greenwood v. Freight Co.*, 105 U. S. 13, 17, 26 L. Ed. 961; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 475, 36 L. Ed. 1018 (dissenting opinion); *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 582, 9 L. Ed. 773; *Pennsylvania College Cases*, 13 Wall. 190, 213, 20 L. Ed. 550; *Douglas v. Kentucky*, 168 U. S. 488, 499, 42 L. Ed. 553. See *United States v. Arredondo*, 6 Pet. 691, 740, 8 L. Ed. 547; *Osborn v. United States Bank*, 9 Wheat. 738, 894, 6 L. Ed. 204; *East Hartford v. Hartford Bridge Co.*, 10 How. 511, 536, 13 L. Ed. 518; *Rice v. Railroad Co.*, 1 Black 358, 373, 17 L. Ed. 147.

The government has no power to revoke a grant, even of its own funds, when given to a private person or a corporation, for special uses. The only authority remaining to the government is judicial, to ascertain the validity of the grant, to enforce its proper uses, to suppress frauds, and, if the uses are charitable, to secure their regular administration, through the means of equitable tribunals, in cases where there would otherwise be a failure of justice. *Dartmouth College v. Woodward*, 4 Wheat. 518, 698, 4 L. Ed. 629.

Thus the statutory repeal of a street railway corporation's charter, and the transfer of its franchises and track to another, although with compensation, is void as impairing the obligation of the contract of the charter, unless, as was held to be the case here, the right of amendment or repeal has been reserved to the state legislature. *Greenwood v. Freight Co.*, 105 U. S. 13, 17, 26 L. Ed. 961.

**25. Even with compensation.**—A statute repealing a corporate charter and

transferring its franchises and property to another corporation, even with payment of compensation therefor, would impair the obligation of a contract unless the right to do so is reserved in the charter or a general statute applicable thereto. *Greenwood v. Freight Co.*, 105 U. S. 13, 22, 26 L. Ed. 961.

**Voluntary dissolution of corporation.**—See post, "Voluntary Dissolution and Surrender of Franchise," XVII, B, 2.

**26. Supplementary franchise.**—*Turnpike Co. v. Illinois*, 96 U. S. 63, 24 L. Ed. 651.

As to supplementary charters generally, see ante, "Supplementary Charters and Amendments," VIII, C, 1, a, (3). See the title BRIDGES, vol. 3, p. 516.

As to when franchise constitutes a contract, see ante, "In General," VIII, C, 1, a.

As to extent of reserved power to amend or repeal, see post, "Where Power Is Reserved to Amend or Repeal," VIII, C, 4.

**27. Revocation of charter for removal of case to federal court.**—See the titles INSURANCE; REMOVAL OF CAUSES.

**28. On change of government.**—*Terrett v. Taylor*, 9 Cranch 43, 51, 3 L. Ed. 650.

**29. Constitutional amendment as impairment.**—*Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401; *State Bank v. Knoop*, 16 How. 369, 14 L. Ed. 977; *Mechanics', etc., Bank v. Thomas*, 18 How. 384, 15 L. Ed. 460; *Jefferson Branch Bank v. Skelly*, 1 Black 436, 17 L. Ed. 173; *New Orleans, Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. Ed. 525; *St. Tammany Waterworks v. New Orleans Waterworks*, 120 U. S. 64, 30 L. Ed. 563; *Keokuk, etc., R. Co. v. Missouri*, 152 U. S. 301, 312, 38 L. Ed. 450. See the title IMPAIRMENT OF OBLIGATION OF CONTRACTS.

**30. Superior right of congress.**—*United*



2. PRESUMPTION AGAINST IMMUNITY FROM LEGISLATIVE CONTROL.—See, generally, ante, "Government Regulation and Control," II, D; "Corporation Takes Charter Subject to General Laws," VIII, B. Charters of private corporations are subject to construction by the same rules of interpretation as other legislative grants.<sup>31</sup> Grants of immunity to a corporation from legitimate governmental control are never to be presumed. On the contrary, the presumptions are all the other way, and unless an exemption is clearly established the legislature is free to act on all subjects within its general jurisdiction as the public interests may seem to require.<sup>32</sup> Legislative contracts are to be construed most favorably to the state if, on a fair consideration to be given the charter, any reasonable doubts arise as to their proper interpretation.<sup>33</sup> Exemption from

States *v.* Mormon Church, 150 U. S. 145, 37 L. Ed. 1033; Mormon Church *v.* United States, 136 U. S. 1, 34 L. Ed. 481; Mormon Church *v.* United States, 140 U. S. 665, 35 L. Ed. 592. See post, "Powers of Congress and State Compared," VIII, C, 4, e, (3).

31. Subject to construction.—"Charters of private corporations duly accepted, it must be admitted, are executed contracts, but the different provisions, unless they are clear, unambiguous, and free of doubt, are subject to construction, and their true intent and meaning must be ascertained by the same rules of interpretation as other legislative grants." *Holyoke Co. v. Lyman*, 15 Wall. 500, 511, 21 L. Ed. 133; *Railway Co. v. Philadelphia*, 101 U. S. 528, 539, 25 L. Ed. 912.

32. Presumption against immunity.—*Ruggles v. Illinois*, 108 U. S. 526, 531, 27 L. Ed. 812; *Railroad Co. v. Hecht*, 95 U. S. 168, 24 L. Ed. 423; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 547, 549, 9 L. Ed. 773; *Ohio Life Ins., etc., Co. v. Debolt*, 16 How. 416, 435, 14 L. Ed. 997; *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 664, 40 L. Ed. 838; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 666, 24 L. Ed. 1036; *Illinois Cent. R. Co. v. Illinois*, 108 U. S. 541, 27 L. Ed. 818; *Louisville, etc., R. Co. v. Kentucky*, 183 U. S. 503, 46 L. Ed. 298; *Blair v. Chicago*, 201 U. S. 400, 472, 50 L. Ed. 801.

As was said by Chief Justice Taney, speaking for the court, in *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 547, 9 L. Ed. 773, "It can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created." This is an elementary principle. *Ruggles v. Illinois*, 108 U. S. 526, 531, 27 L. Ed. 812.

"All doubts with regard to the authority granted in a corporate charter are to be resolved against the corporation, and \* \* \* a surrender of the power of the legislature in any matter of public concern must never be presumed from uncertain or equivocal expressions." *Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677, 685, 40 L. Ed. 849, reaffirmed in *Ornstein v. Cary*, 204 U. S. 669, 51 L. Ed. 672; *Dubuque & Pac. R. Co. v. Litchfield*, 23 How. 66, 88, 16 L. Ed. 500; *Delaware Railroad Tax*, 18 Wall. 206, 225, 21 L. Ed. 888; *Bailey v. Magwire*, 22 Wall. 215, 22

L. Ed. 850; *Slidell v. Grandjean*, 111 U. S. 412, 28 L. Ed. 321; *Wheeling, etc., Bridge Co. v. Wheeling Bridge Co.*, 138 U. S. 287, 34 L. Ed. 967; *Richmond, etc., R. Co. v. Louisa R. Co.*, 13 How. 71, 81, 14 L. Ed. 55; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 544, 9 L. Ed. 773; *Moran v. Commissioners*, 2 Black 722, 17 L. Ed. 342; *Home of the Friendless v. Rouse*, 8 Wall. 430, 19 L. Ed. 495; *Washington University v. Rouse*, 8 Wall. 439, 19 L. Ed. 498; *Jefferson Branch Bank v. Skelly*, 1 Black 436, 446, 17 L. Ed. 173; *Railroad Commission Cases*, 116 U. S. 307, 326, 29 L. Ed. 636; *Railway Co. v. Philadelphia*, 101 U. S. 528, 539, 25 L. Ed. 912.

"Such limitations, however, upon the power of the legislature must be construed in subservience to the general rule that grants by the state are to be construed strictly against the grantees, and that nothing will be presumed to pass except it be expressed in clear and unambiguous language. As was said by Mr. Justice Swayne in *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 666, 24 L. Ed. 1036: 'The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court.'" *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 664, 40 L. Ed. 838.

33. *Home of the Friendless v. Rouse*, 8 Wall. 430, 437, 19 L. Ed. 495; *Washington University v. Rouse*, 8 Wall. 439, 19 L. Ed. 498.

"But as every contract is to be construed to accomplish the intention of the parties to it, if there is no ambiguity about it, and this intention clearly appears on reading the instrument, it is as much the duty of the court to uphold and sustain it, as if it were a contract between private persons." *Home of the Friendless v. Rouse*, 8 Wall. 430, 437, 19 L. Ed. 495; *Washington University v. Rouse*, 8 Wall. 439, 19 L. Ed. 498. And see the title INTERPRETATION AND CONSTRUCTION.

future general legislation, either by a constitutional provision or by an act of the legislature, cannot be admitted to exist unless it is given expressly, or unless it follows by an implication equally clear with express words.<sup>34</sup>

**Public grants are to be construed strictly**, and unless a claim to an exclusive franchise or privilege is based upon the clearest language, it cannot be sustained.<sup>35</sup>

**34. Exemption of company from future general legislation must be clearly given.**

—Chicago, etc., R. Co. v. Minnesota, 134 U. S. 418, 455, 33 L. Ed. 970, citing *Providence Bank v. Billings*, 4 Pet. 514, 7 L. Ed. 939; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. Ed. 773; *Christ Church v. Philadelphia County*, 24 How. 300, 16 L. Ed. 602; *Gilman v. Sheboygan*, 2 Black 510, 17 L. Ed. 305; *Tucker v. Ferguson*, 22 Wall. 527, 22 L. Ed. 805; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036; *Newton v. Commissioners*, 100 U. S. 548, 561, 25 L. Ed. 710; *Chesapeake, etc., R. Co. v. Miller*, 114 U. S. 176, 29 L. Ed. 121; *Pennsylvania R. Co. v. Miller*, 132 U. S. 75, 84, 33 L. Ed. 267; *Minneapolis, etc., R. Co. v. Minnesota*, 134 U. S. 467, 33 L. Ed. 985; *Covington v. Kentucky*, 173 U. S. 231, 238, 43 L. Ed. 679; *Citizens' Sav. Bank v. Owensboro*, 173 U. S. 636, 646, 43 L. Ed. 840; *Louisville, etc., R. Co. v. Kentucky*, 183 U. S. 503, 517, 46 L. Ed. 298; 2 Hare's American Const. Law, 661, 663, 664. See the title *CARRIERS*, vol. 3, p. 626, et seq.

To include in a charter an exemption from legislative control because such exemption was possessed by another company, and a provision of the charter conferred upon it the same rights, privileges and immunities as were enjoyed by that company, would be to thwart the declared will of the legislature, that such exemption should not exist, unless the act granting the charter excepted it in express terms from that law. *Hoge v. Railroad Co.*, 99 U. S. 348, 354, 25 L. Ed. 303.

**35. Construction of grants or franchises.**—*Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. Ed. 773; *United States v. Arredondo*, 6 Pet. 691, 736, 8 L. Ed. 547. See, also, in accord, *Jackson v. Lamphire*, 3 Pet. 280, 289, 7 L. Ed. 679; *Beaty v. Knowler*, 4 Pet. 152, 165, 7 L. Ed. 813; *Providence Bank v. Billings*, 4 Pet. 514, 7 L. Ed. 939.

**Construction of exclusive grants, etc.**—In a grant designed by the sovereign power making it to be a general benefit and accommodation to the public, if the meaning of the words be doubtful they should be taken most strongly against the grantee and for the government; and therefore, should not be extended by implication in favor of the grantee beyond the natural and obvious meaning of the words employed; and if these do not support the right claimed, it must fall. *Mills v. St. Clair County*, 8 How. 569, 581, 12 L. Ed. 1201.

If the grant admits of two interpretations, one of which is more extended, and the other more restricted, so that a choice is fairly open, and either may be adopted without any apparent violation of the apparent objects of the grant, if in such case one interpretation would render the grant inoperative and the other would give it force and effect, the latter, if within a reasonable construction of the terms employed, should be adopted. *Mills v. St. Clair County*, 8 How. 569, 583, 12 L. Ed. 1201.

**Exclusive right to franchise never presumed.**—"Hence, an exclusive right to enjoy a certain franchise is never presumed, and unless the charter contain words of exclusion, it is no impairment of the grant to permit another to do the same thing, although the value of the franchise to the first grantee may be wholly destroyed. This principle was laid down at an early day in the case of the *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. Ed. 773, and has been steadily adhered to ever since." *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 664, 40 L. Ed. 838; *Turnpike Co. v. State*, 3 Wall. 210, 18 L. Ed. 180; *Providence Bank v. Billings*, 4 Pet. 514, 7 L. Ed. 939; *Pennsylvania R. Co. v. Miller*, 132 U. S. 75, 33 L. Ed. 267. See *Lehigh Water Co. v. Easton*, 121 U. S. 388, 391, 30 L. Ed. 1059; *Planters' Bank v. Sharp*, 6 How. 301, 331, 12 L. Ed. 447; *Minturn v. Larue*, 23 How. 435, 437, 16 L. Ed. 574.

Where an act of incorporation from the state is silent in relation to the contested exclusive power or privilege, such exclusive power or privilege is not to be implied from the fact that, unless it is held to exist, the state may destroy the value of the franchise or privilege actually given by granting a similar franchise or privilege to others, and this principle is not effected by the fact that the power of the state has been already exercised so as to destroy the value of the franchise. The existence of the power to grant a similar franchise or privilege cannot depend upon the circumstances of its having been exercised or not. *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. Ed. 773; *Providence Bank v. Billings*, 4 Pet. 514, 7 L. Ed. 939. See ante, "Exclusive Franchise," VIII, C, 1, a, (4), (b). See the titles *BRIDGES*, vol. 3, p. 516; *GAS*; *RAILROADS*; *WATER COMPANIES* AND *WATERWORKS*, and other titles where corporate franchises are treated.

**Construction as license merely.**—"But where the charter authorizes the company



3. CANNOT AFFECT INALIENABLE RIGHTS—*a. Right of Eminent Domain.*—A corporate charter is a contract between the state and the company, but, like all private rights, it is subject to the right of eminent domain in the state. The constitution of the United States cannot be so construed as to take away this right from the states.<sup>36</sup>

*b. Police Power and Right of Regulation.*—**In General.**—See ante, Governmental Regulation and Control," II, D; "Imposition of Additional Duty or Burden," VIII, C, 1, d, (3). The legislature may not destroy vested rights, whether they are expressly prohibited from doing so or not, but otherwise may legislate with respect to corporations, whether expressly permitted to do so or not. While the police power has been most frequently exercised with respect to matters which concern the public health, safety or morals, it has been frequently held that corporations engaged in a public service are subject to legislative control, so far as it becomes necessary for the protection of the public interests.<sup>37</sup> And so with a right to manufacture and sell intoxicating liquors,

in sweeping terms to do certain things which are unnecessary to the main object of the grant, and not directly and immediately within the contemplation of the parties thereto, the power so conferred, so long as it is unexecuted, is within the control of the legislature and may be treated as a license, and may be revoked, if a possible exercise of such power is found to conflict with the interests of the public." *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 673, 40 L. Ed. 838. See the title LICENSES.

**36. Eminent domain.**—*West River Bridge Co. v. Dix*, 6 How. 507, 12 L. Ed. 535; *Planters' Bank v. Sharp*, 6 How. 301, 331, 12 L. Ed. 447; *Richmond, etc., R. Co. v. Louisa R. Co.*, 13 How. 71, 83, 14 L. Ed. 55; *Greenwood v. Freight Co.*, 105 U. S. 13, 22, 26 L. Ed. 961; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 673, 29 L. Ed. 516; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 41 L. Ed. 1165. See, also, *Wilmington Railroad v. Reid*, 13 Wall. 264, 268, 20 L. Ed. 568.

Thus where an exclusive franchise is granted to a railway company to build its road along a certain route, the obligation of its contract with the state is not impaired by a subsequent act authorizing the crossing of its road by another company. The franchise may be condemned in the same manner as individual property. *Richmond, etc., R. Co. v. Louisa R. Co.*, 13 How. 71, 14 L. Ed. 55.

Property held by an incorporated company stands upon the same footing with that held by an individual, and a franchise cannot be distinguished from other property. *West River Bridge Co. v. Dix*, 6 How. 507, 12 L. Ed. 535.

The grant of a franchise is of no higher order and confers no more sacred title, than a grant of land to an individual; and, when the public necessities require it, the one as well as the other may be taken for public purposes on making suitable compensation; nor does such an exercise of the right of eminent domain

interfere with the inviolability of contracts. *Richmond, etc., R. Co. v. Louisa R. Co.*, 13 How. 71, 83, 14 L. Ed. 55; *West River Bridge Co. v. Dix*, 6 How. 507, 12 L. Ed. 535; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. Ed. 463. See the title EMINENT DOMAIN.

**37. Police powers.**—*Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677, 695, 40 L. Ed. 849, reaffirmed in *Ornstein v. Cary*, 204 U. S. 669, 51 L. Ed. 672; *Ray County v. Vansycle*, 96 U. S. 675, 697, 24 L. Ed. 800; *Butchers' Union Slaughter-House, etc., Co. v. Crescent City, etc., Slaughter-House Co.*, 111 U. S. 746, 28 L. Ed. 585; *Barbier v. Connolly*, 113 U. S. 27, 28 L. Ed. 923; *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 29 L. Ed. 463; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 29 L. Ed. 516; *Crescent City Live Stock Co. v. Butchers' Union Slaughter-House Co.*, 120 U. S. 141, 144, 30 L. Ed. 614; *Minneapolis, etc., R. Co. v. Beckwith*, 129 U. S. 26, 32 L. Ed. 585; *Minneapolis, etc., R. Co. v. Emmons*, 149 U. S. 364, 37 L. Ed. 769; *New York, etc., R. Co. v. Bristol*, 151 U. S. 556, 567, 38 L. Ed. 269; *Eagle Ins. Co. v. Ohio*, 153 U. S. 446, 38 L. Ed. 778; *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 665, 40 L. Ed. 838; *St. Louis, etc., R. Co. v. Mathews*, 165 U. S. 1, 23, 41 L. Ed. 611; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 41 L. Ed. 1165; *Chicago, etc., R. Co. v. Nebraska*, 170 U. S. 57, 42 L. Ed. 948; *Louisville, etc., R. Co. v. Kentucky*, 183 U. S. 503, 517, 46 L. Ed. 298; *Diamond Glue Co. v. United States Glue Co.*, 187 U. S. 611, 615, 47 L. Ed. 328. See the title POLICE POWER.

"Nor does it follow, from the fact that the contract evidenced by the charter cannot be impaired, that the power of the legislature over such charter is wholly taken away, since statutes which operate only to regulate the manner in which the franchises are to be exercised, and which do not interfere substantially with the enjoyment of the main object of the grant, are not open to the objection of impairing the contract. A familiar instance of



given to a corporation under its charter. It is no irrevocable contract, but is subject to the police power of the state.<sup>38</sup>

**Nuisance.**—And so again, where the business authorized by the charter becomes a nuisance, it may be abated under the police power.<sup>39</sup>

**Lotteries.**—And the legislature of a state cannot, by a charter granted to a lottery company, defeat the will of the people, authoritatively expressed, in relation to the further continuance of such business in their midst.<sup>40</sup>

**Constitutional Provisions.**—But where the right or privilege to be affected is expressly granted to the corporation by the state constitution, it is exempt from interference therewith by the legislature under the police power. It can only be affected by a change of the constitution.<sup>41</sup>

this class of legislation is that enacted under what is known as the police power. In virtue of this the state may prescribe regulations contributing to the comfort, safety and health of passengers, the protection of public at highway crossings or elsewhere, the security of owners of adjacent property, by requiring the track to be fenced, and such appliances to be annexed to the engines as shall prevent the communication of fire to neighboring buildings. *Cooley Prin. Const. Law*, 321. This power, as was said by Mr. Justice Miller in the *Slaughter-House Cases*, 16 Wall. 36, 62, 21 L. Ed. 394, is and must be, from its very nature, incapable of any very exact definition or limitation. 'Upon it depends the security of social order, the life and health of the citizen, the comfort of existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property.' The following cases show to what extent and for what purposes this power may be exercised: *Slaughter-House Cases*, 16 Wall. 36, 21 L. Ed. 394; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036; *Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989; *Patterson v. Kentucky*, 97 U. S. 501, 24 L. Ed. 1115; *Barbier v. Connolly*, 113 U. S. 27, 28 L. Ed. 923; *Charlotte, etc., R. Co. v. Gibbes*, 142 U. S. 386, 35 L. Ed. 1051; *Lawton v. Steele*, 152 U. S. 133, 38 L. Ed. 385; *Eagle Ins. Co. v. Ohio*, 153 U. S. 446, 38 L. Ed. 778. And so important is this power and so necessary to the public safety and health, that it cannot be bargained away by the legislature, and hence it has been held that charters for purposes inconsistent with a due regard for the public health or public morals may be abrogated in the interests of a more enlightened public opinion. *Stone v. Mississippi*, 101 U. S. 814, 25 L. Ed. 1079; *Phalen v. Virginia*, 8 How. 163, 168, 12 L. Ed. 1030." *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 665, 40 L. Ed. 838.

A legislative act imposing upon a corporation burdens inconsistent with its charter, but consistent with the purposes of the grant and such as might have been originally imposed, may be perhaps a proper exercise of the police power of the state. *Fair Haven, etc., R. Co. v. New Haven*, 203 U. S. 379, 388, 51 L. Ed. 237.

**Consolidations against public policy.**—See post, "Right to Consolidate and Validity of Consolidation," XV, A, 1.

**Effect of consolidation or amendment.**—See post, "Acceptance of New Legislation as Surrender of Exemption," VIII, C, 4, d.

**Forfeiture for misuse or abuse.**—See post, "Misuser or Nonuser of Franchises," XVII, B, 4, b.

**Under right reserved in charter, constitution or general law.**—See post, "Where Power Is Reserved to Amend or Repeal," VIII, C, 4.

**38. Same.**—*Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989. See the titles INTOXICATING LIQUORS; POLICE POWER.

**39. Nuisance.**—*Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036. See *Railroad Commission Cases*, 116 U. S. 307, 327, 29 L. Ed. 636. See the titles NUISANCE; POLICE POWER.

**40. Lotteries.**—*Stone v. Mississippi*, 101 U. S. 814, 821, 25 L. Ed. 1079; *New Orleans v. Houston*, 119 U. S. 265, 30 L. Ed. 411; *Douglas v. Kentucky*, 168 U. S. 488, 42 L. Ed. 553. See, also, *Andrews v. Andrews*, 188 U. S. 14, 34, 47 L. Ed. 366.

**The right to suppress lotteries in governmental,** to be exercised at all times by those in power, at their discretion. Any one, therefore, who accepts a lottery charter does so with the implied understanding that the people, in their sovereign capacity, and through their properly constituted agencies, may resume it at any time when the public good shall require, whether it be paid for or not. All that one can get by such a charter is a suspension of certain governmental rights in his favor, subject to withdrawal at will. He has in legal effect nothing more than a license to enjoy the privilege on the terms named for the specified time, unless it be sooner abrogated by the sovereign power of the state. It is a permit good as against existing laws, but subject to future legislative and constitutional control or withdrawal. *Stone v. Mississippi*, 101 U. S. 814, 821, 25 L. Ed. 1079. See this case distinguished in *New Orleans v. Houston*, 119 U. S. 265, 30 L. Ed. 411; *Douglas v. Kentucky*, 168 U. S. 488, 42 L. Ed. 553. See the title LOTTERIES.

**41. Protection of state constitution.**—*New Orleans v. Houston*, 119 U. S. 265,

**Revival by Constitutional Change after Repeal.**—Where a corporate charter has been repealed by legislative act, and a constitution subsequently enacted recognizes it as being in force by legislating in respect thereto, it is thereby revived and continued in force to that extent.<sup>42</sup>

4. WHERE POWER IS RESERVED TO AMEND OR REPEAL.—a. *In General*.—(1) *In Charter*.—The legislature may in terms, when the charter is granted, retain the authority to alter, amend or repeal a corporate charter.<sup>43</sup> And a charter provision that the constitution shall not be altered or alterable in any other manner than by an act of the legislature, is in all respects equivalent to an express reservation to the state to make any alterations in the charter which the legislature in its wisdom may deem fit, just, and expedient to enact.<sup>44</sup>

275, 30 L. Ed. 411; *Douglas v. Kentucky*, 168 U. S. 488, 42 L. Ed. 553.

Where the grant of a charter to a corporation, in this case a lottery company, is contained in the constitution, the legislature, acting under that constitution, cannot contravene it. It is undoubtedly true that no rights of contract are or can be vested under this constitutional provision which a subsequent constitution might not destroy without impairing the obligation of a contract, within the sense of the constitution of the United States, for the reason assigned in the case of *Stone v. Mississippi*. But an ordinary act of legislation cannot have that effect, because the constitutional provision has withdrawn from the scope of the police power of the state, to be exercised by the general assembly, the subject matter of the granting of lottery charters, so far as the Louisiana State Lottery Company is concerned, and any act of the legislature contrary to this prohibition is upon familiar principles null and void. The subject is not within the jurisdiction of the police power of the state, as it is permitted to be exercised by the legislature under the constitution of the state. *New Orleans v. Houston*, 119 U. S. 265, 275, 30 L. Ed. 411.

42. **Revival by new constitution.**—*New Orleans v. Houston*, 119 U. S. 265, 30 L. Ed. 411.

By act of March 31, 1879, the legislature of Louisiana repealed act No. 25 of the year 1868 which incorporated and established the Louisiana State Lottery Company, and all other laws on the same subject were repealed, and the Louisiana State Lottery Company was thereby abolished and prohibited from further conducting its business in the state of Louisiana. By article 167 of the Louisiana constitution adopted in 1879, the charter of the Louisiana State Lottery Company as granted in the year 1868 was expressly recognized as existing with the force both of law and of contract, with the exception that the monopoly clause of its charter was thereby abrogated. This constitutional provision further provided a limitation as to the period of its existence and required that said lottery should pay a tax of \$40,000 per annum to the state, which should

be in lieu of all taxes, state, county and municipal upon its property. Held, that notwithstanding the repeal of the charter of 1879, the effect of this constitutional provision was to revive the charter of the lottery company and to recognize it as a contract binding upon the state for the period therein mentioned except as to the monopoly feature. *New Orleans v. Houston*, 119 U. S. 265, 30 L. Ed. 411. See the title LOTTERIES.

43. **Reservation in charter of right to amend or repeal.**—*County of Schuyler v. Thomas*, 98 U. S. 169, 174, 25 L. Ed. 88.

Where such a provision is incorporated in the charter, it is clear that it qualifies the grant, and that the subsequent exercise of that reserved power cannot be regarded as an act within the prohibition of the constitution. *Miller v. The State*, 15 Wall. 478, 488, 21 L. Ed. 98; *Dartmouth College v. Woodward*, 4 Wheat. 518, 708, 712, 4 L. Ed. 629; *Pennsylvania College Cases*, 13 Wall. 190, 218, 20 L. Ed. 550; *Railroad Co. v. Maine*, 96 U. S. 499, 24 L. Ed. 836; *Sinking-Fund Cases*, 99 U. S. 700, 726, 25 L. Ed. 496; *Railway Co. v. Philadelphia*, 101 U. S. 528, 539, 25 L. Ed. 912; *Greenwood v. Freight Co.*, 105 U. S. 13, 17, 26 L. Ed. 961; *Close v. Glenwood Cemetery*, 107 U. S. 466, 476, 27 L. Ed. 408; *Hamilton Gas Light, etc., Co. v. Hamilton City*, 146 U. S. 258, 36 L. Ed. 963; *Citizens' Sav. Bank v. Owensboro*, 173 U. S. 636, 651, 43 L. Ed. 840; *Looker v. Maynard*, 179 U. S. 46, 52, 45 L. Ed. 79. See, also, *Denny v. Bennett*, 128 U. S. 489, 495, 32 L. Ed. 491.

And where the incorporating act declared that the corporation should be governed by any subsequent general law enacted by the legislature, it became subject at once to such legislation when enacted, whether by new constitution or legislative act. *Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677, 692, 40 L. Ed. 849.

44. **Same.**—*Pennsylvania College Cases*, 13 Wall. 190, 214, 20 L. Ed. 550.

Almost immediately after the judgment of this court in the *Dartmouth College Case* (*Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629), the states, many of them, in granting charters acted on the suggestion of Mr. Justice Story in his concurring opinion (p. 712), and in-



(2) *In Statutes or Constitution.*—See ante, "Corporation Takes Charter Subject to General Laws," VIII, B.

**In General.**—Or it may insert in its statutes or in its constitution, a provision that all charters afterwards granted shall be subject to alteration, amendment, or repeal at the pleasure of the legislature.<sup>45</sup>

**Reservation in Constitution.**—It is elementary that where the constitution of a state reserves the right to repeal, alter or amend, all charters granted by the legislature are subject to such provision, and therefore are wanting in that attribute of irrevocability which is essential to bring them within the intentment of the clause of the constitution of the United States protecting contracts from impairment.<sup>46</sup> And the right to amend whenever the legislature should

serted provisions by which such authority was expressly retained. *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 352, 28 L. Ed. 173.

**45. In constitution or general statute.**—After the decision, in *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629, "many a state of the Union, in order to secure to its legislature the exercise of a fuller parliamentary or legislative power over corporations than would otherwise exist, inserted, either in its statutes or in its constitution, a provision that charters thenceforth granted should be subject to alteration, amendment or repeal at the pleasure of the legislature. See *Greenwood v. Freight Co.*, 105 U. S. 13, 20, 21, 26 L. Ed. 961. The effect of such a provision, whether contained in an original act of incorporation, or in a constitution or general law subject to which a charter is accepted, is, at the least, to reserve to the legislature the power to make any alteration or amendment of a charter subject to it, which will not defeat or substantially impair the object of the grant, or any right vested under the grant, and which the legislature may deem necessary to carry into effect the purpose of the grant, or to protect the rights of the public or of the corporation, its stockholders or creditors, or to promote the due administration of its affairs." *Looker v. Maynard*, 179 U. S. 46, 52, 45 L. Ed. 79, citing *Sherman v. Smith*, 1 Black 587, 17 L. Ed. 163; *Miller v. The State*, 15 Wall. 478, 21 L. Ed. 98; *Holyoke Co. v. Lyman*, 15 Wall. 500, 21 L. Ed. 133; *Sinking-Fund Cases*, 99 U. S. 700, 720, 721, 25 L. Ed. 496; *Close v. Glenwood Cemetery*, 107 U. S. 466, 27 L. Ed. 408; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 28 L. Ed. 173; *New York, etc., R. Co. v. Bristol*, 151 U. S. 556, 38 L. Ed. 269; *Keokuk, etc., R. Co. v. Missouri*, 152 U. S. 301, 312, 38 L. Ed. 450; *St. Louis, etc., R. Co. v. Paul*, 173 U. S. 404, 408, 43 L. Ed. 746; *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205, 32 L. Ed. 107; *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 408, 32 L. Ed. 979; *Callaway County v. Foster*, 93 U. S. 567, 23 L. Ed. 911; *Railroad Co. v. Maine*, 96 U. S. 499, 24 L. Ed. 836; *Peik v. Chicago, etc., R. Co.*, 94 U. S. 164, 175, 24 L. Ed. 97; *Chesapeake, etc., R. Co. v. Miller*, 114 U. S. 176, 188, 29 L.

Ed. 121; *San Antonio Traction Co. v. Altgelt*, 200 U. S. 304, 308, 50 L. Ed. 491.

**Statutory and constitutional reservation compared as to repeatability and exemption therefrom.**—See post, "Exemption from Reservation and Repeal Thereof," VIII, C, 4, c.

**46. Constitutional reservation.**—"The cases supporting this doctrine are so numerous that they need not be cited." *Northern Cent. R. Co. v. Maryland*, 187 U. S. 258, 267, 47 L. Ed. 167; *Citizens' Sav. Bank v. Owensboro*, 173 U. S. 636, 43 L. Ed. 840; *Bienville Water Supply Co. v. Mobile*, 186 U. S. 212, 222, 46 L. Ed. 1132; *Railway Co. v. Philadelphia*, 101 U. S. 528, 539, 25 L. Ed. 912; *Peik v. Chicago, etc., R. Co.*, 94 U. S. 164, 24 L. Ed. 97; *Hamilton Gas Light, etc., Co. v. Hamilton City*, 146 U. S. 258, 270, 36 L. Ed. 963; *Yazoo, etc., R. Co. v. Adams*, 180 U. S. 1, 17, 45 L. Ed. 395; *San Antonio Traction Co. v. Altgelt*, 200 U. S. 304, 308, 50 L. Ed. 491.

The reservation of power to alter or revoke a grant of special privileges, contained in a state constitution, necessarily became a part of the charter of every corporation formed under the general statute providing for the formation of corporations. A legislative grant to a corporation of special privileges, if not forbidden by the constitution, may be a contract; but where one of the conditions of the grant is that the legislature may alter or revoke it, a law altering or revoking, or which has the effect to alter or revoke, the exclusive character of such privileges, cannot be regarded as one impairing the obligation of the contract, whatever may be the motive of the legislature, or however harshly such legislation may operate, in the particular case, upon the corporation or parties affected by it. The corporation, by accepting the grant subject to the legislative power so reserved by the constitution, must be held to have assented to such reservation. These views are supported by the decisions of this court. *Hamilton Gas Light, etc., Co. v. Hamilton City*, 146 U. S. 258, 270, 36 L. Ed. 963. See *Greenwood v. Freight Co.*, 105 U. S. 13, 17, 26 L. Ed. 961; *Bienville Water Supply Co. v. Mobile*, 186 U. S. 212, 222, 46 L. Ed. 1132; *Railway Co. v. Philadelphia*, 101 U. S. 528, 538, 25 L. Ed.



deem the charter might "be injurious to the citizens," may be exercised whenever the charter of a quasi public corporation, like a common carrier, becomes an obstacle to reasonable and necessary regulations for the public interest.<sup>47</sup> An unaccepted charter remains a mere naked proposition until accepted. Hence, where between the time of the enactment of the statute embodying the charter, and its acceptance by the persons to be incorporated, the territory granting such charter is admitted into the Union under a constitution which reserves to the state the right to alter or amend all corporate charters, and the company then accepts the incorporating act under a statute which continues in force, such acceptance is made subject to the right of the state to alter or amend.<sup>48</sup>

**Reservation in Statute.**—No question can arise as to the impairment of the obligation of a contract, when the company accepted all of its corporate powers subject to the statutory reserved power of the state to modify its charter and to impose additional burdens upon the enjoyment of its franchise,<sup>49</sup> whether such reserved power is exercised by an act of the legislature or by a constitutional amendment or re-enactment.<sup>50</sup> Where, at the time of the incorporation

912; *People v. Cook*, 148 U. S. 397, 411, 37 L. Ed. 498. See, also, *Pennsylvania College Cases*, 13 Wall. 190, 218, 20 L. Ed. 550; *Olcott v. Supervisors*, 16 Wall. 678, 694, 21 L. Ed. 382; *Citizens' Sav. Bank v. Owensboro*, 173 U. S. 636, 43 L. Ed. 840; *Shaw v. Covington*, 194 U. S. 593, 596, 48 L. Ed. 1131.

See *Bienville Water Supply Co. v. Mobile*, 186 U. S. 212, 218, 46 L. Ed. 1132, where it was held that the right of amendment and repeal existed under the constitution in force, and it was said: "The plaintiff, therefore, took its charter with notice that it was not given the exclusive right of supplying the city of Mobile with water, and it had not, at the time of these transactions, obtained that which its charter before amendment purported to authorize it to obtain, to wit, an exclusive right to all the sources of supply within the county."

**In California** the constitution put this reservation into every charter, and consequently this company was from the moment of its creation subject to the legislative power of alteration, and, if deemed expedient, of absolute extinguishment as a corporate body. *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 352, 28 L. Ed. 173.

**47. Corporations for a public purpose.**—Where the state constitution expressly provided that the power to amend might be exercised whenever in the opinion of the legislature the charter might "be injurious to the citizens," and as railroad corporations were organized for a public purpose; their roads were public highways; and they were common carriers; whenever their charters became obstacles to such legislative regulations as would make their roads subserve the public interest to the fullest extent practicable, they would be in that respect injurious, and might be amended; and as it was the duty of the companies to serve the public as common carriers in the most efficient manner practicable, the legislature might so change their charters as to se-

cure that result. *St. Louis, etc., R. Co. v. Paul*, 173 U. S. 404, 407, 43 L. Ed. 746.

**48. Admission of territory as state before acceptance of charter.**—*Stone v. Wisconsin*, 94 U. S. 181, 24 L. Ed. 102. See ante, "Power of Territorial Legislature—Admission as State," IV, A, 1, e.

**49. Reservation in statute.**—*Sioux City St. R. Co. v. Sioux City*, 138 U. S. 98, 108, 34 L. Ed. 898, reaffirmed in *Union St. R. Co. v. Snow*, 168 U. S. 706, 707, 42 L. Ed. 1214; *Greenwood v. Freight Co.*, 105 U. S. 13, 26 L. Ed. 961; *Miller v. The State*, 15 Wall. 478, 488, 21 L. Ed. 98; *Globs v. Consolidated Gas Co.*, 130 U. S. 396, 408, 32 L. Ed. 979; *Hamilton Gas Light, etc., Co. v. Hamilton City*, 146 U. S. 258, 270, 36 L. Ed. 963; *People v. Cook*, 148 U. S. 397, 411, 37 L. Ed. 498; *United States v. Union Pac. R. Co.*, 160 U. S. 1, 37, 40 L. Ed. 319; *New York, etc., R. Co. v. Bristol*, 151 U. S. 556, 567, 38 L. Ed. 269; *Pennsylvania College Cases*, 13 Wall. 190, 20 L. Ed. 550.

Such power to alter, modify, or repeal an act of incorporation, is frequently reserved to the state by a general law applicable to all acts of incorporation, or to certain classes of the same, as the case may be; in which case it is equally clear that the power may be exercised whenever it appears that the act of incorporation is one which falls within the reservation, and that the charter was granted subsequent to the passage of the general law, even though the charter contains no such condition, nor any allusion to such a reservation. *Miller v. The State*, 15 Wall. 478, 488, 21 L. Ed. 98; *Pennsylvania College Cases*, 13 Wall. 190, 213, 20 L. Ed. 550; *Dartmouth College v. Woodward*, 4 Wheat. 518, 708, 4 L. Ed. 629; *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155, 161, 24 L. Ed. 94; *Sherman v. Smith*, 1 Black 587, 17 L. Ed. 163; *Covington v. Kentucky*, 173 U. S. 231, 238, 43 L. Ed. 679.

**50.** *Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677, 692, 40 L. Ed. 849.

a general law of the state was in existence, which enacted that the charter of every corporation subsequently granted, and any renewal, amendment, or modification thereof, should be subject to amendment, alteration, or repeal by legislative authority, unless the act granting the charter or the renewal, amendment, or modification, in express terms excepted it from the operation of that law, the provisions of that law, therefore, constituted the condition upon which every charter of a corporation subsequently granted was held, and upon which every amendment or modification was made. They were as operative and as much a part of the charter and amendment, as if incorporated into them.<sup>51</sup>

**And the fact that a fixed period has been set** for the duration of the grant, does not affect the right of the legislature to amend, repeal or alter under a general statute reserving same.<sup>52</sup>

**51. As condition entering into charter.**—*Tomlinson v. Jessup*, 15 Wall. 454, 457, 21 L. Ed. 204; *Greenwood v. Freight Co.*, 105 U. S. 13, 26 L. Ed. 961; *Louisville Water Co. v. Clark*, 143 U. S. 1, 14, 36 L. Ed. 55; *Railroad Co. v. Georgia*, 98 U. S. 359, 365, 25 L. Ed. 185; *Hoge v. Railroad Co.*, 99 U. S. 348, 353, 25 L. Ed. 303; *Sinking-Fund Cases*, 99 U. S. 700, 720, 25 L. Ed. 496; *Close v. Glenwood Cemetery*, 107 U. S. 466, 476, 27 L. Ed. 408; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 352, 28 L. Ed. 173; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683, 696, 29 L. Ed. 510; *Sherman v. Smith*, 1 Black 587, 17 L. Ed. 163; *Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989; *Freeport Water Co. v. Freeport City*, 180 U. S. 587, 597, 45 L. Ed. 679.

"The original corporators, or subsequent stockholders, took their interests with knowledge of the existence of this power, and of the possibility of its exercise at any time in the discretion of the legislature. The object of the reservation, and of similar reservations in other charters, is to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise if the public interest should at any time require such interference. It is a provision intended to preserve to the state control over its contract with the corporators, which without that provision would be irrepealable and protected from any measures affecting its obligation." *Tomlinson v. Jessup*, 15 Wall. 454, 458, 21 L. Ed. 204; *Stanislaus County v. San Joaquin, etc.*, *Irrigation Co.*, 192 U. S. 201, 211, 48 L. Ed. 406.

A general statute reserving the power to repeal, alter or amend is by implication read into a subsequent charter and prevents it from becoming irrevocable. In a case like the one now considered, where not only was there a general statute reserving the power, but where such general law was made by unambiguous language one of the provisions of the contract, of course the legislative power to repeal or amend is more patently obvious to the extent that that which is plainly expressed is always more evident than that which is to be deduced by a legal implication. *Citi-*

*zens' Sav. Bank v. Owensboro*, 173 U. S. 636, 644, 43 L. Ed. 840. See *Louisville Water Co. v. Clark*, 143 U. S. 1, 36 L. Ed. 55; *Railroad Co. v. Maine*, 96 U. S. 499, 511, 24 L. Ed. 836; *Miller v. The State*, 15 Wall. 478, 21 L. Ed. 98; *Holyoke Co. v. Lyman*, 15 Wall. 500, 21 L. Ed. 133; *Sinking-Fund Cases*, 99 U. S. 700, 720, 25 L. Ed. 496.

The source of the reservation, by many of the states in general laws, of the power to amend, alter or repeal, was fully reviewed in *Greenwood v. Freight Co.*, 105 U. S. 13, 26 L. Ed. 961. Referring to the decision in *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629, the court, through Mr. Justice Miller, said (p. 20): "It was, no doubt, with a view to suggest a method by which the state legislatures could retain in a large measure this important power" (the power to repeal or amend), "without violating the federal constitution, that Mr. Justice Story, in his concurring opinion in the *Dartmouth College* case, suggested that when the legislature was enacting a charter for a corporation, a provision in the statute reserving to the legislature the right to amend or repeal it must be held to be a part of the contract itself, and the subsequent exercise of the right would be in accordance with the contract, and could not, therefore, impair its obligation." *Citizens' Sav. Bank v. Owensboro*, 173 U. S. 636, 651, 43 L. Ed. 840. See *Looker v. Maynard*, 179 U. S. 46, 52, 45 L. Ed. 79.

**Under § 1090 of the Iowa Code**, the legislature had the power not only to repeal and amend the articles of incorporation of a corporation but to impose any conditions upon the enjoyment of its franchise which the general assembly might deem necessary for the public good. The reservation of this power was a condition of the grant. The city council could make no arrangement with the company which would not be subject, under that section, to the superior power of the general assembly. *Sioux City St. R. Co. v. Sioux City*, 138 U. S. 98, 107, 34 L. Ed. 898, reaffirmed in *Union St. R. Co. v. Snow*, 168 U. S. 706, 707, 42 L. Ed. 1214.

**52. Fixed period for existence does not affect right.**—"The assertion that wherever it is stated in a legislative grant or



**Validation of De Facto Organization of Mormon Church and Repeal by Congress.**—The charter of an irregularly formed corporation, afterwards declared to be legal by the lawful territorial legislative body "until superseded by the action of the legislative assembly," is not a contract, except as to vested property rights acquired thereunder, and may be altered or repealed at any time by the legislature, in this case congress.<sup>53</sup>

**Prohibition of Grant of Corporate Powers, etc., by Legislature.**—See ante, "By Special Act," IV, A, 2.

**Rights of Third Parties.**—See ante, "Rights of Third Parties," VIII, C, 1, c.

(3) *Equal Protection of Laws Unimpaired.*—"Corporations are the creations of the state, endowed with such facilities as the state bestows and subject to such conditions as the state imposes, and if the power to modify their charters is reserved, that reservation is a part of the contract, and no change within the legitimate exercise of the power can be said to impair its obligation; and as this amendment rested on reasons deduced from the peculiar character of the business in the corporations affected and the public nature of their functions, and applied to all alike, the equal protection of the law was not denied.<sup>54</sup>

b. *Scope and Construction of Clause Reserving Right.*—As to extent of right to amend, see post, "Extent of Right to Amend, and What Constitutes Impairment," VIII, C, 4, e.

**Supplements to Existing Charters.**—A statute of a state, which declares that all charters of corporations granted after its passage may be altered, amended, or repealed by the legislature, does not necessarily apply to supplements to an existing charter which were enacted subsequently to the statute.<sup>55</sup>

charter that it is to last for a given period of time, therefore such provision is a plain manifestation of the intention of the legislature that the grant or charter shall not be repealed or amended for the time for which it was declared that it should exist, is fallacious, since it overlooks the consideration that the limit of time fixed for the duration of the charter or grant, like every other provision therein, is qualified by the reserved power to alter, amend or repeal. It hence results that where in a charter or grant enacted, when there is a general statute reserving the power to repeal, alter, or amend, a time is stated, the granting act must be read just as if it declared that the charter or grant should exist for a designated time, unless sooner repealed, altered or amended. Indeed, reduced to its final analysis, the argument that because in a grant or charter a time is designated for its duration, it cannot, therefore, until the expiration of such time, be repealed, altered or amended, is equivalent to saying that the reserved power cannot be exercised in any case of contract." *Citizens' Sav. Bank v. Owensboro*, 173 U. S. 636, 650, 43 L. Ed. 840.

**53. Charter of Mormon Church.**—The act of congress of July 1st, 1862, if it did not absolutely repeal the charter of the Mormon Church corporation, certainly took away all right or power which may have been claimed under it to establish, protect or foster the practice of polygamy, under whatever disguise it might be carried on; and it also limited the amount of property which might be ac-

quired by the Church of Jesus Christ of Latter-Day Saints; not interfering, however, with vested rights in real estate existing at that time. If the act of July 1, 1862, had but a partial effect, congress had still the power to make the abrogation of its charter absolute and complete. This was done by the act of 1887. *Mormon Church v. United States*, 136 U. S. 1, 46, 34 L. Ed. 481.

"This absolute annulment of the laws which gave the said corporation a legal existence has dissipated all doubt on the subject, and the said corporation has ceased to have any existence as a civil body, whether for the purpose of holding property or of doing any other corporate act." *Mormon Church v. United States*, 136 U. S. 1, 46, 34 L. Ed. 481. See post, "Effects and Consequences," XVII, C.

**54. St. Louis, etc., R. Co. v. Paul**, 173 U. S. 404, 408, 43 L. Ed. 746; *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205, 32 L. Ed. 107. See the title CONSTITUTIONAL LAW, ante, p. 1.

**55. Supplements to charters.**—*New Jersey v. Yard*, 95 U. S. 104, 24 L. Ed. 352, where it is said (p. 113), that the reservation should not be extended beyond the terms in which it is expressed.

Nor does a provision, which declares that "this supplement, and the charter to which it is a supplement, may be altered or amended by the legislature," apply to a contract with the corporation made in a supplement thereafter passed. *New Jersey v. Yard*, 95 U. S. 104, 24 L. Ed. 352. See ante, "Supplementary Charters and Amendments," VIII, C, 1, a, (3).



**Amendment in Form of Contract.**—Although the Maryland constitution of 1867, which was in force when the amendatory law of 1880 was enacted, reserved the right to repeal, alter or amend only charters granted or adopted, and the act of 1880 was put, not in the form of a charter amendment, but in that of a contract, the act of 1880, in its essential nature and effect in whatever form couched, was intended to be and necessarily operated as an amendment to the charter of the company created by the act of 1854. Such being its essential nature and necessary effect, it plainly came within the provisions of the constitution of 1867, and was therefore subject to repeal, alteration or amendment.<sup>56</sup>

**Construction Generally.**—Such power, expressly reserved to the legislature, should not be frittered away by any construction of subsequent statutes based upon mere inference.<sup>57</sup> And where the constitution of the state in force when each of the several acts of incorporation was passed, provides that all acts for the creation of corporations within the state "may be altered or repealed by the legislature at any time after their passage," this reserved power of the constitution gave the legislature the same power over the business and property of corporations that it has over individuals.<sup>58</sup>

**Proviso That No Injustice Shall Be Done to the Stockholders.**—And a constitutional provision reserving the right to amend or repeal all corporate charters thereafter granted, or existing and revocable, did not prevent an irrepealable exclusive franchise attaching between the state and a corporation, organized after that date, but under rights acquired by a purchase at foreclosure sale of the contract rights belonging to a previously existing corporation, where the constitution also provided that "no injustice shall be done to the stockholders," in exercising the right to amend.<sup>59</sup>

**"At Pleasure of Legislature" Construed.**—While it has been held that the use of the phrase "at the pleasure of the legislature" in the reservation of the power, is significant, and enlarges the powers of amendment,<sup>60</sup> a later case

**56. Amending act in form of contract.**—*Northern Cent. R. Co. v. Maryland*, 187 U. S. 258, 268, 47 L. Ed. 167.

"The mere form adopted by a legislature in conferring a right on a corporation cannot be controlling, for if it were so the provision of the constitution, instead of being commanding and prohibitive, would merely be precatory or advisory." *Northern Cent. R. Co. v. Maryland*, 187 U. S. 258, 269, 47 L. Ed. 167.

The power to grant an irrepealable right by a compromise agreement depends on the existence of the authority to make such grant by original action. The power to compromise on the subject is as limited as the power to contract originally. *District of Columbia v. Bailey* (1897), 171 U. S. 161, 43 L. Ed. 118. Indeed, the entire argument upon this branch of the case, reiterated in many forms, amounts but to the contention, when ultimately considered, that because the act of 1880 is asserted to have been enacted with the view of settling what was honestly deemed to be a pending and serious controversy, it was unwise, and it may be unjust to repeal it, which is untenable. *Northern Cent. R. Co. v. Maryland*, 187 U. S. 258, 270, 47 L. Ed. 167.

**57. Construction.**—*Covington v. Kentucky*, 173 U. S. 231, 239, 43 L. Ed. 679; *Citizens' Sav. Bank v. Owensboro*, 173 U. S. 636, 647, 43 L. Ed. 840. And see post,

"Construction of Amendment." VIII, C, 4, f.

**Effect on grant of exclusive franchise, and right to grant same.**—See ante, "Exclusive Franchise," VIII, C, 1, a, (4), (b).

**58. Same.**—*Peik v. Chicago, etc., R. Co.*, 94 U. S. 164, 165, 175, 24 L. Ed. 97.

**59. Vicksburg v. Vicksburg Waterworks Co.**, 202 U. S. 453, 465, 50 L. Ed. 1102, distinguishing *Hamilton Gas Light, etc., Co. v. Hamilton City*, 146 U. S. 258, 36 L. Ed. 963.

**Proviso that no injustice shall be done to the incorporators.**—A constitutional section which gives the general assembly power to alter, amend or revoke a charter "whenever, in their opinion, it may be injurious to the citizens of the state; in such manner, however, that no injustice shall be done to the corporators," is said in *Bienville Water Supply Co. v. Mobile*, 186 U. S. 212, 220, 46 L. Ed. 1132, to be a new one in this court. It is found in the constitutions of more than one state and has been reviewed in some state courts. So far as they have expressed themselves, the expressions have been in favor of the right of a judicial review. The question as to the precise meaning of this section and the limits of judicial inquiry under it, was not decided, as unnecessary to decision of the case.

**60. "At pleasure of the Legislature."**—Where by general statute the char-

has laid it down that a general reservation of the power to alter or revoke necessarily implies that the power may be exerted at the pleasure of the legislature.<sup>61</sup> Whatever may be the motive of the legislature, or however harshly such legislation may operate, in the particular case, upon the corporation or parties affected by it, the corporation, by accepting the grant, subject to the legislative power so reserved by the constitution, must be held to have assented to such reservation.<sup>62</sup>

**Reservation of Right to "Withdraw Franchise," Construed.**—Where a statute reserves to the legislature the right to "withdraw the franchise" in all cases of private charters thereafter granted, the word franchise is to be construed generically as covering all the rights conferred by the legislature. Such a reservation confers not only the power to withdraw the right to be a corporation, but to withdraw an exemption from taxation without withdrawing any other right.<sup>63</sup>

**Special Charter Unaffected by General Legislation.**—The provisions of a special charter or a special authority from the legislature are not affected by general legislation on the subject, although the latter be not absolutely harmonious therewith.<sup>64</sup>

*c. Exemption from Reservation and Repeal Thereof.*—**In General.**—Although, when a charter was granted, a statute was in existence which declared that the charter of every corporation subsequently granted should be subject to alteration, suspension, and repeal at the discretion of the legislature, from the operation of this provision the company may be expressly exempted by its charter or by an act amendatory of its charter.<sup>65</sup>

ters of all companies subsequently incorporated are made subject to repeal or alteration "at the pleasure of the legislature," that body need give no reason for its action in the matter. The validity of such action does not depend, under such statute, on the necessity for it nor on the soundness of the reasons which prompted it. This expression, "the pleasure of the legislature" is significant, and is not found in many of the similar statutes in other states. *Greenwood v. Freight Co.*, 105 U. S. 13, 26 L. Ed. 961.

**Massachusetts law.**—According to the unvarying decisions of this court, the unconditional repeal of the charter of a corporation is void under the constitution of the United States, as impairing the obligation of the contract made by the acceptance of the charter between the incorporators of that company and the state, unless it is made valid by that provision of the general statutes of Massachusetts, called the reservation clause, concerning acts of incorporation; or unless it falls within some enactment covered by that part of its own charter which makes it "subject to all the duties, restrictions, and liabilities set forth in the general laws," applicable to it. *Greenwood v. Freight Co.*, 105 U. S. 13, 17, 26 L. Ed. 961.

The first of these reservations of legislative power over corporations is found in § 41 of chapter 68 of the general statutes of Massachusetts, in the following language: "Every act of incorporation passed after the eleventh day of March, in the year one thousand eight hundred and thirty-one, shall be subject to amendment, alteration, or repeal, at the pleasure

of the legislature." Under it every such act may be amended; that is, it may be changed by additions to its terms or by qualifications of the same. It may be altered by the same power, and it may be repealed. *Greenwood v. Freight Co.*, 105 U. S. 13, 17, 26 L. Ed. 961.

**61. Same.**—This qualification was decided in *Hamilton Gas Light, etc., Co. v. Hamilton City*, 146 U. S. 258, 271, 36 L. Ed. 963, to be no more comprehensive than the power which would be implied from a general law simply reserving the right to repeal, alter or amend. *Citizens Sav. Bank v. Owensboro*, 173 U. S. 636, 653, 43 L. Ed. 840. See post, "Extent of Right to Amend and What Constitutes Impairment," VIII, C, 4, e.

**62.** *Hamilton Gas Light, etc., Co. v. Hamilton City*, 146 U. S. 258, 270, 36 L. Ed. 963.

**63. Right to withdraw "franchise."**—*Railroad Co. v. Georgia*, 98 U. S. 359, 365, 25 L. Ed. 185. See the title TAXATION.

**64. Special charter and general legislation.**—*State v. Stoll*, 17 Wall. 425, 436, 21 L. Ed. 650; *County of Cass v. Gillett*, 100 U. S. 585, 593, 25 L. Ed. 585. See post, "Exemption from Reservation and Repeal Thereof," VIII, C, 4, c.

**65. Exception.**—*Trask v. Maguire*, 18 Wall. 391, 402, 21 L. Ed. 938; *Tomlinson v. Jessup*, 15 Wall. 454, 457, 21 L. Ed. 204; *Railroad Co. v. Georgia*, 98 U. S. 359, 365, 25 L. Ed. 185; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683, 697, 29 L. Ed. 510.

Such statutory reservations of the right to repeal, unlike similar constitutional provisions, are only binding on a succeeding

**Repeal.**—So it can by a general law repeal this general reservation of the right to repeal, and all special reservation in separate charters.<sup>66</sup> But where the reservation is contained in a constitutional provision, it cannot be repealed or overriden by the legislature.<sup>67</sup>

**Repeal after Adoption in Charter.**—But the right is not lost by the repeal of the act after it has been expressly adopted as a part of the charter of a corporation.<sup>68</sup>

d. *Acceptance of New Legislation as Surrender of Exemption.*—**Acceptance of New Legislation.**—The assent of a corporation to a mere regulation of its

legislature so far as it chooses to conform to them; and, if it so intends, an irrepealable legislative contract may be made. It is, therefore, in every case a question whether the legislature making the contract intended that the former provision for repeal or amendment should, by implication, become a part of the new contract. *New Jersey v. Yard*, 95 U. S. 104, 24 L. Ed. 352. See, also, *Woodruff v. Trapnall*, 10 How. 190, 207, 13 L. Ed. 383.

The court said: "The case before us differs from those in which, by the constitutions of some of the states, this right to alter, amend, and repeal all laws creating corporate privileges becomes an inalienable legislative power. The power thus conferred cannot be limited or bargained away by any act of the legislature, because the power itself is beyond legislative control. (See *Northern Cent. R. Co. v. Maryland*, 187 U. S. 258, 267, 47 L. Ed. 167.) The right asserted in this case to amend or repeal legislative grants to corporations, being itself but the expression of the will or purpose of the legislature for one particular session or term of the state of New Jersey, cannot bind any succeeding legislature which may choose to make a grant or a contract not subject to be altered or repealed." *New Jersey v. Yard*, 95 U. S. 104, 111, 24 L. Ed. 352. See the title **TAXATION**, as to contract for specific rate of taxation.

**Charter amendment, providing there shall be no repeal, prevails over provision of general statute reserving right to amend.**—Where a general statute of Kentucky, enacted in 1856, reserved power to amend or repeal charters, and other laws, unless a contrary intent be therein plainly expressed: although this statute formed a part of the charter of a gas company incorporated in 1867, yet the clause in the amendatory act of Jan. 22, 1869, declaring that "no alteration or amendment to the charter of the gas company shall be made without the concurrence of the city council and the directors of the gas company," plainly expresses the intention that the company's charter should not be amended or repealed "at the will of the legislature," and a waiver of the absolute power to amend. *Louisville Gas. Co. v. Citizens' Gas Co.*, 115 U. S. 683, 697, 698, 29 L. Ed. 510.

But a clause in the charter, which declares it to be subject to the restrictions and liabilities contained in the general laws relating to street railways, does not withdraw it from the operation of such general reservation. The latter declares all acts of incorporation subject to its provisions. This subsection is not impaired by the fact that a particular corporation is made by its charter subject to other laws also of a general character. *Greenwood v. Freight Co.*, 105 U. S. 13, 23, 26 L. Ed. 961.

**By acceptance of new legislation.**—See Post, "Acceptance of New Legislation as Surrender of Exemption," VIII, C, 4, d.

**66. Repeal.**—*New Jersey v. Yard*, 95 U. S. 104, 111, 24 L. Ed. 352.

**67.** *New Jersey v. Yard*, 95 U. S. 104, 24 L. Ed. 352; *Northern Cent. R. Co. v. Maryland*, 187 U. S. 258, 267, 47 L. Ed. 167.

**Repeal and amendment of general laws.**—See ante, "Charter Not Protected unless It Embodies a True Contract," VIII, C, 1, b.

**68. Repeal of statute after adoption.**—*Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989.

Here the incorporating act expressly referred to and adopted an act concerning corporations which expressly reserved to the legislature the right to regulate the business of the corporation, or wholly to repeal its charter. After its incorporation the act referred to was repealed, and another act passed, which qualified the right of repeal. It was held that the rights of the corporation were governed by the prior act, notwithstanding its repeal. *Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989, citing approvingly in *Freeport Water Co. v. Freeport*, 180 U. S. 587, 597, 45 L. Ed. 679.

The qualification of the repeal of the earlier act seems to be intended not only to continue the existence of the corporations subject to it in the enjoyment of all their privileges, but subject to all their liabilities, of which the reserved legislative control was one. *Beer Co. v. Massachusetts*, 97 U. S. 25, 32, 24 L. Ed. 989.

**Prohibition of exclusive franchise and repeal of same.**—See ante, "Exclusive Franchise," VIII, C, 1, a, (4), (b).



by the legislature, which gave no additional franchises or privileges to it, nor created a new corporation, does not subject the corporation to the power of the legislature to amend or repeal its charter.<sup>69</sup> And it is not waived by submission to police regulations of the state, where the statute imposing same expressly provides against such a result.<sup>70</sup> But where a corporation becomes consolidated with another, or accepts new privileges, it becomes subject to the constitution and laws in force at the time of such consolidation or acceptance.<sup>71</sup>

**Extension or Amendment.**—And the same is true where a corporation accepts an extension of its charter,<sup>72</sup> or an amendment thereof.<sup>73</sup> Any right to

**69. Assent to regulation.**—Covington, etc., Turnpike Road Co. *v.* Sandford, 164 U. S. 578, 585, 41 L. Ed. 560. See the title **TURNPIKES AND TOLLROADS**.

**70.** Eagle Ins. Co. *v.* Ohio, 153 U. S. 446, 456, 38 L. Ed. 778.

The contention that compliance with police regulations in regard to statements of its business would bring the company under the operation of the general law of the state relating to corporations, and thus place it in the position of voluntarily subjecting itself to many provisions which would, if applied, impair the obligations of the charter, is not sustained under the state decisions of Ohio. Eagle Ins. Co. *v.* Ohio, 153 U. S. 446, 456, 38 L. Ed. 778.

**71. Consolidation or acceptance of new privileges.**—San Antonio Traction Co. *v.* Altgelt, 200 U. S. 304, 309, 50 L. Ed. 491; Shaw *v.* Covington, 194 U. S. 593, 600, 48 L. Ed. 1131; Northern Cent. R. Co. *v.* Maryland, 187 U. S. 258, 267, 47 L. Ed. 167.

Where a railway was originally chartered before a new constitution took effect (and hence such charter was not limited thereby), yet if such road be subsequently consolidated with other roads, or accept new privileges, after a new constitution takes effect, all contracts, privileges and franchises conferred after the adoption of such constitution are subject to its provisions. San Antonio Traction Co. *v.* Altgelt, 200 U. S. 304, 309, 50 L. Ed. 491; Shields *v.* Ohio, 95 U. S. 319, 24 L. Ed. 357; Railroad Co. *v.* Maine, 96 U. S. 499, 24 L. Ed. 836; Railroad Co. *v.* Georgia, 98 U. S. 359, 25 L. Ed. 185; Keokuk, etc., R. Co. *v.* Missouri, 152 U. S. 301, 38 L. Ed. 450; Yazoo, etc., R. Co. *v.* Adams, 180 U. S. 1, 23, 45 L. Ed. 395.

Where a Texas corporation became extinct by the foreclosure and sale of its property, and its successor also became the owner of all the property, assets, rights and privileges of another company, known as the San Antonio Edison Company, which thus became absorbed with the original company in the new corporation, which is admitted to have been incorporated since 1876, though the charter is not in the record, under these circumstances it received its franchise under the constitution of 1876, which forbade either the legislature or the municipal authorities to make any irrevocable contract. San Antonio Traction Co. *v.* Altgelt, 200 U. S. 304, 309, 50 L. Ed. 491.

A constitutional provision that "no special privileges or immunities shall ever be granted that may not be altered, revoked, or repealed by the general assembly," enters into acts under which consolidations are made, and renders the corporations created and the franchises conferred subject to repeal and alteration, and regulation just as if they had been expressly declared to be so by the acts. Shields *v.* Ohio, 95 U. S. 319, 324, 24 L. Ed. 357. See Stanislaus County *v.* San Joaquin, etc., Irrigation Co., 192 U. S. 201, 211, 48 L. Ed. 406; Rochester R. Co. *v.* Rochester, 205 U. S. 236, 254, 51 L. Ed. 784; Peoples' Gas Light, etc., Co. *v.* Chicago, 194 U. S. 1, 48 L. Ed. 851; Keokuk, etc., R. Co. *v.* Missouri, 152 U. S. 301, 312, 38 L. Ed. 450.

As to rate regulation, see the title **CARRIERS**, vol. 3, pp. 628, 629.

The act of the legislature of Maine of 1856, authorizing two or more existing corporations to consolidate and form a new corporation, was an act of incorporation of the new company; and the latter, upon its formation, became at once subject to the provisions of the general law of 1831, which declared that any act of incorporation subsequently passed should at all times thereafter "be liable to be amended, altered, or repealed at the pleasure of the legislature, in the same manner as if an express provision to that effect were therein contained, unless there shall have been inserted in such act of incorporation an express limitation or provision to the contrary." So long as this provision remained unrepealed, subsequent legislation not repugnant to it was controlled by it, and is to be construed and enforced in connection with it. The existence of the corporation, and its franchises and immunities, derived directly from the state, were thus kept under its control. Rights and interests acquired by the company, not constituting a part of the contract of incorporation, stand upon a different footing. Railroad Co. *v.* Maine, 96 U. S. 499, 500, 24 L. Ed. 836, distinguishing *The Delaware Railroad Tax*, 18 Wall. 206, 21 L. Ed. 888; Central R., etc., Co. *v.* Georgia, 92 U. S. 665, 23 L. Ed. 757; Chesapeake, etc., R. Co. *v.* Virginia, 94 U. S. 718, 24 L. Ed. 310. And see post, "Consolidation," XV, A.

**72. Extension of charter.**—Corry *v.* Baltimore, 196 U. S. 466, 477, 49 L. Ed. 566.

**73. Amendment.**—Hoge *v.* Railroad

exemption from such regulations by virtue of a contract contained in the charter, may be waived and is waived by acceptance of an amended charter recognizing such right of regulation.<sup>74</sup>

**Succession.**—So also where a new corporation is formed to succeed an old one and take over its franchises, as under a foreclosure.<sup>75</sup>

e. *Extent of Right to Amend and What Constitutes Impairment*—(1) *In General.*—The limitation upon the power of amendment of charters of corporations has been defined by the supreme court several times. It is said in one case that such power may be exercised to make any alteration or amendment in a charter granted that will not defeat or substantially impair the object of the grant, or any rights which have vested under it, which the legislature may deem necessary to secure, either the object of the grant, or any other public or private rights not expressly granted away by the charter.<sup>76</sup> Power to legislate, founded upon such a reservation in a charter to a private corporation, is certainly not without limit, and it may well be admitted that it cannot be exercised to take away or destroy rights acquired by virtue of such a charter, and which by a legitimate use of the powers granted have become vested in the corporation, but it may be safely affirmed that the reserved power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant or to secure the due administration of its affairs so as to protect the rights of the stockholders and of creditors, and for the proper disposition of the assets.<sup>77</sup> Such regulations cannot be assailed

Co., 99 U. S. 348, 353, 25 L. Ed. 303; Railroad Co. v. Maine, 96 U. S. 499, 24 L. Ed. 836; Chicago, Life Ins. Co. v. Needles, 113 U. S. 574, 28 L. Ed. 1084.

**74. Waiver of exemption.**—Chicago Life Ins. Co. v. Needles, 113 U. S. 574, 583, 28 L. Ed. 1084. See the title CONSTITUTIONAL LAW, ante, p. 1.

**75. Succession.**—Chesapeake, etc., R. Co. v. Miller, 114 U. S. 176, 188, 29 L. Ed. 121. See post, "Effect on Powers and Corporate Existence and Liabilities," XI, C, 1, f; "Succession," XV, B.

**76. Limitations on power of amendment—Preservation of object and vested rights.**—Holyoke Co. v. Yyman, 15 Wall. 500, 522, 21 L. Ed. 133; Pennsylvania College Cases, 13 Wall. 190, 20 L. Ed. 550; Tomlinson v. Jessup, 15 Wall. 454, 21 L. Ed. 204; Sinking-Fund Cases, 99 U. S. 700, 720, 25 L. Ed. 496. Railway Co. v. Philadelphia, 101 U. S. 528, 540, 25 L. Ed. 912; Greenwood v. Freight Co., 105 U. S. 13, 26 L. Ed. 961; Close v. Glenwood Cemetery, 107 U. S. 466, 476, 27 L. Ed. 408; Spring Valley Waterworks v. Schottler, 110 U. S. 347, 28 L. Ed. 173; Gibbs v. Consolidated Gas Co., 130 U. S. 396, 408, 32 L. Ed. 979; Hamilton Gas Light, etc., Co. v. Hamilton City, 146 U. S. 258, 270, 36 L. Ed. 963; New York, etc., R. Co. v. Bristol, 151 U. S. 556, 567, 38 L. Ed. 269, reaffirmed in New York, etc., R. Co. v. McKeon, 189 U. S. 508, 47 L. Ed. 922; United States v. Union Pac. R. Co., 160 U. S. 1, 33, 40 L. Ed. 319; St. Louis, etc., R. Co. v. Paul, 173 U. S. 404, 409, 43 L. Ed. 746; Looker v. Maynard, 179 U. S. 46, 52, 45 L. Ed. 79; Stanislaus County v. San Joaquin, etc., Irrigation Co., 192 U. S. 201, 213, 48 L. Ed. 406; Wright v. Minnesota, Mut. Life Ins. Co., 193 U. S. 657, 48 L. Ed. 832; New York, etc., R. Co. v. Plymouth, 193

U. S. 668, 48 L. Ed. 839, followed in Connecticut v. Woodruff, 153 U. S. 689, 38 L. Ed. 869; Fair Haven, etc., R. Co. v. New Haven, 203 U. S. 379, 388, 51 L. Ed. 237. See dissenting opinion of Field, J., in Spring Valley Waterworks v. Schottler, 110 U. S. 347, 369, 28 L. Ed. 173.

"The legislature (which has power in advance to determine what rights, privileges and duties it will give to and impose upon a corporation which it is creating) has, under the generally reserved right to alter, amend or repeal the charter, power to impose new duties and new liabilities upon such artificial entities of its creation." Atchison, etc., R. Co. v. Matthews, 174 U. S. 96, 104, 43 L. Ed. 909; St. Louis, etc., R. Co. v. Paul, 173 U. S. 404, 43 L. Ed. 746.

**77.** Miller v. State, 15 Wall. 478, 498, 21 L. Ed. 98; Sinking-Fund Cases, 99 U. S. 700, 720, 742, 25 L. Ed. 496. Railway Co. v. Philadelphia, 101 U. S. 528, 540, 25 L. Ed. 912; Sherman v. Smith, 1 Black 587, 17 L. Ed. 163; Close v. Glenwood Cemetery, 107 U. S. 466, 27 L. Ed. 408.

Or to protect the rights of the public and of the corporators, or to promote the due administration of the affairs of the corporation. Sinking-Fund Cases, 99 U. S. 700, 720, 25 L. Ed. 496; Holyoke Co. v. Lyman, 15 Wall. 500, 519, 21 L. Ed. 133; New York, etc., R. Co. v. Bristol, 151 U. S. 556, 38 L. Ed. 269; Spring Valley Waterworks v. Schottler, 110 U. S. 347, 28 L. Ed. 173; Looker v. Maynard, 179 U. S. 46, 52, 45 L. Ed. 79.

But not to violate or alter the terms of a contract, where a contract exists; only to alter or repeal the charter, which it prevents from being an inviolable contract. Sinking-Fund Cases, 99 U. S. 700, 749, 25 L. Ed. 496, per, Bradley, J., dis-

on the ground of infraction of the fourteenth amendment to the federal constitution.<sup>78</sup> In another case it was said that the "alterations must be reasonable; they must be made in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration."<sup>79</sup> Later cases have repeated these definitions.<sup>80</sup>

(2) *Affects Entire Relation with State.*—The reservation affects the entire relation between the state and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the state.<sup>81</sup>

sending; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 371, 28 L. Ed. 173, per Field, J., dissenting.

**Only exercisable where case contemplated arises.**—Legislative powers over contracts of corporations, lawfully existing when such contracts were formed, affect the nature and enter into the obligations of those contracts. But such powers can be exerted only in the particular cases in reference to which they have been reserved; and they are inoperative in all other cases. And, until such a case arises, the obligation of such a contract can no more be impaired than if it were under no circumstances subject to legislative control. The assumption that, because the legislature may destroy a contract by repealing the charter of the corporation which made it, therefore such a contract may be impaired, or altered or destroyed, in any manner the legislature may think fit, without repealing the charter, is wholly inadmissible. *Curran v. Arkansas*, 15 How. 304, 313, 14 L. Ed. 705.

**78. Fourteenth amendment.**—Where the act was purely prospective in its operation, it did not interfere with vested rights, or existing contracts, or destroy, or sensibly encroach upon, the right to contract, although it did impose a duty in reference to the payment of wages actually earned, which restricted future contracts in the particular named, in view of the fact that these corporations were clothed with a public trust, and discharged duties of public consequence, affecting the community at large, the regulation, as promoting the public interest in the protection of employees to the limited extent stated, is properly within the power to amend reserved under the state constitution. Inasmuch as the right to contract is not absolute, but may be subjected to the restraints demanded by the safety and welfare of the state, that conclusion in its application to the power to amend cannot be disputed on the ground of infraction of the fourteenth amendment. *St. Louis, etc., R. Co. v. Paul*, 173 U. S. 404, 409, 43 L. Ed. 746; *Orient Ins. Co. v. Dagg*, 172 U. S. 557, 43 L. Ed. 552; *Holden v. Hardy*, 169 U. S. 366, 42 L. Ed. 780; *St. Louis, etc., R. Co. v. Mathews*, 165 U. S. 1, 41 L. Ed. 611.

**Fixing wages.**—But it did not follow that the legislature could by amendment

fix or limit the compensation of employees, and particularly not as the right to amend was to be exercised so "that no injustice shall be done to the corporators." *St. Louis, etc., R. Co. v. Paul*, 173 U. S. 404, 407, 43 L. Ed. 746, distinguishing *Gulf, etc., R. Co. v. Ellis*, 165 U. S. 150, 159, 41 L. Ed. 666. See the title CONSTITUTIONAL LAW, ante, p. 372, et seq.

**79. Reasonableness, good faith and consistency with object.**—*Shields v. Ohio*, 95 U. S. 319, 324, 24 L. Ed. 357; *Fair Haven, etc., R. Co. v. New Haven*, 203 U. S. 379, 388, 51 L. Ed. 237; *Sinking-Fund Cases*, 99 U. S. 700, 720, 25 L. Ed. 496; *Stanislaus County v. San Joaquin, etc., Irrigation Co.*, 192 U. S. 201, 213, 48 L. Ed. 406.

The change and increase of burden upon the corporation do not come within the limitations upon the reserved power of the state where it has proper relation to the objects of the grant to the company and the public rights of the state, and is not exercised in mere oppression and wrong, but in good faith. *Fair Haven, etc., R. Co. v. New Haven*, 203 U. S. 379, 389, 51 L. Ed. 237.

**80. Sinking-Fund Cases**, 99 U. S. 700, 720, 25 L. Ed. 496; *Greenwood v. Freight Co.*, 105 U. S. 13, 26 L. Ed. 961; *Close v. Glenwood Cemetery*, 107 U. S. 466, 476, 27 L. Ed. 408.

In the *Sinking-Fund Cases*, 99 U. S. 700, 25 L. Ed. 496, it was said that whatever regulations of a corporation could have been inserted in its charter can be added by amendment. All the cases are reviewed and their principles affirmed in *Stanislaus County v. San Joaquin, etc., Irrigation Co.*, 192 U. S. 201, 48 L. Ed. 406, and water rates fixed by the board of supervisors of the county of Stanislaus under a law of the state, sustained through the income of the company, were reduced from one and a half per cent. per month to six per cent. per annum. *Fair Haven, etc., R. Co. v. New Haven*, 203 U. S. 379, 388, 51 L. Ed. 237. See *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 353, 28 L. Ed. 173.

**Under special provisos.**—See ante, "Scope and Construction of Clause Reserving Right," VIII, C, 4, b.

**81. Affects entire relation.**—*Sinking-Fund Cases*, 99 U. S. 700, 720, 25 L. Ed. 496; *Tomlinson v. Jessup*, 15 Wall. 454,



(3) *Powers of Congress and State Compared.*—And the same limitations apply whether it is congress or a state legislature that is exercising the right of amendment.<sup>82</sup> And where congress has conferred additional rights, powers and privileges upon a state corporation, reserving a right of amendment, it may regulate

459, 21 L. Ed. 204; *Covington v. Kentucky*, 173 U. S. 231, 240, 43 L. Ed. 679; *Stanislaus County v. San Joaquin, etc., Irrigation Co.*, 192 U. S. 201, 211, 48 L. Ed. 406.

"By the reservation \* \* \* the state retains the power to alter the charter in all particulars constituting the grant to the new company, formed under it, of corporate rights, privileges, and immunities. *Sinking-Fund Cases*, 99 U. S. 700, 720, 25 L. Ed. 496." *Railroad Co. v. Maine*, 96 U. S. 499, 510, 24 L. Ed. 836.

"To the same effect are *Railroad Co. v. Georgia*, 98 U. S. 359, 365, 25 L. Ed. 185; *Hoge v. Railroad Co.*, 99 U. S. 348, 353, 25 L. Ed. 303; *Greenwood v. Freight Co.*, 105 U. S. 13, 21, 26 L. Ed. 961; *Close v. Greenwood Cemetery*, 107 U. S. 466, 476, 27 L. Ed. 408; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 352, 28 L. Ed. 173; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683, 696, 29 L. Ed. 510; *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 408, 32 L. Ed. 979; *Sioux City St. R. Co. v. Sioux City*, 138 U. S. 98, 108, 34 L. Ed. 898." See *Covington v. Kentucky*, 173 U. S. 231, 240, 43 L. Ed. 679.

The object of the reservation was to prevent a grant of corporate rights and privileges in a form which would preclude legislative interference with their exercise, if the public interests should at any time require such interference, and to preserve to the state control over its contract with the corporators, which would otherwise be irrevocable and protected from any measures affecting its obligation. *Tomlinson v. Jessup*, 15 Wall. 454, 21 L. Ed. 204; *Covington v. Kentucky*, 173 U. S. 231, 239, 43 L. Ed. 679.

In *Hoge v. Railroad Co.*, 99 U. S. 348, 353, 25 L. Ed. 303, it was said: "By the law of 1841 every charter of a corporation in South Carolina subsequently granted, amended, or modified was subject to repeal, amendment, or modification by the legislature; unless specially excepted from such legislative control in the act granting the charter, amendment, or modification. Such is evidently the meaning of the forty-first section of that law, though the intention is inaptly expressed. This construction is somewhat different from that placed upon it in *Tomlinson v. Jessup*, reported in 15th Wallace, and gives the legislature a more extended control. But it is the construction to which a more careful examination of the language has led us. By it the legislature said, that subsequent charters should be subject to repeal or amendment, unless they were in express terms excepted from its control in the acts granting them; and that existing charters, if

subsequently amended or modified, should stand in the same position. Its provisions constituted the condition upon which every charter was afterwards granted, amended, or modified. They formed as much a part of the new or amended charter as if they had been originally embraced in it. They did not of course operate as a limitation upon the power of succeeding legislatures so as to control any repugnant legislation, but so long as they remained unrepealed, subsequent legislation, not repugnant in its terms, was to be construed and enforced in accordance with them." Citing *Railroad Co. v. Maine*, 96 U. S. 499, 24 L. Ed. 836.

Where the general law was, when a charter issued, that in all cases of private charters hereafter granted, the state reserves the right to withdraw the franchise, unless such right is expressly negatived in the charter, and no such right was negatived in the charter granted to the plaintiffs in error, consequently the franchise was held subject to a power in the state to withdraw it, and subject to be changed, modified, or destroyed at the will of its grantor or creator. These provisions of the code became, in substance, a part of the charter. *Railroad Co. v. Maine*, 96 U. S. 499, 24 L. Ed. 836. It is quite too narrow a definition of the word "franchise," used in this statute, to hold it as meaning only the right to be a corporation. The word is generic, covering all the rights granted by the legislature. As the greater power includes every less power which is a part of it, the right to withdraw a franchise must authorize a withdrawal of every or any right or privilege which is a part of the franchise. *Railroad Co. v. Georgia*, 98 U. S. 359, 365, 25 L. Ed. 185.

**82. Powers of congress and state compared.**—Where congress not only retains, but has given special notice of its intention to retain, full and complete power to make such alterations and amendments of the charter of a federal corporation as come within the just scope of legislative power, this power has a limit. It cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made. *Sinking-Fund Cases*, 99 U. S. 700, 720, 25 L. Ed. 496, approving and adopting the rules laid down in *Miller v. State*, 15 Wall. 478, 498, 21 L. Ed. 98; *Holyoke Co. v. Lyman*, 15 Wall. 500, 519, 21 L. Ed. 133; *Tomlinson v. Jessup*, 15 Wall. 454, 459, 21 L. Ed. 204; *Railroad Co. v. Maine*, 96 U. S. 499, 24 L. Ed. 836; *Shields v. Ohio*, 95 U. S. 319, 324, 24 L. Ed. 357. See, also, *United States v.*

the affairs of the corporation, by virtue of such right, in a manner not inconsistent with the original state charter. See ante, "Right of Congress to Repeal Federal Charter," VIII, C, 1, e.<sup>83</sup> The Central Pacific Company, by accepting the conditions of congress, voluntarily submitted itself to such legislative control by congress as was reserved under the power of amendment in the congressional grant.<sup>84</sup>

(4) *Examples of Valid Regulations.*—See ante, "Imposition of Additional Duty or Burden," VIII, C, 1, d, (3). Examples of regulations that have been held valid, are: Requiring a railroad company to abolish grade crossings at its own expense,<sup>85</sup> or prohibiting the use of locomotives on certain streets,<sup>86</sup> or imposing on a street railway the cost of paving that part of the street occupied by its tracks, and repaving same;<sup>87</sup> or raising the license fee of a street railway

Union Pac. R. Co., 160 U. S. 1, 33, 36, 40 L. Ed. 319.

Congress could not, under the guise of amendment or alteration, impose upon the corporation duties wholly foreign to the objects for which it was created or for which governmental aid was given. *United States v. Union Pac. R. Co.*, 160 U. S. 1, 33, 40 L. Ed. 319.

"Whatever rules congress might have prescribed in the original charter for the government of the corporation (the Union Pacific Railroad Company) in the administration of its affairs, it retained the power to establish by amendment. In so doing it cannot undo what has already been done, and it cannot unmake contracts that have already been made, but it may provide for what shall be done in the future, and may direct what preparation shall be made for the due performance of contracts already entered into." *Sinking-Fund Cases*, 99 U. S. 700, 721, 25 L. Ed. 496.

Where a corporation was chartered by congress, and a large grant of public lands made by the same act upon certain conditions, the clause authorizing congress "to add to, alter, amend, or repeal the act" clearly conferred this power on congress, especially when exercised, as in this instance, before the company had built a mile of road, or earned an acre of land, or in any other manner secured an equitable right to the lands. *Northern Pac. R. Co. v. Traill County*, 115 U. S. 600, 609, 29 L. Ed. 477; *Sinking-Fund Cases*, 99 U. S. 700, 719, 25 L. Ed. 496. See, also, *Railway Co. v. Prescott*, 16 Wall. 603, 21 L. Ed. 373.

**83. Under grant of federal aid to state corporation.**—*Sinking-Fund Cases*, 99 U. S. 700, 728, 730, 25 L. Ed. 496.

"The only material difference between the Central Pacific Company and the Union Pacific lies in the fact that in the case of the Central Pacific the special franchises, as well as the land and subsidy bonds, were granted by the United States to a corporation formed and organized under the laws of California, while in that of the Union Pacific, congress created the corporation to which the

grants were made." *Sinking-Fund Cases*, 99 U. S. 700, 727, 25 L. Ed. 496.

All the rights, privileges and franchises were given the Central Pacific Company that were granted the Union Pacific Company, except the franchise of being a corporation, and such others as were merely incident to the organization of the company. The land grants and subsidy bonds to this company were the same in character and quantity as those to the Union Pacific, and the same right of amendment was reserved. *Sinking-Fund Cases*, 99 U. S. 700, 728, 25 L. Ed. 496.

**84. Same.**—To the extent of the powers, rights, privileges, and immunities granted the Central Pacific Company and the Western Pacific Company, both California corporations, by the United States, congress retains the right of amendment, and in this way it may regulate the administration of the affairs of the company in reference to the debts created under its own authority, in a manner not inconsistent with the requirements of the original state charter, as modified by the State Aid Act of 1864, accepting what had been done by congress. In the words of the court: "This is as far as it is necessary to go now. It will be time enough to consider what more may be done when the necessity arises. As yet, the state has not attempted to interfere with the action of congress. All complaint thus far has come from the corporation itself, which, to secure the government aid, accepted all the conditions that were attached to the grants, including the reservation of power to amend." *Sinking-Fund Cases*, 99 U. S. 700, 730, 25 L. Ed. 496. See ante, "Power of Congress," IV, A, 1, d.

**85. Abolishing grade crossings.**—*New York, etc., R. Co. v. Bristol*, 151 U. S. 556, 38 L. Ed. 269. See the title CROSSINGS.

**86. Use of locomotives on certain streets.**—*Railroad Co. v. Richmond*, 96 U. S. 521, 24 L. Ed. 734. See the title STREETS AND HIGHWAYS.

**87. Imposing paving cost on street railway.**—*Fair Haven, etc., R. Co. v. New Haven*, 203 U. S. 379, 51 L. Ed. 237. See the titles STREETS AND HIGHWAYS; STREET RAILWAYS.



company;<sup>88</sup> or requiring a corporation grantee of public lands to pay the cost of selecting, surveying and conveying the lands;<sup>89</sup> or changing the plan of the business done by a life insurance company from the assessment plan to the legal reserve, flat rate plan of the "old line" insurance companies;<sup>90</sup> requiring construction of fishway in dam.<sup>91</sup>

**Regulation of Rates.**—So of a reasonable regulation of the rates charged by water companies, or change in the mode of ascertaining the same.<sup>92</sup>

**88. Raising license fee.**—*Railway Co. v. Philadelphia*, 101 U. S. 528, 25 L. Ed. 912. See the titles **LICENSES**; **STREET RAILWAYS**.

**89. Imposing costs of acquiring title to public lands.**—*Northern Pac. R. Co. v. Traill County*, 115 U. S. 600, 29 L. Ed. 477; *New Orleans Pac. R. Co. v. United States*, 124 U. S. 124, 131, 31 L. Ed. 383. See the title **PUBLIC LANDS**.

**90. Changing plan of insurance.**—*Wright v. Minnesota Mut. Life Ins. Co.*, 193 U. S. 657, 6645, 48 L. Ed. 832. See the title **INSURANCE**.

**91. Requiring fishway in dam.**—After a manufacturing corporation, chartered with authority to construct and maintain a dam across a river, paying damages to the owners of fishing rights above, and whose charter does not expressly exempt it from maintaining the dam without a fishway, and is subject to amendment, alteration, and repeal at the pleasure of the legislature, has paid such damages and constructed the dam without a fishway, so as to destroy the fishing rights above and to impair similar rights below (for the injury to which last no compensation has ever been made or provided), that corporation, or any other which purchases its dam under the authority of a subsequent statute, may be constitutionally required by the legislature to construct a fishway in the dam to the satisfaction of commissioners appointed by the legislature for the purpose. *Holvoke Co. v. Lyman*, 15 Wall. 500, 21 L. Ed. 133.

**92. Regulation of rates.**—*Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 28 L. Ed. 173; *Stanislaus County v. San Joaquin, etc., Irrigation Co.*, 192 U. S. 201, 48 L. Ed. 406. See ante, "Rate Regulation," II, D, 1, c. See the titles **IRRIGATION**; **WATER COMPANIES AND WATERWORKS**.

The privilege of charging whatever rates it may deem proper is a franchise, which may be taken away under the reserved power, but the right to charge a reasonable compensation would remain as a right under the general law governing natural persons, and not as a special franchise or privilege. *Peik v. Chicago, etc., R. Co.*, 94 U. S. 164, 176, 24 L. Ed. 97; *Lake Shore, etc., R. Co. v. Smith*, 173 U. S. 684, 698, 43 L. Ed. 858.

"The power to alter or amend does not extend to the taking of the property of the corporation either by confiscation or indirectly by other means. The authority to legislate in regard to rates comes from

the power to prevent extortion or unreasonable charges or exactions by common carriers or others exercising a calling and using their property in a manner in which the public have an interest." *Lake Shore, etc., R. Co. v. Smith*, 173 U. S. 684, 698, 43 L. Ed. 858.

Where the general act under which a corporation was incorporated expressly provided for the right of regulating by ordinance the rates that should be charged, people who have accepted, as experience shows they will accept, a charter subject to such liabilities, cannot complain of them or repudiate them, nor can the company which they have formed do so. *Knoxville Water Co. v. Knoxville*, 189 U. S. 434, 437, 47 L. Ed. 887.

**Reduction of rates.**—In reiterating this view of the power, a mere reduction of rates, while still leaving reasonable, fair or just compensation for the use of the property, is not prohibited. *Stanislaus County v. San Joaquin, etc., Irrigation Co.*, 192 U. S. 201, 213, 48 L. Ed. 406.

In *Stanislaus County v. San Joaquin, etc., Irrigation Co.*, 192 U. S. 201, 48 L. Ed. 406, water rates fixed by the board of supervisors of the county under a state law, were sustained, although the income of the company was reduced from 1½ per cent. per month to six per annum. *Fair Haven, etc., R. Co. v. New Haven*, 203 U. S. 379, 389, 51 L. Ed. 237.

"Assuming, but not deciding, that the ordinance of March 16, 1899, extending the franchise of the San Antonio Street Railway, and imposing certain limitations, constituted a contract pro tanto, the question still remains whether the provision 'that said street railway companies shall charge five cents fare for one continuous ride over any one of their lines, with one transfer to or from either line to the other,' constituted a contract with respect to which no further legislation upon that subject could be enacted without impairing its obligation. Even if construed as a contract, it was still subject to the provisions of the constitution of 1876, which, in § 17 of the bill of rights, declared that no irrevocable or uncontrollable grant of special privileges or immunities should be made; but that all privileges granted by the legislature or created under its authority shall be subject to the control thereof." *San Antonio Traction Co. v. Altgelt*, 200 U. S. 304, 308, 50 L. Ed. 491.

**Alteration of commission constituted for**



**Change in Mode of Choosing Directors.**—Or an amendment to the charter of a railroad company to which a city had subscribed, and where a large proportion of the other subscriptions were not paid up, increasing the number of directors which the city had the right to name, under the act authorizing its subscription, so as to give the city the same proportionate representation on its board as it would have had if the whole capital had been paid in, and as was originally contemplated. The original act was not an irrevocable contract, in view of the general statute reserving a right to amend, etc.<sup>93</sup> Or to change the mode of voting for directors, so as to allow cumulative voting by the stockholders, so as to secure representation of minority stockholders.<sup>94</sup>

**Power to Compel Establishment of Sinking Fund to Liquidate Existing Indebtedness.**—Legislative control of the administration of the affairs of a corporation, under a reserved power to alter or amend its charter, may properly include regulations by which suitable provision will be secured in advance for the payment of existing debts when they fall due.<sup>95</sup> The establishment of the fund is a reasonable regulation of the administration of the affairs of the companies, promotive alike of the interests of the public and of the corporators, and is also warranted under the authority which congress has, by way of amendment, to change or modify the rights, privileges, and immunities granted by the charter.<sup>96</sup>

**the purpose of fixing charges of public companies.**—At the time plaintiff company was incorporated the constitution of California provided that, except as to municipal corporations, all corporations should be created by general, and not special laws, and that all laws enacted pursuant to that provision should be subject to alteration and repeal by the legislature. Plaintiff was incorporated under a general law providing for the creation of public water companies. Under this act the rates charged by such companies were to be fixed by a board of commissioners, the members of which were appointed in part by the companies and in part by the authorities of the municipal corporation which the company was created to supply with water. Held, that a subsequent change in the constitution and laws of the state whereby the right to appoint all the members of such commission was vested in the municipal authorities, thereby giving the municipality the sole power of fixing rates, was within the reserved power of the legislature to alter or repeal, and did not impair the obligation of a contract. *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 355, 28 L. Ed. 173.

**Regulation of rates of carriers.**—See the title CARRIERS, vol. 3, p. 556.

**93. Change in directorate.**—*Miller v. State*, 15 Wall. 478, 21 L. Ed. 98; *Looker v. Maynard*, 179 U. S. 46, 53, 45 L. Ed. 79.

**94. Change in mode of electing directors.**—*Looker v. Maynard*, 179 U. S. 46, 54, 45 L. Ed. 79.

**95. Creation of sinking fund.**—*Sinking-Fund Cases*, 99 U. S. 700, 721, 25 L. Ed. 496.

By the legislation of congress in relation to the Central Pacific Railroad Company and the Western Pacific Railroad Company, the latter now by consoli-

tion a part of the former, to the extent of the powers, rights, privileges, and immunities thereby granted, congress retained the right of amendment, and by exercising it might, in a manner not inconsistent with the original charter granted by California, as modified by the act of that state passed in 1864, accepting what had been done by congress, regulate the administration of the affairs of the company in reference to the debts created by it under authority of such legislation, and the establishment of the sinking-fund by the act of May 7, 1878, did not conflict with anything in said charter. *Sinking-Fund Cases*, 99 U. S. 700, 25 L. Ed. 490.

So far as it established in the treasury of the United States a sinking-fund, the act of congress approved May 7, 1878 (20 Stat. 56), entitled "An act to alter and amend the act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes,' approved July 1, 1862, and also to alter and amend the act of congress approved July 2, 1864, in amendment of said first-named act," was not unconstitutional. *Sinking-Fund Cases*, 99 U. S. 700, 25 L. Ed. 496.

**96.** Out of regard to the rights of the subsequent lienholders and stockholders, it is not only the right of the United States, but their duty, as sovereign, to see to it that the current stockholders do not, in the administration of the affairs of the corporation, appropriate to their own use that which in equity belongs to others. A legislative regulation which does no more than require them to submit to their just contribution towards the payment of a bonded debt cannot in any sense be said to deprive them of their property without

**Regulation of Cemetery Company in Interests of Lot Owners.**—See the titles CEMETERIES, vol. 3, p. 647.

(5) *Property and Vested Rights.*—The courts have often held that it was beyond the power of the legislature, under the guise of an act amending or repealing a charter, to take away the property of the corporation, or the fruits, already reduced to possession, of contracts lawfully made.<sup>97</sup> But the unexercised capacity to acquire land for its purposes, does not come within this class of property rights.<sup>98</sup>

due process of law. *Sinking-Fund Cases*, 99 U. S. 700, 724, 726, 25 L. Ed. 496. See *Close v. Glenwood Cemetery*, 107 U. S. 466, 476, 27 L. Ed. 408.

**Debt not paid.**—The debt of the respective companies therein named to the United States is not paid by depositing and investing the fund in the manner prescribed by that act. *Sinking-Fund Cases*, 99 U. S. 700, 25 L. Ed. 496.

Retaining in the fund the one-half of the earnings for services rendered to the government by the respective companies, which, by the act of July 2, 1864 (13 Stat. 356), was to be paid, does not release the government from such payment. Although kept in the treasury, the fund is owned by them, and they will be entitled to the securities whereof it consists which remain undisposed of when the debts chargeable upon it shall be paid. Under the circumstances, such retaining is, in law, a payment to them. *Sinking-Fund Cases*, 99 U. S. 700, 25 L. Ed. 496.

**Right to dividends.**—It was held in the *Sinking-Fund Cases*, 99 U. S. 700, 726, 25 L. Ed. 496, that legislation creating a sinking-fund to provide suitable provision for the payment of existing debts, though to that extent limiting the right of stockholders to dividends, was warranted under the authority, by way of amendment, to change or modify the rights, privileges, and immunities granted by the charter. See *Close v. Glenwood Cemetery*, 107 U. S. 466, 476, 27 L. Ed. 408. And see, ante, "Regulation Generally," II. D, 1, b. See, also, the title STOCK AND STOCKHOLDERS.

**97. Taking of property.**—*Bienville Water Supply Co. v. Mobile*, 186 U. S. 212, 222, 46 L. Ed. 1132; *Sinking-Fund Cases*, 99 U. S. 700, 720, 25 L. Ed. 496; *United States v. Union Pac. R. Co.*, 160 U. S. 1, 33, 40 L. Ed. 319; *Miller v. State*, 15 Wall. 478, 498, 21 L. Ed. 98; *Lake Shore, etc., R. Co. v. Smith*, 173 U. S. 684, 698, 43 L. Ed. 858; *St. Louis, etc., R. Co. v. Paul*, 173 U. S. 404, 409, 43 L. Ed. 746; *Greenwood v. Freight Co.*, 105 U. S. 13, 26 L. Ed. 961; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 28 L. Ed. 173. See post, "Conditions and Consequences of Amendment and Repeal," VIII, C, 4, g.

Beyond the sphere of the reserved powers, the vested rights of property of corporations, in such cases, are surrounded by the same sanctions and are as inviolable as in other cases. *Shields v. Ohio*, 95 U. S. 319, 324, 24 L. Ed. 357; *Stanislaus*

*County v. San Joaquin, etc., Irrigation Co.*, 192 U. S. 201, 213, 48 L. Ed. 406.

The reserved power to alter or repeal all corporate charters at the pleasure of the legislature does not extend to the right to destroy the rights of shareholders to the real and personal property of the corporation, nor rights of contract, or choses in action. *Greenwood v. Freight Co.*, 105 U. S. 13, 26 L. Ed. 961.

The possible rights of a corporation to which such revocation or amendment might extend, group themselves into three classes: First, the right to the tangible property which it may acquire; second, the right to do the specific things which are named in the charter; and, third, the right to exclude others from doing like things. It has been held that the right of revocation or amendment carries with it no right to appropriate the tangible property belonging to the corporation. As said by Chief Justice Waite, speaking of the power of amendment, in *Sinking-Fund Cases*, 99 U. S. 700, 720, 25 L. Ed. 496: "All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made." Nothing of this nature was, however, attempted by this legislation. The plaintiff was left in undisturbed possession of its tangible property. So we need not stop to consider what protection could be afforded if the attempt had been made to take away its property. *Bienville Water Supply Co. v. Mobile*, 186 U. S. 212, 222, 46 L. Ed. 1132.

"The second class includes the power of action granted to the corporation; in other words, the right to use the tangible property for the purposes of the charter." *Bienville Water Supply Co. v. Mobile*, 186 U. S. 212, 222, 46 L. Ed. 1132. See ante, "Property Rights," VIII, C, 1, a, (5).

**98. Eminent domain rights.**—"Undoubtedly the power to amend or repeal cannot be availed of to take away property already acquired or to deprive a corporation of the fruits already reduced to possession of contracts lawfully made. But the capacity to acquire land by condemnation for the construction of a railroad attends the franchise to be a railroad corporation, and when unexecuted cannot be held to be in itself a vested right surviving the existence of the franchise or an authorized circumscription of its scope." *Adirondack R. Co. v. New York*, 176 U.



**Right of Legislature to Confer Franchises and Property of Dissolved Corporation upon Another.**—Where the legislature under a reserved power to repeal, at its pleasure, all corporate charters, repeals the charter of an incorporated company, all the franchises, dependent upon such repealed charter, immediately come to an end, and the company no longer has any property right therein. It cannot complain therefore, when the legislature immediately creates a new corporation and invests it with the franchises (for example, operating a street railway upon certain designated streets), formerly exercised by it.<sup>99</sup>

(6) *Presumption in Favor of Rightful Exercise and Discretion.*—Clearly, the question is, in the first instance, presented for the consideration of the legislature, and a presumption of validity attends its action.<sup>1</sup>

(7) *Municipal Action as Impairment.*—Where there exists a reserved right in the legislature to amend or repeal a corporate charter, and it is alleged that the obligation of the charter is impaired by municipal action, and injunction is sought, either the action of the municipality is sanctioned by the state, in which case the state must be taken to have exercised its reserved right to repeal its grant to that extent, or the action of the municipality is not so sanctioned, in which case it cannot be a law impairing the obligation of contracts within the clause of the constitution, and the plaintiffs are out of court.<sup>2</sup>

f. *Construction of Amendment.*—When there is doubt as to the meaning of an amendment to a corporate charter, it is to be resolved against the corporation,<sup>3</sup> and a charter and its amendments are to be considered as acts in *pari materia* in construing them.<sup>4</sup>

g. *Conditions and Consequences of Amendment or Repeal.*—**Provision for Indemnity.**—And where the general law declared that it might be repealed where provision was made for full indemnity, even if this provision has refer-

S. 335, 344, 44 L. Ed. 492; *People v. Cook*, 148 U. S. 397, 37 L. Ed. 498; *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 40 L. Ed. 838; *Bank v. Tennessee*, 163 U. S. 416, 424, 41 L. Ed. 211; *Baltimore, etc., R. Co. v. Nesbit*, 10 How. 395, 13 L. Ed. 469. See the title EMINENT DOMAIN.

**Exclusive franchise.**—See ante, "Exclusive Franchise," VIII, C. 1, a, (4), (b).

**99. Transfer to new corporation.**—*Greenwood v. Freight Co.*, 105 U. S. 13, 21, 26 L. Ed. 961.

As to the property of the old company, such of it as is necessary to the public use, the legislature may authorize the new company to take under a power of eminent domain, upon making just compensation therefor, since the property of corporations, even including their franchises when that is necessary, may be taken for public use upon making due compensation. *Greenwood v. Freight Co.*, 105 U. S. 13, 22, 26 L. Ed. 961.

Whether this action was oppressive or unjust in view of the public good, or whether the legislature was governed by sufficient reason in thus repealing the charter of one company and in chartering another at the same time to perform as part of its functions the duties required of the first, is not a judicial question in this case. *Greenwood v. Freight Co.*, 105 U. S. 13, 22, 26 L. Ed. 961.

**1. Presumption of validity.**—*Bienville Water Supply Co. v. Mobile*, 186 U. S. 212, 222, 46 L. Ed. 1132.

"The power to alter corporate charters is no doubt one that bad men may

abuse, but when the amendments are within the scope of the power, the courts cannot interfere with the discretion of the legislatures that have been invested with authority to make them." *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 355, 28 L. Ed. 173.

**2. Municipal action as impairment.**—*Shaw v. Covington*, 194 U. S. 593, 596, 48 L. Ed. 1131; *Hamilton Gas Light, etc., Co. v. Hamilton City*, 146 U. S. 258, 36 L. Ed. 963; *Wisconsin, etc., R. Co. v. Powers*, 191 U. S. 379, 386, 48 L. Ed. 229. See *Joplin v. Southwest Missouri Light Co.*, 191 U. S. 150, 155, 156, 48 L. Ed. 127.

**3. Construction.**—*Ruggles v. Illinois*, 108 U. S. 526, 534, 27 L. Ed. 812.

It is undoubtedly true that amendments to the charters of corporations are usually made at the solicitation of the corporations themselves, who cause the bills to be prepared and submitted to the legislatures for enactment, and that, if there is doubt as to the construction of what is enacted, this fact may be resorted to in aid of interpretation. But Vattel's first general maxim of interpretation is that "it is not allowable to interpret what has no need of interpretation," and he continues: "When a deed is worded in clear and precise terms—when its meaning is evident and leads to no absurd conclusion—there can be no reason for refusing to admit the meaning which such deed naturally presents." *Ruggles v. Illinois*, 108 U. S. 526, 534, 27 L. Ed. 812.

**4. In pari materia.**—*New Jersey v. Yard*, 95 U. S. 104, 112, 24 L. Ed. 352.



ence only to the absolute dissolution of a corporation and not to a mere alteration of its charter, it must be observed. But if it be construed in a large sense to cover alteration as well, the qualification with which it is accompanied in the proviso is very important and not to be ignored. This qualification requires reimbursement or indemnity to those who have made advances upon the faith of the charter of incorporation.<sup>5</sup>

**Vested Property Rights.**—But where property rights of an existing corporation are affected, or its property taken or authorized to be taken, compensation must be made, and where it is made, under a reserved right to amend or repeal, it is lawful.<sup>6</sup>

**Effect of Repeal.**—The history of the reservation clause in acts of incorporation supports the proposition, that whatever right, franchise, or power in the corporation depends for its existence upon the granting clauses of the charter, is lost by its repeal. This view is sustained by the decisions of this court and of other courts on the same question.<sup>7</sup>

5. **CONSENT OF CORPORATION.**—Of course, where the corporation consents to the amendment or repeal of its charter, it cannot complain of the breach of any contract.<sup>8</sup> To the extent of such assent, amendments are effectual, and no further.<sup>9</sup> Consent of the corporation, it is conceded, is sufficient to warrant alteration, modification, and amendments in the charters of moneyed, business, and commercial corporations, and it is not perceived that the question presented in

5. **Indemnity.**—*Asylum v. New Orleans*, 105 U. S. 362, 366, 26 L. Ed. 1128.

Nothing of the kind has been attempted in this case. As the corporation has not been dissolved, but is continued in existence, and still represents those who contributed to its establishment, the corporation itself is the only proper party to receive indemnity. *Asylum v. New Orleans*, 105 U. S. 362, 366, 26 L. Ed. 1128.

6. **Property rights must be paid for.**—*Greenwood v. Freight Co.*, 105 U. S. 13, 26 L. Ed. 961. See ante, "Property and Vested Rights," VIII, C, 4, e, (5).

**Exemption from taxation.**—See the title TAXATION.

7. **Effect of repeal.**—*Greenwood v. Freight Co.*, 105 U. S. 13, 26 L. Ed. 961; *Pennsylvania College Cases*, 13 Wall. 190, 20 L. Ed. 550; *Tomlinson v. Jessup*, 15 Wall. 454, 21 L. Ed. 204; *Railroad Co. v. Maine*, 96 U. S. 499, 24 L. Ed. 836; *Sinking-Fund Cases*, 99 U. S. 700, 25 L. Ed. 496; *Railroad Co. v. Georgia*, 98 U. S. 359, 25 L. Ed. 185.

The result of the repeal of the charter of a corporation like this is that it no longer exists. Its life is at an end. Whatever force the law may give to transactions into which the corporation entered and which were authorized by the charter while in force, it can originate no new transactions dependent on the power conferred by the charter. In short, whatever power is dependent solely upon the grant of the charter, and which could not be exercised by unincorporated private persons under the general laws of the state, is abrogated by the repeal of the law which granted these special rights. *Greenwood v. Freight Co.*, 105 U. S. 13, 18, 26 L. Ed. 961. See post, "Effects and Consequences," XVII, C.

8. **Consent of corporation.**—*Maryland v. Baltimore, etc., R. Co.*, 3 How. 534, 552, 11 L. Ed. 714; *Farrington v. Tennessee*, 95 U. S. 679, 683, 24 L. Ed. 558. *Pennsylvania College Cases*, 13 Wall. 190, 218, 20 L. Ed. 550. See *State Bank v. Knopp*, 16 How. 369, 14 L. Ed. 977. See ante, "Rights of Third Parties," VIII, C, 1, c.

An alteration in the charter of a private corporation is not binding upon the company without its consent; but when the company has assented to the proposed alteration and agreed to accept the law it becomes a contract between it and the state in the same sense in which the original charter was a contract. *Maryland v. Baltimore, etc., R. Co.*, 3 How. 534, 552, 11 L. Ed. 714; *Tomlinson v. Jessup*, 15 Wall. 454, 458, 21 L. Ed. 204. See *Turnpike Co. v. Illinois*, 96 U. S. 63, 68, 24 L. Ed. 651.

9. *Farrington v. Tennessee*, 95 U. S. 679, 683, 24 L. Ed. 558. "And when the company assented to the proposed alterations in their charter, and agreed to accept the law, it undoubtedly became a contract between it and the state; but it was a contract in no other sense than every charter, whether original or supplementary, is a contract, where rights of private property are acquired under it. Yet, although this supplementary charter was a contract in this sense of the term, it does not by any means follow that the legislature might not, in the charter, impose duties and obligations upon the company, and inflict penalties and forfeitures as a punishment for its disobedience, which might be enforced against it in the form of criminal proceedings, and as the punishment of an offense against the law. Such penal provisions are to be found in many charters." *Maryland v. Baltimore, etc., R. Co.*, 3 How. 534, 552, 11 L. Ed. 714.

a case involving incorporated institutions of learning stands upon any different footing from such as arise out of legislation of that character.<sup>10</sup>

**Rights of Individual or Minority Stockholders.**—There is much discussion in the authorities as to when a charter amendment is of that fundamental character that a majority of the members or stockholders cannot bind the minority by agreeing to a change in the nature of the business to be carried on or the purposes and objects for which the corporation was created. Each case depends upon its own circumstances, and how far the right of amendment has been impliedly or expressly reserved in the creation of corporate rights. It would be unreasonable and oppressive to require a member or stockholder to remain in a corporation whose fundamental purposes have been changed against his will. On the other hand, where the right of amendment is reserved in the statute or articles of association, it is because the right to make changes which the business may require is recognized, and the exercise of the privilege may be vested in the controlling body of the corporation. In such cases, where there is an exercise of the power in good faith, which does not change the essential character of the business, but authorizes its extension upon a modified plan, both reason and authority support the corporation in the exercise of the right.<sup>11</sup>

6. **REMEDY FOR INFRINGEMENT, AND JURISDICTION.**—If a state injure one incorporated company by the unlawful grant of a charter to another and rival one, the remedy of the first company is by proper proceedings to restrain the second from getting into operation, and not by neglecting its own duties.<sup>12</sup>

**Jurisdiction of Question.**—The federal supreme court preserves to itself the right to say whether the statute, charter or alleged grant constitutes a contract; or whether the repeal or the judicial construction of a statute has deprived plaintiff of his remedy for enforcing the contract. If this were not so, if the plaintiff below were concluded by the decision of the state court upon these matters, his right to appeal to the federal supreme court would avail him nothing.<sup>13</sup>

7. **AMENDMENT BY SPECIAL ACT.**—See ante, "By Special Act," IV, A, 2.

## IX. By-Laws and Regulations.

See the title **OFFICERS AND AGENTS OF PRIVATE CORPORATIONS**.<sup>14</sup>

## X. Corporate Name.

**Right to Name.**—One corporation cannot prevent another from using in its

10. **Incorporated institutions of learning.**—Undoubtedly the corporate franchises of two institutions of learning which were consolidated by legislative act with the consent of the trustees of both, were contracts of the description protected by that clause of the constitution which ordains that no state shall pass any law impairing the obligation of contracts, but the contract involved in such an act of incorporation is a contract between the state and the corporation, and as such the terms of the contract may, as a general rule, be altered, modified, or amended by the assent of the corporation, even though the charter contains no such reservation and there was none such existing in any general law of the state at the time the charter was granted. *Pennsylvania College Cases*, 13 Wall. 190, 218, 20 L. Ed. 550.

It cannot be doubted that the assent of the corporation is sufficient to render such legislation valid, unless it appears that the new legislation will have the effect to change the control of the institution, or to divert the fund of the donors to some

new use inconsistent with the intent and purpose for which the endowment was originally made. *Pennsylvania College Cases*, 13 Wall. 190, 220, 20 L. Ed. 550.

11. **Rights of minority stockholders.**—*Wright v. Minnesota Mut. Life Ins. Co.*, 193 U. S. 657, 663, 48 L. Ed. 832; *Nugent v. The Supervisors*, 19 Wall. 241, 251, 22 L. Ed. 83. See, also, *Pennsylvania College Cases*, 13 Wall. 190, 220, 20 L. Ed. 550. And see, the title **STOCK AND STOCKHOLDERS**.

12. **Remedy for infringement.**—*Turnpike Co. v. State*, 3 Wall. 210, 18 L. Ed. 180. See the title **INJUNCTIONS**.

13. **Jurisdiction.**—*Butz v. Muscatine*, 8 Wall. 575, 852, 19 L. Ed. 490, followed in *United States v. Burlington*, 154 U. S. 568, 19 L. Ed. 495; *Jefferson Branch Bank v. Skelly*, 1 Black 436, 17 L. Ed. 173. See the titles **APPEAL AND ERROR**, vol. 1, p. 333; **CONSTITUTIONAL LAW**, ante, p. 1; **COURTS; IMPAIRMENT OF OBLIGATION OF CONTRACTS**.

14. **Subordination to state regulation.**—See ante, "Implied Power," II, D, 2, a.

corporate title a name to which others have a common right.<sup>15</sup> And in the absence of contract, fraud or estoppel, any man may use his own name, in all legitimate ways, and as the whole or a part of a corporate name.<sup>16</sup>

**Necessity.**—But every corporation must needs have a name, or it could not perform its corporate acts.<sup>17</sup>

**Selection.**—The authority to select a corporate name might be conferred upon the incorporators by the special act authorizing the incorporation, where that mode of incorporation was still legal.<sup>18</sup>

**Misnomer.**—If there is enough of the name to designate the artificial being intended and distinguish it from all others, there is no misnomer.<sup>19</sup>

**Even a contract is not avoided by misnaming the corporation** with which it is made. And if a corporation is misnamed in a statute, the statute is not thereby rendered inoperative if there is enough from which to ascertain what corporation is meant.<sup>20</sup>

## XI. Corporate Powers.

**A. In General.**—I. SUCH AS CHARTER AND LAWS CONFER—*a. In General.*—See ante, "Definitions," II, A. As to the doctrine of ultra vires, see post, "Ultra Vires Acts," XII. As a general rule, corporations can have and exercise only such powers as are expressly conferred on them by the act of incorporation, and such implied powers as are necessary to enable them to perform their prescribed duties, or incident to their existence.<sup>21</sup> The general doctrine

### 15. Right to name of common character.

—"The principle that one corporation is not entitled to restrain another from using in its corporate title a name to which others have a common right, is sustained by the discussion in *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 37 L. Ed. 1144 and is, we think, necessarily applicable to all names *publici juris*. *American Cereal Company v. Eli Pettijohn Cereal Company*, 72 Fed. Rep. 903; S. C., 76 Fed. Rep. 372; *Hazelton Boiler Company v. Hazelton Tripod Boiler Company*, 142 Illinois, 494; *Monarch v. Rosenfeld*, 39 S. W. Rep. 236." *Howe Scale Co. v. Wyckoff*, 198 U. S. 118, 137, 49 L. Ed. 972. See ante, "Impairment of Contract," IV, A, 1, c, (3).

**Presumption from identity of name.**—See ante, "Status of Resulting Entity," II, H, 1, a, (3).

**16. Surname.**—*Howe Scale Co. v. Wyckoff*, 198 U. S. 118, 140, 49 L. Ed. 972. See the title TRADEMARKS, TRADE-NAMES AND UNFAIR COMPETITION.

**17. Necessity for name.**—For it is nobody to plead and be impleaded, to take and give, until it hath gotten a name. *Bac. Abr. Corp. (C)*" *Louisville, etc., R. Co. v. Letson*, 2 How. 497, 551, 11 L. Ed. 353. See *Dartmouth College v. Woodward*, 4 Wheat. 518, 667, 4 L. Ed. 629. See ante, "Corporation as Entity Distinct from Shareholders," II, C.

Its name is the symbol of its personal existence. *Osborn v. United States Bank*, 9 Wheat. 738, 877, 6 L. Ed. 204.

**18. Under special act.**—*The Telephone Cases*, 126 U. S. 1, 571, 31 L. Ed. 863.

**19. Misnomer.**—"Although the names of corporations are not merely arbitrary

sounds, yet if there be enough to show that there is such an artificial being, and to distinguish it from all others, the body politic is well named, though the words and syllables are varied from." *Bacon's Abr.*, tit. Corporation, C. 2. And it has been held by the supreme court of Illinois that the transposition of words comprising the name of a corporation is unimportant, if it be evident what corporation is intended." *County of Moultrie v. Fairfield*, 105 U. S. 370, 377, 26 L. Ed. 945.

**20. Effect on contract.**—*County of Moultrie v. Fairfield*, 105 U. S. 370, 377, 26 L. Ed. 945. And see the title NAMES.

**How availed of.**—See post, "Misnomer," XIV, E, 4. See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 32.

**21. General rule.**—*Scovill v. Thayer*, 105 U. S. 143, 148, 26 L. Ed. 968; *Head v. Providence Ins. Co.*, 2 Cranch 127, 2 L. Ed. 229; *Dartmouth College v. Woodward*, 4 Wheat. 518, 636, 4 L. Ed. 629; *Goszler v. Georgetown*, 6 Wheat. 593, 597, 5 L. Ed. 339; *Osborn v. United States Bank*, 9 Wheat. 738, 823, 6 L. Ed. 204; *United States Bank v. Dandridge*, 12 Wheat. 64, 6 L. Ed. 552; *Beaty v. Knowler*, 4 Pet. 152, 7 L. Ed. 813; *United States v. Robertson*, 5 Pet. 641, 670, 8 L. Ed. 257; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 544, 9 L. Ed. 773; *Bank v. Earle*, 13 Pet. 519, 587, 10 L. Ed. 274; *Runyan v. Coster*, 14 Pet. 122, 10 L. Ed. 382; *Perrine v. Chesapeake, etc., Canal Co.*, 9 How. 172, 183, 13 L. Ed. 92; *Minturn v. Larue*, 23 How. 435, 16 L. Ed. 574; *Rice v. Railroad Co.*, 1 Black 358, 380, 17 L. Ed. 147; *Rogers v. Burlington*, 3 Wall. 654, 669, 18 L. Ed. 79, per Field, J., dissenting; *Huntington v. Savings*



upon this subject is now well settled. The charter of a corporation, read in connection with the general laws applicable to it, is the measure of its powers,

Bank, 96 U. S. 388, 24 L. Ed. 777; Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. Ed. 1036; Thomas v. Railroad Co., 101 U. S. 71, 82, 25 L. Ed. 950; Relfe v. Rundle, 103 U. S. 222, 225, 26 L. Ed. 337; Spring Valley Waterworks v. Schottler, 110 U. S. 347, 352, 28 L. Ed. 173; Pacific R. Removal Cases, 115 U. S. 1, 13, 29 L. Ed. 319; Home Ins. Co. v. New York, 134 U. S. 594, 599, 33 L. Ed. 1025; Merrill v. Monticello, 138 U. S. 673, 687, 34 L. Ed. 1069; Horn Silver Min. Co. v. New York, 143 U. S. 305, 312, 36 L. Ed. 164; Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 44 L. Ed. 657; New York Life Ins. Co. v. Cravens, 178 U. S. 389, 396, 44 L. Ed. 1116; Hancock Mut. Life Ins. Co. v. Warren, 181 U. S. 73, 76, 45 L. Ed. 755; Fidelity Mut. Life Ass'n v. Mettler, 185 U. S. 308, 327, 46 L. Ed. 922; Hale v. Henkel, 201 U. S. 43, 75, 50 L. Ed. 652.

"It may be considered as the established doctrine of this court in regard to the powers of corporations, that they are such and such only as are conferred upon them by the acts of the legislatures of the several states under which they are organized." Oregon R., etc., Co. v. Oregonian R. Co., 130 U. S. 1, 20, 32 L. Ed. 837, followed in Oregon R., etc., Co. v. Oregonian R. Co., 145 U. S. 52, 36 L. Ed. 620. See McCormick v. Market Bank, 165 U. S. 538, 550, 41 L. Ed. 817; Concord First Nat. Bank v. Hawkins, 174 U. S. 364, 371, 43 L. Ed. 1007, reaffirmed in Shaw v. National German-American Bank, 199 U. S. 603, 50 L. Ed. 328.

And the general doctrine in this country, though there may be exceptional cases and some authorities to the contrary, is that the powers of corporations organized under legislative statutes are such and such only as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others. Pennsylvania R. Co. v. St. Louis, etc., R. Co., 118 U. S. 290, 307, 30 L. Ed. 83; Green Bay, etc., R. Co. v. Union Steamboat Co., 107 U. S. 98, 27 L. Ed. 413; Pearce v. Madison, etc., R. Co., 21 How. 441, 16 L. Ed. 184; New York, etc., R. Co. v. Winans, 17 How. 30, 15 L. Ed. 27; New Orleans v. Texas & Pac. R. Co., 171 U. S. 312, 343, 43 L. Ed. 178; Jenkins v. Neff, 186 U. S. 230, 234, 46 L. Ed. 1140; Thomas v. Railroad Co., 101 U. S. 71, 25 L. Ed. 950; First Nat. Bank v. National Exchange Bank, 92 U. S. 122, 128, 23 L. Ed. 679; De La Vergne, etc., Mach. Co. v. German Sav. Institution, 175 U. S. 40, 54, 44 L. Ed. 65.

"The nature and character of a corporation created by a statute, and the extent of the powers which it may lawfully exercise, have upon several occasions been under consideration in this court. In the case of Head v. Providence Ins. Co., 2 Cranch 127, 2 L. Ed. 229, Chief Justice Marshall, in delivering the opinion of the court, said, 'without ascribing to this body, which in its corporate capacity is the mere creature of the act to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may correctly be said, to be precisely what the incorporating act has made it; to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes. To this source of its being, then, we must recur to ascertain its powers; and to determine whether it can complete a contract by such communications as are in this record.' In the case of Dartmouth College v. Woodward, 4 Wheat. 518, 636, 4 L. Ed. 629, the same principle was again decided by the court. 'A corporation,' said the court, 'is an artificial being, invisible, intangible, and existing only in contemplation of law. Being a mere creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.' And in the case of the United States Bank v. Dandridge, 12 Wheat. 64, 6 L. Ed. 552, where the question in relation to the powers of corporations and their mode of action were very carefully considered, the court said: 'But whatever may be the implied powers of aggregate corporations, by the common law, and the modes by which those powers are to be carried into operation, corporations created by statute, must depend, both for their powers and the mode of exercising them, upon the true construction of the statute itself.' Bank v. Earle, 13 Pet. 519, 587, 10 L. Ed. 274. See Runyan v. Coster, 14 Pet. 122, 10 L. Ed. 382; Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 43, 44 L. Ed. 657; Telluride Power Transmission Co. v. Rio Grande, Western R. Co., 187 U. S. 569, 583, 47 L. Ed. 317; Hale v. Henkel, 201 U. S. 43, 75, 50 L. Ed. 652.

"It can very well be seen that the aggregation of individual capital and energy into an associated organization may require different powers for each enterprise so established." School District v. Insurance Co., 103 U. S. 707, 709, 26 L. Ed. 601.

Any privileges which may exempt it from the burdens common to individuals do not flow necessarily from the charter, but must be expressed in it, or they do not exist. Louisville, etc., R. Co. v. Let-

and a contract manifestly beyond those powers will not sustain an action against the corporation.<sup>22</sup>

son, 2 How. 497, 558, 11 L. Ed. 353; Providence Bank v. Billings, 4 Pet. 514, 7 L. Ed. 939.

A state act of incorporation confers a corporate character, but can give that corporate body no peculiar privileges in the courts of the United States, not belonging to it as a corporation. Those privileges do not exist, unless conferred by an act of congress. *Young v. Bank*, 4 Cranch 384, 397, 2 L. Ed. 655.

**When a corporation is chartered by act of congress**, that act must be resorted to as the measure of the powers and duties, as well as to define the character of the corporation created thereby. *Speer v. Colbert*, 200 U. S. 130, 143, 50 L. Ed. 403; *Bradfield v. Roberts*, 175 U. S. 291, 44 L. Ed. 168; *Osborne v. United States Bank*, 9 Wheat. 738, 823, 6 L. Ed. 204.

**Subordination to federal law and liberty of contract.**—Liberty of contract does not imply liberty in a corporation or individuals to defy the national will, when legally expressed. Nor does the enforcement of a legal enactment of congress infringe, in any proper sense, the general inherent right of every one to acquire and hold property. That right, like all other rights, must be exercised in subordination to the law. (Per curiam, speaking through Harlan, J., four judges dissenting.) *Northern Securities Co. v. United States*, 193 U. S. 197, 351, 48 L. Ed. 679.

**22. Charter the measure of its powers.**—*Green Bay, etc., R. Co. v. Union Steamboat Co.*, 107 U. S. 98, 100, 27 L. Ed. 413; *Bank v. Earle*, 13 Pet. 519, 10 L. Ed. 274; *Thomas v. Railroad Co.*, 101 U. S. 71, 25 L. Ed. 950; *Pittsburg, etc., R. Co. v. Keokuk, etc., Bridge Co.*, 131 U. S. 371, 385, 33 L. Ed. 157; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 49, 35 L. Ed. 55; *Fort Worth City Co. v. Smith Bridge Co.*, 151 U. S. 294, 301, 38 L. Ed. 167.

"Outside of the powers conferred and the privileges granted to those organizations by the statutes under which they exist, they are in all the states of the Union, which, like Oregon, have the common law as a foundation of their jurisprudence, governed by that common law; and it is the established doctrine of this court, and, with some exception, of the states in which that common law prevails, as well as of Great Britain, from which it is derived, that such a corporation can exercise no power or authority which is not granted to it by the charter under which it exists, or by some other act of the legislature which granted that charter." *Oregon, R., etc., Co. v. Oregonian R. Co.*, 130 U. S. 1, 21, 32 L. Ed. 837, citing *Thomas v. Railroad Co.*, 101 U. S. 71, 25 L. Ed. 950, followed in *Oregon R.,*

*etc., Co. v. Oregonian R. Co.*, 145 U. S. 52, 36 L. Ed. 620.

**One striking difference between the artificial and a natural person** is that the latter can do anything not forbidden by law, while the former can do only what is so permitted. Its powers and immunities depend primarily upon the law of its creation. Beyond that it is subject, like individuals, to the will of the lawmaking power. *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 666, 667, 24 L. Ed. 1036; *Shields v. Ohio*, 95 U. S. 319, 323, 24 L. Ed. 357; *Railroad Co. v. Harris*, 12 Wall. 65, 20 L. Ed. 354; *Minneapolis, etc., R. Co. v. Gardner*, 177 U. S. 332, 343, 44 L. Ed. 793. See post, "Implied Powers," XI, A, 1, b.

**Provisions of title under which organized considered.**—"The general rule is that corporations have only such powers as are granted and the powers incidental thereto, and in arriving at a conclusion as to the powers of this corporation the applicable provisions of the title under which it was organized must be considered; legislation which will be found to be in harmony with the common law." *Fort Worth City Co. v. Smith Bridge Co.*, 151 U. S. 294, 301, 38 L. Ed. 167.

**Common-law and statutory corporations contrasted.**—"The doctrine has been long and repeatedly affirmed by this court, that, in interpreting the powers and rights of corporations, an essential distinction must be taken between corporations existing by the common law (often, nay, necessarily, traceable to a remote and obscure antiquity), and those which are created by statute, whose constitutions and powers are defined and ascertained by accessible and visible proofs. Into the composition or practices of the former, tradition, implication, or usage may enter, and thus give room for assumptions of power; with respect to the latter, no such rule, or rather misrule, has obtained or been permitted, especially by the settled decisions of this day." *Planters' Bank v. Sharp*, 6 How. 301, 337, 12 L. Ed. 447, citing *Head v. Providence Ins. Co.*, 2 Cranch 127, 2 L. Ed. 229; *Dartmouth College v. Woodward*, 4 Wheat. 518, 636, 4 L. Ed. 629; *United States Bank v. Dandridge*, 12 Wheat. 64, 6 L. Ed. 552; *Bank v. Earle*, 13 Pet. 519, 587, 10 L. Ed. 274.

**Duty to exercise.**—"Upon the authority and the duty of a corporation to exercise the powers granted to it by the legislature, and those only; and upon the invalidity of any contract, made beyond those powers, or providing for their disuse or alienation; there is no occasion to refer to decisions of other courts, because the judgments of this court, \* \* \* afford satisfactory guides and ample illustrations." *Central Transp. Co. v. Pull-*

**Restrictions.**—And if the charter impose restrictions, of course they must be observed.<sup>23</sup>

**Law Applicable.**—The rights of a corporation are to be determined by the laws in force when it came into being.<sup>24</sup>

**Conformity to Nature and Objects.**—The general power of a corporate body must be restricted by the nature and object of its institution.<sup>25</sup>

**Under Dual Incorporation.**—Where a corporation is incorporated under the laws of two states, all its powers in relation to land lying in one of them must be derived from the law of that state alone.<sup>26</sup>

**Exhaustion.**—"When a charter power is once exhausted it is, in respect to further contracts and rights, as though it had never been granted."<sup>27</sup>

b. *Implied Powers.*—See post, "Construction," XI, A, 2. But while the charter of a corporation, read in connection with the general laws applicable to it, is the measure of its powers, yet whatever, under the charter and other general laws, reasonably construed, may fairly be regarded as incidental to the objects for which the corporation is created, is not to be taken as prohibited.<sup>28</sup>

man's Palace Car Co., 139 U. S. 24, 40, 35 L. Ed. 55.

**Discretion of directors.**—See the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

**Criminal capacity.**—See the title CRIMINAL LAW.

**Diversion of water of navigable stream.**—See the title NAVIGABLE WATERS.

**Execution of chattel mortgage.**—See the title CHATTEL MORTGAGES, vol. 3, p. 699.

**Perpetual succession.**—See ante, "Corporation," II, A, 1.

**Power to lay assessment on stockholders.**—See the title STOCK AND STOCKHOLDERS.

**Presumptions.**—See the title PRESUMPTIONS AND BURDEN OF PROOF.

**Presumption in favor of validity of corporate acts.**—See post, "Ultra Vires Acts," XII.

**United States Bank.**—See the title BANKS AND BANKING, vol. 3, pp. 13, 14.

**Ultra vires contracts and their effect.**—See post, "Ultra Vires Acts," XII.

**23. Restrictions in charter.**—United States Bank *v.* Dandridge, 12 Wheat. 64, 69, 6 L. Ed. 552.

**24. Laws in force at incorporation.**—Chesapeake, etc., R. Co. *v.* Miller, 114 U. S. 176, 189, 29 L. Ed. 121. As to conflict of laws, see the title CONFLICT OF LAWS, vol. 3, p. 1020.

**25. Nature and object of institution.**—*Korn v. Mutual Assur. Society*, 6 Cranch 192, 200, 3 L. Ed. 195. It is not only illegal for a corporation to apply its capital to objects not contemplated by its charter, but also to apply its profits. *Dodge v. Woolsey*, 18 How. 331, 342, 15 L. Ed. 401.

It cannot vary from the object of its creation. *Zabriskie v. Cleveland, etc., R. Co.*, 23 How. 381, 398, 16 L. Ed. 488; *Pearce v. Madison, etc., R. Co.*, 21 How. 441, 16 L. Ed. 184; *Scovill v. Thayer*, 105 U. S. 143, 150, 26 L. Ed. 968; *Central*

*Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 42, 35 L. Ed. 55. See ante, "Objects and Consideration," IV, A, 1, a; post, "Construction," XI, A, 2.

As to powers of foreign corporation, see the title FOREIGN CORPORATIONS. As to powers of banks, see the title BANKS AND BANKING, vol. 3, p. 1.

**26. Powers of incorporation under laws of two or more states.**—*Beatty v. Knowler*, 4 Pet. 152, 167, 7 L. Ed. 813. See ante, "Dual Incorporation," II, H, 1.

**27. Exhaustion.**—*East Tennessee, etc., R. Co. v. Frazier*, 139 U. S. 288, 292, 35 L. Ed. 196.

**28. Implied powers.**—*Pittsburg, etc., R. Co. v. Keokuk, etc., Bridge Co.*, 131 U. S. 371, 385, 33 L. Ed. 157; *Head v. Providence Ins. Co.*, 2 Cranch 127, 2 L. Ed. 229; *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629; *Goszler v. Georgetown*, 6 Wheat. 593, 597, 5 L. Ed. 339. *Osborn v. United States Bank*, 9 Wheat. 738, 823, 6 L. Ed. 204. *Beatty v. Knowler*, 4 Pet. 152, 7 L. Ed. 813. *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 544, 9 L. Ed. 773; *Bank v. Earle*, 13 Pet. 519, 587, 10 L. Ed. 274; *Perrine v. Chesapeake, etc., Canal Co.*, 9 How. 172, 183, 13 L. Ed. 92; *New York, etc., R. Co. v. Winans*, 17 How. 30, 15 L. Ed. 27; *Pearce v. Madison, etc., R. Co.*, 21 How. 441, 16 L. Ed. 184; *Minturn v. Larue*, 23 How. 435, 16 L. Ed. 574; *Huntington v. Savings Bank*, 96 U. S. 388, 24 L. Ed. 777; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 675, 24 L. Ed. 1036; *Thomas v. Railroad Co.*, 101 U. S. 71, 82, 25 L. Ed. 950; *Relfe v. Rundle*, 103 U. S. 222, 26 L. Ed. 337; *Scovill v. Thayer*, 105 U. S. 143, 148, 26 L. Ed. 968; *Green Bay, etc., R. Co. v. Union Steamboat Co.*, 107 U. S. 98, 27 L. Ed. 413; *Branch v. Jessup*, 106 U. S. 468, 478, 27 L. Ed. 279; *Pacific R. Removal Cases*, 115 U. S. 1, 13, 29 L. Ed. 319; *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 307, 30 L. Ed. 83; *Pittsburg, etc., R. Co. v. Keokuk, etc., Bridge Co.*, 131 U. S. 371, 33 L. Ed. 157;



And where the subject matter of the contract is not foreign to the purposes for which the corporation is created, a contract embracing whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorized, ought not, unless expressly prohibited, to be held by judicial construction to be *ultra vires*.<sup>29</sup>

**Estoppel to Deny.**—A contract having been fully performed by the corporation, and the defendant company having the full benefit thereof, the latter cannot now be allowed to say that the power was not properly exercised.<sup>30</sup>

**Transportation Companies.**—Authority given the corporation to carry persons and property, implies authority to charge a reasonable sum for the carriage. In this way the corporation was put in the same position a natural person would occupy if engaged in the same or like business. Its rights and its privileges in its business of transportation are just what those of a natural person would be under like circumstances; no more, no less.<sup>31</sup>

*Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 49, 35 L. Ed. 55; *Fort Worth City Co. v. Smith Bridge Co.*, 151 U. S. 294, 301, 38 L. Ed. 167.

In *United States Bank v. Deveaux*, 5 Cranch 61, 3 L. Ed. 38, it was held "that the technical definition of a corporation does not uniformly circumscribe its capacities, but that courts for legitimate purposes will contemplate it more substantially." *Bacon v. Robertson*, 18 How. 480, 485, 15 L. Ed. 499. See ante, "In General," XI, A, 1, a.

**29. Reasonably incidental powers.**—*Union Pac. R. Co. v. Chicago, etc., R. Co.*, 163 U. S. 564, 581, 41 L. Ed. 265; *Jacksonville, etc., R. & Nav. Co. v. Hooper*, 160 U. S. 514, 525, 40 L. Ed. 515; *Woodruff v. Mississippi*, 162 U. S. 291, 299, 40 L. Ed. 973, where it is said: "a discretion exists in the choice of the means to accomplish the required result, unless restricted by the terms of the grant."

This doctrine ought to be reasonably, and not unreasonably understood and applied. In the application of the doctrine the court must be influenced somewhat by the special circumstances of the case. *Jacksonville, etc., R. & Nav. Co. v. Hooper*, 160 U. S. 514, 525, 40 L. Ed. 515; *Union Pac. R. Co. v. Chicago, etc., R. Co.*, 163 U. S. 564, 581, 41 L. Ed. 265. The power sought to be implied must not be contradictory to the express charter stipulations. *Dartmouth College v. Woodward*, 4 Wheat. 518, 638, 4 L. Ed. 629.

There is no rule or principle by which an act, creating a corporation for certain specific objects, or to carry on a particular trade or business, is to be strictly construed as prohibitory of all other dealings or transactions not coming within the exact scope of those designated. Undoubtedly the main business of a corporation is to be confined to that class of operations which properly appertain to the general purposes for which its charter was granted. But it may also enter into and engage in transactions which are incidental or auxiliary to its main business, which may become necessary, expedient, or profitable in the care and

management of the property which it is authorized to hold under the act by which it was created. *Jacksonville, etc., R. & Nav. Co. v. Hooper*, 160 U. S. 514, 525, 40 L. Ed. 515.

It is not indispensable to hold that corporations in modern times possess numerous incidental powers, equal to those of individuals, as was once the doctrine (*Kyd. Corp.* 108; 2 *Kent Com.* 281, and cases in those treatises); but seems now in some respects overruled. But merely to hold, as has often been held in late years, that what is necessary and proper to be done to carry into effect express grants and which is nowhere forbidden, may in most cases be lawful. *Planters' Bank v. Sharp*, 6 How. 301, 322, 12 L. Ed. 447; *Bank v. Earle*, 13 Pet. 519, 587, 10 L. Ed. 274; *Head v. Providence Ins. Co.*, 2 Cranch 127, 167, 2 L. Ed. 229; *United States Bank v. Dandridge*, 12 Wheat. 64, 6 L. Ed. 552.

To corporations, however created, there are certain incidents attached, without express words or authority, such as the power to plead and to be impleaded, to purchase and sell, to make a common seal, and to pass by-laws. *United States Bank v. Dandridge*, 12 Wheat. 64, 67, 6 L. Ed. 552.

"A corporation created for the purpose of dealing in lands, and to which the powers to purchase, to subdivide, and to sell, and to make any contract essential to the transaction of its business, are expressly granted, possesses as fairly incidental the power to incur liability in respect of securing better facilities for transit to and from the lots or lands, which it is its business to acquire and dispose of." *Fort Worth City Co. v. Smith Bridge Co.*, 151 U. S. 294, 301, 38 L. Ed. 167.

**30. Estoppel.**—*Fort Worth City Co. v. Smith Bridge Co.*, 151 U. S. 294, 302, 38 L. Ed. 167. See the title **ESTOPPEL**.

**31. Transportation companies.**—*Railroad Commission Cases*, 116 U. S. 307, 329, 29 L. Ed. 636. See the title **CARRIERS**, vol. 3, p. 556.

**Extension of line of transportation.**—*"In Green Bay, etc., R. Co. v. Union Steamboat Co.*, 107 U. S. 98, 27 L. Ed.

**Newspaper Company.**—An authority to charter a yacht for the purpose of collecting news was clearly within the corporate powers of a newspaper corporation such as The Sun Association of New York, and the mere signing of a charter party in execution of such a contract was not illegal, nor can it, with any plausibility, be said where, in a case like this, the vessel chartered was to be manned, equipped and operated by the hirer, to be taken far from her home port, in time of threatened or actual war, on a presumably hazardous venture, that the agreement to absolutely return or, in default, to pay a fixed value, was so beyond the means incidental to the exercise of the power to charter as to cause the act to be beyond the corporate power.<sup>32</sup>

**Implied Contract to Pay for Services.**—See the title IMPLIED CONTRACTS.  
**To Increase Capital Stock.**—See the title STOCK AND STOCKHOLDERS.

c. *Presumption in Favor of Right to Exercise.*—The contract of a corporation is presumed to be *infra vires*, until the contrary is made to appear.<sup>33</sup>

2. **CONSTRUCTION**—a. *In General.*—The different provisions, unless they are clear, unambiguous, and free of doubt, are subject to construction, and their true intent and meaning must be ascertained by the same rules of interpretation as apply to other legislative grants, the universal rule being that whenever the privileges granted to such a corporation come under revision in the courts, the grant is to be strictly construed against the corporation and in favor of the public, and that nothing passes to the corporation but what is granted in clear and explicit terms.<sup>34</sup> And so with grants of power and authority to a corporation.

413, and in *Pittsburg, etc., R. Co. v. Keokuk, etc., Bridge Co.*, 131 U. S. 371, 384, 33 L. Ed. 157, the general doctrine of *ultra vires*, as established by earlier decisions, was affirmed; and a railroad corporation was held to have the power, for the purpose of securing a continuous line of transportation of which its road formed part, to make a contract with a steamboat company, or with a company chartered to construct a railway bridge or viaduct, because the charter of the particular railroad corporation, read in connection with the general laws applicable to it, clearly manifested the intention of the legislature to confer upon it that power." *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 46, 35 L. Ed. 55. But see post, "Void Where Want of Power Absolute," XII, B, 1.

32. **Chartering yacht by newspaper company.**—*Sun Printing, etc., Ass'n v. Moore*, 183 U. S. 642, 651, 46 L. Ed. 366. See the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

33. **Presumption.**—*Express Co. v. Railroad Co.*, 99 U. S. 191, 199, 25 L. Ed. 319. See post, "Construction," XI, A, 2; "Ultra Vires Acts," XII.

"When a contract is not on its face necessarily beyond the scope of the power of the corporation by which it was made, it will, in the absence of proof to the contrary, be presumed to be valid. Corporations are presumed to contract within their powers." *Railway Co. v. McCarthy*, 96 U. S. 258, 267, 24 L. Ed. 693.

34. **Strict construction the rule.**—*Moran v. Commissioners*, 2 Black 722, 17 L. Ed. 342; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. Ed. 773; *Ohio Life Ins., etc., Co. v. Debolt*, 16 How. 416, 434, 14 L. Ed. 997; *Rice v.*

*Railroad Co.*, 1 Black 358, 17 L. Ed. 147; *Jefferson Branch Bank v. Skelly*, 1 Black 436, 446, 17 L. Ed. 173; *Gilman v. Sheboygan*, 2 Black 510, 17 L. Ed. 305; *The Binghamton Bridge*, 3 Wall. 51, 75, 18 L. Ed. 137; *Holyoke Co. v. Lyman*, 15 Wall. 500, 512, 21 L. Ed. 133; *Tucker v. Ferguson*, 22 Wall. 527, 22 L. Ed. 805; *Newton v. Commissioners*, 100 U. S. 548, 561, 25 L. Ed. 710; *Railway Co. v. Philadelphia*, 101 U. S. 528, 540, 25 L. Ed. 912; *Slidell v. Grandjean*, 111 U. S. 412, 438, 28 L. Ed. 321; *Hannibal, etc., R. Co. v. Missouri River Packet Co.*, 125 U. S. 260, 271, 31 L. Ed. 731; *Stein v. Bienville Water Supply Co.*, 141 U. S. 67, 80, 35 L. Ed. 622; *Coosaw Min. Co. v. South Carolina*, 144 U. S. 550, 562, 36 L. Ed. 537; *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 664, 676, 40 L. Ed. 838. See *New Mexico v. United States Trust Co.*, 172 U. S. 171, 186, 43 L. Ed. 407. See, also, *Rundle v. Delaware, etc., Co.*, 14 How. 80, 92, 14 L. Ed. 335.

Whatever is not unequivocally granted in corporate charters is taken to have been withheld, as all such charters and acts extending the privileges of corporate bodies are to be taken most strongly against the incorporators. *Railway Co. v. Philadelphia*, 101 U. S. 528, 540, 25 L. Ed. 912; *Holyoke Co. v. Lyman*, 15 Wall. 500, 512, 21 L. Ed. 133.

The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded to it but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. *Fertilizing Co. v. Hyde Park*, 97 U. S.



They are to be construed strictly in favor of the public and against the corporation, and all doubts with regard to the authority granted in a corporate charter are to be resolved against the corporation.<sup>35</sup> Where an act contains the grant of certain privileges by the public to a private corporation, and in a matter where the public interest is concerned, the rule of construction in all such cases is now fully established to be this: "That any ambiguity in the terms of the contract must operate against the corporation, and in favor of the public; and the corporation can claim nothing but what is clearly given by the act."<sup>36</sup> And the

659, 666, 24 L. Ed. 1036; *Newton v. Commissioners*, 100 U. S. 548, 561, 25 L. Ed. 710.

The charter of any corporation is the only source of its powers, and the only authority by which any can be exercised; it is opposed to all sound rules of construction, to consider that which confers, as merely restraining and controlling powers incident to the incorporation; and therefore, to be construed strictly as a limitation or exception to powers which pre-existed, or necessarily resulted from it, as is the power to make by-laws, to sue and be sued. *United States v. Robertson*, 5 Pet. 641, 670, 8 L. Ed. 257.

But this principle must be applied with reference to the subject matter as a whole, and not in such manner as to defeat the general intent of the legislature. *Moran v. Commissioners*, 2 Black 722, 17 L. Ed. 342; *Curtis v. County of Butler*, 24 How. 435, 448, 16 L. Ed. 745. See ante, "In General," XI, A, 1, a.

**35. Powers and authority.**—*Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677, 685, 40 L. Ed. 849; *Moran v. Commissioners*, 2 Black 722, 17 L. Ed. 342; *Pearshall v. Great Northern R. Co.*, 161 U. S. 646, 40 L. Ed. 838.

**36. Ambiguity construed against corporation.**—*Richmond, etc., R. Co. v. Louisa R. Co.*, 13 How. 71, 81, 14 L. Ed. 55; *Jackson v. Lamphire*, 3 Pet. 280, 289, 7 L. Ed. 679; *United States v. Arredondo*, 6 Pet. 691, 738, 8 L. Ed. 547; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 544, 9 L. Ed. 773; *Perrine v. Chesapeake, etc., Canal Co.*, 9 How. 172, 13 L. Ed. 92; *Minturn v. Larue*, 23 How. 435, 16 L. Ed. 574; *Rice v. Railroad Co.*, 1 Black 358, 380, 17 L. Ed. 147; *Moran v. Commissioners*, 2 Black 722, 17 L. Ed. 342; *Ruggles v. Illinois*, 108 U. S. 526, 27 L. Ed. 812; *Stein v. Bienville Water Supply Co.*, 141 U. S. 67, 35 L. Ed. 622; *Covington, etc., Turnpike Road Co. v. Sanford*, 164 U. S. 578, 41 L. Ed. 560; *Blair v. Chicago*, 201 U. S. 400, 472, 50 L. Ed. 801.

"By a familiar rule, every public grant of property, or of privileges or franchises, if ambiguous, is to be construed against the grantee and in favor of the public; because an intention, on the part of the government, to grant to private persons, or to a particular corporation, property or rights in which the whole public is interested, cannot be presumed, unless unequivocally expressed or necessarily to

be implied in the terms of the grant; and because the grant is supposed to be made at the solicitation of the grantee, and to be drawn up by him or by his agents, and therefore the words used are to be treated as those of the grantee; and this rule of construction is a wholesome safeguard of the interests of the public against any attempt of the grantee, by the insertion of ambiguous language, to take what could not be obtained in clear and express terms. *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 544, 548, 9 L. Ed. 773; *Dubuque & Pac. R. Co. v. Litchfield*, 23 How. 66, 88, 89, 16 L. Ed. 500; *Slidell v. Grandjean*, 111 U. S. 412, 437, 438, 28 L. Ed. 321. This rule applies with peculiar force to articles of association, which are framed under general laws, and which are a substitute for a legislative charter, and assume and define the powers of the corporation by the mere act of the associates, without any supervision of the legislature or of any public authority." *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 49, 35 L. Ed. 55; *Oregon R., etc., Co. v. Oregonian R. Co.*, 130 U. S. 1, 26, 27, 32 L. Ed. 837, followed in *Oregon R., etc., Co. v. Oregonian R. Co.*, 145 U. S. 52, 55, 36 L. Ed. 620; *Ohio Life Ins., etc., Co. v. Debolt*, 16 How. 416, 435, 14 L. Ed. 997; *The Delaware Railroad Tax*, 18 Wall. 206, 21 L. Ed. 888; *Coosaw Min. Co. v. South Carolina*, 144 U. S. 550, 36 L. Ed. 537; *Turnpike Co. v. Illinois*, 96 U. S. 63, 24 L. Ed. 651.

Neither privileges, powers, nor authorities, can pass by an act of incorporation, unless they be given in unambiguous words, and an act giving special privileges must be construed strictly. In such a case, where a sentence is capable of having two distinct meanings, a construction must be given to it most favorable to the public. But in applying these principles to a given case, it must be done with reference to the subject-matter contemplated by the legislature as a whole, and not allow its manifested intention and design to be defeated. *Curtis v. County of Butler*, 24 How. 435, 448, 16 L. Ed. 745. See, also, *Moran v. Commissioners*, 2 Black 722, 17 L. Ed. 342; *The Binghamton Bridge*, 3 Wall. 51, 75, 18 L. Ed. 137; *Blair v. Chicago*, 201 U. S. 400, 472, 50 L. Ed. 801.

Not that the charter is to receive a strained and unreasonable interpretation, contrary to the obvious intention of the



same construction is to be put upon the grant of powers to a private corporation exercising public functions, such as a railroad company.<sup>37</sup>

**A corporation is strictly limited** to the exercise of those powers which are specially conferred on it; the exercise of the corporate franchise, being restrictive of individual rights, cannot be extended beyond the letter and spirit of the act of incorporation.<sup>38</sup>

**But where the meaning is clear,** there is no room for construction.<sup>39</sup>

b. *Construction of Franchises*.—A grant of franchises and special privileges is to be construed most strongly against the donee and in favor of the public.<sup>40</sup>

c. *Enlargement by Construction*.—And their powers are not to be enlarged by construction merely because circumstances have changed.<sup>41</sup>

**No Enlargement under Implied Agreement**.—A corporation cannot, when holding their corporate existence under a law extending the charter, and deriving their franchises altogether from it, add to the privileges expressed in their charter, an implied agreement, which is in direct conflict with a portion of the law from which they derive their corporate existence.<sup>42</sup>

grant, but it must be fairly examined and considered, and reasonably and justly expounded. If, upon such an examination, there is doubt or ambiguity in its terms, and the power claimed is not clearly given, it cannot be exercised. The rights of the public are never presumed to be surrendered to a corporation, unless the intention to surrender clearly appears in the law. *Perrine v. Chesapeake, etc., Canal Co.*, 9 How. 172, 191, 13 L. Ed. 92; *Blair v. Chicago*, 201 U. S. 400, 472, 50 L. Ed. 801; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 675, 24 L. Ed. 1036; *The Binghamton Bridge*, 3 Wall. 51, 75, 18 L. Ed. 137.

**37. Private corporation exercising public functions**.—*Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 40 L. Ed. 838.

**38. Beaty v. Knowler**, 4 Pet. 152, 7 L. Ed. 813; *United States v. Robertson*, 5 Pet. 641, 666, 8 L. Ed. 257, per Baldwin, J., dissenting; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. Ed. 773, per Taney, C. J.; *Planters' Bank v. Sharp*, 6 How. 301, 319, 12 L. Ed. 447. See, also, *Providence Bank v. Billings*, 4 Pet. 514, 7 L. Ed. 939.

**"Courts may well be astute** in dealing with efforts of corporations to usurp powers not granted them, or to stretch their lawful franchises against the interests of the public." *Jacksonville, etc., R. & Nav. Co. v. Hooper*, 160 U. S. 514, 524, 40 L. Ed. 515.

**39. Perspicuity obviates construction**.—Vattel's first general maxim of interpretation is that "it is not allowable to interpret what has no need of interpretation," and he continues: "When a deed is worded in clear and precise terms—when its meaning is evident and leads to no absurd conclusion—there can be no reason for refusing to admit the meaning which such deed naturally presents. To go elsewhere in search of conjectures, in order to restrict or extend it, is but to elude it." This is true of a corporate charter, and when the words are plain and interpret themselves, extrinsic facts are not com-

petent to change this meaning. *Ruggles v. Illinois*, 108 U. S. 526, 534, 27 L. Ed. 812. See, also, *Home of the Friendless v. Rouse*, 8 Wall. 430, 436, 19 L. Ed. 495; *The Binghamton Bridge*, 3 Wall. 51, 75, 18 L. Ed. 137; *Blair v. Chicago*, 201 U. S. 400, 472, 50 L. Ed. 801.

**40. Franchises**.—*Turnpike Co. v. Illinois*, 96 U. S. 63, 24 L. Ed. 651.

It is incumbent upon those claiming under a public grant to make out the rights contended for by terms which clearly and unequivocally convey them, and it is enough to deny the privileges contended for, if, upon considering the act, the mind rests in doubt and uncertainty as to whether they are intended to be conferred. So where there is ambiguity in a statute extending corporate franchises, as to whether for a longer or shorter period. *Blair v. Chicago*, 201 U. S. 400, 467, 50 L. Ed. 801. See ante, "Duration and Termination of Corporate Existence," IV, C, 2.

**Public service corporations**.—One who asserts private rights in public property under grants of franchises to a corporation such as a street railway company, must, if he would establish them, come prepared to show that they have been conferred in plain terms, for nothing passes by the grant except it be clearly stated or necessarily implied. *Blair v. Chicago*, 201 U. S. 400, 463, 471, 50 L. Ed. 801.

**41. Enlargement by construction**.—See the title CANALS, vol. 3, p. 551.

**42. Implied supplementary agreement**.—The legislature cannot be presumed to have taken upon themselves an implied obligation, contrary to their own acts and declarations contained in the same law. It would be difficult to find a case justifying such an implication, even between individuals; still less will it be found, where sovereign rights are concerned, and where the interests of a whole community would be deeply affected by such an implication. *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 551, 9 L. Ed. 773. See ante, "In General," XI, A, 2, a.

d. *Under Articles of Association Filed under General Law.*—And especially is this rule to be rigidly applied to the case of corporations formed by filing articles of association under a general law regulating the organization of corporations. The reason is that such articles are in a sense *ex parte*; their formation and execution—what shall be put in and what shall be left out—do not take place under the supervision of official authority. They are the production of private citizens, gotten up in the interest of the parties who propose to become corporators, and drafted with a view to the personal advantage of the parties concerned rather than the general good.<sup>42</sup>

3. *MODE OF ACTION AND PROOF THEREOF*—a. *Representation by Officers and Agents*—(1) *In General.*—A corporation can act only by its officers and agents,<sup>44</sup> its affairs are necessarily managed by them,<sup>45</sup> and, as an artificial be-

43. *Under articles of association adopted by corporation.*—Oregon R., etc., Co. v. Oregonian R. Co., 13 U. S. 1, 26, 32 L. Ed. 837, followed in Oregon R., etc., Co. v. Oregonian R. Co., 145 U. S. 52, 55 L. Ed. 620. See, also, Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 35 L. Ed. 55.

"Instances might be multiplied in which powers described in general terms as belonging to the objects of the parties who thus become incorporated would be valid; but the corporation, in carrying out this general purpose, would not be authorized to exercise the powers necessary for so doing in any mode which the law of the state would not justify in any private person or any unincorporated body. The manner in which these powers shall be exercised, and their subjection to the restraint of the general laws of the state and its general principles of public policy, are not in any sense enlarged by inserting in the articles of association the authority to depart therefrom." Oregon R., etc., Co. v. Oregonian R. Co., 130 U. S. 1, 29, 32 L. Ed. 837, followed in Oregon R., etc., Co. v. Oregonian R. Co., 145 U. S. 52, 36 L. Ed. 620.

#### 44. Can act only by officers and agents.

—Nelson v. United States, 201 U. S. 92, 115, 50 L. Ed. 673; Bank v. Patterson, 7 Cranch 299, 3 L. Ed. 351; Bank v. Gutschlick, 14 Pet. 19, 10 L. Ed. 335; Gordon v. Appeal Tax Court, 3 How. 133, 148, 11 L. Ed. 529; Washington, etc., Steam Packet Co. v. Sickles, 10 How. 419, 13 L. Ed. 479; Philadelphia, etc., R. Co. v. Quigley, 21 How. 202, 210, 16 L. Ed. 73; Barnes v. District of Columbia, 91 U. S. 540, 545, 23 L. Ed. 440; Hitchcock v. Galveston, 96 U. S. 341, 348, 24 L. Ed. 659; Jones v. Guaranty, etc., Co., 101 U. S. 622, 628, 25 L. Ed. 1030; Relfe v. Rundle, 103 U. S. 222, 225, 26 L. Ed. 337; Gottfried v. Miller, 104 U. S. 521, 26 L. Ed. 851; St. Clair v. Cox, 106 U. S. 350, 27 L. Ed. 222; McKinley v. Wheeler, 130 U. S. 630, 637, 32 L. Ed. 1048; Hollins v. Brierfield Coal, etc., Co., 150 U. S. 371, 382, 37 L. Ed. 1113. And see the titles OFFICERS AND AGENTS OF PRIVATE CORPORATIONS; PRINCIPAL AND AGENT.

A corporation, though legally considered a person, must perform its corporate duties through natural persons, and is impersonated in and represented by its principal officers, the president and directors, who are not merely its agents, but are generally speaking, the representatives of the corporation in its dealings with others. Louisville, etc., R. Co. v. Louisville Trust Co., 174 U. S. 552, 570, 43 L. Ed. 1081, reaffirmed in Walters v. Chicago, etc., R. Co., 186 U. S. 479, 46 L. Ed. 1266.

"It is true that these stockholders are corporators, and represented by this 'judicial person,' and come under the shadow of its name. But for all the purposes of acting, contracting, and judicial remedy, they can speak, act, and plead, only through their representatives or curators." Marshall v. Baltimore, etc., R. Co., 16 How. 314, 327, 14 L. Ed. 953.

Every corporation acts, ministerially, by agents. Hitchcock v. Galveston, 96 U. S. 341, 348, 24 L. Ed. 659.

"A corporation interested in mining may be represented by an officer or agent, at any meeting of miners called together to frame such rules and regulations in their mining district. Corporations engaged in other business are constantly represented in this way at meetings called in relation to matters in which they are interested. There is nothing in the nature of mining to prevent such a representation of a corporation when rules to control the acquisition and development of mines are to be considered and settled." McKinley v. Wheeler, 130 U. S. 630, 637, 32 L. Ed. 1048.

While a corporation can act only by its agents or servants, this obvious truth does not imply that the acts must be done by inferior or subordinate agents, but, on the contrary, the higher the authority of the agent, the more evident is the responsibility of the principal. Barnes v. District of Columbia, 91 U. S. 540, 545, 23 L. Ed. 440.

45. *Management.*—Graham v. Railroad Co., 102 U. S. 148, 160, 26 L. Ed. 106.

Without as well as within the state. St. Clair v. Cox, 106 U. S. 350, 355, 27 L. Ed. 222.



ing, acting only through agents, only through them can it be reached.<sup>46</sup> The state may say who these shall be,<sup>47</sup> and they may be different, after the forfeiture of its charter, from those representing it when in active operation.<sup>48</sup> But if an act is to be done relative to the corporation by which its charter is to be in any way changed, the stockholders must do it, unless another mode has been provided by the charter.<sup>49</sup> And where such corporate action is necessary, it acts by the collective vote or will of its competent members.<sup>50</sup>

(2) *Responsibility of Corporation for Acts Generally.*—For acts done by the agents of a corporation, in the course of its business and of their employment, the corporation is responsible, in the same manner and to the same extent, as an individual is responsible under similar circumstances.<sup>51</sup> The appropriate form of verifying any written obligation to be the act of the corporation is by affixing the signatures of the president and secretary and the corporate seal.<sup>52</sup> And when, in a declaration, it is averred that the corporation, by its officers, agreed to a certain contract, this averment imports everything to make the contract binding.<sup>52</sup>

**For Torts.**—See post, "For Torts," XIII, A, 2.

**For Contracts and Instruments in Name of Corporation, and Ratification Thereof.**—See the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

b. *Terms and Conditions and Legislative Control.*—Until a general power

**46. Reached only through agents.**—*St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222. See ante, "Corporate Seal and Deed," II, G.

**47. Designation by state.**—*Relfe v. Rundle*, 103 U. S. 222, 225, 26 L. Ed. 337; *Bank v. Earle*, 13 Pet. 519, 10 L. Ed. 274.

**48. As going concern and after forfeiture of charter.**—"A corporation is the creature of legislation, and may be endowed with such powers as its creator sees fit to give. Necessarily it must act through agents, and the state which creates it may say who those agents shall be. One may be its representative when in active operation, and in full possession of all its powers, and another if it has forfeited its charter and has no lawful existence except to wind up its affairs." *Relfe v. Rundle*, 103 U. S. 222, 225, 26 L. Ed. 337.

**49. Exception where fundamental law is to be affected.**—*Gordon v. Appeal Tax Court*, 3 How. 133, 148, 11 L. Ed. 529. See *Commercial Nat. Bank v. Weinhard*, 192 U. S. 243, 250, 48 L. Ed. 425.

**50. Corporate action.**—*Dartmouth College v. Woodward*, 4 Wheat. 518, 667, 4 L. Ed. 629.

**Banks.**—See the title BANKS AND BANKING, vol. 3, p. 1.

**By directors.**—See the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

**51. Responsibility.**—*Lake Shore, etc., R. Co. v. Prentice*, 147 U. S. 101, 109, 37 L. Ed. 97; *Fleckner v. United States Bank*, 8 Wheat. 338, 5 L. Ed. 631; *United States Bank v. Dandridge*, 12 Wheat. 64, 83, 6 L. Ed. 552; *Bacon v. Robertson*, 18 How. 480, 485, 15 L. Ed. 499; *Philadelphia, etc., R. Co. v. Quigley*, 21 How. 202, 210, 16 L. Ed. 73; *Merchants' Bank v. State Bank*, 10 Wall. 604, 645, 19 L. Ed. 1008; *National*

*Bank v. Graham*, 100 U. S. 699, 702, 25 L. Ed. 750; *Pollard v. Vinton*, 105 U. S. 7, 26 L. Ed. 998; *Salt Lake City v. Hollister*, 118 U. S. 256, 261, 30 L. Ed. 176; *Denver, etc., Railway v. Harris*, 122 U. S. 597, 608, 30 L. Ed. 1146.

The powers of the corporation are placed in the hands of a governing body selected by the members, who manage its affairs, and who appoint the agents that exercise its faculties for the accomplishment of the object of its being. But these agents may infringe the rights of persons who are unconnected with the corporation, or who are brought into relations of business or intercourse with it. As a necessary correlative to the principle of the exercise of corporate powers and faculties by legal representatives, is the recognition of a corporate responsibility for the acts of those representatives. *Philadelphia, etc., R. Co. v. Quigley*, 21 How. 202, 210, 16 L. Ed. 73.

But the corporation is not liable where the agent or employee is conniving at or implicated in a wrongful act. His acts will not then be imputed to the corporation. *Fidelity and Deposit Co. v. Courtney*, 186 U. S. 342, 360, 46 L. Ed. 1193.

For what is done by the authority of a corporation aggregate, a corporation ought as such to be liable, as well as the individuals who compose it. *Philadelphia, etc., R. Co. v. Quigley*, 21 How. 202, 212, 16 L. Ed. 73. And see the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

**52. Verification.**—*Louisville, etc., R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 570, 43 L. Ed. 1081. See ante, "Corporate Seal and Deed," II, G.

**53. Averment in declaration.**—*Bank v. Guttschlick*, 14 Pet. 19, 10 L. Ed. 335.



granted to corporations has been exercised, the terms and conditions under which it may be exercised are subject to legislative control. It may change or modify them as it sees fit, and the law in force at the time the power is exercised, with all the conditions and limitations it imposes, is the law which determines the force and effect of the act.<sup>54</sup>

c. *Formality of Execution and Proof Thereof*.—See generally, post, "Ultra Vires Acts," XII.

(1) *Formalities and Effect of Noncompliance*.—It is a general rule, that a corporation can only act in the manner prescribed by law. When its agents do not clothe their proceedings with those solemnities which are required by the incorporating act, to enable them to bind the company, the informality of the transaction is itself conducive to the opinion, that such act was rather considered as manifesting the terms on which they were willing to bind the company, as negotiations preparatory to a conclusive agreement, than as a contract obligatory on both parties.<sup>55</sup> It may be safely assumed that a corporation can make no contracts, and do no acts, either within or without the state which creates it, except such as are authorized by its charter; and those acts must also be done by such officers or agent, and in such manner as the charter authorizes.<sup>56</sup> But a corporation may be bound by the conduct and representations of its directors in those cases in which a corporation acts within the range of its general authority, but fails to comply with some formality or regulation which it should not have neglected, but which it has chosen to disregard.<sup>57</sup>

**54. Legislative control of terms and conditions.**—*East Tennessee, etc., R. Co. v. Frazier*, 139 U. S. 288, 292, 35 L. Ed. 196.

Where corporations have no specific mode of acting prescribed, the common-law mode of acting may be properly inferred. *Fleckner v. United States Bank*, 8 Wheat. 338, 358, 5 L. Ed. 631.

**55. Noncompliance with formalities and effect.**—*Head v. Providence Ins. Co.*, 2 Cranch 127, 166, 2 L. Ed. 229; *Rogers v. Burlington*, 3 Wall. 654, 669, 18 L. Ed. 79, per Field, J., dissenting; *Merrill v. Monticello*, 138 U. S. 673, 687, 34 L. Ed. 1069; *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 44, 44 L. Ed. 657.

"The communications stated in the record, lead to an event (the cancellation of an insurance policy), which might have been so readily completed, that it might have been and probably was, supposed unnecessary to pass through the previous solemnities of a contract binding themselves to do that which, if really the wish of both parties, might so speedily be accomplished; so short a space of time was requisite to have the policy delivered up and canceled, that the forms of completing a contract to cancel it might have been deemed useless. On this account, and on account of the known incapacities of a body corporate to act or speak but in the manner prescribed by law, it may well be doubted, whether communications which, between individuals, would really constitute an agreement, were viewed by the parties before the court in any other light than as ascertaining the terms on which a contract might be formed." *Head v. Providence Ins. Co.*, 2 Cranch 127, 166, 2 L. Ed. 229.

"A corporation is the creature of the

law, and none of its powers are original. They are precisely what the incorporating act has made them, and can only be exerted in the manner which that act authorizes. In other words, the state prescribes the purposes of a corporation and the means of executing those purposes. Purposes and means are within the state's control. This is true as to domestic corporations. It has even a broader application to foreign corporations." *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 43, 44 L. Ed. 657; *New York Life Ins. Co. v. Cravens*, 178 U. S. 389, 397, 44 L. Ed. 1116; *Hancock Mut. Life Ins. Co. v. Warren*, 181 U. S. 73, 76, 45 L. Ed. 755; *Fidelity Mut. Life Ass'n v. Mettler*, 185 U. S. 308, 327, 46 L. Ed. 922.

**56. Charter provisions to be followed.**—*Bank v. Earle*, 13 Pet. 519, 10 L. Ed. 274.

Where the incorporating act so prescribes, an instrument, then, to bind the company, must be signed by the president, or some other officer, according to the ordinances, by-laws and regulations of the company or board of directors. *Head v. Providence Ins. Co.*, 2 Cranch 127, 167, 2 L. Ed. 229.

**57. Neglect of directory provisions.**—*Zabriskie v. Cleveland, etc., R. Co.*, 23 How. 381, 398, 16 L. Ed. 488; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 42, 35 L. Ed. 55; *Relief Fire Ins. Co. v. Shaw*, 94 U. S. 574, 578, 24 L. Ed. 291; *Jacksonville, etc., R. & Nav. Co. v. Hooper*, 160 U. S. 514, 521, 40 L. Ed. 515. And see the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

**Contracts of banks.**—See the title BANKS AND BANKING, vol. 3, p. 91.

(2) *Reduction to Writing and Record Proof.*—The mere failure to reduce to writing does not invalidate, unless the statute makes such formality indispensable.<sup>58</sup> It is not true, even with respect to corporations, that all their acts must be established by positive record evidence.<sup>59</sup>

(3) *Necessity for Corporate Action and Regular Stockholders' Meeting.*—See the title STOCK AND STOCKHOLDERS. The stockholders of a corporation cannot convey away and assign the assets or property of the corporation, even though they all sign the conveyance, where there was no corporate action taken authorizing any such conveyance by the corporation, and no formal action at a meeting held for that purpose.<sup>60</sup>

**Necessity for Formal Action by Board.**—See the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS. Where the contracts in question were in the proper form, signed and executed by the proper executive officers and attested by the corporate seal; they were approved and authorized by the executive committee, which committee had all the power of the board, and were ratified, approved and confirmed by the stockholders at their regular annual meeting; this was sufficient to bind the company although no formal action by the board was had.<sup>61</sup>

(4) *Ratification.*—**By Corporation.**—But an agreement in writing informally entered into by an officer or agent in behalf of his corporation may be subsequently ratified by the company so as to be binding on it.<sup>62</sup>

**By Legislature.**—See post, "Ratification," XII, B, 4.

**B. To Acquire, Hold and Dispose of Property.**—1. IN GENERAL—*a. Acquisition and Tenure of Property Generally.*—The doctrine is well established that rights with respect to property held by citizens are not lost because they unite themselves into corporate bodies. They are subsequently as able to invoke the law for the enforcement of their rights as previously, the

**58. Reduction to writing.**—The acts of a corporation, although in all other respects rightly transacted, are not invalid, as a general proposition, merely from the omission to have them reduced to writing, unless the statute creating it makes such writing indispensable as evidence, or to give them an obligatory force. If the statute imposes such a restriction, it must be obeyed; if it does not, then it remains for those who assert the doctrine to establish it by the principles of the common law, and by decisive authorities. *United States Bank v. Dandridge*, 12 Wheat. 64, 69, 6 L. Ed. 552; *United States v. Fillebrown*, 7 Pet. 28, 8 L. Ed. 596; *Eureka Co. v. Bailey Co.*, 11 Wall. 488, 491, 20 L. Ed. 209; *Jacksonville, etc., R. & Nav. Co. v. Hooper*, 160 U. S. 514, 521, 40 L. Ed. 515; *Bacon v. Robertson*, 18 How. 480, 485, 15 L. Ed. 499.

**59. Record evidence not indispensable.**—*United States v. Fillebrown*, 7 Pet. 28, 8 L. Ed. 596.

They may be proved by parol evidence, unless the law requires evidence of a higher character. *United States Bank v. Dandridge*, 12 Wheat. 64, 83, 6 L. Ed. 552. See dissenting opinion of Marshall, C. J., at p. 92.

**Proof of action at stockholders' meeting.**—See the title STOCK AND STOCKHOLDERS.

**Corporate deed and seal.**—See ante, "Corporate Seal and Deed," II, G.

**60. Corporate action.**—*De La Vergne, etc., Mach. Co. v. German Sav. Institu-*

*tion*, 175 U. S. 40, 44 L. Ed. 65, where it was held that the promise to pay therefor was without consideration, and the proceeds of such sale belonged to the company or its assigns, not the stockholders.

**61. Formal action by board unnecessary.**—*Union Pac. R. Co. v. Chicago, etc., R. Co.*, 163 U. S. 564, 598, 41 L. Ed. 265, where it was said that there was nothing in the provisions relating to the government directors of the Union Pacific R. Co., making it necessary for the board to authorize such contracts as this.

**62. Ratification by corporation.**—*Eureka Co. v. Bailey Co.*, 11 Wall. 488, 20 L. Ed. 209; *Fitzgerald, etc., Const. Co. v. Fitzgerald*, 137 U. S. 98, 109, 34 L. Ed. 608.

Although there may be a provision in the by-laws of a company requiring certain formalities in the execution of a promissory note or draft, yet that does not necessarily make such formalities essential to the ratification of the contract; and if, from the evidence, said notes were given for the purpose of paying off debts that were due by said company, and the directors of said company had full knowledge of the same and assented to the transaction, to the signing and execution of the notes, then said acts of the president have been fully confirmed, and the corporation is liable. *Fitzgerald, etc., Const. Co. v. Fitzgerald*, 137 U. S. 98, 109, 34 L. Ed. 608. See post, "Ratification," XII, B, 4.

**Effect of dissolution.**—See post, "Effects and Consequences," XVII, C.



court in such cases looking through the name in order to protect those whom the name represents.<sup>62a</sup> They may acquire and dispose of property generally as individuals.<sup>62</sup>

**Provisions of Charter Govern.**—But its rights are limited by the provisions of its charter, and it must hold in subordination thereto,<sup>64</sup> and for the purposes of its business.<sup>65</sup>

**62a. Property rights generally.**—McKinley v. Wheeler, 130 U. S. 630, 635, 32 L. Ed. 1048; Hollins v. Brierfield Coal, etc., Co., 150 U. S. 371, 382, 37 L. Ed. 1113.

**63. Same.**—Railroad Co. v. Howard, 7 Wall. 392, 412, 19 L. Ed. 117; United States Bank v. Dandridge, 12 Wheat. 64, 67, 6 L. Ed. 552.

"At the common law, every corporation had, as incident to its existence, the power to acquire, hold, and convey real estate, except so far as it was restrained by its charter or by act of Parliament. This comprehensive capacity included also personal effects of every kind. The jus disponendi was without limit or qualification. It extended to mortgages given to secure the payment of debts." Jones v. Guaranty, etc., Co., 101 U. S. 622, 625, 25 L. Ed. 1030. See Railroad Co. v. Howard, 7 Wall. 392, 412, 19 L. Ed. 117.

A corporation is a distinct entity. Its affairs are necessarily managed by officers and agents, it is true, but in law, it is as distinct a being as an individual is, and is entitled to hold property (if not contrary to its charter) as absolutely as an individual can hold it. Its estate is the same, its interest is the same, its possession is the same. Its stockholders may call the officers to account, and may prevent any malversation of funds, or fraudulent disposal of property on their part. But that is done in the exercise of their corporate rights, not adverse to the corporate interests, but coincident with them. Hollins v. Brierfield Coal, etc., Co., 150 U. S. 371, 382, 37 L. Ed. 1113; Graham v. Railroad Co., 102 U. S. 148, 160, 26 L. Ed. 106.

The ownership of the property of the corporation is in the corporation, and not in the holders of its shares of stock. Gibbons v. Mahon, 136 U. S. 549, 557, 34 L. Ed. 525; De La Vergne, etc., Mach. Co. v. German Sav. Institution, 175 U. S. 40, 60, 44 L. Ed. 65. See the title STOCK AND STOCKHOLDERS.

**Acceptance of deed.**—"In respect to grants and deeds beneficial to a corporation, there seems to be no particular reason why their assent to, and acceptance of the same, may not be inferred from their acts, as well as in the case of individuals." United States Bank v. Dandridge, 12 Wheat. 64, 71, 6 L. Ed. 552. See the title DEEDS.

**Religious corporation.**—As no distinction is made by the state courts of New York between a religious corporation and an individual, in regard to capacity to hold by force of the statute, none can be

taken by this court. Harpending v. Reformed Protestant Dutch Church, 16 Pet. 455, 493, 10 L. Ed. 1029. See the title RELIGIOUS SOCIETIES.

**64. Charter provisions rule.**—"The corporation has no rights of property except those derived from the provisions of the charter, nor can it exercise any powers over the property it holds except those with which the charter has clothed it. It holds the property only for the purposes for which it was permitted to acquire it—that is, to effectuate the objects for which the legislature created it. And whether it may lawfully demand compensation from a person whom it permits to pass over its property must depend upon the language of the charter, and not upon the rules of the common law." Perrine v. Chesapeake, etc., Canal Co., 9 How. 172, 183, 13 L. Ed. 92; Case v. Kelly, 133 U. S. 21, 33 L. Ed. 513.

**65. For purposes of corporate business.**—"Presumptively all the property of the corporation or company is held and used for the purposes of its business, and the value of its capital stock and bonds is the value of only that property so held and used." Adams Express Co. v. Ohio, 165 U. S. 194, 227, 41 L. Ed. 683; Adams Express Co. v. Ohio, 166 U. S. 185, 223, 41 L. Ed. 965.

The general power of purchasing, receiving, and holding real and personal estate could only be exercised to effect the purpose for which it was conferred by the government upon a corporation. Bank v. Tennessee, 104 U. S. 493, 496, 26 L. Ed. 810.

"Private corporations are but associations of individuals united for some common purpose, and permitted by the law to use a common name, and to change its members without a dissolution of the association. Whatever interferes with the comfortable use of their property, for the purposes of their formation, is as much the subject of complaint as though the members were united by some other than a corporate tie." Baltimore, etc., R. Co. v. Fifth Baptist Church, 108 U. S. 317, 330, 27 L. Ed. 739. See the title NUISANCE.

**Informality in organization.**—Where, for some of the purposes designated in the articles of incorporation, the law in existence authorized the incorporation of companies, and therefore the incorporation here was not wholly illegal, a corporate body competent to exercise some of the powers mentioned was created, and under the statute of the territory could acquire and hold or convey, by deed or otherwise, any real or personal estate



**In Other States.**—A corporation may hold property in states other than that of its incorporation.<sup>66</sup>

b. *Public Grants.*—Corporations do not take public grants and privileges by implication, and where express and positive obligations are imposed in making a grant, these obligations cannot, without violating an elementary canon of interpretation, be frittered away in consequence of loose implications made by way of reference in subsequent municipal ordinances.<sup>67</sup>

c. *Appropriation of Property.*—But no corporation, even though engaged in interstate commerce, can appropriate to its own use property, public or private, without liability to charge therefor.<sup>68</sup>

d. *Assignment.*—And a corporation may assign a patent right owned by it, although shares of its capital stock have been attached in the hands of a stockholder, and a written assignment with seal is sufficient.<sup>69</sup>

e. *Upon Trust.*—Where a corporation has this power (to take real or personal estate), it may also take and hold property in trust in the same manner and to the same extent that a private person may; if the trust be repugnant to, or inconsistent with, the proper purpose for which the corporation was created, it may not be compellable to execute it, but the trust (if otherwise unexceptionable) will not be void, and a court of equity will appoint a new trustee to enforce and perfect the objects of the trust.<sup>70</sup>

2. **POWER TO ACQUIRE AND HOLD LANDS.**—A corporation, in order to be entitled to buy and sell, to receive and hold, the title to real estate, must have some statutory authority of the state in which such lands lie, to enable it to do so, and the absence of such provision in the law of its incorporation does not

whatever, necessary to enable it to carry on its business. *Cowell v. Springs Co.*, 100 U. S. 55, 60, 25 L. Ed. 547.

66. **In more than one state.**—"The general power of a corporation to hold property in states other than the one which incorporated it (in the absence of statutory prohibition in such states), is firmly established." *United Lines Tel. Co. v. Boston, etc., Trust Co.*, 147 U. S. 431, 447, 37 L. Ed. 231. See the title FOREIGN CORPORATIONS.

67. **Public grants.**—*New Orleans v. Texas & Pac. R. Co.*, 171 U. S. 312, 343, 43 L. Ed. 178.

In *Detroit v. Detroit Citizens' St. R. Co.*, 184 U. S. 368, 395, 46 L. Ed. 592, it was rightly held that although a corporation be organized for a limited period by the terms of its charter, it may receive a grant which would inure to the benefit of those lawfully entitled to succeed to the rights of the corporation, although for a period of years beyond the corporate life. But the right granted must be construed with reference to the system of which it was made a part, and where the terms of the grant were limited to twenty-five years, and until purchase, it will not be construed to grant or receive a perpetuity simply because no term of years was named in the one ordinance under consideration. *Blair v. Chicago*, 201 U. S. 400, 482, 50 L. Ed. 801. See post, "Duration and Termination of Corporate Existence," IV, C, 2.

68. **Right to appropriate.**—*Atlantic & Pac. Tel. Co. v. Philadelphia*, 190 U. S. 160, 163, 47 L. Ed. 995; *Packet Co. v. St. Louis*, 100 U. S. 423, 25 L. Ed. 688; *Packet*

*Co. v. Catlettsburg*, 105 U. S. 559, 26 L. Ed. 1169; *Transportation Co. v. Parkersburg*, 107 U. S. 691, 27 L. Ed. 584; *Huse v. Glover*, 119 U. S. 543, 30 L. Ed. 487; *Ouachita Packet Co. v. Aiken*, 121 U. S. 444, 30 L. Ed. 976; *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92, 37 L. Ed. 380; *St. Louis v. Western Union Tel. Co.*, 149 U. S. 465, 37 L. Ed. 810; *Postal Tel. Cable Co. v. Baltimore*, 156 U. S. 210, 39 L. Ed. 399; *Richmond v. Southern Bell Tel., etc., Co.*, 174 U. S. 761, 771, 43 L. Ed. 1162. See the title EMINENT DOMAIN.

69. **Assignment.**—*Gottfried v. Miller*, 104 U. S. 521, 26 L. Ed. 851. See the titles ASSIGNMENTS, vol. 2, p. 549; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

70. **Property upon a trust.**—*Vidal v. Girard*, 2 How. 126, 11 L. Ed. 205; *Planters' Bank v. Sharp*, 6 How. 301, 322, 12 L. Ed. 447; *Perin v. Carey*, 24 How. 465, 505, 16 L. Ed. 701. See *Girard v. Philadelphia*, 7 Wall. 1, 12, 19 L. Ed. 53. And see the title TRUSTS AND TRUSTEES.

"Neither is there any positive objection in point of law to a corporation taking property upon a trust not strictly within the scope of the direct purposes of its institution, but collateral to them; nay, for the benefit of a stranger or of another corporation." *Vidal v. Girard*, 2 How. 126, 187, 11 L. Ed. 205; *Perin v. Carey*, 24 How. 465, 505, 16 L. Ed. 701. See post, "Power to Acquire and Hold Lands," XI, B, 2.

**Trust for charity.**—See the title CHARITIES, vol. 3, p. 687.

**After dissolution.**—See post, "Effects and Consequences," XVII, C.

create any general statute which authorizes any such right,<sup>71</sup> and where authority is given for certain enumerated purposes, these purposes must be held to be exclusive.<sup>72</sup> But where it receives a conveyance without authority of law, its title is voidable and not void.<sup>73</sup>

**71. Necessity for statutory authority.**—*Case v. Kelly*, 133 U. S. 21, 27, 33 L. Ed. 513. See *Christian Union v. Yount*, 101 U. S. 352, 359, 25 L. Ed. 888; *United States v. Fox*, 94 U. S. 315, 321, 24 L. Ed. 192; *United States v. Northern Pac. R. Co.*, 152 U. S. 284, 300, 38 L. Ed. 443; *Fritts v. Palmer*, 132 U. S. 282, 294, 33 L. Ed. 317.

Although at common law every corporation had the power, unless restrained by its charter or act of parliament. *Jones v. Guaranty, etc., Co.*, 101 U. S. 622, 625, 25 L. Ed. 1030.

"The real estate of a corporation is a distinct thing from its franchise. But the right to acquire and sell real estate is a franchise." *Davis v. Gray*, 16 Wall. 203, 228, 21 L. Ed. 447.

Where land was granted by the royal charter of 1761, which created the Town of Pawlett, and among the grantees therein named, was "the Society for the Propagation of the Gospel in Foreign Parts," to whom one share in the township was given, this is a plain recognition, by the crown, of the existence of the corporation, and of its capacity to take. It would confer the power to take the lands, even if it had not previously existed. *Society for the Propagation of the Gospel v. Pawlet*, 4 Pet. 480, 502, 7 L. Ed. 927.

As to when right begins, see ante, "Beginning of Corporate Existence," IV, C, 1.

**Corporations formed under the general law of Illinois (1859)** were made capable of taking, holding, or receiving any property, real estate or personal, by gift, purchase, devise, or bequest, or in any other manner. Authority was given to sell real estate purchased by them for their own use, with any building erected thereon, and invest the proceeds in the purchase of another lot, or the erection of another building, or both. As to such as was devised or given to them for any specified benevolent purpose, authority was conferred to sell the same and apply the proceeds in aid of that purpose, such real estate, however, not to be held more than five years. *Christian Union v. Yount*, 101 U. S. 352, 355, 25 L. Ed. 888.

**Pennsylvania.**—*Quære*, whether any, and if any, which, of the English statutes of mortmain are in force in Pennsylvania. *Runyan v. Coster*, 14 Pet. 122, 132, 10 L. Ed. 382; *Vidal v. Girard*, 2 How. 126, 11 L. Ed. 205.

The act of 32 and 34 Henry VIII, which exempts corporations from taking by devise, is not in force in Pennsylvania. *Vidal v. Girard*, 2 How. 126, 127, 11 L. Ed. 205.

The policy of the state of Pennsylvania, on the subject of holding lands in the state by corporations, is clearly indicated

by the act of its legislature of April 6th, 1833. Lands held by corporations of the state, or of any other state, without license from the commonwealth of Pennsylvania, are subject to forfeiture to the commonwealth; but every such corporation, its feoffee or feoffees, may hold and retain the same, to be divested or dispossessed by the commonwealth, by due course of law. The plain interpretation of this statute is, that until the claim to a forfeiture is asserted by the state, the land is held subject to be divested by due course of law, instituted by the commonwealth alone, and for its own use. *Runyan v. Coster*, 14 Pet. 122, 10 L. Ed. 382.

**New York.**—The term "corporation" in the New York statute of wills was held, in *United States v. Fox*, 94 U. S. 315, 321, 24 L. Ed. 192, to apply only to such corporations as are created under the laws of the state, and not to include the United States.

**72. Enumerated purposes exclusive.**—*Bank v. Tennessee*, 104 U. S. 493, 496, 26 L. Ed. 810; *Case v. Kelly*, 133 U. S. 21, 26, 33 L. Ed. 513.

Where it is not pretended that there is any general statute of the state which authorizes either this company or any other corporation to purchase and hold lands indefinitely, as an individual could do, without regard to the uses to be made of such real estate, the enumeration in the charter of the purposes for which the corporation could acquire title to real estate must necessarily be held exclusive of all other purposes, and, as the court said at the time of making its interlocutory decree, "it was not authorized by its charter to take lands for speculative or farming purposes," and it must be held, therefore, that there was no authority under the laws of the state for this corporation to receive an indefinite quantity of lands, whether by purchase or gift, to be converted into money or held for any other purposes than those mentioned in its act of incorporation. *Case v. Kelly*, 133 U. S. 21, 26, 33 L. Ed. 513.

**73. Title voidable not void.**—*Fritts v. Palmer*, 132 U. S. 282, 291, 33 L. Ed. 317; *Runyan v. Coster*, 14 Pet. 122, 10 L. Ed. 382; *National Bank v. Matthews*, 98 U. S. 621, 627, 25 L. Ed. 188. See post, "Who May Raise Question," XI, B, 4.

**When the grantee in a deed is described** in a way which is a proper enough description of an incorporated company, capable of holding land, as ex. gr., "The Sulphur Springs Land Company," the court, in the absence of any proof whatever to the contrary, will presume that the company was capable in law to take a conveyance of real estate. *Myers v. Croft*, 13 Wall. 291, 20 L. Ed. 562.



**Through Medium of Trustee.**—Although a corporation by statute, or the trustees, on the expiration of its charter, who liquidate its affairs, may be deprived of power to take or hold real estate, this does not prevent either's making an arrangement through the medium of a trustee, by which, without ever having a legal title, control, or ownership of such estate, they yet secure a debt for which they had a lien on such estate, and have the estate sold so as to pay the debt.<sup>74</sup>

**To Locate Mining Claim or Land Entry.**—A corporation created under the laws of one of the states of the Union, all of whose members are citizens of the United States, is competent to locate or join in the location of a mining claim upon the public lands of the United States, in like manner as individual citizens.<sup>75</sup>

**Foreign Corporations.**—See the title FOREIGN CORPORATIONS.

3. CONTROL AND DISPOSITION THEREOF.—**In General.**—It has been held, that the power to manage, control and dispose of the corporate property is a special authority given by the charter. None can be exercised which is not explicitly granted; and it can only be exercised on the precise subjects over which it is given, and within the limits definitely assigned.<sup>76</sup> But it is now settled that a corporation, without special authority, may dispose of land, goods, and chattels, or of any interest in the same, as it deems expedient,<sup>77</sup> although a corporation, by its directors, cannot sell or dispose of its assets to the prejudice of creditors and stockholders under such circumstances, on such terms, and at such prices as indicate, upon the face of the transaction, that they are being squandered recklessly or fraudulently in disregard of the trust committed to them.<sup>78</sup>

**74. Through trustee.**—*Zantzingers v. Gunton*, 19 Wall. 32, 22 L. Ed. 96.

The corporation had a debt due to it and a lien on this property. The right of the corporation, or its liquidating trustees, to have this property so sold as to pay this debt, is undoubted. If in doing this they were compelled, for their own protection, to buy off other incumbrances, so that when sold and converted into money all of it should be paid to them, no principle of law or justice was violated. *Zantzingers v. Gunton*, 19 Wall. 32, 36, 22 L. Ed. 96. See ante, "Upon Trust," XI, B, 1, e.

**75. Location of mining claim.**—*McKinley v. Wheeler*, 130 U. S. 630, 631, 32 L. Ed. 1048; *United States v. Trinidad Coal, etc., Co.*, 137 U. S. 160, 168, 34 L. Ed. 640; *Dahl v. Montana Copper Co.*, 132 U. S. 264, 266, 33 L. Ed. 325.

"Section 2319 of the Revised Statutes must be held not to preclude a private corporation formed under the laws of a state, whose members are citizens of the United States, from locating a mining claim on the public lands of the United States. There may be some question raised as to the extent of a claim which a corporation may be permitted to locate as an original discoverer. It may perhaps be treated as one person and entitled to locate only to the extent permitted to a single individual. That question, however, is not before us and does not call for an expression of opinion." *McKinley v. Wheeler*, 130 U. S. 630, 636, 32 L. Ed. 1048.

**Vacant coal lands.**—And an incorporated company is an "association of persons" within the meaning of the statute

relating exclusively to the vacant coal lands of the government, and, as such, is subject to the restriction as to the number of acres of such lands that may be entered in its name. *United States v. Trinidad Coal, etc., Co.*, 137 U. S. 160, 168, 34 L. Ed. 640. See the titles MINES AND MINERALS; PUBLIC LANDS.

**76. Control and disposition.**—*United States v. Robertson*, 5 Pet. 641, 670, 8 L. Ed. 257.

**77. Same.**—*White Water Valley Canal Co. v. Vallette*, 21 How. 414, 424, 16 L. Ed. 154; *Jones v. Guaranty, etc., Co.*, 101 U. S. 622, 625, 25 L. Ed. 1030. See, also, *Chesapeake, etc., R. Co. v. Miller*, 114 U. S. 176, 29 L. Ed. 121; *Van Allen v. Assessors*, 3 Wall. 573, 584, 18 L. Ed. 229. See post, "Succession," XV, B.

**78. Violation of trust.**—*Fogg v. Blair*, 139 U. S. 118, 126, 35 L. Ed. 104.

**While solvent.**—But if a corporation, being solvent at the time, without any actual intent to defraud creditors, disposes of property, for an inadequate consideration, or even makes a voluntary conveyance of it, subsequent creditors cannot question the transaction. They are not injured. They gave credit to the debtor in the status which he had after the voluntary conveyance was made. There is no more reason why it should be so questioned than a like disposal by an individual of his property should be. The same principles of law apply to each. *Graham v. Railroad Co.*, 102 U. S. 148, 153, 161, 26 L. Ed. 106.

**While insolvent.**—See ante, "Corporate Property as Trust Fund," II, E.

**Sale by directors for nonpayment of as-**



4. **WHO MAY RAISE QUESTION.**—The question whether a corporation, having capacity to purchase and hold real estate for certain defined purposes, or in certain quantities, has taken title to real estate for purposes not authorized by law, or in excess of the quantity permitted by its charter, concerns only the state within whose limits the property is situated. It cannot be raised collaterally by private persons unless there be something in the statute expressly or by necessary implication authorizing them to do so.<sup>79</sup> There is a distinction between the right to purchase, and the right to hold lands, and they are very different in their consequences; the right of a corporation in this respect is like that of an alien, who has power to take, but not to hold lands.<sup>60</sup> But a court will not make itself the active agent of the corporation, and aid it to enforce such an unauthorized acquisition of property.<sup>81</sup>

**seesment.**—See the title **STOCK AND STOCKHOLDERS**.

**Conveyance or lease.**—Whether a corporation, empowered to hold and convey real estate for the objects of its incorporation, may convey an estate in fee or any less estate in lands which it has purchased, and may therefore make a valid lease of them for any term of years, though extending beyond the limit of its corporate existence, or not, as to which no opinion is expressed, if it so exceeded its corporate powers, yet it had authority to compromise and settle all claims by or against it under that contract, and a new note given by such lessee in compromise of his obligations under the lease, is based upon a legal and sufficient consideration, and is valid and enforceable. *Northern Liberty Market Co. v. Kelly*, 113 U. S. 199, 202, 28 L. Ed. 948.

As to effect of ultra vires lease generally, see post, "Ultra Vires Acts," XII.

**Sale or lease to officer.**—See the title **OFFICERS AND AGENTS OF PRIVATE CORPORATIONS**.

**Pledge or lease as affecting state regulation.**—See ante, "Implied Power," II, D, 2, a.

**Transfer as affecting trust fund doctrine.**—See ante, "Corporate Property as Trust Fund," II, E.

79. **Concerns state alone, not private persons.**—*Fritts v. Palmer*, 132 U. S. 282, 291, 293, 33 L. Ed. 317; *Case v. Kelly*, 133 U. S. 21, 28, 33 L. Ed. 513; *Cowell v. Springs Co.*, 100 U. S. 55, 60, 25 L. Ed. 547; *Jones v. Habersham*, 107 U. S. 174, 188, 27 L. Ed. 401; *Blair v. Chicago*, 201 U. S. 400, 450, 50 L. Ed. 801. See *McBroom v. Scottish Mortgage, etc., Invest. Co.*, 153 U. S. 318, 326, 38 L. Ed. 729. See, also, *McCormick v. Market Bank*, 165 U. S. 538, 552, 41 L. Ed. 817. See the title **BANKS AND BANKING**, vol. 3, p. 1.

Restrictions imposed by the charter of a corporation upon the amount of property that it may hold cannot be taken advantage of collaterally by private persons, but only in a direct proceeding by the state which created it. *Jones v. Habersham*, 107 U. S. 174, 188, 27 L. Ed. 401; *Runyan v. Coster*, 14 Pet. 122, 131, 10 L. Ed. 382; *Smith v. Sheeley*, 12 Wall. 358, 361, 20 L. Ed. 430; *Gold-Minning Co. v. National Bank*, 96 U. S. 640, 24 L. Ed. 648;

*Reynolds v. Crawfordsville First Nat. Bank*, 112 U. S. 405, 413, 28 L. Ed. 733; *Swope v. Leffingwell*, 105 U. S. 3, 26 L. Ed. 939; *Fritts v. Palmer*, 132 U. S. 282, 291, 33 L. Ed. 317. See the title **BANKS AND BANKING**, vol. 3, p. 67.

**As to acquisition by foreign corporation.**—See the title **FOREIGN CORPORATIONS**.

**Decision of question of necessity.**—When a corporation is authorized by statute to hold real property necessary to enable it to carry on its business, the inquiry whether any particular real property is necessary for that business is a matter between the state and the corporation, which does not concern third parties. *Cowell v. Springs Co.*, 100 U. S. 55, 25 L. Ed. 547. See *Fritts v. Palmer*, 132 U. S. 282, 293, 33 L. Ed. 317.

80. **Right to purchase and to hold compared.**—*Runyan v. Coster*, 14 Pet. 122, 131, 10 L. Ed. 382.

**Neither the grantor, nor one who claims under him**, is in a position to question the capacity of the company to take the title after it has paid to the grantor full value for the property. *Myers v. Croft*, 13 Wall. 291, 295, 20 L. Ed. 562; *Smith v. Sheeley*, 12 Wall. 358, 20 L. Ed. 430. See, also, *McCormick v. Market Bank*, 165 U. S. 538, 552, 41 L. Ed. 817.

Conceding a corporation to be guilty of usurpation, where it was still a body corporate de facto, exercising at least one of the franchises which the legislature attempted to confer upon it, in such a case the party who makes a sale of real estate to it, is not in a position to question its capacity to take the title, after it has paid the consideration for the purchase. *Smith v. Sheeley*, 12 Wall. 358, 361, 20 L. Ed. 430.

If, prior to the execution of the deed, there had been a judgment of ouster against the corporation at the instance of the government, the aspect of the case would be different. *Smith v. Sheeley*, 12 Wall. 358, 362, 20 L. Ed. 430.

81. **No right to aid of court.**—Although the limitation upon the power of the corporation to receive land is one which concerns the state alone, and the title to such lands in a corporation can only be defeated by a proceeding in the nature of a quo warranto on behalf of the state, and

**As to Competency to Execute Trust.**—If the trusts under which property was devised to a corporation were in themselves valid, but the corporation incompetent to execute them, the heirs of the deviser could not take advantage of such inability; it could only be done by the state in its sovereign capacity, by a quo warranto, or other proper judicial proceeding.<sup>82</sup>

**Illegality of Security for Loan.**—The fact that a loan by a corporation was upon a security which it was illegal for it to take, cannot be set up by the borrower as a defense to the enforcement of the security to pay the loan.<sup>83</sup>

**C. To Alienate Franchise or Property Necessary Thereto**—1. **PRIVATE CORPORATIONS GENERALLY**—a. *General Rule.*—A private corporation may not alienate its franchises to another corporation without special legislative authority therefor; but with such authority it may do so.<sup>84</sup> But where such special authority is given, the franchises may be sold with the corporate property.<sup>85</sup> And the franchise or right of being a corporation, unlike the property and the other franchises or powers and privileges, can never be alienated by the corporation without express authority and provision therefor, pointing out how it may be effected.<sup>86</sup>

while a court might hesitate to declare the title to lands received already, and in the possession and ownership of the company, void on the principle that they had no authority to take such lands, it is very clear that it will not make itself the active agent in behalf of the company in violating the law and enabling the company to do that which the law forbids. *Case v. Kelly*, 133 U. S. 21, 28, 33 L. Ed. 513.

**82. Competency to execute trust.**—*Vidal v. Girard*, 2 How. 126, 11 L. Ed. 205.

**83. Loan on illegal security.**—*National Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188. See the title **BANKS AND BANKING**, vol. 3, pp. 62, 63.

**84. Alienation of franchises generally.**—*Branch v. Jesup*, 106 U. S. 468, 478, 27 L. Ed. 279; *Willamette Mfg. Co. v. Bank*, 119 U. S. 191, 198, 30 L. Ed. 384. See *De La Vergne, etc., Mach. Co. v. German Sav. Institution*, 175 U. S. 40, 44 L. Ed. 65; *Union Pac. R. Co. v. Chicago, etc., R. Co.*, 163 U. S. 564, 606, 41 L. Ed. 265, per *Shiras, J.*, dissenting. See post, "Consolidation and Succession," XV; "Voluntary Dissolution and Surrender of Franchise," XVII, B, 2.

The mere grant of franchises to a corporation carries with it no power of alienation. On the contrary, the general rule is that, in the absence of express authority, they are incapable of alienation. And many cases have arisen in which an attempted alienation by the corporation has been declared by the courts to be void, as divesting it of the power to discharge the duties imposed by the charter. *Snell v. Chicago*, 152 U. S. 191, 199, 38 L. Ed. 408; *Thomas v. Railroad Co.*, 101 U. S. 71, 25 L. Ed. 950; *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 30 L. Ed. 83; *Oregon R., etc., Co. v. Oregonian R. Co.*, 130 U. S. 1, 32 L. Ed. 837, followed in *Oregon R., etc., Co. v. Oregonian R. Co.*, 145 U. S. 52, 36 L. Ed. 620; *Central Transp. Co. v. Pullman's Palace*

*Car Co.*, 139 U. S. 24, 35 L. Ed. 55. See, also, *Hartford Fire Ins. Co. v. Chicago, etc., R. Co.*, 175 U. S. 91, 100, 44 L. Ed. 84.

"The franchise of becoming and being a corporation in its nature is incommunicable by the act of the parties and incapable of passing by assignment." *Memphis, etc., R. Co. v. Railroad Commissioners*, 112 U. S. 609, 618, 28 L. Ed. 837.

Although at common law they could, if merely for pecuniary benefit of stockholders, by a majority vote sell all their property and wind up their business. *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 411, 32 L. Ed. 979.

**85. Chesapeake, etc., R. Co. v. Miller**, 114 U. S. 176, 185, 29 L. Ed. 121.

While it is the general rule that a corporation cannot dispose of its franchises to another corporation without legislative authority, the authority clearly existed in this case, being fairly derived from the legislation which affected the two companies, without any forced or strained construction of its terms. *Branch v. Jesup*, 106 U. S. 468, 484, 27 L. Ed. 279.

**Sale of franchise.**—The supreme legislative power, which had the right to make this corporation, and to which it would be subject more or less in its exercise of the powers conferred upon it, has also said, as it had a right to say, that it may sell these privileges, may part with them, and may transfer them to other persons, and this language is sufficient warrant for anything actually conveyed by the mortgage and by the decree of the court. *Willamette Mfg. Co. v. Bank*, 119 U. S. 191, 198, 30 L. Ed. 384.

**In Louisiana.**—There is nothing in the nature of a corporate franchise, under the law of Louisiana, which forbids its transfer with the other property of the corporation. *New Orleans, etc., R. Co. v. Delamare*, 114 U. S. 501, 509, 29 L. Ed. 244.

**86. Franchise of corporate existence.**—*New Orleans, etc., R. Co. v. Delamare*, 114 U. S. 501, 508, 29 L. Ed. 244; *Memphis, etc., R. Co. v. Railroad Commissioners*,



b. *Estoppel to Attack Collaterally*.—But a third party may be estopped to question the validity of such transfer by proceeding upon the assumption that it was valid.<sup>87</sup>

c. *Under Authority to Mortgage*.—The power given to mortgage the franchise of the corporation must necessarily include the power to bring it to sale with the property to make the sale effectual as a means of transferring the right to use the thing conveyed.<sup>88</sup> By the sale under mortgage foreclosure, the mortgage having been with due authority, the title of the mortgagor corporation to its franchise and property, except its mere right to be a corporation, passes to the purchaser.<sup>89</sup>

d. *Power to Sell as Including Mortgage*.—The right to sell includes the power to mortgage, and where the charter itself gives unlimited power to the company to sell everything it had, including its exclusive right to the hydraulic powers and privileges created by the water which it takes from a river, it may mortgage such powers and privileges,<sup>90</sup> although the right to mortgage its rights

112 U. S. 609, 619, 28 L. Ed. 837; *Williamette Mfg. Co. v. Bank*, 119 U. S. 191, 197, 30 L. Ed. 384; *Julian v. Central Trust Co.*, 193 U. S. 93, 106, 48 L. Ed. 629; *Mercantile Bank v. Tennessee*, 161 U. S. 161, 171, 40 L. Ed. 656.

"The franchise to be a corporation is therefore not a subject of sale and transfer unless the law by some positive provision made it so and pointed out the modes in which such sale and transfer may be effected. But the franchises to build, own and manage a railroad and to take tolls thereon are not necessarily corporate rights. They are capable of existing in and being enjoyed by natural persons, and there is nothing in their nature inconsistent with their being assignable." *New Orleans, etc., R. Co. v. Delamore*, 114 U. S. 501, 508, 29 L. Ed. 244; *Memphis, etc., R. Co. v. Railroad Commissioners*, 112 U. S. 609, 619, 28 L. Ed. 837. See the title RAILROADS.

"The essential properties of corporate existence are quite distinct from the franchises of the corporation. The franchise of being a corporation belongs to the corporators, while the powers and privileges, vested in and to be exercised by the corporate body as such, are the franchises of the corporation. The latter has no power to dispose of the franchise of its members, which may survive in the mere fact of corporate existence, after the corporation has parted with all its property and all its franchises." *Julian v. Central Trust Co.*, 193 U. S. 93, 106, 48 L. Ed. 629; *Memphis, etc., R. Co. v. Railroad Commissioners*, 112 U. S. 609, 619, 28 L. Ed. 837, where it was said, at p. 622, that it is immaterial that the form of the transaction is that of a mortgage, sale, or other transfer inter partes of the franchise to be a corporation. The real transaction, in all such cases of transfer, sale, or conveyance, in legal effect, is nothing more or less, and nothing other, than a surrender or abandonment of the old charter by the corporators, and a grant de novo of a similar charter to the so-called transferees or purchasers. See, generally, ante, "Corporate Franchise," II, A, 3.

**Powers of president.**—See the title OF-

FICERS AND AGENTS OF PRIVATE CORPORATIONS.

**Powers of stockholders.**—See the title STOCK AND STOCKHOLDERS.

**87. Estoppel.**—*Fogg v. Blair*, 133 U. S. 534, 540, 33 L. Ed. 721. See post, "Ultra Vires Acts," XII. See the title ESTOPPEL.

**88. Authority to mortgage.**—*Julian v. Central Trust Co.*, 193 U. S. 93, 106, 48 L. Ed. 629; *Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453, 464, 50 L. Ed. 1102.

Where a company is authorized to mortgage its franchises and rights, these may be sold and the purchaser acquire title thereto at foreclosure sale, although the corporate right to exist may not be sold. (*Memphis, etc., R. Co. v. Railroad Commissioners*, 112 U. S. 609, 28 L. Ed. 837.) The power to mortgage the privileges and rights of the corporation must necessarily include the power to bring them to sale to make the mortgage effectual. (*New Orleans, etc., R. Co. v. Delamore*, 114 U. S. 501, 29 L. Ed. 244, cited and followed in *Julian v. Central Trust Co.*, 193 U. S. 93, 106, 48 L. Ed. 629.) But the mortgage in this case covered, and the decree passed, the contract rights given originally to the Vicksburg Water Supply Company by the ordinance of November 18, 1886. *Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453, 464, 50 L. Ed. 1102, reaffirmed in *Vicksburg v. Vicksburg Waterworks Co.*, 206 U. S. 496, 51 L. Ed. 1155.

**89. Julian v. Central Trust Co.**, 193 U. S. 93, 101, 48 L. Ed. 629. See post, "Mortgages," XI, E, 2, b.

But a sale under a junior security must be subordinate to one that is prior and paramount. Successive sales of the same franchises are no more incompatible than successive sales of the same property. *Galveston Railroad v. Cowdrey*, 11 Wall. 459, 476, 20 L. Ed. 199.

**90. Right to mortgage.**—*Williamette Mfg. Co. v. Bank*, 119 U. S. 191, 197, 30 L. Ed. 384. See, also, *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 46, 35 L. Ed. 55.



and privileges, without such special authority, may be doubted.<sup>91</sup> It also admits of doubt whether the mortgagor corporation in this case intended, by the use of the general language found in this instrument describing what was conveyed, to transfer all of the powers, the privileges, and the franchises conferred upon it by its charter.<sup>92</sup>

e. *Sale under Execution*.—See the title EXECUTIONS.

f. *Effect on Powers and Corporate Existence and Liabilities*.—See post, "Succession," XV, B. The corporation's power to make contracts, to sue and be sued, to have a common seal, to buy other lands and sell them, to make by-laws, and to do many other things, which an incorporated body can do, and which are described in the second section of its charter, did not end with such sale,<sup>93</sup> for the corporate franchise remains in the old corporation until the new one was formed and organized, when it was surrendered to the state and regranted to the latter.<sup>94</sup>

**Right to Corporate Existence or to Form New Corporation.**—The power to mortgage and to convey to purchasers under foreclosure thereof, all the property and franchises, does not include the franchise of becoming and being a corporation, in the sense of acquiring the right to organize as such under the act incorporating the old company, as successor to and substitute for the original company, as if that act had named them as incorporators, and endowed them with the corporate faculty.<sup>95</sup> Provisions of law allowing the formation of

91. "The right of the corporation to make a mortgage which should cover everything described in this mortgage under ordinary acts of incorporation, or provisions usually found in such acts, might be an interesting question." *Williamette Mfg. Co. v. Bank*, 119 U. S. 191, 196, 30 L. Ed. 384. See post, "Mortgages," XI, E, 2, b.

92. **Scope of language.**—*Williamette Mfg. Co. v. Bank*, 119 U. S. 191, 196, 30 L. Ed. 384. See, generally, the title MORTGAGES AND DEEDS OF TRUST.

93. **Effect on status and powers.**—*Williamette Mfg. Co. v. Bank*, 119 U. S. 191, 197, 30 L. Ed. 384; *Memphis, etc., R. Co. v. Railroad Commissioners*, 112 U. S. 609, 620, 28 L. Ed. 837.

94. **Corporate existence.**—*Memphis, etc., R. Co. v. Railroad Commissioners*, 112 U. S. 609, 620, 623, 28 L. Ed. 837.

"It is, of course the law in force at the time the transaction is consummated and made effectual, that must be looked to as determining its validity and effect. This is the principle on which this court proceeded in deciding the case of *Railroad Co. v. Georgia*, 98 U. S. 359, 25 L. Ed. 185. The franchise to be a corporation remained in, and was exercised by, the old corporation, notwithstanding the mortgage of its charter, until the new corporation was formed and organized; it was then surrendered to the state, and by a new grant then made passed to the incorporators of the new corporation, and was held and exercised by them under the constitutional restrictions then existing." *Memphis, etc., R. Co. v. Railroad Commissioners*, 112 U. S. 609, 623, 28 L. Ed. 837. See post, "Corporate Existence and Formation of New Corporations," XV, A, 2, a.

95. **Right to be or form new corporation.**—*Memphis, etc., R. Co. v. Railroad Commissioners*, 112 U. S. 609, 617, 28 L. Ed. 837; *Mercantile Bank v. Tennessee*, 161 U. S. 161, 171, 40 L. Ed. 656.

While it is not claimed that the assignment of the charter, by way of mortgage and subsequent judicial sale, constituted the purchasers to be the identical corporation that the mortgagor had been; for that would involve an assumption of its obligations and debts as well as an acquisition of its privileges and exemptions; yet, it is insisted, that it resulted in another corporation in lieu of the original one, entitled to all the provisions of the charter, by relation to its date, as though it had been originally organized under it, such a construction of the words authorizing a mortgage of the charter and works of the company is beyond the intention of the law and altogether inadmissible. There is no express grant of corporate existence to any new body. *Memphis, etc., R. Co. v. Railroad Commissioners*, 112 U. S. 609, 618, 28 L. Ed. 837.

"A mortgage of the franchises and property of a corporation, made in the exercise of a power given by statute, confers no right upon purchasers at a foreclosure sale to exist as the same corporation, but to reorganize as a new corporation subject to the laws existing at the time of the reorganization." *Norfolk, etc., R. Co. v. Pendleton*, 156 U. S. 667, 673, 39 L. Ed. 574; *Chesapeake, etc., R. Co. v. Miller*, 114 U. S. 176, 189, 29 L. Ed. 121; *New Orleans, etc., Co. v. Louisiana*, 180 U. S. 320, 329, 45 L. Ed. 550.

The franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders, or the purchasers at a foreclosure sale, the substantial rights intended to be secured.

a new corporation by the purchasers of a corporate franchise under foreclosure sale, do not constitute a contract on the part of the state with either the corporation, or the mortgagees, bondholders or purchasers at foreclosure sale.<sup>96</sup> The state does not part with the franchise until it passes to the organized corporation; and, when it is thus imparted, it must be what the government is then authorized to grant and does actually confer.<sup>97</sup>

2. **QUASI PUBLIC CORPORATIONS**.—*a. Voluntary Dissolution*.—At common law, corporations formed merely for the pecuniary benefit of their shareholders, could, by a vote of the majority thereof, part with their property and wind up their business, but corporations to which privileges are granted in order to enable them to accommodate the public, and in the proper discharge of whose duties the public are interested, do not come within the rule.<sup>98</sup>

*b. Alienation of Franchise and Property*.—A corporation cannot, without the

They acquire the ownership of the railroad, and the property incident to it, and the franchise of maintaining and operating it as such; and the corporate existence is not essential to its use and enjoyment. *Memphis, etc., R. Co. v. Railroad Commissioners*, 112 U. S. 609, 619, 28 L. Ed. 837.

96. **Right to reorganize as contract**.—*Grand Rapids, etc., R. Co. v. Osborn*, 193 U. S. 17, 29, 48 L. Ed. 598; *Memphis, etc., R. Co. v. Railroad Commissioners*, 112 U. S. 609, 28 L. Ed. 837; *Chesapeake, etc., R. Co. v. Miller*, 114 U. S. 176, 189, 29 L. Ed. 121. See ante, "Provisions of General Law Not Amounting to Contract," VIII, C, 1, b, (3).

They are merely matters of law instead of contract, and the right therein conferred upon purchasers of the corporate properties and franchises sold under foreclosure of mortgages thereon, to reorganize and become a new corporation, is subject to the laws of the state existing or in force at the time of such reorganization and the grant of a new charter of incorporation, until actually vested by organization. *People v. Cook*, 148 U. S. 397, 410, 37 L. Ed. 498 thereunder. *Grand Rapids, etc., R. Co. v. Osborn*, 193 U. S. 17, 29, 48 L. Ed. 598; *Memphis, etc., R. Co. v. Railroad Commissioners*, 112 U. S. 609, 28 L. Ed. 837.

In *People v. Cook*, 148 U. S. 397, 407, 37 L. Ed. 498, it is said: "The principles and reasoning in the decision of this court in *Memphis, etc., R. Co. v. Railroad Commissioners*, 112 U. S. 609, 28 L. Ed. 837, are directly applicable to the present case. The attempt to distinguish the two cases necessitates the drawing of distinctions too refined and theoretical to form the basis of sound judicial determination. It was said by this court in that case (p. 621): 'In many, if not in most, acts of incorporation, however special in their nature, there are various provisions which are matters of general law and not of contract, and are, therefore, subject to modification or repeal. Such, in our opinion, would be the character of the right in the mortgage bondholders, or the purchasers at the sale under the mortgage, to organize as a corporation, after acquir-

ing title to the mortgaged property, by sale under the mortgage, if, in the charter under consideration, it had been conferred in express terms, and particular provision had been made as to the mode of procedure to effect the purpose. It would be matter of law and not of contract.'" See, also, *Mercantile Bank v. Tennessee*, 161 U. S. 161, 171, 40 L. Ed. 656. See, however, *Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453, 50 L. Ed. 1102.

As to banks, see the title **BANKS AND BANKING**, vol. 3, p. 12.

97. *Memphis, etc., R. Co. v. Railroad Commissioners*, 112 U. S. 609, 622, 28 L. Ed. 837. See *Dartmouth College v. Woodward*, 4 Wheat. 518, 691, 693, 4 L. Ed. 629; *People v. Cook*, 148 U. S. 397, 407, 37 L. Ed. 498.

"The corporations, mortgagees and bondholders under such circumstances acquire the rights subject to the reserved power of the legislature to enlarge or diminish the franchises conferred, and to increase or reduce the burdens thereon. Purchasers succeeding to properties and franchises of corporations thus situated cannot occupy any better position in respect to their application for a new charter of incorporation." *People v. Cook*, 148 U. S. 397, 411, 37 L. Ed. 498. See ante, "Where Power Is Reserved to Amend or Repeal," VIII, C, 4.

**Liability for debts, and privileges and immunities**.—See post, "Succession," XV, B.

**Impairment of contract obligation to creditors**.—See ante, "Provisions of General Law Not Amounting to Contracts," VIII, C, 1, b, (3); "Rights of Third Parties," VIII, C, 1, c.

**Purchase of franchises of corporation of another state**.—See ante, "Incorporation in More than One State," II, H, 1, a.

**Rights and liabilities of transferee**.—See post, "Succession," XV, B.

**Voluntary dissolution**.—See post, "Dissolution, Forfeiture and Ouster," XVII, B.

98. **Disposal of property and franchises**.—*Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 411, 32 L. Ed. 979. See post, "Voluntary Dissolution and Surrender of Franchise," XVII, B, 2.



assent of the legislature, transfer its franchise to another corporation, and abnegate the performance of the duties to the public, imposed upon it by its charter as the consideration for the grant of its franchise.<sup>99</sup> The mere use of the

**99. Alienation of franchise and property.**—*Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 49, 35 L. Ed. 55.

Neither the grant of a franchise to transport passengers, nor a general authority to sell and dispose of property, empowers the grantee, while it continues to exist as a corporation, to sell or to lease its entire property and franchise to another corporation. These principles apply equally to companies incorporated by special charter from the legislature, and to those formed by articles of association under general laws. *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 49, 35 L. Ed. 55. See, also, *Thomas v. Railroad Co.*, 101 U. S. 71, 25 L. Ed. 950; *Hartford Fire Ins. Co. v. Chicago, etc., R. Co.*, 175 U. S. 91, 100, 44 L. Ed. 84; *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 309, 30 L. Ed. 83; *New York, etc., R. Co. v. Winans*, 17 How. 30, 15 L. Ed. 27.

Where the validity of the plaintiff's incorporation, as well as its power to make an indenture, however, depends, not solely upon the original charter and the general laws under which it came into existence, but mainly upon a special act of the legislature of Pennsylvania of February 9, 1870, by which the validity of the charter for the object therein named was clearly recognized, the charter was extended for ninety-nine years, nearly fivefold the period for which the corporation was or could have been formed under general laws, and the corporation was expressly empowered to double its capital stock, and "to enter into contracts with corporations of this or any other state for the leasing or hiring and transfer to them, or any of them," of its "railway cars and other personal property," the plaintiff, therefore, was not an ordinary manufacturing corporation, such as might, like a partnership or an individual engaged in manufactures, sell or lease all its property to another corporation. *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 50, 35 L. Ed. 55.

"The evident purpose of the legislature, in passing the statute of 1870, was to enable the plaintiff the better to perform its duties to the public, by prolonging its existence, doubling its capital, and confirming, if not enlarging, its powers. An intention that it should immediately abdicate those powers, and cease to perform those duties, is so inconsistent with that purpose, that it cannot be implied, without much clearer expressions of the legislative will looking towards that end, than are to be found in this statute." *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 51, 35 L. Ed. 55.

"The provision of this statute, by which

the plaintiff is empowered to contract with other corporations 'for the leasing or hiring and transfer to them, or any of them,' of its 'railway cars and other personal property,' is fully satisfied by construing it as confirming the plaintiff's right to do as it had been doing, to 'lease' or 'hire' (which are equivalent words) to other corporations in the regular course of its business, and to 'transfer' under such leasing or hiring, its 'railway cars,' and 'other personal property,' either connected with the cars, or at least of the same general nature of tangible property. It can hardly be stretched to warrant the plaintiff in making to a single corporation an absolute transfer, or a long lease, of all that might be comprehended in the words 'personal property' in their widest sense, including not only goods and chattels, but moneys, credits and rights of action. In any view, it would be inconsistent alike with the main purpose of the statute, and with the uniform course of decision in this court, to construe these words as authorizing the plaintiff to deprive itself, either absolutely, or for a long period of time, of the right to exercise the franchise granted to it by the legislature for the accommodation of the public." *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 51, 35 L. Ed. 55.

The case of *New York, etc., R. Co. v. Winans*, 17 How. 30, 15 L. Ed. 27, held that a corporation which has undertaken to construct and operate a railroad cannot, by alienating its right to use, and its powers of control and supervision, avoid the responsibility that it assumed in accepting the charter. The court said: "The corporation cannot absolve itself from the performance of its obligations without the consent of the legislature." *Oregon R., etc., Co. v. Oregonian R. Co.*, 130 U. S. 1, 23, 32 L. Ed. 837, followed in *Oregon R., etc., Co. v. Oregonian R. Co.*, 145 U. S. 52, 36 L. Ed. 620. See, also, *Green Bay, etc., R. Co. v. Union Steamboat Co.*, 107 U. S. 98, 27 L. Ed. 413; *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 309, 30 L. Ed. 83; *Thomas v. Railroad Co.*, 101 U. S. 71, 83, 25 L. Ed. 950. And see the title RAILROADS.

Ability to perform its own immediate duties to the public is the limitation on the *jus disponendi* under consideration. *Union Pac. R. Co. v. Chicago, etc., R. Co.*, 163 U. S. 564, 589, 41 L. Ed. 265. See *St. Louis, etc., R. Co. v. Terre Haute, etc., R. Co.*, 145 U. S. 393, 36 L. Ed. 738; *United States v. Union Pac. R. Co.*, 160 U. S. 1, 40 L. Ed. 319.

**Under authority to consolidate.**—See post, "Consolidation," XV, A.



word "assigns" in the charter will not confer the power.<sup>1</sup> Nor a provision for dissolution by voluntary act of incorporators, with disposition of its property by distribution of its profits, sale of shares of stock or other lawful disposition of its effects.<sup>2</sup>

c. *Agreements Disabling from Performance of Duties.*—It is too well settled to admit of doubt that a corporation cannot disable itself by contract from performing the public duties which it has undertaken, and by agreement compel itself to make public accommodation or convenience subservient to its private interests.<sup>3</sup>

**D. To Acquire Corporate Stock**—1. **IN ITSELF.**—Unless prohibited by law, an incorporation may become the holder of a portion of its own shares.<sup>4</sup>

2. **IN ANOTHER CORPORATION.**—**To Control Other Corporations.**—As the powers of corporations, created by legislative act, are limited to such as the act expressly confers, and the enumeration of these implies the exclusion of all others, it follows that, unless express permission be given to do so, it is not within the general powers of a corporation to purchase the stock of other corporations for the purpose of controlling their management.<sup>5</sup> It cannot be done

1. *Oregon R., etc., Co. v. Oregonian R. Co.*, 130 U. S. 1, 30, 32 L. Ed. 837, followed in *Oregon R., etc., Co. v. Oregonian R. Co.*, 145 U. S. 52, 36 L. Ed. 620. See *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 47, 35 L. Ed. 55.

2. **Provision for voluntary dissolution and disposal of property.**—*Oregon R., etc., Co. v. Oregonian R. Co.*, 130 U. S. 1, 35, 32 L. Ed. 837, reaffirmed in *Oregon R., etc., Co. v. Oregonian R. Co.*, 145 U. S. 52, 36 L. Ed. 620. See *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 49, 35 L. Ed. 55.

3. **Disabling agreements.**—*Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 410, 32 L. Ed. 979; *Jacksonville, etc., R. & Nav. Co. v. Hooper*, 160 U. S. 514, 524, 40 L. Ed. 515; *New York, etc., R. Co. v. Winans*, 17 How. 30, 15 L. Ed. 27; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 42, 35 L. Ed. 55; *Snell v. Chicago*, 152 U. S. 191, 199, 38 L. Ed. 408; *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 30 L. Ed. 83. See, also, *Hartford Fire Ins. Co. v. Chicago, etc., R. Co.*, 175 U. S. 91, 100, 44 L. Ed. 84.

"Where," says Mr. Justice Miller, delivering the opinion of the court in *Thomas v. Railroad Co.*, 101 U. S. 71, 83, 25 L. Ed. 950, "a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes without the consent of the state to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the state and is void as against public policy." *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 411, 32 L. Ed. 979; See *New York, etc., R. Co. v. Winans*, 17 How. 30, 15 L. Ed. 27.

Where, considering the long term of the indenture, the perishable nature of the property transferred, the large sums to be paid quarterly by the defendant by way of compensation, its assumption of the plaintiff's debts, and the frank avowal, in the indenture itself, of the intention of the two corporations to prevent competition and to create a monopoly, there can be no doubt that the chief consideration for the sums to be paid by the defendant was the plaintiff's covenant not to engage in the business of manufacturing, using or hiring sleeping cars; and that the real purpose of the transaction was, under the guise of a lease of personal property, to transfer to the defendant nearly the whole corporate franchise of the plaintiff, and to continue the plaintiff's existence for the single purpose of receiving compensation for not performing its duties, the necessary conclusion from these premises is, that the contract sued on was unlawful and void, because it was beyond the powers conferred upon the plaintiff by the legislature, and because it involved an abandonment by the plaintiff of its duty to the public. *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 52, 35 L. Ed. 55. See, generally, ante, "Classification," II, B. See the title **RAILROADS**, and the other public service corporation titles, such as **GAS**, **STREET RAILWAYS**; etc.

4. **Its own stock.**—*Commissioners v. Thayer*, 94 U. S. 631, 643, 24 L. Ed. 133.

**Banks and bank stock.**—See the title **BANKS AND BANKING**, vol. 3, p. 1.

5. **To acquire control of other corporations.**—*De La Vergne, etc., Co. v. German Savings Inst.*, 175 U. S. 40, 54, 44 L. Ed. 65; *First Nat. Bank v. National Exchange Bank*, 92 U. S. 122, 128, 23 L. Ed. 679; *Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677, 698, 40 L. Ed. 849.

Indeed the purchase of such stock in a rival and competing line of railroad is held to be contrary to public policy and void. *Louisville, etc., R. Co. v. Kentucky*,

under authority to purchase other property necessary for their business.<sup>6</sup> But an agreement between two telegraph companies under which one was to construct lines of telegraph for the other and was to receive in return mortgage bonds of the other company, which were afterwards, by a supplementary agreement, exchanged for stock in that corporation, violated no principle of law and no rule of good morals; and if it had been fully carried out, it is probable that both parties would have realized from it the benefits which they anticipated, although the two corporations were thus brought under one management and control.<sup>7</sup> The ownership by one corporation of the stock of another will not of itself prevent the creation of a new and independent lien upon the property of the latter.<sup>8</sup>

161 U. S. 677, 698, 40 L. Ed. 849. And see *Dodge v. Woolsey*, 18 How. 331, 342, 15 L. Ed. 401.

**New York manufacturing corporations.**—Under the laws of New York providing for the organization of manufacturing corporations, such corporations are not authorized to purchase the stock of a rival corporation for the purpose of suppressing competition and obtaining the management of such corporation. *De La Vergne, etc., Co. v. German Savings Inst.*, 175 U. S. 40, 48, 44 L. Ed. 65. See New York Laws, 1848, 1853, ch. 333, and 1866, ch. 838, amendatory thereof; Rev. Stat. N. Y. 1889, vol. 3, p. 1967.

Not only is this true as a general rule, but by the law of the state of New York, under which this corporation was organized, i. e.: "An act to authorize the formation of corporations for manufacturing, mining, mechanical and chemical purposes," passed February 17, 1838, it was declared in section eight that "it shall not be lawful for such company to use any of their funds for the purpose of any stock in any other corporation." This language is clear and explicit, and evidently covers purchases of stock in other corporations, whether engaged in the same or different business. *De La Vergne, etc., Co. v. German Savings Inst.*, 175 U. S. 40, 55, 44 L. Ed. 65.

In the Revised Statutes of New York of 1889, c. 18, vol. 3, p. 1959, there is also an act permitting manufacturing companies to increase or diminish their capital stock to any amount which may be sufficient and proper for the purposes of the corporation, and also to extend their business to any other manufacturing business subject to the provision of the act. That neither of these acts were intended to give authority to corporations to purchase stock of other corporations engaged in the same business is evident from a subsequent act approved June 7, 1890, to take effect May 1, 1891, § 40. This act of 1890 refers to loans and not to purchases of such stocks. *De La Vergne, etc., Co. v. German Savings Inst.*, 175 U. S. 40, 57, 44 L. Ed. 65.

The truth is, that the legislature of New York, instead of repealing the prohibitory clause in the original act of 1848, concerning the purchase of stock in other corporations, has modified it but slightly,

by slow degrees, and in special cases, by the acts mentioned here, to enable a manufacturing corporation to control more perfectly its own legitimate business operations, and has thereby manifested the more clearly its intention to preserve the original inhibition. *De La Vergne, etc., Co. v. German Savings Inst.*, 175 U. S. 40, 58, 44 L. Ed. 65.

**6. Authority to purchase "property necessary for their business."**—Under the authority to purchase "other property necessary for their business," it was not competent for manufacturing corporations to purchase the stock of other similar corporations. Its evident object was to permit manufacturing corporations to purchase mines from which they could extract their own ore, or manufactories of raw material, such as pig iron or lumber, which could furnish to them material to be worked up into their own products; and in case such purchases involved a larger outlay than their present resources would justify, to issue new stock "to the amount of the value thereof in payment therefor." But there is nothing to indicate that the legislature intended to authorize them to purchase the stock of competing corporations, or corporations engaged in other business. It is only property necessary for their own current business they were authorized to purchase. *De La Vergne, etc., Co. v. German Savings Inst.*, 175 U. S. 40, 54, 44 L. Ed. 65. See New York Laws, 1853, ch. 333, amending act of 1848, and of 1866, ch. 838, for a similar purpose.

**7. Exchange of bonds for stock.**—*United Lines Tel. Co. v. Boston Safe Deposit, etc., Co.*, 147 U. S. 431, 447, 37 L. Ed. 231.

Nor is there any force in the objection that the agreement was ultra vires, on the part of the former company. The statutes of New York authorized and justified it. *United Lines Tel. Co. v. Boston Safe Deposit, etc., Co.*, 147 U. S. 431, 447, 37 L. Ed. 231.

**8. Creation of lien.**—*Central Trust Co. v. Kneeland*, 138 U. S. 414, 423, 34 L. Ed. 1014.

**Bank.**—See the title BANKS AND BANKING, vol. 3, p. 1.

**Railroads.**—See the title RAILROADS. Creation of monopoly and conse-



**E. To Borrow Money and Execute Evidence of Debt**—1. **IN GENERAL**.—Private corporations may borrow money, or become parties to negotiable paper in the transaction of their legitimate business, unless expressly prohibited; and until the contrary is shown, the legal presumption is that their acts in that behalf were done in the regular course of their authorized business.<sup>9</sup> When a corporation has power, under any circumstances, to issue negotiable securities, the decision of this court is that the bona fide holder has a right to presume they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper.<sup>10</sup>

2. **CORPORATE BONDS AND MORTGAGES**—a. **Bonds**.—As to power to execute, see ante, "In General," XI, E, 1.

**Negotiability**.—See the title **BONDS**, vol. 3, p. 415.

**Privy of Bondholders and Stockholders**.—See post, "In General," XV, B, 1.

**Railroad Bonds and Mortgages**.—See the titles **MORTGAGES AND DEEDS OF TRUST**; **RAILROADS**.

**Reorganization and Rights of Bondholders**.—See post, "Reorganization," XVI.

**Definition and Terms Controlling**.—Corporate bonds are the representatives of money, being issued for sale in negotiable form.<sup>11</sup>

**quences thereof**.—See the title **MONOPOLIES AND CORPORATIONS**.

**Injunction against**.—See the title **INJUNCTIONS**.

**Character, as bailment or trust, of acquisition of controlling interest**.—See the title **MONOPOLIES AND CORPORATE TRUSTS**.

9. **Borrowing money and executing evidence of debt**.—*Railroad Co. v. Howard*, 7 Wall. 392, 412, 19 L. Ed. 117; *Hill v. Memphis*, 134 U. S. 198, 203, 33 L. Ed. 887; *Planters' Bank v. Sharp*, 6 How. 301, 322, 12 L. Ed. 447.

"Private corporations created for private purposes may contract debts in connection with their business, and issue evidences of them in such form as may best suit their convenience." *Hill v. Memphis*, 134 U. S. 198, 203, 33 L. Ed. 887.

In the course of their legitimate business, corporations may make a bond, mortgage, note, or draft. *White Water Valley Canal Co. v. Vallette*, 21 How. 414, 424, 16 L. Ed. 154.

10. **Prima facie validity**.—*Supervisors v. Schenck*, 5 Wall. 772, 784, 18 L. Ed. 556; *Gelpcke v. Dubuque*, 1 Wall. 175, 203, 17 L. Ed. 520. See the titles **BILLS, NOTES AND CHECKS**, vol. 3, p. 257; **BONDS**, vol. 3, p. 382.

"One who takes from a railroad or business corporation, in good faith, and without actual notice of any inherent defect, a negotiable obligation issued by order of the board of directors, signed by the president and secretary in the name and under the seal of the corporation, and disclosing upon its face no want of authority, has the right to assume its validity, if the corporation could, by any action of its officers or stockholders, or of both, have authorized the execution and issue of the obligation." *Louisville*,

*etc.*, *R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 573, 43 L. Ed. 1081.

**Under the Iowa law**, the fact that the corporation contracted a debt in excess of the charter or statutory limitation did not render the debt void, but, on the contrary, such debt, by the settled rule in Iowa, was merely voidable, and was enforceable against the corporation and those holding under it, and gave rise only to a right of action on the part of the state because of the violation of the statute, or entailed, it would seem, a liability on the officers of the corporation for the excessive debt so contracted. The supreme court followed these decisions in construing the Iowa law. *Sioux City, etc., Warehouse Co. v. Trust Co.*, 173 U. S. 99, 111, 43 L. Ed. 628.

**Formality in execution**.—See ante, "Formality of Execution and Proof Thereof," XI, A, 3, c.

**Notes for ultra vires purchase**.—See post, "Void Where Want of Power Absolute," XII, B, 1.

**Note in compromise of claim under lease**.—See ante, "Control and Disposition Thereof," XI, B, 3.

**Priorities**.—See post, "Insolvency, Winding Up, Dissolution and Forfeiture," XVII.

**Preferences generally**.—See post, "Power to Create Preferences," XI, F, 1.

**Execution by officers or agents**.—See the title **OFFICERS AND AGENTS OF PRIVATE CORPORATIONS**.

11. **Definition**.—*Bailey v. Railroad Co.*, 22 Wall. 604, 636, 22 L. Ed. 840.

**Terms**.—The corporate bonds being the principal thing containing the obligation of the company, and the mortgage a mere security to insure the performance of that obligation, the terms of the bonds should control. *Railway Co. v. Sprague*, 103 U. S. 756, 761, 26 L. Ed. 554.



**Consideration.**—A constitutional prohibition against issuing corporate bonds except for money or property actually received or labor done, and against the fictitious increase of indebtedness, was intended to protect stockholders and guard the public against absolutely worthless securities. It does not necessarily indicate a purpose to make the validity of every issue of bonds by a private corporation depend upon the inquiry whether the money, property, or labor actually received therefor was of equal value in the market with the bonds so issued.<sup>12</sup>

**Sale of Bonds or Pledge as Collateral Security.**—Where a corporation is authorized by law to sell its bonds, the fact that collateral security was exacted for their payment is not irreconcilable with a sale.<sup>12</sup>

**Demand of Payment.**—Where a corporation is insolvent, and has no funds at the place where its bonds are payable, demand of payment at such place need not be made before suit brought to foreclose its mortgages executed to secure the bonds.<sup>14</sup>

**Guaranty by State and Subsidiary Stipulation for Payment in Coin.**—Where bonds of a corporation, as prepared for issue and sale, promise payment in lawful money, and, as such, were guaranteed by a state, a stipulation that they shall be paid in coin, subsequently indorsed on them by the corporation, in accordance with the requirement of purchasers from it, is supplementary and subsidiary, and binds only the corporation itself.<sup>15</sup>

**Lien by Implication.**—It has been held that a loan of money to a corporation, under the terms of the statute authorizing same, where the whole transaction consists in a loan of the bonds to the corporation, and a pledge of its stock with power of sale, gave no prior lien or mortgage on the property of the corporation.<sup>16</sup>

**Coupons.**—See the title COUPONS.<sup>17</sup>

b. *Mortgages.*—**In General.**—The *jus disponendi* of a private corporation at common law was without limit or qualification, and extended to mortgages given to secure the payment of debts, and a mortgage for future advances was recognized as valid by the common law. It is believed they are held valid throughout the United States, except when forbidden by the local law.<sup>18</sup>

**12. Consideration and prima facie validity.**—It is not clear, from the words used, that the framers of that instrument intended to restrict private corporations—at least, when acting with the approval of their stockholders—in the exchange of their bonds for money, property, or labor, upon such terms as they deem proper; provided, always, the transaction is a real one, based upon a present consideration, and having reference to legitimate corporate purposes, and is not a mere device to evade the law and accomplish that which is forbidden. *Memphis, etc., Railroad v. Dow*, 120 U. S. 287, 299, 30 L. Ed. 595.

**13. Sale.**—*Junction R. Co. v. Bank*, 12 Wall. 226, 231, 20 L. Ed. 385.

**Pledgees as bona fide purchasers.**—The takers of corporate bonds as collateral security for a valid debt for which they held no other security, and which the bonds fell far short of securing, after applying these and other assets to the debts for which they were pledged, were therefore purchasers for value, and entitled to all the rights of bona fide holders for value, among which is the right to enforce payment from the stockholders of the company. *American File Co. v. Garrett*, 110 U. S. 288, 294, 28 L. Ed. 149, citing *Swift*

*v. Tyson*, 16 Pet. 1, 10 L. Ed. 865; *Oates v. National Bank*, 100 U. S. 239, 25 L. Ed. 580; *Railroad Co. v. National Bank*, 102 U. S. 14, 26 L. Ed. 61.

**14. Demand of payment.**—*Shaw v. Bill*, 95 U. S. 10, 24 L. Ed. 333. See the titles CHATTEL MORTGAGES, vol. 3, p. 699; MORTGAGES AND DEEDS OF TRUST.

**15. Guaranty by state and effect of subsidiary stipulation.**—*Wallace v. Loomis*, 97 U. S. 146, 24 L. Ed. 895. See the titles BONDS, vol. 3, p. 382; PAYMENT.

**16. Implied lien.**—*Cincinnati v. Morgan*, 3 Wall. 275, 291, 18 L. Ed. 146. See the titles CHATTEL MORTGAGES, vol. 3, p. 699; PLEDGE AND COLLATERAL SECURITY.

**17. Usury as defense.**—See the title USURY.

**Commissions on sale.**—See the title BROKERS, vol. 3, p. 531.

**Construction of agreement for commissions.**—See the title RAILROADS.

**18. Power to mortgage.**—*Jones v. Guaranty, etc., Co.*, 101 U. S. 622, 625, 25 L. Ed. 1030; *White Water Valley Canal Co. v. Vallette*, 21 How. 414, 424, 16 L. Ed. 154; *Lawrence v. Tucker*, 23 How. 14, 16 L. Ed. 474. See ante, "To Alienate

**Mortgages Authorized by Stockholders.**—Where a mortgage was expressly authorized by the stockholders, they cannot claim that the directors in executing the instrument, which they had themselves authorized, were guilty of any breach of duty to them.<sup>19</sup>

**By Procuration.**—As a corporation can act only by its agents, although a corporate mortgage describes the individual obligation of A, its president, as the obligation to be secured instead of the debt of the corporation (B), yet where, in all that A did he acted as the agent of the company, and it would involve an utter perversion of the facts to hold that he and not that company was the principal debtor to mortgagee C, it was the corporation's debt that was secured.<sup>20</sup>

Franchise, or Property Necessary Thereto," XI, C.

**To secure future advancements.**—A corporation of New York having authority to mortgage its property for the purpose of carrying on its business is not prohibited by the laws of that state from executing such a mortgage to secure the payment of money to be thereafter advanced. *Jones v. Guaranty, etc., Co.*, 101 U. S. 622, 25 L. Ed. 1030.

**Execution.**—See ante, "Corporate Seal and Deed," II, G.

Where, in their business proceedings, generally, as well as in the execution of a mortgage, three individuals assumed to act as a corporation, but they were not authorized to act in this capacity, the acts of these individuals, in their assumed character as corporators, are not void. They may not hold themselves out to the world as entitled to certain corporate privileges, when they were not so entitled; and afterwards avoid their contract on this ground, but that these individuals, not being responsible on their contracts as a corporation, are liable as copartners, is too clear to admit of doubt. The property of the company, both real and personal, was vested in them, and they controlled its entire operations. The mortgage deed was executed on the 20th of November, 1837. And it appears from the record, that G. and D. unanimously resolved, that the mortgage should be executed by G., as agent of the corporation. And it was accordingly executed on that day. All those parts of the deed, which refer to the corporation, including the corporate seal, may be rejected as surplusage, which do not vitiate it. They are considered as merely descriptive, and being false in fact, can have no effect on the deed. The seal of one partner to a deed, with the assent of the copartner, will bind the firm. The mortgage was valid as respects the rights involved in this suit, and conveyed title to the personalty embraced in it. *Anthony v. Butler*, 13 Pet. 421, 432, 10 L. Ed. 229.

**Money obtained on ultra vires securities.**—See post, "Ultra Vires Acts," XII.

**Railroad mortgages.**—See the title RAILROADS.

**Right to set up ultra vires.**—See post, "Right of Complaint or Restraint Generally," XII, C, 1.

**Priority with reference to judgments for torts.**—See post, "Distribution and Priorities," XVII, A, 2.

**Effect of fraud.**—See the title FRAUD AND DECEIT.

**Effect of illegality of object of incorporation.**—See ante, "Objects and Consideration," IV, A, 1, a.

**Effect of insolvency.**—See post, "As to Debts, Contracts and Other Liabilities," XVII, C, 2.

**19. Authority of stockholders.**—*Sanford Fork & Tool Co. v. Howe, etc., Co.*, 157 U. S. 312, 317, 39 L. Ed. 713.

Where a corporation had a domicile in each state, the corporators or shareholders could, in the absence of any statutory provision to the contrary, hold meetings and transact corporate business in any one state, so as to bind the corporation in respect to its property everywhere, and a corporate mortgage so authorized is valid. *Graham v. Boston, etc., R. Co.*, 118 U. S. 161, 169, 30 L. Ed. 196.

The irregularity, if any, in such an authority, was one which the legislatures of the four states could rectify, as they did, because all of them, acting together for the one purpose, could have authorized in advance the holding of the meeting at New York. *Graham v. Boston, etc., R. Co.*, 118 U. S. 161, 170, 30 L. Ed. 196; *Grenada County Supervisors v. Brogden*, 112 U. S. 261, 28 L. Ed. 704; *Anderson v. Santa Anna*, 116 U. S. 356, 29 L. Ed. 633. See the title STOCK AND STOCKHOLDERS.

**Mortgage authorized at directors meeting held out of state.**—See the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

**20. Execution by agent.**—A., as president of B., a corporation, applied to C. for a loan. The latter then advanced \$50,000, taking therefor a note of B., payable to the order of D. & Co.—of which firm A. was a member—and bearing their indorsement. A. also stipulated to deliver to C., B.'s mortgage on its real estate for \$100,000, as security for said \$50,000 and for any further loans from C. to B. The execution of the mortgage was assented to in writing by B.'s trustees and by A., who was its creditor to a large amount and the holder of nearly all of its capital stock. The mortgage describes the individual obligation of A. as the liability

**Validation by Legislative Act.**—A corporate mortgage, although unauthorized or irregular without such action, may be validated by legislative action giving it the effect which, by its terms, it was intended to have.<sup>21</sup>

**Power to Sell as Including Power to Mortgage.**—See ante, "Private Corporations Generally," XI, C, 1.

**Mortgage to Directors as Preference.**—See post, "Power to Create Preferences," XI, F, 1. See the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

**Mortgage to Directors to Secure Loan.**—See the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

**F. To Prefer Creditors and Assign for Their Benefit**—1. **POWER TO CREATE PREFERENCES.**—A corporation has the power, except when restrained by law, to prefer certain of its creditors over others.<sup>22</sup>

to be secured, but recites that its execution was authorized to secure a loan of \$100,000; that A. had given to C. his personal bond in that sum to secure advances made as therein stipulated. It was conditioned for the payment by B. of the amount that might be due upon the instrument secured by it. The bond bears even date with the mortgage. It recites that it was given to cover any advances made or to be made to A. by C. to the amount of \$100,000 or less, on condition that such advances and their payment should be indorsed thereon, as fixing the amount of indebtedness, for all of which certain premises that day conveyed by B. to C. by indenture of mortgage shall be liable. Upon the delivery of the bond and mortgage to C., B.'s note for said \$50,000 was renewed, and the amount thereof indorsed on the bond as an advance of that date. The bond shows two other advances to A. of \$25,000 each, for one of which a note of B. for that amount payable to his order, and duly indorsed, was delivered as collateral, and for the other a warehouse receipt for oil, given by B. to him. The receipt proved worthless, and the note was subsequently renewed. None of B.'s notes were paid, but the money advanced to A. was used for the benefit of B. Held, 1. That it was the debt of B. and not that of A. which was intended to be, and is, secured by the mortgage. 2. That parol evidence was admissible to show such intent. *Jones v. Guaranty, etc., Co.*, 101 U. S. 622, 25 L. Ed. 1030.

"A corporation can act only by its agents. If there were any such technical defect as is claimed touching the execution of this mortgage, it has been cured by acquiescence and ratification by the mortgagor. No one else can raise the question. All other parties are concluded." *Jones v. Guaranty, etc., Co.*, 101 U. S. 622, 628, 25 L. Ed. 1030.

**21. Validation by legislature.**—*Galveston Railroad v. Cowdrey*, 11 Wall. 459, 474, 20 L. Ed. 199. See *Houston, etc., R. Co. v. Texas*, 170 U. S. 243, 259, 42 L. Ed. 1023.

Where it is urged against the validity of a mortgage that it appears from the mortgage, that the vote at the meeting

was merely one to authorize the directors to apply to the several legislatures for authority to make a mortgage; that five days after the vote the mortgage was executed; that the shareholders never voted to authorize the making of a mortgage; and that therefore the mortgage was invalid; the sufficient answer to this contention is, that the terms of the vote, as recited in the mortgage, are adequate to confer authority on the directors, acting for the company, to make the mortgage, after the legislatures should have granted authority to make it; and that the subsequent ratification by the legislatures is equivalent to previous authority. The terms of the mortgage are specified in detail in the vote, the mortgage conforms to them, and the vote is to be construed as covering authority from the shareholders to make the mortgage, if legislative authority should be given. It sufficiently appears that the four confirmatory acts were passed before the mortgage was recorded anywhere, and before any bonds secured by it were issued. *Graham v. Boston, etc., R. Co.*, 118 U. S. 161, 170, 30 L. Ed. 196.

Whatever the legislature might have authorized in advance, in regard to the execution of a corporate mortgage, it may validate by retrospective action. It may rectify any irregularity which it might have authorized, and such subsequent ratification is equivalent to previous authority. *Graham v. Boston, etc., R. Co.*, 118 U. S. 161, 170, 30 L. Ed. 196.

**22. Power to prefer.**—*White Water Valley Canal Co. v. Vallette*, 21 How. 414, 424, 16 L. Ed. 154; *United States v. Robertson*, 5 Pet. 641, 8 L. Ed. 257, where a preference of the United States by the pledge to them of the entire estate of the corporation was upheld.

See the dissenting opinion of Baldwin, J., however, as follows: "No charter ever gave a right of preference of one creditor of the corporation to the exclusion of all others; none ever authorized a transfer of all its property, as this assignment does; and those who claim a right under it are bound to show, affirmatively, the authority of the directors to do so, by the terms of the charter. The



**Mortgage to Directors to Secure Previous Debt and Present Advances.**—See the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

2. COMPOSITIONS OR ASSIGNMENTS.—In the course of their legitimate business, corporations may make compositions with creditors, or an assignment for their benefit, with preferences, except when restrained by law,<sup>23</sup> and the good will of the business may be included.<sup>24</sup>

**G. To Contract.—In General.**—Whenever a corporation makes a contract, it is the contract of the legal entity—of the artificial being created by the charter—and not the contract of the individual members; the only rights it can claim are the rights which are given to it in that character, and not the rights which belong to its members as citizens of a state.<sup>25</sup> That corporations are bound by their contracts is admitted.<sup>26</sup> But where two corporations contract with each

injured creditors are not bound to show a negative of the power, by any restrictions or prohibitions." *United States v. Robertson*, 5 Pet. 641, 670, 671, 8 L. Ed. 257.

See *Sanford Fork & Tool Co. v. Howe, etc., Co.*, 157 U. S. 312, 318, 39 L. Ed. 713, where it was said: "It is one of the vexed questions of the law as to how far the duty of a corporation and its directors to creditors interferes with the otherwise conceded power of a debtor to perfect certain of his creditors." See the title ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 2, p. 616.

Under a statute (of New York) which declares that it shall not be lawful for any incorporated company to "make any transfer or assignment in contemplation of the insolvency of such company, to any person or persons whatever," a corporation which had consigned goods to a commission merchant and was indebted to him for advances to more than the value thereof, might validly transfer and assign the said goods to him in discharge, pro tanto, of said indebtedness, although the effect was to give a preference over other creditors. The consignee had a valid lien already and this merely gave him the legal title as well. *Fourth Nat. Bank v. American Mills Co.*, 137 U. S. 234, 237, 34 L. Ed. 655. See the title FACTORS AND COMMISSION MERCHANTS.

But, it being the law of Ohio, under its decisions, that mortgages made by a trading corporation after it had become insolvent, and had ceased to do business, to prefer some of its creditors, are invalid and ineffectual against its creditors generally, without regard to the question whether the mortgages were or were not parts of the same transaction as an assignment under the statute, this should be accepted as decisive of the law of Ohio. See *Rev. Stat. of Ohio (1880)*, §§ 6335, 6343. *Smith Middlings Purifier Co. v. McGroarty*, 136 U. S. 237, 241, 34 L. Ed. 346.

Creditors who are neither stockholders nor directors, but strangers to a corporation, are not disabled from taking security from the corporation by reason of the fact that upon the paper they hold there is also the indorsement of certain of the

directors or stockholders. *Sanford Fork & Tool Co. v. Howe, etc., Co.*, 157 U. S. 312, 318, 39 L. Ed. 713.

**Preferences by banks.**—See the titles BANKS AND BANKING, vol. 3, pp. 190, 195.

23. **Power generally.**—*White Water Valley Canal Co. v. Vallette*, 21 How. 414, 244, 16 L. Ed. 154; *De La Vergne, etc., Co. v. German Savings Inst.*, 175 U. S. 40, 52, 44 L. Ed. 65. See *Lenox v. Roberts*, 2 Wheat. 373, 4 L. Ed. 264.

"In *Lenox v. Roberts*, 2 Wheat. 373, 4 L. Ed. 264, the court gave effect to a general assignment of a corporation of its choses in action made in the anticipation of the expiration of its charter, and which was designed to preserve to the corporations their rights of property." *Bacon v. Robertson*, 18 How. 480, 486, 15 L. Ed. 499.

24. A general assignment sweeping in its terms, and including all the real and personal property and effects of every kind and description belonging to the corporation, or in which it had any right or interest, was doubtless sufficient to pass the good will of the business, which was an incident either to the premises, to the name of the corporation or to the tangible property with which the business was carried on. *De La Vergne, etc., Co. v. German Savings Inst.*, 175 U. S. 40, 52, 44 L. Ed. 65. See, generally, the title ASSIGNMENTS FOR BENEFIT OF CREDITORS, vol. 2, p. 599.

25. **Contract rights.**—*Bank v. Earle*, 13 Pet. 519, 10 L. Ed. 274. See *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 107, 42 L. Ed. 964; *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 44, 44 L. Ed. 657.

As to necessity for seal, see ante, "Corporate Seal and Deed," II, G.

26. **Obligation.**—*Fowle v. Alexandria*, 3 Pet. 398, 409, 7 L. Ed. 719; *United States Bank v. Dandridge*, 12 Wheat. 64, 67, 6 L. Ed. 552. See *Railroad Co. v. Howard*, 7 Wall. 392, 412, 19 L. Ed. 117; *Morgan's, etc., Steamship Co. v. Texas Cent. R. Co.*, 137 U. S. 171, 196, 34 L. Ed. 625. Once organized, it has the implied power to make contracts connected with its business and debts, through agents and notes as well as under its seal. *Planters' Bank v. Sharp*, 6 How. 301, 322, 12 L. Ed. 447.

One object in creating a corporation by

other, both must be capable of entering into the contract.<sup>27</sup>

**Contract Not to Exercise Corporate Franchise, or Disabling Therefrom.**<sup>28</sup>—See ante, "Quasi Public Corporations," XI, C, 2.

**Extension Beyond Charter Period.**—And a contract by a corporation cannot be held invalid because within its prescribed duration the charter of the company expired by its terms.<sup>29</sup>

**Limited by Charter, and Public Policy.**—But a corporation can make such contracts only as are allowed by the act of incorporation,<sup>30</sup> and a corpora-

law is to enable it to make contracts. *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328.

"It is to the higher interest of all, corporations and public alike, that it be understood that there is a binding force in all contract obligations; that no change of interest or change of management can disturb their sanctity or break their force; but that the law which gives to corporations their rights, their capacities for large accumulations, and all their faculties, is potent to hold them to all their obligations, and so make right and justice the measure of all corporate as well as individual action." *Union Pac. R. Co. v. Chicago, etc., R. Co.*, 163 U. S. 564, 604, 41 L. Ed. 265.

It being objected that the nominal party to the alleged contract never received any of the consideration, and hence was not bound, where the stockholders of that corporation entered into the covenants in question, and each of its incorporators was an officer or employee of the company to which the consideration was paid; its road was built with the funds of that company; every share of its stock ever issued was taken, held or voted by some officer or employee of that company in trust for it; the officers of the two companies had always been the same, and in their operation no distinction had ever been made between the two roads; and their earnings had gone into and their expenditures been paid from a common treasury; held, that there is no merit in the objection that for the reason given the first company was not bound by its covenants. *Union Pac. R. Co. v. Chicago, etc., R. Co.*, 163 U. S. 564, 592, 41 L. Ed. 265.

See, for quære, whether an aggregate corporation can make an express assumption, unless specially authorized by statute. *Marine Ins. Co. v. Young*, 1 Cranch 332, 2 L. Ed. 126.

**27. To make a valid contract between two corporations,** it is necessary to show that both parties are competent to enter into the proposed stipulations. It is a fundamental principle in the law of contracts that, to make a valid agreement, there must be a meeting of minds, and, obviously, if there be a disability on the part of either party to enter into the proposed contract, there can be no valid agreement. As was said by this court in *St. Louis, etc., R. Co. v. Terre Haute, etc., R. Co.*, 145 U. S. 393, 404, 36 L. Ed. 738: "It is unnecessary, however, to express a definitive opinion upon the question

whether a contract between these parties was beyond the corporate powers of the plaintiff, because, as held by the decisions of this court already cited, a contract beyond the corporate power of either party is as invalid as if beyond the corporate powers of both, and the contract in question was clearly beyond the corporate powers of the defendant." *Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677, 692, 40 L. Ed. 849. See, also, *Thomas v. Railroad Co.*, 101 U. S. 71, 25 L. Ed. 950; *Oregon R., etc., Co. v. Oregonian R. Co.*, 130 U. S. 1, 32 L. Ed. 837; *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 30 L. Ed. 83; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 35 L. Ed. 55. See post, "General Consideration," XII, A.

**28. Contracts prior to incorporation.**—See ante, "Status before Incorporation," III, E.

**Damages on disaffirmance.**—See the title DAMAGES.

**Effect of dissolution.**—See post, "Effects and Consequences," XVII, C.

**Estoppel by receipt of benefits.**—See the title ESTOPPEL.

**Exhaustion.**—See ante, "In General," XI, A, 1, a.

**Injunction against ultra vires acts.**—See the title INJUNCTIONS.

**Insurance contracts.**—See the title INSURANCE.

**Necessity for formal action and compliance with formalities.**—See ante, "Formality of Execution and Proof Thereof," XI, A, 3, c.

**Presumption in favor of validity.**—See ante, "Presumption in Favor of Right to Exercise," XI, A, 1, c.

**Representation by officers and agents.**—See ante, "Mode of Action and Proof Thereof," XI, A, 3.

**29. Extension beyond term of charter.**—The contract was carefully drawn in view of such expiration of the several corporate existences of the parties to it, who bound themselves to take such steps as might be necessary to continue the contract in force. And, as observed by the court of appeals, the contingency that the company "will cease to exist and leave neither assigns nor successors is far too remote to have any influence upon the validity of this contract." *Union Pac. R. Co. v. Chicago, etc., R. Co.*, 163 U. S. 564, 592, 41 L. Ed. 265.

**30. Charter the test of power.**—*Goszler v. Georgetown*, 6 Wheat. 593, 597, 5 L. Ed. 339.



tion can do no valid act unauthorized by statute, and can make no contract in contravention of public policy.<sup>31</sup>

**Under Enabling Provisions.**—Provisions in a corporate charter, merely enabling in their character, do not restrict the general power to effect contracts in any lawful and convenient mode, within the ordinary scope of their chartered powers.<sup>32</sup>

**Contracts with Officers or Stockholders.**—While a party's relation as a director and officer, or as a stockholder of the company, does not preclude him from entering into contracts with it, making loans to it and taking its bonds as collateral security, courts of equity regard such personal transactions of a party in either of these positions, not, perhaps, with distrust, but with a large measure of watchful care; and unless satisfied by the proof that the transaction was entered into in good faith, with a view to the benefit of the company as well as of its creditors, and not solely with a view to his own benefit, they refuse to lend their aid to its enforcement.<sup>32a</sup>

**With Stockholders.**—A private corporation may sue, and be sued by, its own members, and may contract with them, in the same manner as with any strangers.<sup>33</sup>

**Parol Contracts.**—Whenever a corporation aggregate is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents, are express promises of the corporation; and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which, an action lies.<sup>34</sup>

**Compromise and Settlement.**—Although a corporation exceeded its corporate powers in making the original contract, yet it had authority to compromise and settle all claims by or against it under that contract. The compromise of the disputed claim on the original notes was a legal and sufficient consideration for the new note.<sup>35</sup>

**Contract of Guaranty.**—A corporation cannot guarantee the performance by another corporation of acts or contracts which it could not perform or enter into itself.<sup>36</sup>

**31. Statute or public policy.**—*Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 312, 30 L. Ed. 83.

"Where a corporate contract is forbidden by a statute or is obviously hostile to the public advantage or convenience, the courts disapprove of it, but when there is no express prohibition and it is obvious that the contract is one of advantage to the public, the rule is otherwise." *Union Pac. R. Co. v. Chicago, etc., R. Co.*, 163 U. S. 564, 594, 41 L. Ed. 265.

**32. Enabling provisions of charter.**—*Relief Fire Ins. Co. v. Shaw*, 94 U. S. 574, 578, 24 L. Ed. 291.

**32a. With officers or stockholders.**—*Richardson v. Green*, 133 U. S. 30, 43, 33 L. Ed. 516; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328. See the titles OFFICERS AND AGENTS OF PRIVATE CORPORATIONS; STOCK AND STOCKHOLDERS.

**33. Contracts with stockholders.**—*Dartmouth College v. Woodward* (per Story, J.), 4 Wheat. 518, 667, 4 L. Ed. 629; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 589, 23 L. Ed. 328. See, also, *Wright v. Kentucky, etc., R. Co.*, 117 U. S. 72, 93 29 L. Ed. 821.

In some classes of corporations, as in mutual insurance companies, the main object of incorporation is to enable the com-

pany to make contracts with its stockholders, or with persons who thereby become stockholders. *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 589, 23 L. Ed. 328.

**34. Parol contracts.**—*Bank v. Patterson*, 7 Cranch 299, 3 L. Ed. 351; *Fleckner v. United States Bank*, 9 Wheat. 338, 358, 5 L. Ed. 631. See *Osborn v. United States Bank*, 9 Wheat. 738, 829, 6 L. Ed. 204; *United States Bank v. Dandridge*, 12 Wheat. 64, 74, 6 L. Ed. 552; *Pittsburg, etc., R. Co. v. Keokuk, etc., Bridge Co.*, 131 U. S. 371, 381, 33 L. Ed. 157. See ante, "Necessity for Seal," II, G, 1.

**35. Compromise and settlement.**—*Northern Liberty Market Co. v. Kelly*, 113 U. S. 199, 202, 28 L. Ed. 948. See the title COMPROMISE AND SETTLEMENT, vol. 3, p. 980.

**36. Guaranty.**—*Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 315, 30 L. Ed. 83. See the title GUARANTY.

A corporation has no authority to guarantee the bonds of another corporation, unless such power is conferred by its act of incorporation or other statutes, and such guaranty, or any contract to give one, not so authorized, is strictly ultra vires, unlawful and void, and incapable of being made good by ratification or estoppel. *Louisville, etc., R. Co. v. Louisville*



**H. Dealings with Officers and Agents.**—See ante, "To Contract," XI, G. See the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

**I. To Sue and Be Sued.**—See post, "Actions by and against Corporations," XIV.

## XII. Ultra Vires Acts.

**A. General Consideration.—Ultra Vires Doctrine Not Favorably Regarded.**—The doctrine of ultra vires, whether invoked for or against a corporation, is not favored in the law. It should never be applied where it will defeat the ends of justice, or work a legal wrong, if such a result can be avoided.<sup>38</sup>

**Applicable between Corporations if Either Exceed Powers.**—Where the contract sued on is clearly beyond the powers of the plaintiff corporation, it is unnecessary to determine whether it is also ultra vires of the defendants, because, in order to bind either party, it must be within the corporate powers of both.<sup>39</sup>

**Law Governing.**—When the question of ultra vires arises, the validity of a corporate contract is to be determined by the *lex loci contractus*, not the *lex fori*.<sup>40</sup>

**B. As Voidable or Void**—1. **VOID WHERE WANT OF POWER ABSOLUTE.**—The clear result of the decisions may be summed up thus: The charter of a corporation, read in the light of any general laws that are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of those powers are unlawful and void, not merely voidable, and no action can be maintained upon them in the courts,<sup>41</sup> and nothing can infuse any

Trust Co., 174 U. S. 552, 567, 43 L. Ed. 1081.

As to ultra vires guaranty, see, also, post, "Estoppel," XII, B, 2, b.

**By loan and trust company.**—See the title LOAN, TRUST, AND SAFE DEPOSIT COMPANIES.

**By railroads.**—See the title RAILROADS.

**Irregular guaranty.**—See post, "Ultra Vires Acts," XII.

**38. Doctrine not regarded with favor.**—*San Antonio v. Mehaffy*, 96 U. S. 312, 315, 24 L. Ed. 816; *National Bank v. Matthews*, 98 U. S. 621, 626, 25 L. Ed. 188. See, also, *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 55, 35 L. Ed. 55; *Jacksonville, etc., R. & Nav. Co. v. Hooper*, 160 U. S. 514, 40 L. Ed. 515; *Railway Co. v. McCarthy*, 96 U. S. 258, 267, 24 L. Ed. 693.

A corporation, after having, by its officers and agents, made a contract, and induced the other party, acting in good faith, to rely on its engagements, cannot be permitted to shelter itself behind ambiguous expressions in its charter, and claim to have a special statute of frauds for its own benefit. *Relief Fire Ins. Co. v. Shaw*, 94 U. S. 574, 577, 24 L. Ed. 291. See *Pneumatic Gas Co. v. Berry*, 113 U. S. 322, 327, 28 L. Ed. 1003. See ante, "Presumption in Favor of Right to Exercise," XI, A, 1, c; post, "In General," XIII, A, 1.

**39. Between two corporations.**—*Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 54, 35 L. Ed. 55; *Thomas v. Railroad Co.*, 101 U. S. 71, 25 L. Ed. 950; *Pennsylvania R. Co. v. St.*

*Louis, etc., R. Co.*, 118 U. S. 290, 310, 30 L. Ed. 83; *Oregon R., etc., Co. v. Oregonian R. Co.*, 130 U. S. 1, 32 L. Ed. 837; *St. Louis, etc., R. Co. v. Terre Haute, etc., R. Co.*, 145 U. S. 393, 404, 36 L. Ed. 738; *McCormick v. Market Bank*, 165 U. S. 538, 550, 41 L. Ed. 817. See ante, "To Contract," XI, G.

**40. Conflict of laws.**—*St. Louis, etc., R. Co. v. Terre Haute, etc., R. Co.*, 145 U. S. 393, 36 L. Ed. 738; *Eastern Building, etc., Ass'n v. Ebaugh*, 185 U. S. 114, 121, 46 L. Ed. 830. See the title CONFLICT OF LAWS, vol. 3, p. 1020.

As to powers of dual incorporation, see ante, "Powers," II, H, 1, a, (4).

This case was presented to the supreme court of South Carolina with the facts found by the trial court, among which were that under such circumstances it was the law of New York that the plaintiff in error, a New York corporation, could not be heard to say that its promise was ultra vires; and the court decided that such findings of fact were conclusive upon it. The case was presented here under like conditions, and this court holds that the law of New York was a necessary element in the question of ultra vires and in it was involved not only what the statutory law is, but what its application is under the courts of that state. Both of these are facts to be proved, and the finding upon them is binding on this court. *Eastern Building, etc., Ass'n v. Ebaugh*, 185 U. S. 114, 46 L. Ed. 830.

**41. Void if absolutely ultra vires.**—*Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 49, 35 L. Ed. 55; *Pittsburg, etc., R. Co. v. Keokuk, etc.,*

vitality into them.<sup>42</sup> But the argument is unsound that whatever is done by a corporation in excess of the corporate powers, as defined by its charter, is as though it was not done at all.<sup>43</sup>

2. PLEA OF ULTRA VIRES BY CORPORATION OR STOCKHOLDER—a. *General Rule*.—And the corporation may plead its want of power and assert the nullity of an ultra vires act.<sup>44</sup> The assent of all the stockholders cannot confer validity

Bridge Co., 131 U. S. 371, 384, 33 L. Ed. 157; St. Louis, etc., R. Co. v. Terre Haute, etc., R. Co., 145 U. S. 393, 402, 36 L. Ed. 738; Jacksonville, etc., R. & Nav. Co. v. Hooper, 160 U. S. 514, 40 L. Ed. 515; California Bank v. Kennedy, 167 U. S. 362, 367, 42 L. Ed. 198; Concord First Nat. Bank v. Hawkins, 174 U. S. 364, 370, 43 L. Ed. 1007, reaffirmed in Shaw v. National German-American Bank, 199 U. S. 603, 50 L. Ed. 328; Louisville, etc., R. Co. v. Louisville Trust Co., 174 U. S. 552, 567, 43 L. Ed. 1081. See, also, Hartford Fire Ins. Co. v. Chicago, etc., R. Co., 175 U. S. 91, 100, 44 L. Ed. 84; O'Brien v. Wheelock, 184 U. S. 450, 490, 6 L. Ed. 636.

"As said in McCormick v. Market Bank, 165 U. S. 538, 49, 41 L. Ed. 817: 'The doctrine of the ultra vires, by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void and will not support an action, rests, as this court has often recognized and affirmed, upon three distinct grounds: The obligation of any one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subject to risks which they have never undertaken; and, above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law. Pearce v. Madison, etc., R. Co., 21 How. 441, 16 L. Ed. 184; Pittsburg, etc., R. Co. v. Keokuk, etc., Bridge Co., 131 U. S. 371, 384, 33 L. Ed. 157; Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 48, 35 L. Ed. 55.' The doctrine thus enunciated is likewise that which obtains in England." California Bank v. Kennedy, 167 U. S. 362, 367, 42 L. Ed. 198, reaffirmed in Shaw v. National German Bank, 199 U. S. 603, 50 L. Ed. 328; McCreery Realty Corporation v. Equitable-American Nat. Bank, 203 U. S. 584, 51 L. Ed. 328; Zabriskie v. Cleveland, etc., R. Co., 23 How. 381, 398, 16 L. Ed. 488; Thomas v. Railroad Co., 101 U. S. 71, 25 L. Ed. 950; Pennsylvania R. Co. v. St. Louis, etc., R., 118 U. S. 290, 630, 30 L. Ed. 83; Oregon R., etc., Co. v. Oregonian R. Co., 130 U. S. 1, 25, 32 L. Ed. 837; Pittsburg, etc., R. Co. v. Keokuk, etc., Bridge Co., 131 U. S. 371, 384, 33 L. Ed. 157; Concord First Nat. Bank v. Hawkins, 174 U. S. 364, 371, 43 L. Ed. 1007. See, also, De La Vergne, etc., Co. v. German Savings Inst., 175 U. S. 40, 59, 44 L. Ed. 65; First Nat. Bank v. Converse, 200 U. S. 425, 440, 50 L. Ed. 537; Ward v. Joslin, 186 U. S. 142, 151, 46 L. Ed. 1093.

42. As said in O'Brien v. Wheelock, 184 U. S. 450, 490, 46 L. Ed. 636: "Even in

the instance of contracts of a corporation beyond the scope of its corporate powers, the law is well settled in this court that nothing which has been done under them or the action of the courts can infuse any vitality into them. Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 61, 35 L. Ed. 55." See, also, California Bank v. Kennedy, 167 U. S. 362, 42 L. Ed. 198; Pennsylvania R. Co. v. St. Louis, etc., R. Co., 118 U. S. 290, 317, 30 L. Ed. 83. See post, "Plea of Ultra Vires by Corporation or Stockholder," XII, A, 2.

43. Salt Lake City v. Hollister, 118 U. S. 256, 260, 30 L. Ed. 176; Gold-Mining Co. v. National Bank, 96 U. S. 640, 24 L. Ed. 648. See post, "Right to Complain or Set Up Defense," XII, C; "For Torts," XIII, A, 2.

**Informality.**—See ante, "Formality of Execution and Proof Thereof," XI, A, 3, c.

**Unauthorized guaranty.**—See ante, "To Contract," XI, G.

**Acts prior to incorporation.**—See ante, "Status before Incorporation," III, E.

**Notes given for ultra vires purchase.**—Where two separate corporations were created to make railroads, they had no right to unite and conduct their business under one management; nor had they a right to establish a steamboat line, to run in connection with the railroads, and notes given for the purchase of the steamboat cannot be recovered upon by the indorsees thereof, who were not the owners of the boat or claimants under assignment of the owner's interests. Pearce v. Madison, etc., R. Co., 21 How. 441, 16 L. Ed. 184. See Pennsylvania R. Co. v. St. Louis, etc., R. Co., 118 U. S. 290, 308, 30 L. Ed. 83; Pittsburg, etc., R. Co. v. Keokuk, etc., Bridge Co., 131 U. S. 371, 384, 33 L. Ed. 157; De La Vergne, etc., Co. v. German Savings Inst., 175 U. S. 40, 58, 44 L. Ed. 65; Central Transp. Co. v. Pullman Palace Car Co., 139 U. S. 24, 41, 35 L. Ed. 55.

The suit is instituted on the notes by plaintiff as an endorsee, and the only question is, had the corporation the capacity to make the contract, in the fulfillment of which they were executed, which is answered in the negative. Pearce v. Madison, etc., R. Co., 21 How. 441, 444, 16 L. Ed. 184.

Such consolidation being invalid as without legal authority, neither of the original corporations is liable on the notes. Pearce v. Madison, etc., R. Co., 21 How. 441, 16 L. Ed. 184. See, however, ante, "Implied Powers," XI, A, 1, b.

44. **Pleable by corporation.**—"Whatever divergence of opinion may arise on

on an ultra vires contract.<sup>45</sup>

b. *Estoppel*.—See the title ESTOPPEL. A contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced, or rendered enforceable by the application of the doctrine of estoppel.<sup>46</sup> Excess of the scope of the powers conferred upon the corporation by law could not be ratified or be made good by estoppel; but compliance with regulations as to the manner of exercising corporate powers, the stockholders might waive, or the corporation might be estopped, by lapse of time, or otherwise, to deny.<sup>47</sup>

this question from conflicting adjudications in some of the state courts, in this court it is settled in favor of the right of the corporation to plead its want of power; that is to say, to assert the nullity of an act which is an ultra vires act. The cases of *Thomas v. Railroad Co.*, 101 U. S. 71, 25 L. Ed. 950; *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 30 L. Ed. 83; *Oregon R., etc., Co. v. Oregonian R. Co.*, 130 U. S. 1, 32 L. Ed. 837; *Pittsburg, etc., R. Co. v. Keokuk, etc., Bridge Co.*, 131 U. S. 371, 33 L. Ed. 157; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 35 L. Ed. 55; *St. Louis, etc., R. Co. v. Terre Haute, etc., R. Co.*, 145 U. S. 393, 36 L. Ed. 738; *Union Pac. R. Co. v. Chicago, etc., R. Co.*, 163 U. S. 564, 41 L. Ed. 265, and *McCormick v. Market Bank*, 165 U. S. 538, 41 L. Ed. 817, recognize as sound doctrine that the powers of corporations are such only as are conferred upon them by statute, and that, to quote from the opinion of the court in *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 59 to 60, 35 L. Ed. 55: 'A contract of a corporation, which is ultra vires, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.' This language was also cited and expressly approved in *Jacksonville, etc., R. & Nav. Co. v. Hooper*, 160 U. S. 514, 524, 530, 40 L. Ed. 515; *California Bank v. Kennedy*, 167 U. S. 362, 367, 42 L. Ed. 198. See, also, *Concord First Nat. Bank v. Hawkins*, 174 U. S. 364, 371, 43 L. Ed. 1007, reaffirmed in *Shaw v. National German-American Bank*, 199 U. S. 603, 50 L. Ed. 328; *Louisville, etc., R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 567, 43 L. Ed. 1081; *De La Vergne, etc., Co. v. German Savings Inst.*, 175 U. S. 40, 59, 44 L. Ed. 65.

"The question of the liability of corporations on contracts which the law does not authorize them to make, and which

are wholly beyond the scope of their powers, is governed by a different principle (from that applicable to torts). Here the party dealing with the corporation is under no obligation to enter into the contract. No force, or restraint, or fraud is practised on him. The powers of these corporations are matters of public law open to his examination, and he may and must judge for himself as to the power of the corporation to bind itself by the proposed agreement." *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 46, 35 L. Ed. 55; *Salt Lake City v. Hollister*, 118 U. S. 256, 263, 30 L. Ed. 170.

#### 45. Assent of all the stockholders.—

The broad doctrine is established that a contract not within the scope of the powers conferred on the corporation cannot be made valid by the assent of every one of the shareholders. This represents the decided preponderance of authority, both in this country and in England, and is based upon sound principle. *Thomas v. Railroad Co.*, 101 U. S. 71, 83, 25 L. Ed. 950; *Jacksonville, etc., R. & Nav. Co. v. Hooper*, 160 U. S. 514, 524, 40 L. Ed. 515; *California Bank v. Kennedy*, 167 U. S. 362, 367, 42 L. Ed. 198. See *Concord First Nat. Bank v. Hawkins*, 174 U. S. 364, 370, 43 L. Ed. 1007, reaffirmed in *Shaw v. National German American Bank*, 199 U. S. 603, 50 L. Ed. 328.

46. *Estoppel*.—*Union Pac. R. Co. v. Chicago, etc., R. Co.*, 163 U. S. 564, 581, 41 L. Ed. 265; *Thomas v. Railroad Co.*, 101 U. S. 71, 25 L. Ed. 950; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 35 L. Ed. 55; *California Bank v. Kennedy*, 167 U. S. 362, 371, 42 L. Ed. 198, reaffirmed in *Shaw v. National German American Bank*, 199 U. S. 603, 50 L. Ed. 328; *Louisville, etc., R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 43 L. Ed. 1081; *Ward v. Joslin*, 186 U. S. 142, 151, 46 L. Ed. 1093; *McCreery Realty Corporation v. Equitable Nat. Bank*, 203 U. S. 584, 51 L. Ed. 328.

47. *Same*.—*St. Louis, etc., R. Co. v. Terre Haute, etc., R. Co.*, 145 U. S. 393, 403, 36 L. Ed. 738; *Zabriskie v. Cleveland, etc., R. Co.*, 23 How. 381, 398, 16 L. Ed. 488; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 42, 60, 35 L. Ed. 55.

"When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corpora-



**Ultra Vires Lease.**—The same doctrine has been applied to leases ultra vires a corporation, and it has been uniformly held that there could be no re-

tion, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation nor the other party to the contract can be estopped by assenting to it, or by acting upon it, to show that it was prohibited by those laws.' The principles thus asserted were directly applied in the case of *California Bank v. Kennedy*, 167 U. S. 362, 367, 42 L. Ed. 198, where the question and the answer were thus stated by Mr. Justice White." *Concord First Nat. Bank v. Hawkins*, 174 U. S. 364, 370, 43 L. Ed. 1007, reaffirmed in *Shaw v. National German American Bank*, 199 U. S. 603, 50 L. Ed. 328; *Whitney v. Wyman*, 101 U. S. 392, 25 L. Ed. 1050; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 60, 35 L. Ed. 55.

"The distinction between the doing by a corporation of an act beyond the scope of the powers granted to it by law, on the one side, and an irregularity in the exercise of the granted powers, on the other, is well established, and has been constantly recognized by this court. It was clearly indicated in two of its earliest judgments on the subject of ultra vires, both of which were delivered by Mr. Justice Campbell." *Louisville, etc., R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 570, 43 L. Ed. 1081, reaffirmed in *Walters v. Chicago, etc., R. Co.*, 186 U. S. 479, 46 L. Ed. 1266. See *Pearce v. Madison, etc., R. Co.*, 21 How. 441, 16 L. Ed. 184, and *Zabriskie v. Cleveland, etc., R. Co.*, 23 How. 381, 16 L. Ed. 488.

"In *Merchants' Bank v. State Bank*, 10 Wall. 604, 19 L. Ed. 1008, this court stated, as an axiomatic principle in the law of corporations, this proposition: 'Where a party deals with a corporation in good faith—the transaction is not ultra vires—and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists. If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume the existence, and the corporation is estopped to deny them.' *Merchants' Bank v. State Bank*, 10 Wall. 604, 644, 645, 19 L. Ed. 1008. The proposition was supported by citations of many English and American cases, and among them *Royal British Bank v. Turquand*, (1856), 6 El. & Bl. 327. And the justices of this court, while differing among themselves in the application of the principle to municipal bonds, have always treated *Royal Brit-*

*Bank v. Turquand* (1856), 6 El. & Bl. upon its facts." *Louisville, etc., R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 573, 43 L. Ed. 1081, reaffirmed in *Walters v. Chicago, etc., R. Co.*, 186 U. S. 479, 46 L. Ed. 1266; *Commissioners v. Aspinwall*, 21 How. 539, 545, 16 L. Ed. 208; *Moran v. Commissioners*, 2 Black 722, 724, 17 L. Ed. 342; *Gelpcke v. Dubuque*, 1 Wall. 175, 203, 17 L. Ed. 520; *St. Joseph Township v. Rogers*, 16 Wall. 644, 666, 21 L. Ed. 328; *Humboldt Township v. Long*, 92 U. S. 642, 650, 23 L. Ed. 752. And see *Zabriskie v. Cleveland, etc., R. Co.*, 23 How. 381, 16 L. Ed. 488, above cited. See, also, *Moore v. Citizens' Nat. Bank*, 111 U. S. 156, 169, 28 L. Ed. 385; *Peoples' Bank v. National Bank*, 101 U. S. 181, 183, 25 L. Ed. 907.

See *Sioux City, etc., Warehouse Co. v. Trust Co.*, 173 U. S. 99, 112, 43 L. Ed. 628, where it is said: "Whatever, it is argued, may be the rule in state courts, in this court it is settled that a corporation cannot be estopped from asserting that it is not bound by a corporate act which is absolutely void, citing, among other cases, *Pullman's Palace Car Co. v. Cent. Transp. Co.*, 171 U. S. 138, 43 L. Ed. 108; *California Bank v. Kennedy*, 167 U. S. 362, 42 L. Ed. 198; *McCormick v. Market Bank*, 165 U. S. 538, 41 L. Ed. 817; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 35 L. Ed. 55. But we are not called upon, in the case before us, to decide the question thus raised, since it rests upon an assumption that the court of Iowa has decided that the corporation was by estoppel prevented from complaining of a void act. But the supreme court of Iowa has not so decided. On the contrary whilst in the course of its opinions it has referred to the doctrine of estoppel, it expressly, in the cases cited, made the application of the doctrine depend upon the legal conclusion found by it, that the act of a corporation in contracting a debt in excess of the statutory limit was not void but merely voidable, and for this reason the corporation, or those holding under it, could not be heard to assail the act in question. The decisions of this court which are relied upon considered the application of the doctrine of estoppel to corporate acts absolutely void, and not its relation to contracts which were merely voidable. Whether, as an independent question, if we were enforcing the Iowa statute, we would decide that the issue of stock by a corporation in excess of a statutory inhibition was not void but merely voidable, need not be considered, since, as we have said, in applying an Iowa law, we follow the settled construction given to it by the supreme court of that state."

**Obligation of good faith and fair dealing.**—See post, "In General," XIII, A, 1.

**Estoppel by performance.**—See post,

covery upon the lease itself, though there might be in an action for use and occupation of the property.<sup>48</sup>

**Guaranty Contract.**—Where the guaranty by one corporation of the bonds of another was not *ultra vires*, in the sense of being outside the corporate powers of the former company, as where a statute expressly authorized such a company to execute such a guaranty, and its board of directors to direct its execution by the company, but made it a prerequisite, to the action of the board of directors, that it should be upon the petition of a majority of the stockholders, this was only a regulation of the mode and the agencies by which the corporation should exercise the power granted to it.<sup>48a</sup>

"Performance by Opposite Party," XII, B, 2, c.

**Estoppel by receipt of benefits.**—See post, "Receipt of Benefits," XII, B, 2, d.

**48. Lease.**—*De La Vergne, etc., Co. v. German Savings Inst.*, 175 U. S. 40, 49, 44 L. Ed. 65; *Thomas v. Railroad Co.*, 101 U. S. 71, 25 L. Ed. 950; *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 630, 30 L. Ed. 83; *Oregon R., etc., Co. v. Oregonian R. Co.*, 130 U. S. 1, 32 L. Ed. 837, followed in *Oregon R., etc., Co. v. Oregonian R. Co.*, 145 U. S. 52, 36 L. Ed. 620; *Pittsburg, etc., R. Co. v. Keokuk, etc., Bridge Co.*, 131 U. S. 371, 384, 33 L. Ed. 157; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 48, 54, 35 L. Ed. 55; *Pullman's Palace Car Co. v. Cent. Transp. Co.*, 171 U. S. 138, 43 L. Ed. 108; *Union Pac. R. Co. v. Chicago, etc., R. Co.*, 163 U. S. 564, 41 L. Ed. 265; *McCormick v. Market Bank*, 165 U. S. 538, 550, 41 L. Ed. 817; *California Bank v. Kennedy*, 167 U. S. 362, 42 L. Ed. 198.

"The lease sued on having been executed by the defendant, contrary to the express prohibition of the statute, which peremptorily forbade the corporation to transact any business, unless to perfect its organization, and thus denied it the capacity of entering into any contract whatever, except in perfecting its organization, the lease is void, cannot be made good by estoppel, and will not support an action to recover anything beyond the value of what the defendant has actually received and enjoyed." *McCormick v. Market Bank*, 165 U. S. 538, 553, 41 L. Ed. 817, reaffirmed in *McCreery Realty Corporation v. Equitable Nat. Bank*, 203 U. S. 584, 51 L. Ed. 328; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 54, 61, 35 L. Ed. 55; *Logan County Nat. Bank v. Townsend*, 139 U. S. 67, 35 L. Ed. 107.

In *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 317, 30 L. Ed. 83, where an *ultra vires* lease had been made of a railroad and an *ultra vires* guaranty by other corporations of the performance of the obligations of the lease by the lessee corporation, and suit for specific performance of the lease and guaranty was brought, after holding them both *ultra vires* and void, the court said: "Whatever may be said in regard to the Indianapolis and St. Louis Company,

there is wanting in the case of the guaranteeing companies one of the strongest reasons usually urged in support of the estoppel, as it is sometimes called, namely, that the recalcitrant party has received the money or the property of the other. For, so far from these guaranteeing companies having received of the plaintiffs any money or property, they are the parties who have been paying money, and the plaintiffs receiving it for rent of its road. They are not, therefore, estopped on any principles of that doctrine from ceasing to pay money on an illegal contract because they have heretofore done so." See post, "Receipt of Benefits," XII, C, 2, d; "Relief Afforded," XII, B, 3. See, also, the titles RAILROADS; STREET RAILWAYS.

**48a. Ultra vires guaranty.**—The distinction between the doing by a corporation of an act beyond the scope of the powers granted to it by law, on the one side, and an irregularity in the exercise of the granted powers, on the other, is well established, and has been constantly recognized by this court. In the first instance the act is void, but in the second, the corporation may be estopped to deny its validity against innocent third parties claiming, for value, thereunder. Such is the case with purchasers of the bonds without notice of the defect. Not so as to purchasers with notice. *Louisville, etc., R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 570, 43 L. Ed. 1081; *Zabriskie v. Cleveland, etc., R.*, 23 How. 381, 398, 16 L. Ed. 488. See, also, ante, "To Contract," XI, G.

Where a corporation availed itself of the provisions of an act allowing it to endorse the bonds of another corporation after complying with certain requirements laid down therein, and when they endorsed the bonds hereafter mentioned, had formally complied with neither of these requirements; had neither convoked a meeting of the stockholders, nor signified their acceptance to the secretary of state as then required, and a stockholder in the company filed a bill to enjoin the directors from paying the interest upon the bonds which they had thus guaranteed, upon the ground that these directors had exceeded their legal authority in making the guaranty, some of the bondholders coming in as defendants with the corporation: as between

**Estoppel of Stockholder.**—A court of equity will not hear a stockholder assert that he is not interested in preventing the law of the corporation from being broken, and assumes that none contemplate advantages from an application of the common property that the constitution of the company does not authorize.<sup>49</sup>

**Alienation of Entire Property.**—See ante, "Private Corporations Generally," XI, C, 1.

c. *Performance by Opposite Party.*—The argument that even if the contract sued on was void, because ultra vires and against public policy, yet that, having been fully performed on the part of the plaintiff, and the benefits of it received by the defendant, for the period covered by the declaration, the defendant was estopped to set up the invalidity of the contract as a defense to this action to recover the compensation agreed on for that period, though sustained by decisions in some of the states, finds no support in the judgments of the supreme court.<sup>50</sup>

the parties to this suit, the acceptance of the acts may be inferred from the conduct of the corporators themselves. The corporation has executed the powers and claimed the privileges conferred by them, and cannot exonerate itself from the responsibility by asserting that it has not filed the evidence required by the statute to evince its decision. *Zabriskie v. Cleveland, etc., R. Co.*, 23 How. 381, 16 L. Ed. 488.

Amongst the acts of the corporators was this—that at a meeting of the stockholders of the company, the endorsement of the bonds was approved, adopted, and sanctioned, and this resolution has never been rescinded at any subsequent annual meetings, of which there have been several, at which the complainant was represented. His proxy was also present at the meeting, but declined to vote, when his vote would have controlled the action of the meeting. These negotiable securities have been placed on sale in the community, accompanied by these resolutions and votes, inviting public confidence; and a corporation cannot, by representations or silence, involve others in onerous engagements, and then defeat the calculations and claims its own conduct has superinduced. It is bound to adherence to truth as much as an individual. *Zabriskie v. Cleveland, etc., R. Co.*, 23 How. 381, 16 L. Ed. 488.

"The bill is framed, not to obtain relief from error or fraud in the administration of the powers of the company by their trustees, but against the exercise of powers that did not belong to the corporation, and which the body could not confirm, except by a unanimous vote." *Zabriskie v. Cleveland, etc., R. Co.*, 23 How. 381, 399, 16 L. Ed. 488.

**49. Stockholder.**—*Zabriskie v. Cleveland, etc., R. Co.*, 23 How. 381, 395, 16 L. Ed. 488.

Corporators must be prompt and vigilant in the exposure of illegality or abuse in the employment of their corporate powers, and not wait until the evil has been done, and the interest of innocent parties has become involved. *Zabriskie*

*v. Cleveland, etc., R. Co.*, 23 How. 381, 398, 16 L. Ed. 488.

It does not lie in the mouths of stockholders to object that another corporation, in carrying into full effect a transaction with their corporation already completed and carried out in substance, and which they and all parties concerned had consented to and acquiesced in long before, unlawfully exercised corporate powers. *Branch v. Jesup*, 106 U. S. 468, 487, 27 L. Ed. 279. See the title STOCK AND STOCKHOLDERS.

**50. Performance.**—*Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 54, 35 L. Ed. 55.

In a clear case of the exercise of a power forbidden by its charter, or contrary to public policy, a corporation would not be estopped to decline to be bound by its own act, even when the other party has fulfilled. *Jacksonville, etc., R. & Nav. Co. v. Hooper*, 160 U. S. 514, 524, 40 L. Ed. 515; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 35 L. Ed. 55.

To hold otherwise would be "to hold that any act performed in executing a void contract makes all its parts valid, and that the more that is done under a contract forbidden by law, the stronger is the claim to its enforcement by the courts." *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 55, 35 L. Ed. 55; *Thomas v. Railroad Co.*, 101 U. S. 71, 86, 25 L. Ed. 950.

"The passages cited by the plaintiff from *Railway Co. v. McCarthy*, 96 U. S. 258, 267, 24 L. Ed. 693, and *San Antonio v. Mehaffy*, 96 U. S. 312, 315, 24 L. Ed. 816, are no more than a passing remark that 'the doctrine of ultra vires, when invoked for or against a corporation, should not be allowed to prevail when it would defeat the ends of justice or work a legal wrong,' and a repetition, in substance, of the same remark, adding 'if such a result can be avoided.'" *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 55, 35 L. Ed. 55.

"According to many recent opinions of this court, a contract made by a corporation, which is unlawful and void because



**New York Rule.**—The general rule in New York is that where a private corporation has entered into a contract, not immoral in itself, and not forbidden by any statute, and it has been in good faith performed by the other party, the corporation will not be heard on a plea of *ultra vires*.<sup>51</sup>

d. *Receipt of Benefits*.—See post, "Relief Afforded," XII, B, 3. But although there may be a defect of power in a corporation to make a contract, yet if a contract made by it is not in violation of its charter, or of any statute prohibiting it, and the corporation has by its promise induced a party relying on the promise and in execution of the contract to expend money and perform his part thereof, the corporation is liable on the contract.<sup>52</sup> Where money had been obtained

beyond the scope of its corporate powers, does not, by being carried into execution, become lawful and valid, but the proper remedy of the party aggrieved is by disaffirming the contract, and suing to recover, as on a quantum meruit, the value of what the defendant has actually received the benefit of." *Pittsburg, etc., R. Co. v. Keokuk, etc., Bridge Co.*, 131 U. S. 371, 389, 33 L. Ed. 157. See, also, *Thomas v. Railroad Co.*, 101 U. S. 71, 83, 25 L. Ed. 950; *Louisiana v. Wood*, 102 U. S. 294, 26 L. Ed. 153; *Parkersburg v. Brown*, 106 U. S. 487, 503, 27 L. Ed. 238; *Chapman v. Douglass County*, 107 U. S. 348, 360, 27 L. Ed. 378; *Salt Lake City v. Hollister*, 118 U. S. 256, 263, 30 L. Ed. 176; *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 317, 318, 30 L. Ed. 83; *Oregon R., etc., Co. v. Oregonian R. Co.*, 130 U. S. 1, 22, 32 L. Ed. 837, followed in *Oregon R., etc., Co. v. Oregonian R. Co.*, 145 U. S. 52, 36 L. Ed. 620; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 59, 35 L. Ed. 55; *Jacksonville, etc., R. & Nav. Co. v. Hooper*, 160 U. S. 514, 524, 40 L. Ed. 515; *California Bank v. Kennedy*, 167 U. S. 362, 367, 42 L. Ed. 198; *Concord First Nat. Bank v. Hawkins*, 174 U. S. 364, 370, 43 L. Ed. 1007, reaffirmed in *Shaw v. National German-American Bank*, 199 U. S. 603, 50 L. Ed. 328; *De La Vergne, etc., Co. v. German Savings Inst.*, 175 U. S. 40, 59, 44 L. Ed. 65.

"Whatever doubts might have been once entertained as to the power of corporations to set up the defense of *ultra vires* to defeat a recovery upon an executed contract, the rule is now well settled, at least in this court, that where the action is brought upon the illegal contract, it is a good defense that the corporation was prohibited by statute from entering into such contract, although in an action upon a quantum meruit it may be compelled to respond for the benefit actually received." *De La Vergne, etc., Co. v. German Savings Inst.*, 175 U. S. 40, 58, 44 L. Ed. 65, saying: "The earliest case in which this doctrine is distinctly laid down is that of *Pearce v. Madison, etc., R. Co.*, 21 How. 441, 16 L. Ed. 184. See post, "Receipt of Benefits," XII, B, 2, d; "Relief Afforded," XII, B, 3.

**Ultra vires promise in building and loan stock.**—See the title BUILDING AND LOAN COMPANIES, vol. 3, p. 543.

**Rescission of executed agreement.**—See post, "Annulment and Rescission," XII, D.

**51. New York rule.**—*Eastern Building, etc., Ass'n v. Ebaugh*, 185 U. S. 114, 120, 46 L. Ed. 830.

"It is now well settled (in New York) that a corporation cannot avail itself of the defense of *ultra vires* when the contract has been, in good faith, fully performed by the other party, and the corporation has had the benefit of the performance and of the contract. As has been said, corporations, like natural persons, have power and capacity to do wrong. They may, in their contracts and dealings, break over the restraints imposed upon them by their charters; and when they do so their exemption from liability cannot be claimed on the mere ground that they have no attributes nor facilities which render it possible for them thus to act. While they have no right to violate their charters, yet they have capacity to do so, and are bound by their acts where a repudiation of them would result in manifest wrong to innocent parties, and especially where the offender alleges its own wrong to avoid a just responsibility. It may be that while a contract remains unexecuted upon both sides, a corporation is not estopped to say in its defense that it had not the power to make the contract sought to be enforced, yet when it becomes executed by the other party, it is estopped from asserting its own wrong and cannot be excused from payment upon the plea that the contract was beyond its powers." *Eastern Building, etc., Ass'n v. Williamson*, 189 U. S. 122, 129, 47 L. Ed. 735.

**52. Receipt of benefits under contract.**—*Hitchcock v. Galveston*, 96 U. S. 341, 351, 24 L. Ed. 659; *Fort Worth City Co. v. Smith Bridge Co.*, 151 U. S. 294, 302, 38 L. Ed. 167; *Gold-Mining Co. v. National Bank*, 96 U. S. 640, 24 L. Ed. 648.

Where a contract was, at farthest, only *ultra vires*, in such a case, though specific performance of an engagement to do a thing transgressive of its corporate power may not be enforced, the corporation can be held liable on its contract. Having received benefits at the expense of the other contracting party, it cannot object that it was not empowered to perform what it promised in return, in the mode in which it promised to perform. This was directly ruled in *The State Board of Agri-*

by a corporation upon its securities which were irregular and ultra vires, but the money was applied for the benefit of the company, with the knowledge and acquiescence of the shareholders, the company and the shareholders were estopped from denying the liability of the company to repay it. And the same result follows where such securities are issued with the knowledge of the shareholders, so far as the money thus raised is applied for the benefit of the company.<sup>53</sup> And the same is true, although the money was loaned to the corporation by some of its directors. It cannot claim that the trust relationship entitled it to repudiate the obligation to repay the money.<sup>54</sup> And a corporation is liable to an action for the use and occupation of premises under an ultra vires lease, although not liable on the lease itself,<sup>55</sup> or to restore or pay for property received thereunder.<sup>56</sup>

culture *v. The Citizens' Street-Railway Co.*, 47 Ind. 407. *Hitchcock v. Galveston*, 96 U. S. 341, 351, 24 L. Ed. 659. See this case distinguished in *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 57, 35 L. Ed. 55, as not intended to hold that the ultra vires contract itself was validated or made enforceable, but merely that equitable principles required that services rendered and received should be paid for apart from any express contract to do so. See, also, ante, "Performance by Opposite Party," XII, B, 2, c.

The true ground of relief in such cases is clearly shown in a line of opinions, two of which were cited by Mr. Justice Miller (*Pennsylvania R. Co. v. St. Louis*, etc., R. Co., 118 U. S. 290, 317, 30 L. Ed. 83), in support of the proposition just quoted, in which municipal corporations, having received money or property under contracts so far beyond their power as not to be capable of being enforced or sued on according to their terms, have been held, while not liable to pay according to the contracts, to be bound to account for the money or property which they had received. *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 57, 58, 35 L. Ed. 55. See *Hitchcock v. Galveston*, 96 U. S. 341, 350, 24 L. Ed. 659; *Louisiana v. Wood*, 102 U. S. 294, 299, 26 L. Ed. 153; *Parkersburg v. Brown*, 106 U. S. 487, 503, 27 L. Ed. 238; *Chapman v. County of Douglas*, 107 U. S. 348, 355, 27 L. Ed. 378.

This result is produced in like manner in many instances where a corporation, having enjoyed the fruits of a contract fairly made, denies, when called to account, the existence of the corporate power to make it. *Daniels v. Tearney*, 102 U. S. 415, 420, 26 L. Ed. 187, citing *Railway Co. v. McCarthy*, 96 U. S. 258, 24 L. Ed. 693; *Western Nat. Bank v. Armstrong*, 152 U. S. 346, 352, 38 L. Ed. 470; *Pneumatic Gas Co. v. Berry*, 113 U. S. 322, 327, 28 L. Ed. 1003.

**53. Ultra vires loans.**—*Jones v. Guaranty*, etc., Co., 101 U. S. 622, 628, 25 L. Ed. 1030.

Under a state constitution which provides: "No corporation shall issue stock or bonds except for money paid, labor done, or property actually received, and all fictitious increase of stock or indebted-

ness shall be void," if this section be in any way applicable and could be regarded as invalidating so much of the contract as provided that the consideration should be paid in bonds, which is not to be conceded, the company "having received benefits at the expense of the other contracting party, cannot object that it was not empowered to perform what it promised in return, in the mode in which it promised to perform," and would still remain liable on its contract, otherwise within its lawful powers. *Fort Worth City Co. v. Smith Bridge Co.*, 151 U. S. 294, 302, 38 L. Ed. 167; *Hitchcock v. Galveston*, 96 U. S. 341, 351, 24 L. Ed. 659; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 58, 35 L. Ed. 55.

That an act of a corporation is ultra vires does not necessarily make it void. A loan so made may still be enforceable. *Gold-Mining Co. v. National Bank*, 96 U. S. 640, 24 L. Ed. 648.

**54. Loan by directors.**—*Hotel Co. v. Wade*, 97 U. S. 13, 24 L. Ed. 917. See the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

**55. Use and occupation.**—*County of Macon v. Shores*, 97 U. S. 272, 279, 24 L. Ed. 889; *De La Vergne, etc., Co. v. German Savings Inst.*, 175 U. S. 40, 59, 44 L. Ed. 65. See *Pennsylvania R. Co. v. St. Louis*, etc., R. Co., 118 U. S. 290, 318, 30 L. Ed. 83, where a doubt is expressed as to whether a liability on a quantum meruit existed in that case of an ultra vires lease.

"In *Steamboat Co. v. McCutchen & Collins* (13 Pa. St. 13), the company, which was a corporation, had occupied for a term agreed upon, as an office, premises belonging to the other parties. When sued for the rent, the corporation set up as a defense that the contract was ultra vires, and claimed exemption from liability upon that ground. Coulter, J., in the opinion of the court affirming the liability, said: 'Some things lie too deep in the common sense and common honesty of mankind to require either argument or authority to support them, and this, I think, is one of them.'" *County of Macon v. Shores*, 97 U. S. 272, 279, 24 L. Ed. 889. See ante, "Estoppel," XII, B, 2, b.

**56. Where an ultra vires lease by one corporation to another is terminated by**

**Express Prohibition and Want of Power Compared.**—There may be a difference between the case of an engagement made by a corporation to do an act expressly prohibited by its charter, or some other law, and a case where legislative power to do the act has not been granted. Such a distinction is asserted in some decisions.<sup>57</sup>

e. *Ultra Vires Torts.*—See post, "For Torts," XIII, A, 2.

3. **RELIEF AFFORDED.**—But "a contract ultra vires being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms; but on an implied contract of the defendant to return, or, failing to do that, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract."<sup>58</sup> Where a corporation has made an ultra vires contract by which it has come into possession of property, it cannot retain the property against the demand of the other party who has done what he agreed to do under the contract, and on its refusal to surrender the property it becomes liable for its value upon grounds or implied contract.<sup>59</sup>

the lessee corporation, the property received by it under the terms of the lease must either be returned or compensation be made therefor. *Pullman's Palace Car Co. v. Cent. Transp. Co.*, 171 U. S. 138, 147, 43 L. Ed. 108.

57. **Prohibition and want of power compared.**—*Hitchcock v. Galveston*, 96 U. S. 341, 351, 24 L. Ed. 659; *Union Pac. R. Co. v. Chicago, etc., R. Co.*, 163 U. S. 564, 594, 41 L. Ed. 265. See ante, "As Voidable or Void," XII, B.

**Rescission.**—See post, "Annulment and Rescission," XII, D.

58. **Recovery of property or compensation.**—*Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 60, 35 L. Ed. 55; *Pullman's Palace Car Co. v. Cent. Transp. Co.*, 171 U. S. 138, 151, 43 L. Ed. 108; *De La Vergne, etc., Co. v. German Savings Inst.* 175 U. S. 40, 58, 44 L. Ed. 65; *Aldrich v. Chemical Nat. Bank*, 176 U. S. 618, 633, 44 L. Ed. 611; *National Bank, etc., Co. v. Petrie*, 189 U. S. 423, 425, 47 L. Ed. 879. See, also, the title **BANKS AND BANKING**, vol. 3, p. 1.

The courts have gone a long way to enable parties who have parted with property or money on the faith of contracts with corporations which the law does not authorize them to make, and which are wholly beyond the scope of their powers, to obtain justice by recovery of the property or the money specifically, or as money had and received to plaintiff's use. *Salt Lake City v. Hollister*, 118 U. S. 256, 263, 30 L. Ed. 176; *Thomas v. Railroad Co.*, 101 U. S. 71, 25 L. Ed. 950; *Louisiana v. Wood*, 102 U. S. 294, 26 L. Ed. 153; *Chapman v. Douglas County*, 107 U. S. 348, 355, 27 L. Ed. 378. See, also, *Logan County Nat. Bank v. Town-*

*send*, 139 U. S. 67, 76, 35 L. Ed. 107; *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 30 L. Ed. 83.

59. *Logan County Nat. Bank v. Townsend*, 139 U. S. 67, 35 L. Ed. 107.

When no penalty is imposed, and the intention of the legislature appears to be simply that the agreement by a corporation to do certain acts is not to be enforced, then neither the agreement itself nor the performance of it is to be treated as unlawful for any other purpose, and where "the money of the plaintiff was taken and is still held by the defendant under an agreement which it is contended it had no power to make, and which, if it had power to make, it has wholly failed on its part to perform, it was money of the plaintiff, now in the possession of the defendant, which in equity and good conscience it ought now to pay over, and which may be recovered in an action for money had and received. The illegality is not that which arises where the contract is in violation of public policy or of sound morals, and under which the law will give no aid to either party. The plaintiff himself is chargeable with no illegal act, and the corporation is the only one at fault in exceeding its corporate powers by making the express contract. The plaintiff is not seeking to enforce that contract, but only to recover his own money and prevent the defendant from unjustly retaining the benefit of its own illegal act. He is doing nothing which must be regarded as a necessary affirmation of an illegal act. *Chapman v. Douglas County*, 107 U. S. 348, 356, 27 L. Ed. 378.

The grounds and the limits of the rule concerning the remedy, in the case of a



4. **RATIFICATION.**—See ante, "Ratification," XI, A, 3, c, (4).

**By Legislative Act.**—The legislative power may ratify and validate any irregularity in the execution of a corporate authority, which it could have authorized beforehand.<sup>60</sup> But the fact that the legislature, after an ultra vires lease was made, passes a statute forbidding the directors of the company, its lessees or agents, from collecting more than a fixed amount of compensation for carrying passengers and freight, is not a ratification of the lease or an acknowledgment of its validity.<sup>61</sup>

**By Corporation or Stockholders.**—See ante, "Ratification," XI, A, 3, c, (4); "Plea of Ultra Vires by Corporation or Stockholder," XII, B, 2; post, "Annulment and Rescission," XII, D.

**C. Right to Complain or Set Up Defense**—1. **RIGHT OF COMPLAINT OR RESTRAINT GENERALLY.**—Where the suit is brought by an individual to enjoin a corporation from the doing of acts as ultra vires and injurious to him, and his interest can only consist in preventing competition with himself in his business, which such more extensive use of the corporate property would create, if the right to assert it exists, it must rest, not upon the claim that the premises are thus used for purposes to which they might not be lawfully devoted if owned and used by a natural person, but on the allegation merely that such use is beyond the corporate powers of the company. But if the competition in itself, however injurious, is not a wrong of which he could complain against a natural person, it does not become so merely because the author of it is a corporation acting ultra vires. The damage is attributable to the competition, and to that alone.<sup>62</sup>

contract ultra vires, which has been partly performed, and under which property has passed, can hardly be summed up better than they were by Mr. Justice Miller in *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 317, 30 L. Ed. 83, where he said that the rule "stands upon the broad ground that the contract itself is void, and that nothing which has been done under it, nor the action of the court, can infuse any vitality into it;" and that "where the parties have so far acted under such a contract that they cannot be restored to their original condition, the court inquires if relief can be given independently of the contract, or whether it will refuse to interfere as the matter stands." *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 61, 35 L. Ed. 55. See ante, "Performance by Opposite Party," XII, B, 2, c; "Receipt of Benefits," XII, B, 2, d.

**Payment for benefits received.**—See ante, "Receipt of Benefits," XII, B, 2, d.

**Annulment and rescission.**—See post, "Annulment and Rescission," XII, D.

**Ultra vires lease.**—See ante, "Estoppel," XII, B, 2, b; "Receipt of Benefits," XII, B, 2, d.

**60. Ratification by legislature.**—*Thomas v. Railroad Co.*, 101 U. S. 71, 25 L. Ed. 950; *Galveston Railroad v. Cowdrey*, 11 Wall. 459, 474, 20 L. Ed. 199; *Graham v. Boston, etc., R. Co.*, 118 U. S. 161, 170, 30 L. Ed. 196. See *Houston, etc., R. Co. v. Texas*, 170 U. S. 243, 259, 42 L. Ed. 1023. See ante, "Mortgages," XI, E, 2, b.

"The power which can give authority to act can ratify any act that is taken, and generally legislative recognition of an act

or a corporation validates the act or the corporation, although neither one nor the other may have full prior legal authority." *Street v. United States*, 133 U. S. 299, 307, 33 L. Ed. 631.

**61. Same.**—*Thomas v. Railroad Co.*, 101 U. S. 71, 25 L. Ed. 950. And see the title **OFFICERS AND AGENTS OF PRIVATE CORPORATIONS**, as to ratification of agent's acts. See, generally, the title **PRINCIPAL AND AGENT**.

**Contracts made before incorporation.**—See ante, "Status before Incorporation," III, E.

**62. Right to complain of and restrain ultra vires acts.**—*Railroad Co. v. Ellerman*, 105 U. S. 166, 173, 26 L. Ed. 1015.

But the competition is not illegal. It is not unlawful for any one to compete with the company, although the latter may not be authorized to engage in the same business. The legal interest which qualifies a complainant other than the state itself to sue in such a case is a pecuniary interest in preventing the defendant from doing an act where the injury alleged flows from its quality and character as a breach of some legal or equitable duty. A stockholder of the company has such an interest in restraining it within the limits of the enterprise for which it was formed, because that is to enforce his contract of membership. The state has a legal interest in preventing the usurpation and perversion of its franchises, because it is a trustee of its powers for uses strictly public. In these questions the individual has no interest, and he cannot raise them in order, under that cover, to create and protect a monopoly which the

**Estoppel by Receipt of Benefit.**—It must be further borne in mind that the invalidity of contracts made in violation of statutes is subject to the equitable exception, that although a corporation in making a contract acts in disagreement with its charter, where it is a simple question of capacity or authority to contract arising either on a question of regularity of organization or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted in an action founded on it to question its validity.<sup>63</sup>

**Ultra Vires Mortgage.**—If a corporate mortgage in question be ultra vires, no one can take advantage of the defect of power involved but the state. As to all other parties, it must be held valid, and may be enforced accordingly.<sup>64</sup>

2. **RIGHT OF CORPORATION OR STOCKHOLDER.**—See ante, "Plea of Ultra Vires by Corporation or Stockholder," XII, B, 2.<sup>65</sup>

**D. Annulment and Rescission.**—See ante, "Relief Afforded," XII, B, 3. See, generally, the title **RESCISSION, CANCELLATION AND REFORMATION.**

1. **IN GENERAL.**—Where it is a contract forbidden by public policy and beyond the power of the corporation to make, having entered into the agreement, it was the duty of the company to rescind or abandon it at the earliest moment. This duty was independent of the clause in the contract which gave them the right to do it. Though they delayed its performance for several years, it was nevertheless a rightful act when it was done. This performance of a legal duty, a duty both to stockholders of the company and to the public, cannot give to plaintiffs a right of action.<sup>66</sup>

law does not give him. He cannot maintain the suit. *Railroad Co. v. Ellerman*, 105 U. S. 166, 26 L. Ed. 1015.

**Acts prior to incorporation.**—See ante, "Status before Incorporation," III, E.

**63. Receipt of benefits as estoppel.**—*Township of Pine Grove v. Talcott*, 19 Wall. 666, 678, 22 L. Ed. 227; *National Bank v. Matthews*, 98 U. S. 621, 629, 25 L. Ed. 188, quoting above from *Sedwick* on Statutory and Constitutional law. See, also, *Whitney v. Wyman*, 101 U. S. 392, 397, 25 L. Ed. 1050; *Jones v. Guaranty, etc., Co.*, 101 U. S. 622, 628, 25 L. Ed. 1030; *Branch v. Jesup*, 106 U. S. 468, 27 L. Ed. 279; *Fritts v. Palmer*, 132 U. S. 282, 291, 33 L. Ed. 317; *Logan County Nat. Bank v. Townsend*, 139 U. S. 67, 76, 35 L. Ed. 107; *Thompson v. St. Nicholas Nat. Bank*, 146 U. S. 240, 251, 36 L. Ed. 956; *McBroom v. Scottish Mortgage, etc., Investment Co.*, 153 U. S. 318, 326, 38 L. Ed. 729; *Scott v. Deweese*, 181 U. S. 202, 211, 45 L. Ed. 822; *Schuyler Nat. Bank v. Gadsden*, 191 U. S. 451, 458, 48 L. Ed. 258; *Third Nat. Bank v. Buffalo German Ins. Co.*, 193 U. S. 581, 588, 48 L. Ed. 805. See the title **ESTOPPEL**. See, also, ante, "Estoppel to Attack Collaterally," XI, C, 1, b.

**64. Mortgage.**—*Jones v. Guaranty, etc., Co.*, 101 U. S. 622, 628, 25 L. Ed. 1030. See *National Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188, in which this subject was fully examined. See, also, *Scott v. Deweese*, 181 U. S. 202, 211, 45 L. Ed. 822; *Fortier v. New Orleans Nat. Bank*, 112 U. S. 439, 28 L. Ed. 764. See ante, "Mortgages," XI, E, 2, b. And see the title **BANKS AND BANKING**, vol. 3, p. 1.

**65. Defense set up for first time on appeal.**—See the title **APPEAL AND ERROR**, vol. 2, p. 90.

**Estoppel of corporation generally.**—See the title **ESTOPPEL**.

**Estoppel of other party.**—See the titles **BANKS AND BANKING**, vol. 3, p. 20; **ESTOPPEL**.

**Ultra vires acts of banks.**—See the title **BANKS AND BANKING**, vol. 3, p. 20.

**66. Rescission.**—*Thomas v. Railroad Co.*, 101 U. S. 71, 86, 25 L. Ed. 950; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 35 L. Ed. 55.

In this last case it was said: "Whether this plaintiff could maintain any action against this defendant, in the nature of a quantum meruit, or otherwise, independently of the contract, need not be considered, because it is not presented by this record, and has not been argued. This action, according to the declaration and the evidence, was brought and prosecuted for the single purpose of recovering sums which the defendant had agreed to pay by the unlawful contract, and which, for the reasons and upon the authorities above stated, the defendant is not liable for." *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 61, 35 L. Ed. 55.

In *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 317, 30 L. Ed. 83, it was said: "We know of no well-considered case where a corporation, which is party to a continuing contract which it had no power to make, seeks to retract and refuses to proceed further, can be compelled to do so. As was said in *Thomas v. Railroad Co.* (a case so often in point here), 'having entered into the agreement it was the duty of the company to rescind or abandon it at the earliest moment. This duty was independent of the clause in the contract which gave them the right to do it. Though they delayed its performance for several years, it was



2. LACHES AND CHANGE OF CIRCUMSTANCES.—But where two corporations have entered into and executed a contract which is ultra vires and illegal as to at least one of them, if not the other, as was known to both, the latter corporation cannot have the contract rescinded in equity, certainly where it has waited for seventeen years to do so. And its stockholders have no better right than it.<sup>67</sup>

nevertheless a rightful act when it was done. Can this performance of a legal duty, a duty both to stockholders of the company and to the public, give to plaintiffs a right of action? Can they found such a right on an agreement void for want of corporate authority and forbidden by the policy of the law? To hold that they can is, in our opinion, to hold that any act performed in execution of a void contract makes all its parts valid, and that the more that is done under a contract forbidden by law, the stronger is the claim to its enforcement by the courts.' *Thomas v. Railroad Co.*, 101 U. S. 71, 86, 25 L. Ed. 950."

67. *St. Louis, etc., R. Co. v. Terre Haute, etc., R. Co.*, 145 U. S. 393, 396, 36 L. Ed. 738.

Although the contract in question was ultra vires of the defendant, and therefore did not bind either party, and neither party could have maintained a suit upon it, at law or in equity, against the other. *St. Louis, etc., R. Co. v. Terre Haute, etc., R. Co.*, 145 U. S. 393, 406, 36 L. Ed. 738.

This was a long lease by which the plaintiff conveyed its railroad and franchise to the defendant for a term of nine hundred and ninety-nine years, which was beyond the defendant's corporate powers, and therefore unlawful and void, of which the plaintiff was bound to take notice. The plaintiff stood in the position of alienating the powers which it had received from the state, and the duties which it owed to the public, to another corporation, which it knew had no lawful capacity to exercise those powers or to perform those duties. If, as the plaintiff contends, the contract was also beyond its own corporate powers, it is certainly in no better position. In either aspect of the case, the plaintiff was in *pari delicto* with the defendant. The invalidity of the contract, in view of the laws of which both parties were bound to take notice, was apparent on its face. The contract has been fully executed on the part of the plaintiff by the actual transfer of its railroad and franchise to the defendant; and the defendant has held the property, and paid the stipulated consideration from time to time, for seventeen years, and has taken no steps to rescind or repudiate the contract. Upon this state of facts, for the reasons above stated, the plaintiff, considered as a party to the unlawful contract, has no right to invoke the assistance of a court of equity to set it aside. And so far as the plaintiff corporation can be considered as representing the stockholders, and seeking to

protect their interests, it and they are barred by laches. *St. Louis, etc., R. Co. v. Terre Haute, etc., R. Co.*, 145 U. S. 393, 408, 36 L. Ed. 738. See, also, *Hancock v. Louisville, etc., R. Co.*, 145 U. S. 409, 417, 36 L. Ed. 755.

In *Union Trust Co. v. Illinois, etc., R. Co.*, 117 U. S. 434, 29 L. Ed. 963, the court in no way maintained any suit on the contract supposed to be unlawful; but simply refused to set it aside at the demand of parties, by reason of whose silence, and omission to seasonably interpose any objection, it had been acted upon as valid throughout a long course of judicial proceedings. *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 56, 35 L. Ed. 55.

The distinction is clearly brought out in *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 317, 30 L. Ed. 83, in which it was argued, substantially as in the present case, that, although the contract of lease might be void, so that no action could originally have been maintained upon it, yet there had been for years such performance of it, in the use, possession and control by the defendants of the plaintiff's road and franchise, that they could not now be permitted to repudiate or abandon it; and that the case came within that class in which it had been held that, where a contract has been so far executed that property has passed and rights have been acquired under it, the courts will not disturb the possession of such property, or compel restitution of money received under such a contract. In answering that objection, Mr. Justice Miller, speaking for the court, said: "Undoubtedly there are such decisions in courts of high authority, and there is such a principle, very sound in its application to appropriate cases. But we understand the rule in such cases to stand upon the broad ground that the contract itself is void, and that neither what has been done under it, nor the action of the court, can infuse any vitality into it. Looking at the case as one where the parties have so far acted under such a contract that they cannot be restored to their original condition, the court inquires if relief can be given independently of the contract, or whether it will refuse to interfere as the matter stands." And whether, in the case then before the court, the lessee might be liable to the lessor, as on a quantum meruit, for the use of its road, was not decided, because not presented. Rescission was, however, allowed. No grounds of estoppel from receipt of money or property under the contract by the party seeking re-



3. EXECUTED CONTRACTS.—See ante, "Performance by Opposite Party," XII, B, 2, c; "Receipt of Benefits," XII, B, 2, d. There can be no question that, in many instances, where an invalid contract, which the party to it might have avoided or refused to perform, has been fully performed on both sides, whereby money has been paid or property changed hands, the courts have refused to sustain an action for the recovery of the property or the money so transferred.<sup>68</sup>

scission arose in this case, though. *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 56, 35 L. Ed. 55; *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 316, 318, 30 L. Ed. 83.

68. Executed contracts.—In regard to corporations, the rule has been well laid down by Comstock, C. J., in *Parish v. Wheeler* (22 N. Y. 494), that the executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith require it. *Thomas v. Railroad Co.*, 101 U. S. 71, 86, 25 L. Ed. 950. See *St. Louis, etc., R. Co. v. Terre Haute, etc., R. Co.*, 145 U. S. 393, 409, 36 L. Ed. 738; citing *Union Trust Co. v. Illinois, etc., R. Co.*, 117 U. S. 434, 468, 29 L. Ed. 963; *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 316, 30 L. Ed. 83; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 56, 61, 35 L. Ed. 55.

Leases.—And where an ultra vires lease by corporate directors of all the corporate property had been made and was afterwards sought to be set aside and an accounting of profits had, the lease having been executed over seven years before any objection was made to it, and during this time having been repeatedly ratified; and a release executed as a full and final settlement of the matters and claims between the parties, there being no evidence that the settlement was obtained by fraud or any improper conduct of either party, the court therefore properly dismissed the bill. A court of equity does not listen with much satisfaction to the complaints of a company that transactions were illegal which had its approval, which were essential to its protection, and the benefits of which it has fully received. Complaints that its own directors exceeded their authority come with ill grace when the acts complained of alone preserved its existence. *Pneumatic Gas Co. v. Berry*, 113 U. S. 322, 326, 28 L. Ed. 1003.

"After seven years' acquiescence in the lease, something more must be shown than that it was executed in excess of the powers of the directors, before the lessee will be required to surrender the profits he has made under it. The lease expired June 1, 1874; the disposition of the property was settled by the agreement of March 15, 1876; and the release is an answer to all claims for the profits made by the defendants. The release is of itself sufficient to justify the dismissal of the bill. There is no evidence that it was obtained upon any fraudulent representations. Nothing was kept from the parties when it was executed." *Pneumatic Gas*

*Co. v. Berry*, 113 U. S. 322, 327, 28 L. Ed. 1003.

And where street railway corporations of a city have entered into leases by which they have undertaken to transfer the rights of the lessor companies, and the lessees have gone into possession thereof, and the same are now in possession of receivers under authority of the court, and all of the companies are parties to the suit, and the rights and franchises of all are by order of the court vested in the receivers, they hold the title to all these rights to be sold at judicial sale, or otherwise dealt with as the court may direct, and in this view it is not material to inquire into the validity of the intermediate transfers between the companies. No contract is undertaken to be enforced with the city which depends upon the validity of these transfers. The city has no power to invalidate them, and the state has not attempted to inquire into their validity by a proceeding in quo warranto. In such case, we think, the principle laid down in *Fritts v. Palmer*, 132 U. S. 282, 293, 33 L. Ed. 317, is controlling: "The question whether a corporation having capacity to purchase and hold real estate for certain defined purposes, or in certain quantities, has taken title to real estate for purposes not authorized by law, or in excess of the quantity permitted by its charter, concerns only the state within whose limits the property is situated. It cannot be raised collaterally by private persons unless there be something in the statute expressly or by necessary implication authorizing them to do so." *Blair v. Chicago*, 201 U. S. 400, 450, 50 L. Ed. 801.

But where an ultra vires lease of a railroad for twenty years was made, and the lessors resumed possession at the end of five years, and the accounts for that period were adjusted and paid, a condition in the lease to arbitrate and pay the value of the unexpired term is void, the case not coming within the principle that executed contracts originally ultra vires shall stand good for the protection of rights acquired under a completed transaction. This clause cannot be enforced and the very nature of the suit is to recover damages for its nonperformance. As to this it is not an executed contract. *Thomas v. Railroad Co.*, 101 U. S. 71, 86, 25 L. Ed. 950.

And a contract by which a railroad corporation demised its road, privileges and franchises, for a period of ninety-six years, to the defendant corporation, who took possession of it, and used and occupied it, under the lease, for a period of less than three years, and then did what was

## XIII. Liabilities.

**A. Civil Liabilities**—1. IN GENERAL.<sup>69</sup>—A corporation cannot absolve itself from the performance of its obligations, without the consent of the legislature,<sup>70</sup> and courts will not allow corporations to escape from their proper responsibility, by means of any disguise.<sup>71</sup>

**Good Faith and Fair Dealing.**—Corporations, as much as individuals, are bound to truth, good faith and fair dealing, and the rule is well settled that they cannot, by their acts, representations, or silence, involve others in onerous engagements and then turn round and disavow their acts and defeat the just expectations which their own conduct has superinduced.<sup>72</sup>

**After Lease or Transfer of Property, Rights and Powers.**—See ante, "To Alienate Franchise, or Property Necessary Thereto," XI, C.

**Enforcement.**—A liquidated claim against a corporation, where unsecured by lien, can only be enforced by legal proceedings establishing its validity and amount by judicial determination, and then by process upon the judgment obtained, in subordination to any previously existing liens upon the property.<sup>73</sup>

**Liability to Liens.**—It is contrary to public policy to subject public or quasi public corporations, operating public utilities, to the operation of ordinary lien laws, and in the absence of an express statutory declaration to that effect, such a construction will not be given to a statute.<sup>74</sup>

equivalent to returning the property to the plaintiff, and refused to be further bound by the contract, is not thus so far an executed one that the defendant is estopped to deny its validity and to refuse to continue its performance. To say that a contract which runs for ninety-six years, and which requires of both parties to it continual and actual operations and performance under it, becomes an executed contract by such performance for less than three years of the term, is carrying the doctrine much farther than it has ever been carried, and is decidedly a misnomer. This class of cases is not governed by the doctrine of part performance in a suit in equity for specific performance, nor is this a suit for specific performance. *Oregon R., etc., Co. v. Oregonian R. Co.*, 130 U. S. 1, 37, 32 L. Ed. 837.

**Sales.**—The suggestion that the contract of sale of the property of a corporation was unauthorized because not authorized by a two-thirds vote of the stockholders is entitled to no weight, where the contract was ultimately carried into effect by the consent or subsequent ratification of all parties interested in the subject matter of the sale. *Railroad Co. v. Howard*, 7 Wall. 392, 415, 19 L. Ed. 117.

**Restoration of property or compensation therefor.**—See ante, "Relief Afforded," XII, B. 3.

**69. For acts of officers and agents generally.**—See ante, "Representation by Officers and Agents," XI, A, 3, a. See the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

**For ultra vires acts.**—See ante, "Ultra Vires Acts," XII.

**In respect to issue and transfer of stock.**—See the title STOCK AND STOCKHOLDERS.

**To taxation.**—See the titles REVE-

NUE LAWS; SUCCESSION TAXES; TAXATION.

**Effect of consolidation and succession.**—See post, "Consolidation and Succession," XV.

**70. In general.**—*New York, etc., R. Co. v. Winans*, 17 How. 30, 39, 15 L. Ed. 27.

**71. New York, etc., R. Co. v. Winans, 17 How. 30, 40, 15 L. Ed. 27.**

**72. Good faith and fair dealing.**—*Railroad Co. v. Howard*, 7 Wall. 392, 413, 19 L. Ed. 117; *Zabriskie v. Cleveland, etc., R. Co.*, 23 How. 381, 397, 16 L. Ed. 488; *Bissell v. Jeffersonville*, 24 How. 289, 300, 16 L. Ed. 664; *Moran v. Commissioners*, 2 Black 722, 723, 17 L. Ed. 342; *Hackett v. Ottawa*, 99 U. S. 86, 96, 25 L. Ed. 363. See, also, *People's Bank v. National Bank*, 101 U. S. 181, 183, 25 L. Ed. 907; *Leavenworth County v. Barnes*, 94 U. S. 69, 73, 24 L. Ed. 63.

"Corporations, quite as much as individuals, are held to a careful adherence to truth and uprightness in their dealings with other parties; nor can they be permitted, with impunity, to involve others in onerous obligations, by their misrepresentations or concealments, without being held to just responsibility for the consequences of their misconduct or bad faith." *Calhoun County v. American Emigrant Co.*, 93 U. S. 124, 130, 23 L. Ed. 826. See the title ESTOPPEL.

**73. Legal process and judicial determination.**—*Fogg v. Blair*, 133 U. S. 534, 538, 33 L. Ed. 721. See post, "Actions by and against Corporations," XIV.

**Equity jurisdiction.**—See the title EQUITY.

**74. Liens.**—*Buncombe County Comm'r's v. Tommey*, 115 U. S. 122, 130, 134, 29 L. Ed. 305. See the titles LIENS; MECHANICS' LIENS.

2. FOR TORTS—*a. In General.*—The doctrine which formerly was sometimes asserted, that an action will not lie against a corporation for a tort, is exploded. The same rule in that respect now applies to corporations as to individuals. They are equally responsible for injuries done in the course of their business by their servants.<sup>75</sup> Corporations are liable for every wrong of which they are guilty, and in such cases the doctrine of ultra vires has no application.<sup>76</sup> The result of the authorities is, that in order to hold a corporation liable for the torts of any of its agents, the act in question must be performed in the course

**75. For torts.**—"This is so well settled as not to require the citation of any authorities in its support." *Baltimore, etc., R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 330, 27 L. Ed. 739. See *Fowle v. Alexandria*, 3 Pet. 398, 409, 7 L. Ed. 719; *Philadelphia, etc., R. Co. v. Quigley*, 21 How. 202, 209, 16 L. Ed. 73. *Weightman v. Corporation of Washington*, 1 Black 39, 50, 17 L. Ed. 52; *Merchants' Bank v. State Bank*, 10 Wall. 604, 19 L. Ed. 1008; *Orleans v. Platt*, 99 U. S. 676, 682, 25 L. Ed. 404; *National Bank v. Graham*, 100 U. S. 699, 702, 25 L. Ed. 750; *New Jersey Steamboat Co. v. Brockett*, 121 U. S. 637, 645, 30 L. Ed. 1049; *Lake Shore, etc., R. Co. v. Prentice*, 147 U. S. 101, 109, 37 L. Ed. 97; *Chesapeake, etc., R. Co. v. Howard*, 178 U. S. 153, 160, 44 L. Ed. 1015.

Thus they are liable "for damages by a collision of rail-cars and steamboats. *Nutt v. Minor*, 14 How. 464, 465, 14 L. Ed. 500; *Scott v. Sandford*, 19 How. 393, 543, 15 L. Ed. 691. For a false representation. *34 L. & Eq. R. 14*; *Etting v. Bank*, 11 Wheat. 59, 6 L. Ed. 419." *Philadelphia, etc., R. Co. v. Quigley*, 21 How. 202, 210, 211, 16 L. Ed. 73.

"The result of the cases is, that for acts done by the agents of a corporation, either in contractu or in delicto, in the course of its business, and of their employment, the corporation is responsible, as an individual is responsible under similar circumstances. At a very early period, it was decided in Great Britain, as well as in the United States, that actions might be maintained against corporations for torts; and instances may be found, in the judicial annals of both countries, of suits for torts arising from the acts of their agents, of nearly every variety." *Philadelphia, etc., R. Co. v. Quigley*, 21 How. 202, 210, 16 L. Ed. 73. See, also, *Washington Gas Light Co. v. Lansden*, 172 U. S. 534, 544, 43 L. Ed. 543; *Denver, etc., Railway v. Harris*, 122 U. S. 597, 608, 30 L. Ed. 1146; *Railroad Co. v. Howard*, 7 Wall. 392, 413, 19 L. Ed. 117; *Salt Lake City v. Hollister*, 118 U. S. 256, 261, 30 L. Ed. 176. See *Bacon v. Robertson*, 18 How. 480, 485, 15 L. Ed. 499.

The duty of appealing to the courts for redress of wrongs, and refraining from taking the law into their own hands and enforcing by violence their alleged rights, although an appeal to the law, for the determination of the dispute as to their rights would have involved some delay, in a peculiar sense rests upon corporations, which keep in their employment large

bodies of men, whose support depends upon their ready obedience of the orders of their superior officers, and who, being organized for the accomplishment of illegal purposes, may endanger the public peace, as well as the personal safety and the property of others besides those immediately concerned in their movements. *Denver, etc., Railway v. Harris*, 122 U. S. 597, 606, 30 L. Ed. 1146.

It is no answer to an action against a corporation for an injury done by the negligence of its agent or employee, either, that the plaintiff was riding for pleasure, or that he was a stockholder in the corporation, or that he had not paid his toll, or that he was the guest of the defendant, or riding in a carriage borrowed from him, or that the defendant was the friend, benefactor, or brother of the plaintiff. These arguments, arising from the social or domestic relations of life, may, in some cases, successfully appeal to the feelings of the plaintiff, but will usually have little effect where the defendant is a corporation, which is itself incapable of such relations or the reciprocation of such feelings. *Philadelphia, etc., R. Co. v. Derby*, 14 How. 468, 485, 14 L. Ed. 502.

**76. Ultra vires doctrine inapplicable.**—*Merchants' Bank v. State Bank*, 10 Wall. 604, 645, 19 L. Ed. 1008; *Philadelphia, etc., R. Co. v. Quigley*, 21 How. 202, 209, 16 L. Ed. 73; *National Bank v. Graham*, 100 U. S. 699, 702, 25 L. Ed. 750; *Chesapeake, etc., R. Co. v. Howard*, 178 U. S. 153, 160, 44 L. Ed. 1015. See, also, *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 46, 35 L. Ed. 55; *New Jersey Steamboat Co. v. Brockett*, 121 U. S. 637, 645, 30 L. Ed. 1049, where it is said: The corporation is estopped from setting up such a defense. *Daniels v. Tearney*, 102 U. S. 415, 420, 26 L. Ed. 187; *National Bank v. Graham*, 100 U. S. 699, 25 L. Ed. 750.

"If the agents and servants of a corporation commit a wrong in the course of their employment and while in the performance of an agreement of the corporation which is ultra vires, the company is liable for the wrong thus committed, notwithstanding the illegality of the agreement." *Chesapeake, etc., R. Co. v. Howard*, 178 U. S. 153, 160, 44 L. Ed. 1015; *National Bank v. Graham*, 100 U. S. 699, 702, 25 L. Ed. 750; *Salt Lake City v. Hollister*, 118 U. S. 256, 260, 30 L. Ed. 176.

**For nuisance.**—See the title NUISANCE.



and within the scope of the agent's employment in the business of the principal.<sup>77</sup>

But if entirely beyond the scope of the agent's employment in his principal's business, the corporation is not liable. And where the uncontradicted evidence shows this, a verdict should be directed.<sup>78</sup> And other unauthorized acts of the agent cannot be shown to prove his authority in the first instance.<sup>79</sup>

b. *Trespass, or Wanton and Reckless Tort.*—They can commit a trespass, are liable in an action on the case, and subject generally to actions for torts as individuals are.<sup>80</sup> And a corporation is liable, like an individual, for any tort of an agent in the course of his employment, although done wantonly and recklessly and against express orders.<sup>81</sup>

c. *Fraudulent and Malicious Tort.*—By the great weight of modern authority,

**77. Same.**—The corporation can be held responsible for acts which are not strictly within the corporate powers, but which were assumed to be performed for the corporation and by the corporate agents who were competent to employ the corporate powers actually exercised. There need be no written authority under seal nor vote of the corporation constituting the agency or authorizing the act. But in the absence of evidence of this nature there must be evidence of some facts from which the authority of the agent to act upon or in relation to the subject matter involved may be fairly and legitimately inferred by the court or jury. *Washington Gas Light Co. v. Lansden*, 172 U. S. 534, 544, 43 L. Ed. 543; *Salt Lake City v. Hollister*, 118 U. S. 256, 260, 30 L. Ed. 176; *Denver, etc., Railway v. Harris*, 122 U. S. 597, 609, 30 L. Ed. 1146; *Lake Shore, etc., R. v. Prentice*, 147 U. S. 101, 109, 37 L. Ed. 97, and cases cited at p. 110. See, also, *New Jersey Steamboat Co. v. Brockett*, 121 U. S. 637, 30 L. Ed. 1049; *National Bank v. Graham*, 100 U. S. 699, 702, 25 L. Ed. 750; *Philadelphia, etc., R. Co. v. Quigley*, 21 How. 202, 16 L. Ed. 73.

If, in the employment of force and violence, personal injury arises therefrom to the person or persons in peaceable possession, the party using such unnecessary force and violence is liable in damages, without reference to the question of legal title or right of possession. *Denver, etc., Railway v. Harris*, 122 U. S. 597, 607, 30 L. Ed. 1146.

**Injuries to servants and employees.**—See the titles MASTER AND SERVANT; NEGLIGENCE.

**Measure of damages and exemplary damages.**—See the titles DAMAGES; EXEMPLARY DAMAGES.

**Effect of succession.**—See post, "Liability for Torts," XV, B, 3.

**78. Scope of authority exceeded—Directing verdict.**—The court erred in submitting to the jury the question whether the general manager of the corporation in respect to the subject of the letters written by him to the publisher on which he based a libelous publication, had authority to bind the company. The court should have directed a verdict for the corporation on the ground that there was an entire lack of evidence upon which to

base a verdict against it. *Washington Gas Light Co. v. Lansden*, 172 U. S. 534, 548, 43 L. Ed. 543.

Upon an inquiry whether the evidence is sufficient upon which a jury might be permitted to base an inference that the officer had the necessary authority to act for the company in this business, if different inferences might fairly be drawn from the evidence by reasonable men, then the jury should be permitted to choose for themselves, but if only one inference could be drawn from the evidence, and that is a want of authority, then the question is a legal one for the court to decide. *Washington Gas Light Co. v. Lansden*, 172 U. S. 534, 545, 43 L. Ed. 543. And see the titles LIBEL AND SLANDER; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

**79. Evidence.**—The fact that the manager copied his letters into the official copy book kept in the office of the secretary is not material upon this question. It was his own act unknown to the officers of the company, so far as the record shows, and the company cannot be held liable for the original act of the manager by such evidence. It does not tend to show that his action was within the scope of his employment as manager. *Washington Gas Light Co. v. Lansden*, 172 U. S. 534, 547, 43 L. Ed. 543.

**80. Trespass.**—*Salt Lake City v. Hollister*, 118 U. S. 256, 262, 30 L. Ed. 176. See *Weightman v. Corporation of Washington*, 1 Black 39, 50, 17 L. Ed. 52.

**81. For wanton and reckless tort of agent.**—*Lake Shore, etc., R. Co. v. Prentice*, 147 U. S. 101, 109, 37 L. Ed. 97; *Philadelphia, etc., R. Co. v. Derby*, 14 How. 468, 14 L. Ed. 502; *New Jersey Steamboat Co. v. Brockett*, 121 U. S. 637, 30 L. Ed. 1049. "A corporation may even be held liable for a libel, or a malicious prosecution, by its agent within the scope of his employment; and the malice necessary to support either action, if proved in the agent, may be imputed to the corporation." *Lake Shore, etc., R. Co. v. Prentice*, 147 U. S. 101, 109, 37 L. Ed. 97; *Philadelphia, etc., R. Co. v. Quigley*, 21 How. 202, 211, 16 L. Ed. 73; *Salt Lake City v. Hollister*, 118 U. S. 256, 262, 30 L. Ed. 176.

a corporation may be liable, even where a fraudulent or malicious intent in fact is necessary to be proved, the fraud or malice of its authorized agents being imputable to the corporation; as in actions for fraudulent representations, for libel or for malicious prosecution.<sup>82</sup> Thus it may be liable for fraud perpetrated by an agent, although it never sanctioned the contract involving it;<sup>83</sup> or for the publication of a libel.<sup>84</sup>

3. FOR ACTS OF OFFICERS AND AGENTS.—See ante, "Representation by Officers and Agents," XI, A, 3, a; "For Torts," XIII, A, 2. And see the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

4. EFFECT OF ALIENATION OF FRANCHISE OR PROPERTY.—See ante, "To Alienate Franchise or Property Necessary Thereto," XI, C.

**B. Criminal Liability.**—See the title CRIMINAL LAW.

**82. Fraud or malice.**—Salt Lake City v. Hollister, 118 U. S. 256, 262, 30 L. Ed. 176.

"An action may be maintained against a corporation for its malicious or negligent torts, however foreign they may be to the object of its creation or beyond its granted powers. It may be sued for assault and battery, for fraud and deceit, for false imprisonment, for malicious prosecution, for nuisance and for libel." National Bank v. Graham, 100 U. S. 699, 702, 25 L. Ed. 750, citing Philadelphia, etc., R. Co. v. Quigley, 21 How. 202, 209, 16 L. Ed. 73. See, also, Daniels v. Tearney, 102 U. S. 415, 420, 26 L. Ed. 187.

"But, as well observed by Mr. Justice Field, now chief justice of Massachusetts: 'The logical difficulty of imputing the actual malice or fraud of an agent to his principal is perhaps less when the principal is a person than when it is a corporation; still, the foundation of the imputation is not that it is inferred that the principal actually participated in the malice or fraud, but, the act having been done for his benefit by his agent acting within the scope of his employment in his business, it is just that he should be held responsible for it in damages.'" Lake Shore, etc., R. Co. v. Prentice, 147 U. S. 101, 110, 37 L. Ed. 97, quoting Lothrop v. Adams, 133 Mass. 471, 480, 481.

The rule of "respondeat superior," or that the master shall be civilly liable for the tortious acts of his servant, is of universal application, whether the act be one of omission or commission, whether negligent, fraudulent, or deceitful, and applies in full force to corporations. In the course of servant's employment, the corporation is liable; and it makes no difference that the latter did not authorize, or even know of the servant's act or neglect, or even if he disapproved or forbade it, he is equally liable, if the act be done in the course of his servant's employment. Philadelphia, etc., R. Co. v. Derby, 14 How. 468, 486, 14 L. Ed. 502; New Jersey Steamboat Co. v. Brockett, 121 U. S. 637, 645, 30 L. Ed. 1049.

"The president and general manager, or, in his absence, the vice president in his place, actually wielding the whole executive power of the corporation, may well be treated as so far representing the

corporation and identified with it, that any wanton, malicious or oppressive intent of his, in doing wrongful acts in behalf of the corporation to the injury of others, may be treated as the intent of the corporation itself." Lake Shore, etc., Prentice, 147 U. S. 101, 114, 37 L. Ed. 97.

... fraud.—On a suit for damages by a patentee against a British corporation and its "managing agent," sent to this country, in having been fraudulently pretending in a series of negotiations to conclude an agreement with him, the patentee, to make use of his patent—the alleged real purpose having been through drafts of agreements and protracted consultations to keep the patentee from using his invention during a certain season and so to get time to use another invention in which they were themselves largely interested—it is error to charge that if the corporation never gave any authority to the managing agent to assent to the draft of agreement in their behalf and in their name, and never sanctioned it as a corporate act, suit for such a fraud as above indicated could not be maintained. The suit not being on any contract, the corporation might be, notwithstanding, responsible for the fraud. Butler v. Watkins, 13 Wall. 456, 20 L. Ed. 629.

It does not follow, because a corporation never authorized or sanctioned a contract, that they may not be responsible for such a fraud as was alleged in the petition. Where it appears that some evidence was given tending to show that the acts and conduct of the defendants (agent and corporation), were deceitful and fraudulent, designed to mislead, and done for the purpose of keeping the plaintiff's invention out of the market, in order that they might secure heavy sales of the other, in which they were largely interested, if the evidence did establish or tended to establish such deceit and fraud, for such a purpose, and if the plaintiff was injured thereby, as his petition alleged, it was erroneous to charge the jury that the suit could not be maintained. Butler v. Watkins, 13 Wall. 456, 463, 20 L. Ed. 629.

**84. Libel.**—A corporation is responsible in its corporate capacity for acts done by its agents, either ex contractu or in delicto, in the course of its business and



#### XIV. Actions by and against Corporations.

**A. Power to Sue and Be Sued.**—1. IN GENERAL—*a. Capacity and Liability Generally.*—A corporation can sue and be sued,<sup>85</sup> even though it be only a de facto corporation.<sup>86</sup> And a power to sue and be sued includes a power of reference, that being one of the modes of prosecuting a suit to judgment.<sup>87</sup>

**Privity of Holder of Bonds Assumed by Corporation for Association.**—An association having issued bonds, some of which were as collateral security in the hands of its creditors, a corporation adopted a resolution whereby it assumed the payment of the bonds, provided that stock was issued to the corporation by the association to the amount of said assumption of payment by said corporation as the said bonds were paid. A holder of the bonds is not in such privity with the corporation, nor has he such interest in the contract be-

of their employment. It is responsible, therefore, in an action for the publication of a libel. *Philadelphia, etc., R. Co. v. Quigley*, 21 How. 202, 16 L. Ed. 73; *Washington Gas Light Co. v. Lansden*, 172 U. S. 534, 543, 43 L. Ed. 543; *Denver, etc., Railway v. Harris*, 122 U. S. 597, 606, 30 L. Ed. 1146. See the title **LIBEL AND SLANDER**.

**85. Capacity to sue and be sued.**—*Doctor v. Harrington*, 196 U. S. 579, 586, 49 L. Ed. 606; *Alexandria Canal Co. v. Swann*, 5 How. 83, 12 L. Ed. 60; *United States Bank v. Dandridge*, 12 Wheat. 64, 67, 6 L. Ed. 552; *Railroad Co. v. Harris*, 12 Wall. 65, 81, 20 L. Ed. 354; *Louisville, etc., R. Co. v. Letson*, 2 How. 497, 551, 11 L. Ed. 353; *Northern Indiana R. Co. v. Michigan Cent. R. Co.*, 15 How. 233, 247, 14 L. Ed. 674; *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. Ed. 451. See ante, "Corporation as Person or Citizen," II, F.

A corporation may sue and be sued in all things touching its corporate rights and duties, even to suing and being sued by its own members. *Dartmouth College v. Woodward*, 4 Wheat. 518, 666, 4 L. Ed. 629, per Story, J.

In *United States Bank v. Deveaux*, 5 Cranch 62, 3 L. Ed. 38, the court allowed the corporation to use its corporate name for the purposes of suit in the courts of the United States to represent the civil capacities of the persons who composed it. *Bacon v. Robertson*, 18 How. 480, 485, 15 L. Ed. 499.

This power to sue and be sued, if not incident to a corporation, is conferred by every incorporating act, and is not understood to enlarge the jurisdiction of any particular court, but to give a capacity to the corporation to appear, as a corporation, in any court which would, by law, have cognizance of the case, if brought by individuals. *United States Bank v. Deveaux*, 5 Cranch 62, 85, 3 L. Ed. 38.

Quære, whether an action on a policy will lie against the Marine Insurance Company of Alexandria, in their corporate name, under the special provisions of their charter, or whether the declaration must not be against the president alone. *Marine*

*Ins. Co. v. Young*, 1 Cranch 332, 2 L. Ed. 126.

**86. De facto corporations.**—Even a de facto corporation may maintain an action against any one, other than the state, who has contracted with the corporation, or who has done it a wrong. *Baltimore, etc., R. Co. v. Fifth Baptist Church*, 137 U. S. 568, 572, 34 L. Ed. 784, citing *United States Bank v. Dandridge*, 12 Wheat. 64, 72, 6 L. Ed. 552; *Conard v. Atlantic Ins. Co.*, 1 Pet. 386, 450, 7 L. Ed. 189; *Chubb v. Upton*, 95 U. S. 665, 24 L. Ed. 523. See, also, *New Orleans, etc., Co. v. Louisiana*, 180 U. S. 320, 328, 45 L. Ed. 550; *County of Macon v. Shores*, 97 U. S. 272, 277, 24 L. Ed. 889. See ante, "De Facto Corporations," V, A.

**87. Power of reference included.**—*Alexandria Canal Co. v. Swann*, 5 How. 83, 12 L. Ed. 60. See the title **REFERENCE**.

**Injunction.**—See the title **INJUNCTIONS**.

**Suit for rescission, cancellation and reformation.**—See the title **RESCISSION, CANCELLATION AND REFORMATION**.

**Suits by stockholders.**—See the title **STOCK AND STOCKHOLDERS**.

**Actions and suits against stockholders.**—See the title **STOCK AND STOCKHOLDERS**.

**Suits to remove cloud from title to shares of stock.**—See the title **STOCK AND STOCKHOLDERS**.

**Effect of consolidation.**—See post, "In General," XV, A, 3, a.

**Effect of insolvency.**—See post, "Insolvency," XVII, A.

**Effect of dissolution and ouster.**—See post, "As to Suits by and against," XVII, C, 4.

**Jurisdiction of suits and actions generally.**—See the titles **COURTS; JURISDICTION**.

**Judgments and decrees against corporations, and impeachment and reopening thereof.**—See the title **JUDGMENTS AND DECREES**.

**Pleas in abatement.**—See the title **ABATEMENT, REVIVAL AND SURVIVAL**, vol. 1, pp. 30, 33.

**Executions against corporations and corporate franchises and property.**—See the title **EXECUTIONS**.



tween it and the association, as to warrant a suit in his own name to compel the corporation to pay the bonds.<sup>88</sup>

b. *At Law and in Equity.*—**In General.**—In courts of law, an act of incorporation and a corporate name are necessary to enable the representatives of a numerous association to sue and be sued.<sup>89</sup> Quære as to the right of a single creditor of a corporation, in some other form of judicial proceeding than a legal judgment and execution, to compel the sale of the whole property of the corporation, including the franchise, for the payment of his debt.<sup>90</sup> If he has a right to enforce the sale of the whole property, including the franchise, his remedy is in a court of chancery, where the rights and priorities of all the creditors may be considered and protected, and the property of the corporation disposed of to the best advantage, for the benefit of all concerned. A court of common law, from the nature of its jurisdiction and modes of proceeding, is incapable of accomplishing this object.<sup>91</sup>

**Creditors' Suits.**—The creditors of an indebted corporation may have the aid of a court of equity against such corporation and its debtors, to compel the collection of what is due to it, and the payment of the debts it owes.<sup>92</sup>

**Administration by Hand of Court, or Receiver.**—See the title RECEIVERS.

**Suit to Prevent Threatened Breach of Trust.**—The jurisdiction of a

88. **Necessity for privity.**—National Bank v. Grand Lodge, 98 U. S. 123, 25 L. Ed. 75.

"The resolution and acceptance constituted at most only an executory contract inter partes. It was a contract made for the benefit of the association and of the grand lodge—made that the latter might acquire the ownership of stock of the former, and that the former might obtain relief from its liabilities. The holders of the bonds were not parties to it, and there was no privity between them and the lodge. They may have had an interest in the performance of the undertakings of the parties, as they would have in an agreement by which the lodge should undertake to lend money to the association, or contract to buy its stock to enable it to pay its debts; but that is a very different thing from the privity necessary to enable them to enforce the contract by suits in their own names." National Bank v. Grand Lodge, 98 U. S. 123, 124, 25 L. Ed. 75.

89. **At law.**—Marshall v. Baltimore, etc., R. Co., 16 How. 314, 328, 14 L. Ed. 953. See Bank v. Earle, 13 Pet. 519, 10 L. Ed. 274.

90. **Law and equity rules compared.**—Gue v. Tide Water Canal Co., 24 How. 257, 264, 16 L. Ed. 635.

It would be against the principles of equity to allow a single creditor of a corporation to destroy a fund to which other creditors had a right to look for payment, and equally against the principles of equity to permit him to destroy the value of the property of the stockholders, by disavowing from the franchise property which was essential to its useful existence. Gue v. Tide Water Canal Co., 24 How. 257, 263, 16 L. Ed. 635.

**Inspection of books and records.**—A plaintiff in an action at law against a corporation to recover damages for a wrong

or trespass, seeking discovery as to who did the wrong, it being simply a question of evidence, has a right to an inspection of the books and records of the corporation, and has the same power to obtain the facts therefrom in that action as in a suit in equity. United States v. Bitter Root Co., 200 U. S. 451, 473, 50 L. Ed. 550. See the title DISCOVERY.

91. **Same.**—Gue v. Tide Water Canal Co., 24 How. 257, 264, 16 L. Ed. 635. See the title EQUITY.

And equity has jurisdiction to grant relief by enforcing the lien given by a bond upon the corporate property, and as incident to that to make a decree against the corporation for the payment of the debt. Manufacturing Co. v. Bradley, 105 U. S. 175, 182, 26 L. Ed. 1034.

92. **Suits by creditors.**—Ogilvie v. Knox Ins. Co., 2 Black 539, 17 L. Ed. 349. See the title CREDITORS' SUITS.

Where a bill for that purpose is brought by some of the creditors and prosecuted to decree, and afterwards other creditors get judgments, and are permitted by the court to come in as parties, with the averment that there are also other debtors of the corporation, who should be compelled to pay for their benefit, the court cannot make a decree, settling the principle of the distribution, until the assets are collected, and the amounts received from the different classes of debtors ascertained. Ogilvie v. Knox Ins. Co., 2 Black 539, 17 L. Ed. 349. See post, "Insolvency, Winding Up, Dissolution and Forfeiture," XVII. See the titles RECEIVERS; REFERENCE.

**Necessity for issuance of execution.**—See the title CREDITORS' SUITS.

**To enforce stockholders' liability and subscription.**—See the title STOCK AND STOCKHOLDERS.

court of equity to prevent any threatened breach of trust in the misapplication or diversion of the funds of a corporation by illegal payments out of its capital or profits has been frequently sustained.<sup>93</sup>

c. *Assumpsit*.—It was at one time doubted whether assumpsit would lie against a corporation aggregate, since it was said it could only bind itself under seal, but this has been long overruled.<sup>94</sup>

d. *Action for Nuisance*.—As a corporation cannot be said to have life or health or senses, the only ground on which it can obtain either damages or an injunction, against a nuisance, is injury to its property.<sup>95</sup>

e. *Action of Covenant*.—See the title COVENANT, ACTION OF.

2. UNDER SPECIAL STATUTE.—Statutes have been frequently passed directing suits for specific objects to be brought by an attorney general, and regulating the proceedings in them, such as a quo warranto, or a bill in equity against a corporation to test its right to the exercise of its franchises, or to declare them forfeited, or, if insolvent, to wind up its business and distribute its assets; and the validity of such statutes has uniformly been recognized.<sup>96</sup>

93. **To prevent breach of trust.**—*Pollock v. Farmers', etc., Trust Co.*, 157 U. S. 429, 553, 39 L. Ed. 759, citing *Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401; *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827; See *Richmond v. Irons*, 121 U. S. 27, 37, 48, 30 L. Ed. 864, where it is said that a court of equity would be entitled, on general equity principles, to entertain a bill by one or more creditors, for the benefit of all, against a banking corporation, its officers, managers and all participating in its voluntary liquidation, to prevent and renders any maladministration or fraud against creditors, contemplated or executed. And that in the liquidation, those entrusted with its management are trustees, first for creditors, bound to collect the assets and distribute them equally among the creditors.

94. **Assumpsit.**—*Weightman v. Corporation of Washington*, 1 Black 39, 50, 17 L. Ed. 52. See the title ASSUMPSIT, vol. 2, pp. 637, 638. See, contra, *Breckbill v. Lancaster Turnpike Co.*, 3 Dall. 496, 499, 1 L. Ed. 694. See, also, ante, "Corporate Seal and Deed," II, G."

95. **For nuisance.**—*Northern Pac. R. Co. v. Whalen*, 149 U. S. 157, 163, 37 L. Ed. 686. See the title NUISANCE.

96. *United States v. Union Pac. R. Co.* 98 U. S. 569, 25 L. Ed. 143.

"The statute books of the states are full of acts directing the law officers to proceed against corporations, such as banks, insurance companies, and others, in order to have a decree declaring their charters forfeited. Special statutes are also common, ordering suits against such corporations when they have become insolvent, to wind up their business affairs and to distribute their assets, and prescribing with minuteness the course of procedure which shall be followed and the court in which the suit shall be brought." *United States v. Union Pac. R. Co.*, 98 U. S. 569, 605, 25 L. Ed. 143. See the title CONSTITUTIONAL LAW, ante, p. 1.

Such a bill filed by the United States attorney general in the name of the United States under act of congress of

March 3, 1873 (17 Stat. 509), against the Union Pacific Railroad and certain of its stockholders, having, on demurrer, been dismissed below, its sufficiency must be determined here by the provisions of said act; for it cannot be supposed that congress, in laying down in specific terms the subject matter of the suit, and granting enlarged and peculiar powers to the court, intended that any other matters should be tried in the case. This is confirmed by the fact that the same act provided other remedies for other subjects of controversy with the Union Pacific Railroad Company, and an effectual means of investigating all its affairs. *United States v. Union Pac. R. Co.*, 98 U. S. 569, 25 L. Ed. 143.

This act was valid legislation, and was intended, not to change the substantial rights of the parties to the suits, but to provide a specific mode of procedure, which, by removing certain restrictions on the jurisdiction, process, and pleading, would give a larger scope to the action of the court, and a more economical and efficient remedy than before existed. *United States v. Union Pac. R. Co.*, 98 U. S. 569, 25 L. Ed. 143.

So with the provisions authorizing parties and subjects of controversy to be united which would otherwise render a bill multifarious, being proper regulations of practice and procedure. *United States v. Union Pac. R. Co.*, 98 U. S. 569, 25 L. Ed. 143. See post, "Jurisdiction and Procedure to Ascertain and Declare," XVII, B, 3.

This interference by the attorney general with corporations on the ground of such a trust in the government is limited to two classes, to neither of which the present case belongs: 1. That of religious, charitable, municipal, or other corporations whose functions are solely public, and whose managers have destroyed or misappropriated the fund, or otherwise abused their functions; 2. Where other corporations exercise powers beyond those to which they are limited by the law of their organization. *United States*

**This bill exhibits no right on the part of the United States to relief** founded on the contract with them contained in the charter and amendment. The company has completed its road, keeps it in running order, and carries all that is required by the government. To the latter nothing is due, and it has the security which by law it provided. Nor does the bill show anything which authorizes the United States as the depository of a trust, public or private, to sustain this suit.<sup>97</sup>

**3. STATE AS STOCKHOLDER.**—The fact that a state is a stockholder, or even the sole stockholder, in a private corporation, does not affect the jurisdiction of a court of an action against the corporation, where such court would otherwise have jurisdiction, unless the state is necessarily a party defendant, although its interest may be affected by the decision.<sup>98</sup>

**4. CORPORATIONS SOLE.**—In the case of a corporation sole, it is held by the authorities that action will lie by and against the actual incumbents of such corporations for causes of action accruing under their predecessors in office.<sup>99</sup>

**5. FEDERAL CORPORATIONS.**—The fact that a corporation was organized under and by virtue of acts of congress, does not exempt it from being sued in the state courts.<sup>1</sup>

**B. Appearance for Corporation.**—See the title **APPEARANCES**, vol. 2, pp. 434, 435, 439, 446. For the purposes of a suit or controversy, the persons rep-

*v. Union Pac. R. Co.*, 98 U. S. 569, 25 L. Ed. 143.

That act authorized a decree in favor of that company for money due for capital stock, for money or property received from it on fraudulent contracts, or which ought in equity to belong to it; and also a decree in favor of it or of the United States for money, bonds, or lands wrongfully received from the latter, which ought in equity to be paid or accounted for. Except in favor of the company or of the United States, there can, under this act, therefore, be no recovery, and none but such as was sanctioned by the principles of equity before it was passed. *United States v. Union Pac. R. Co.*, 98 U. S. 569, 25 L. Ed. 143.

**Stockholders not parties.**—Though the bill sets up many fraudulent transactions on the part of the directors of the company and some of its stockholders, for which the other stockholders would be entitled to relief, the latter are not parties, and neither the frame of the bill nor the provisions of the act authorize any relief or recovery in their favor. *United States v. Union Pac. R. Co.*, 98 U. S. 569, 25 L. Ed. 143.

**Participants in fraud.**—"As to the directors and stockholders who took part in these fraudulent contracts, they are participes criminis, and can have no relief. This class probably included nine-tenths in value of the shareholders. It is against all the principles of jurisprudence, whether at law or in equity, to permit them to litigate this fraud among themselves. If the innocent stockholders are not parties here, we have already seen that, with the power of the directors over the money recovered, they would get no relief by the suit." *United States v. Union Pac. R. Co.*, 98 U. S. 569, 612, 25 L. Ed. 143.

**Cross bill, and right of corporation to relief.**—See the title **CROSS BILLS**.

**97. Right of United States.**—*United States v. Union Pac. R. Co.*, 98 U. S. 569, 25 L. Ed. 143.

The United States sustains two distinct relations to the company; namely, that of the government creating it and exercising legislative and visitatorial powers; and that growing out of the contract contained in the charter and its amendment. *United States v. Union Pac. R. Co.*, 98 U. S. 569, 25 L. Ed. 143; *Sinking-Fund Cases*, 99 U. S. 700, 724, 25 L. Ed. 496.

While the court does not say that there is no trust in regard to the duties of the company which the United States can enforce in equity, it is of opinion that none such is shown in this bill, and that no case is made for any relief authorized by the act under which it was brought. *United States v. Union Pac. R. Co.*, 98 U. S. 569, 25 L. Ed. 143. See the title **UNITED STATES**.

**Discretion of directors as to bringing suit.**—See the titles **OFFICERS AND AGENTS OF PRIVATE CORPORATIONS; STOCK AND STOCKHOLDERS**.

**98. Where state is stockholder.**—*Louisville, etc., R. Co. v. Letson*, 2 How. 497, 11 L. Ed. 353; *Bank v. Wister*, 2 Pet. 318, 7 L. Ed. 437; *Bank v. Planters' Bank*, 9 Wheat. 904, 6 L. Ed. 244; *Briscoe v. Bank*, 11 Pet. 256, 324, 9 L. Ed. 709; *Curran v. State*, 15 How. 304, 309, 14 L. Ed. 705. See the titles **COURTS; JURISDICTION; STATES**.

**99. Corporation sole.**—*McNulta v. Lochridge*, 141 U. S. 327, 331, 35 L. Ed. 796.

**1. Federal corporation.**—*Texas, etc., R. Co. v. Johnson*, 151 U. S. 81, 98, 38 L. Ed. 81.



resented by a corporate name can appear only by attorney, appointed by its constitutional organs. The individual or personal appearance of each and every corporator would not be a compliance with the exigency of the writ of summons or distringas, though, nominally, they are not really parties to the suit or controversy.<sup>2</sup>

**C. Parties.**—See the title PARTIES.

**Corporation.**—Where a corporation is not made a party to the suit, its rights cannot be affected in any way by the decision of the court.<sup>3</sup> If an account of profits of the use of patented inventions by a corporation, under transfers to it, is wanted, and an injunction against the further use of the patented inventions under the transfers to the corporation, then the suit should have been against the corporation in its corporate capacity, and not against a part only of its stockholders and directors individually.<sup>4</sup> And where the contract on which action is brought was made for and in behalf of a corporation, the corporation must be sued and not the individual who acted for it. If the individual is sued and the evidence shows such a contract, the defendant is entitled to a verdict.<sup>5</sup>

**Corporation as Party to Suit against Stockholders.**—See the title STOCK AND STOCKHOLDERS.

**D. Averment and Proof of Incorporation.**—See, generally, the titles PLEADING; PRESUMPTIONS AND BURDEN OF PROOF.

1. **NECESSITY AND SUFFICIENCY OF AVERMENT.**—An averment that an association of persons, sued under a corporate name, is a corporation duly incorporated, is necessary to maintain such a suit.<sup>6</sup> The allegation that a company

2. *Marshall v. Baltimore, etc., R. Co.*, 16 How. 314, 327, 14 L. Ed. 953.

3. **Corporation as necessary party.**—*Iron Cliffs Co. v. Negaunee Iron Co.*, 197 U. S. 463, 472, 49 L. Ed. 836; *Finley v. United States Bank*, 11 Wheat. 304, 307, 6 L. Ed. 480; *New Orleans Waterworks Co. v. New Orleans*, 164 U. S. 471, 480, 41 L. Ed. 518. See *Swan Land Co. v. Frank*, 148 U. S. 603, 610, 37 L. Ed. 577.

Where it was charged in the bill that its corporate existence had ended, and, so far from making it a party, the complainants refrained from recognizing it as an existing corporation, and the relief sought was against the corporations and persons named and made defendants in their own right and not as agents of the corporation, but who were alleged and found to be using the name of that corporation as a cover for wrongful acts of their own, the mere fact that the defendants sought to justify their acts as agents of the company would not warrant the court in awarding a decree against that company or its agents, neither being made a party to the record. *Iron Cliffs Co. v. Negaunee Iron Co.*, 197 U. S. 463, 472, 49 L. Ed. 836.

4. **Same.**—*Ambler v. Choteau*, 107 U. S. 586, 590, 27 L. Ed. 322. See the title PATENTS.

5. Where an action was brought against defendants upon a contract as copartners, and they allege as a defense that the contract was with a corporation, and the court, in its general charge, distinctly instructed the jury that, if M., as president of the corporation, and B. as its secretary, made the contract in the name of "The McGowan Pump Company," and informed the agent of the plaintiff at the time that

said company was a corporation and was contracting in that capacity, the defendants were entitled to a verdict, and again, the court instructed the jury that if, notwithstanding any want of authority in M. and B. to contract for the corporation, they assumed, in their corporate capacity, to contract with the plaintiff, and to notify the plaintiff's agent, that they so assumed to act, or he otherwise knew it, their verdict must be for the defendants, irrespective of any want of authority; and again in its general charge, the court instructed the jury as follows: "If the jury find that, on the 23d of June, 1881, there was in existence a corporation called 'The McGowan Pump Company,' qualified to do business, when the contract of that date was signed in that name, and that the defendants were authorized to act for it, and informed plaintiff's agent that it was that corporation making the contract, the verdict must be for the defendants, because the corporation is not here sued;" held that this disposition of the question of partnership by the court seems to have been proper, and to have been as favorable to the defendants as they were entitled to ask. *McGowan v. American Tan Bark Co.*, 121 U. S. 575, 596, 30 L. Ed. 1027.

6. **Necessity for averment of incorporation.**—*Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. Ed. 451; *Piquignot v. Pennsylvania R. Co.*, 16 How. 104, 14 L. Ed. 863. See *Chapman v. Barny*, 129 U. S. 677, 32 L. Ed. 800; *Muller v. Dows*, 94 U. S. 444, 24 L. Ed. 207; *Oregon Short Line, etc., R. Co. v. Skottowe*, 162 U. S. 490, 40 L. Ed. 1048, followed in *Oregon Short Line, etc., R. Co. v. Mullan*, 162 U. S. 498, 40 L. Ed. 1051; *Oregon Short Line, etc.,*

was organized under the laws of New York is not an allegation that it is a corporation. In fact, the allegation is, that the company is not a corporation, but a joint-stock company—that is, a mere partnership.<sup>7</sup> But to justify a recovery for injury to a passenger by a carrier, it would not be necessary for the plaintiff to allege or to prove the extent and nature of the defendant's corporate powers.<sup>8</sup>

2. **BURDEN OF PROOF OF CORPORATE EXISTENCE AND CAPACITY.**—Corporate capacity must be shown before any corporate act or instrument can be given in evidence.<sup>9</sup> Where a suit is brought by the corporation to enforce its rights, if the fact of its legal existence is put in controversy upon the issue, the corporation may be called upon to establish its existence.<sup>10</sup> In the case of a public prosecution for a crime, where the corporation is no party, and is merely collaterally introduced as being intended to be prejudiced by the commission of the crime, under such circumstances nothing more is necessary for the government to prove than that the company was de facto organized, and acting as an insurance company and corporation.<sup>11</sup>

3. **SUFFICIENCY OF PROOF OF CORPORATE EXISTENCE AND CAPACITY.**—It is necessary to establish the corporate capacity of the corporation before any corporate act or instrument could be given in evidence, but the acts of the legislature of the state on that subject, from the statute book published by authority, are competent evidence thereof, and this being limited in its duration, so is an exemplification of a later act, protracting the existence of the corporation at and beyond the time in question.<sup>12</sup> Though it does not appear that a copy of the certificate

R. Co. v. Conlin, 162 U. S. 498, 40 L. Ed. 1051; Great Southern Fire Proof Hotel Co. v. Jones, 177 U. S. 449, 454, 44 L. Ed. 842.

But where the plaintiff's replication alleges that the defendants are a corporation, created under the laws of a named state, having its principal place of business in that state, it is sufficient, where these allegations are confessed by demurrer. Lafayette Ins. Co. v. French, 18 How. 404, 15 L. Ed. 451. See Railroad Co. v. Harris, 12 Wall. 65, 86, 20 L. Ed. 354; Muller v. Dows, 94 U. S. 444, 24 L. Ed. 207.

7. **Sufficiency.**—Chapman v. Barney, 129 U. S. 677, 682, 32 L. Ed. 800.

To confer jurisdiction on supreme court.—See the title COURTS.

8. **Same.**—Oregon Short Line, etc., R. Co. v. Skottowe, 162 U. S. 490, 494, 40 L. Ed. 1048, followed in Oregon Short Line, etc., R. Co. v. Mullan, 162 U. S. 498, 40 L. Ed. 1051; Oregon Short Line, etc., R. Co. v. Conlin, 162 U. S. 498, 40 L. Ed. 1051.

Where the plaintiff alleged that the defendant was "a corporation duly organized, existing and doing business in the state of Oregon," there would not have been a fatal failure in the proof if no evidence was added to show the nature and character of the plaintiff's charter. As already said, those allegations were sufficiently sustained by evidence of the defendant's actual operation and management of the railroad. Whether the defendant was a corporation de jure or de facto was, in a case like the present, of no importance. If the plaintiff had actually undertaken to show the true character and extent of the defendant's corporate powers as a lawfully organized company and had failed to show such an organiza-

tion, such failure would not have defeated her recovery if her other allegations had been made good. Oregon Short Line, etc., R. Co. v. Skottowe, 162 U. S. 490, 497, 40 L. Ed. 1048, followed in Oregon Short Line, etc., R. Co. v. Mullan, 162 U. S. 498, 40 L. Ed. 1051; Oregon Short Line, etc., R. Co. v. Conlin, 162 U. S. 498, 40 L. Ed. 1051.

**Averment of citizenship.**—See the title COURTS.

9. **Burden of proof.**—United States v. Johns, 4 Dall. 412, 415, 1 L. Ed. 888.

10. United States v. Amedy, 11 Wheat. 392, 407, 6 L. Ed. 502; United States v. Ins. Companies, 22 Wall. 99, 22 L. Ed. 816.

11. "In cases of the murder of officers, it is not necessary to prove that they are officers, by producing their commissions. It is sufficient to show that they act de facto as such." United States v. Amedy, 11 Wheat. 392, 409, 6 L. Ed. 502. See the titles CRIMINAL LAW; HOMICIDE.

**General issue as admission of capacity to sue.**—See post, "General Issue," XIV, E, 2.

As dependent on denial of incorporation and sufficiency thereof, see post, "Plea, Answer and Defenses," XIV, E.

12. **Sufficiency of proof.**—United States v. Johns, 4 Dall. 412, 415, 1 L. Ed. 888.

The exemplification, however, was under the great seal of the state, but was not attested by the governor, or any other principal officer of the state. The objection on that ground was overruled. United States v. Johns, 4 Dall. 412, 415, 1 L. Ed. 888. See the titles FOREIGN LAWS; RECORDS; STATUTES.

"But the certificate of incorporation, as originally drawn up, taken in connection with the other evidence now introduced, and especially the record of the former



of incorporation in a state was filed with the secretary of the territory where it was doing business, but no objection to the introduction of the county records having been taken on that ground, it will be presumed that such filing existed, and, if required, it could have been readily shown. There was no error, therefore, in the ruling of the court admitting the records of the county showing the incorporation of the plaintiff in the state of its origin.<sup>13</sup>

**E. Plea, Answer and Defenses.**—See, generally, the title PLEADING.

1. **NUL TIEL CORPORATION.**—Nul tiel corporation, or that the plaintiff is not and never was a corporation, is a good plea in bar, because it goes to show that the plaintiff can never maintain any action whatever, and need not be pleaded in abatement necessarily.<sup>14</sup> Where the defense was in terms and effect a denial that the plaintiff at or since the time of the commencement of this action was or is now a corporation, this was not merely misnomer, properly pleadable in abatement only; it was, in substance, nul tiel corporation, which is a good plea in bar, although it would have been waived by the first answer to the merits of the case, but for the leave, expressly granted by the court, to plead it after-

action in which this plaintiff as a corporation recovered judgment against this defendant without any objection being taken to the plaintiff's capacity to sue, is clearly competent and sufficient, as between these parties, to prove that the plaintiff had in good faith attempted to legally organize as a corporation, and had long acted as such, and was at least a corporation de facto, which is all that is necessary to enable it to maintain an action against any one, other than the state, who has contracted with the corporation, or who has done it a wrong. *United States Bank v. Dandridge*, 12 Wheat. 64, 72, 6 L. Ed. 552; *Conard v. Atlantic Ins. Co.*, 1 Pet. 386, 450, 7 L. Ed. 189; *Chubb v. Upton*, 95 U. S. 665, 24 L. Ed. 523." *Baltimore, etc., R. Co. v. Fifth Baptist Church*, 137 U. S. 568, 571, 572, 34 L. Ed. 784.

"It may be that, as held by the court below in 4 Mackey 43, at a former stage of one of these cases, the original certificate of incorporation, not stating the date of election or the term of office of the trustees, nor supported by affidavit, as required by statute, was not sufficient of itself to prove the plaintiff's existence as a corporation, either de jure or de facto; and that the adding of an affidavit to the certificate, and recording it anew, since the commencement of these actions, could not avail the plaintiff." *Baltimore, etc., R. Co. v. Fifth Baptist Church*, 137 U. S. 568, 571, 34 L. Ed. 784.

13. Where the law of a territory in force at the time with reference to foreign corporations provided that, before they proceeded to do business under their charter or certificate of incorporation in the territory, they should "file for record with the secretary of the territory, and also with the recorder of the county in which they are carrying on business, the charter or certificate of incorporation, duly authenticated, or a copy of said charter or certificate of incorporation," and the law does not specify in what way the copy filed shall be authenticated, in the absence of any provision on that sub-

ject, the certificate of the official custodian of the original in the state of its incorporation, that it is a correct copy under the seal of his office, must be deemed sufficient. *Hammer v. Garfield Min., etc., Co.*, 130 U. S. 291, 297, 32 L. Ed. 964.

Where objection was made to the sufficiency of the proof of the incorporation of the American Bell Telephone Company, the complainant in a bill in equity, and the proof was, 1, a special act of the general court of Massachusetts, entitled "An act to incorporate the American Bell Telephone Company," which authorized certain persons therein named and their associates to organize themselves under the provisions of c. 224 of the acts of 1870, and the acts in amendment thereof, for telephone purposes; and 2, a certificate of the secretary of the commonwealth on the form required by § 11 of c. 224, that certain persons, among whom were the most of those mentioned in the special act, were legally organized and established as an existing corporation under the name of the American Bell Telephone Company, which section made such a certificate "conclusive evidence of the existence of a corporation" organized under that chapter; held, that the authority granted by the special act to the persons named to organize as a corporation in this way, gave them the authority to select a corporate name, and also made the statutory certificate conclusive evidence of their corporate existence. *Telephone Cases*, 126 U. S. 1, 2, 571, 31 L. Ed. 863.

**Proof of consolidation.**—See post, "Remedies and Rights of Action," XV, A, 6.

14. **As plea in bar.**—*Baltimore, etc., R. Co. v. Fifth Baptist Church*, 137 U. S. 568, 572, 34 L. Ed. 784; *Michigan Ins. Bank v. Eldred*, 143 U. S. 293, 300, 36 L. Ed. 162. See, however, *Conard v. Atlantic Ins. Co.*, 1 Pet. 386, 450, 7 L. Ed. 189; *Society for Propagation of the Gospel v. Pawlet*, 4 Pet. 480, 7 L. Ed. 927. See post, "General Issue," XIV, E, 2.



wards.<sup>15</sup> And an objection that a corporation was not organized within the time limited by the charter, is, in effect, a plea of nul tiel corporation.<sup>16</sup>

2. **GENERAL ISSUE.**—It is well settled, that, in a suit by a corporation, a plea of the general issue admits the competency of the plaintiff to sue as such.<sup>17</sup> On a trial upon the merits, it is too late to take exception to the corporate capacity of the plaintiffs to sue; this should have been done by a plea in abatement, before the trial; and the omission to do this is a waiver of the objection.<sup>18</sup>

3. **ANSWER DENYING CORPORATE EXISTENCE.**—The denial in the answer of knowledge or information sufficient to form a belief on the corporate capacity of plaintiff put in issue the plaintiff's corporate character, within the meaning of

**15. Terms and substance.**—Michigan Ins. Bank *v. Eldred*, 143 U. S. 293, 300, 36 L. Ed. 162, citing Baltimore, etc., R. Co. *v. Fifth Baptist Church*, 137 U. S. 568, 572, 34 L. Ed. 784; *Society for Propagation of the Gospel v. Pawlet*, 4 Pet. 480, 501, 7 L. Ed. 927.

**16. Same.**—County of Macon *v. Shores*, 97 U. S. 272, 277, 24 L. Ed. 889. (But this was not a suit by or against the corporation itself.)

"In *Kayser v. Trustees of Bremen* (16 Mo. 88), the supreme court of the state said: 'It cannot be shown in defense to a suit of a corporation that the charter was obtained by fraud; neither can it be shown that the charter has been forfeited by misuser or nonuser. Advantage can only be taken of such forfeiture by process on behalf of the state, instituted directly against the corporation for the purpose of avoiding its charter; and individuals cannot avail themselves of it in collateral suits until it be judicially declared.' See, also, *Smith v. County of Clarke* (54 Mo. 58), which is to the same effect. This case being a Missouri case, these authorities are conclusive. *Olcott v. Bynum*, 17 Wall. 44, 21 L. Ed. 570." County of Macon *v. Shores*, 97 U. S. 272, 277, 24 L. Ed. 889. See post, "Jurisdiction and Procedure to Ascertain and Declare," XVII, B, 3.

It was said in *Casey v. Galli*, 94 U. S. 673, 678, 24 L. Ed. 168, that pleas denying the legal existence of the corporation, because not legally organized, in a suit by the receiver of the corporation, were properly framed in abatement and not in bar. A simple plea of nul tiel corporation had been plead in abatement also, but abandoned at the argument. See, generally, post, "As to Suits by and against," XVII, C, 4. And see the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, pp. 30, 40.

**General issue as admission of capacity to sue.**—See post, "General Issue," XIV, E, 2.

**Plea of incapacity of bank.**—See the title BANKS AND BANKING, vol. 3, p. 177.

**17. General issue.**—*Society for Propagation of the Gospel v. Pawlet*, 4 Pet. 480, 7 L. Ed. 927; *Pullman v. Upton*, 96 U. S. 328, 329, 24 L. Ed. 818. See *County of Macon v. Shores*, 97 U. S. 272, 277, 24 L. Ed. 889.

Where the general issue is pleaded, it admits the competency of the plaintiffs to sue in the corporate capacity in which they have sued. If the defendants meant to have insisted upon the want of a corporate capacity in the plaintiffs to sue, it should have been insisted upon by a special plea in abatement or bar. Pleading to the merits has been held by this court to be an admission of the capacity of the plaintiffs to sue. *Society for Propagation of the Gospel v. Pawlet*, 4 Pet. 480, 501, 7 L. Ed. 927, citing *Conard v. Atlantic Ins. Co.*, 1 Pet. 386, 450, 7 L. Ed. 189.

"By pleading to the merits, the defendant necessarily admitted the capacity of the plaintiffs to sue. If he intended to take the exception, it should have been done by a plea in abatement, and his omission so to do was a waiver of this objection. But, independently of this special ground, the very agreement in the case upon which the trial was had, as well as the admissions of the bond given to the United States, as security to refund the amount, if judgment should pass against the plaintiffs, was certainly prima facie evidence of an admission on the part of the United States, of the corporate capacity of the plaintiffs, and to throw the burden of proof on the other side." *Conard v. Atlantic Ins. Co.*, 1 Pet. 386, 450, 7 L. Ed. 189.

**18. Same.**—*Conrad v. Atlantic Ins. Co.*, 1 Pet. 386, 7 L. Ed. 189.

"Notwithstanding the old rule that a corporation suing must prove its corporate existence, it has been many times decided that a plea of the general issue admits its capacity to sue, as does going to trial upon the merits. And such is the established practice in the court of claims." *United States v. Ins. Companies*, 22 Wall. 99, 100, 22 L. Ed. 816.

It may well be doubted whether, under the pleadings in the court below, the appellants have any right to raise the objection here that the companies plaintiff have now no legal existence, because incorporated after the attempted secession of Georgia from the Union, and after the close of the war, where there was no plea that traversed directly the corporate existence of the plaintiffs. A general denial of the averments of the petition was hardly sufficient. *United States v. Ins. Companies*, 22 Wall. 99, 100, 22 L. Ed. 816.

the rule, no longer to be questioned, that for purposes of suing and of being sued in the courts of the United States the members of a corporation are to be deemed citizens of the state by whose laws it was created.<sup>19</sup> And while the denial must be specific and not general, it may be made upon information and belief.<sup>20</sup>

4. **MISNOMER.**—While nul tiel corporation, or that the plaintiff is not and never was a corporation, is a good plea in bar, because it goes to show that the plaintiff can never maintain any action whatever; yet misnomer, or mere mistake in the name of a corporation plaintiff, which does not affect its capacity to sue in the right name, is pleadable in abatement only, and is waived by pleading to the merits.<sup>21</sup>

5. **USURY.**—A corporation cannot plead usury to a bond payable in New York. Statute law there prevents it.<sup>22</sup>

**F. Verification of Pleading.**—See ante, "Plea, Answer and Defenses," XIV, E. See the title **PLEADING**.

**G. Venue of Action.**—See the title **VENUE**.

**H. Service of Process.**—See the title **SUMMONS AND PROCESS**.

**I. Removal of Causes by Corporation or Stockholder.**—See the title **REMOVAL OF CAUSES**.

**J. Limitation of Actions.**—See the title **LIMITATION OF ACTIONS AND ADVERSE POSSESSION**.

**K. Averment of Sealing.**—See ante, "Form of Seal and Recognition Thereof," II, G, 2, b.

## **XV. Consolidation and Succession.**

See ante, "To Alienate Franchise, or Property Necessary Thereof," XI, C.

**A. Consolidation.**—On the subjects of consolidation and succession of corporations and the effect thereof, see the titles **MORTGAGES AND DEEDS OF TRUST**, and **RAILROADS**, as most of the cases involving these points are railroad corporation cases and properly belong there.<sup>23</sup>

19. **Denial in answer.**—*Wells Co. v. Gastonia Cotton Mfg. Co.*, 198 U. S. 177, 182, 49 L. Ed. 1003. See the title **COURTS**.

20. **On information and belief.**—Under § 4199 of the Code of Wisconsin providing "in actions by or against any corporation it shall not be necessary to prove on the trial the existence of such corporation, unless the defendant, by his answer duly verified, shall have specifically denied that the plaintiff or defendant, as the case may be, is a corporation," a denial of the fact that the plaintiff is a corporation must be specific and not general, and a denial of any knowledge or information thereof sufficient to form a belief is not enough. But an express denial that the plaintiff is a corporation is not the less specific, because made upon information and belief; and such a denial puts in issue the existence of the corporation. *Michigan Ins. Bank v. Eldred*, 143 U. S. 293, 299, 36 L. Ed. 162.

21. **Misnomer.**—*Baltimore, etc., R. Co. v. Fifth Baptist Church*, 137 U. S. 568, 572, 34 L. Ed. 784; *Society for Propagation of the Gospel v. Pawlet*, 4 Pet. 480, 501, 7 L. Ed. 927. See, also, *Michigan Ins. Bank v. Eldred*, 143 U. S. 293, 36 L. Ed. 162. And see the title **ABATEMENT, REVIVAL AND SURVIVAL**, vol. 1, p. 12.

22. **Plea of usury.**—*Junction R. Co. v.*

*Bank*, 12 Wall. 226, 227, 20 L. Ed. 385. See the title **USURY**.

23. **Consolidation under concurrent legislation of different states.**—See ante, "Incorporation in More than One State," II, H, 1, a.

**Consolidation under federal law.**—See ante, "Power of Congress," IV, A, 1, d.

**Consolidation as waiver of immunity from amendment or repeal.**—See ante, "Acceptance of New Legislation as Surrender of Exemption," VIII, C, 4, d.

**Charge for filing articles of consolidation as tax on interstate commerce.**—See the title **INTERSTATE AND FOREIGN COMMERCE**.

**Certified copy of agreement as evidence.**—See the title **DOCUMENTARY EVIDENCE**. See, generally, the title **EVIDENCE**.

**Citizenship of consolidated corporations.**—See ante, "Dual Incorporation," II, H, 1. See the title **COURTS**.

**Recital in agreement as estoppel against corporation and in favor of stockholder.**—See the title **ESTOPPEL**.

**Effect on right to county and municipal aid bonds.**—See the title **MUNICIPAL, COUNTY, STATE AND FEDERAL AID**.

**Surrender of stock to obtain consolidation as sale or loan to corporation.**—See

1. **RIGHT TO CONSOLIDATE AND VALIDITY OF CONSOLIDATION**<sup>24</sup>—*a. Legislative Authority and Necessity Therefor.*—A new corporation may be as readily created by the union of two or more corporations as by the union of individuals, and its powers and privileges designated by reference to the charters of other companies as well as by special enumeration.<sup>25</sup> But the legislature must authorize it, and its power to do so is unquestionable where no contract right is impaired.<sup>26</sup>

**Consolidation against Public Policy.**—The principle that the legislature may regulate the operations of a corporation, under the police power, without impairing the obligation of its charter as a contract, applies to the power of the legislature to forbid the consolidation of parallel or competing lines of railroad, whenever, in its opinion, such consolidation is calculated to affect seriously the public interests.<sup>27</sup>

*b. Consent of Old Corporations.*—Where the legislature had provided for the consolidation, it could not occur without the consent of the original independent companies. The consolidated company had then no existence, and could have none while the original corporations subsisted. All, the old and the new, could not co-exist. It was a condition precedent to the existence of the new corporation that the old should first surrender their vitality and submit to dissolution. That being done, *eo instante*, the new corporation came into existence. But the franchise alone to be a corporation would have been unavailing for the purposes in view, and other powers must be given.<sup>28</sup>

*c. Consent of Stockholders.*—There are cases where it has been held that a consolidation cannot be consummated against the consent of a stockholder in one of the companies unless his stock is purchased. This, however, may be doubted as applicable to all cases; but, if universally true, it leaves open the question, whether the consolidation is the creation of a new company.<sup>29</sup>

the title STOCK AND STOCKHOLDERS.

**Liability on notes given under illegal consolidation.**—See ante, "Void Where Want of Power Absolute," XII, B, 1.

**24. Illegal combination and consolidations.**—See the titles MONOPOLIES AND CORPORATE TRUSTS; RESTRAINT OF TRADE.

**Imposition of conditions on foreign corporations.**—See the title FOREIGN CORPORATIONS.

**Existence of corporation for purposes of consolidation.**—See ante, "Beginning of Corporate Existence," IV, C, 1.

**25. Power.**—*Railroad Co. v. Maine*, 96 U. S. 499, 24 L. Ed. 836. See *Chesapeake, etc., R. Co. v. Miller*, 114 U. S. 176, 188, 29 L. Ed. 121.

**26. Same.**—*Clearwater v. Meredith*, 1 Wall. 25, 39, 17 L. Ed. 604; *Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677, 703, 40 L. Ed. 849, and cases cited; *Branch v. Jessup*, 106 U. S. 468, 478, 27 L. Ed. 279. See ante, "Power to Create," IV, A.

The power of the legislature to confer authority to consolidate two or more private corporations cannot be questioned, and without the authority, railroad corporations organized separately, could not merge and consolidate their interests. But, in conferring the authority, the legislature never intended to compel a dissenting stockholder to transfer his interest, because a majority of the stockholders consented to the consolidation. Even if the legislature had manifested an

obvious purpose to do so, the act would have been illegal, for it would have impaired the obligation of a contract. *Clearwater v. Meredith*, 1 Wall. 25, 39, 17 L. Ed. 604. See the title STOCK AND STOCKHOLDERS.

**27.** *Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677, 697, 40 L. Ed. 849. See the title RAILROADS for treatment of this point.

**28. Consent of old companies.**—*Shields v. Ohio*, 95 U. S. 319, 322, 24 L. Ed. 357.

**29. Consent of old stockholders.**—*Central R., etc., Co. v. Georgia*, 92 U. S. 663, 671, 23 L. Ed. 757. See *Clearwater v. Meredith*, 1 Wall. 25, 40, 17 L. Ed. 604, where it was said: "And the act of consolidation was not void because the state assented to it, but a nonconsenting stockholder was discharged. C. (a consenting stockholder) could have prevented this consolidation had he chosen to do so; instead of that he gave his assent to it and merged his own stock in the new adventure." *Clearwater v. Meredith*, 1 Wall. 25, 40, 17 L. Ed. 604. And see *Keokuk, etc., R. Co. v. Missouri*, 152 U. S. 301, 310, 38 L. Ed. 450.

If a majority of the stockholders of the corporation of which he was a member had undertaken to transfer his interest against his wish, they would have been enjoined. There was no power to force him to join the new corporation, and to receive stock in it on the surrender of his stock in the old company. *Clearwater v.*



d. *Acquiescence and Estoppel*.—Persons acquiescing in the consolidation of corporations, by accepting stock in the consolidated corporation, and their vendees, may be estopped from questioning the validity of the transaction, particularly after the lapse of several years.<sup>30</sup>

e. *Consolidation of Colleges*.—Where the act of the legislature uniting two colleges did not contemplate that either college as an institution of learning should cease to exist, or that the funds of either should be devoted to any other use than that described in the original charters, but all that was contemplated by the act in question was that the two institutions should be united in one corporation, as requested by the friends and patrons of both, that they might secure greater patronage and be able to extend their usefulness and carry out more effectually the great end and aim of their creation, authorized as the act of the legislature was by the reservation contained in the original charter, and sanctioned as the act was by having been adopted by the incorporators, it is clear to a demonstration that the act uniting the two colleges was a valid act, and that the two original corporations became merged in the one corporation created by the amendatory and enabling act passed for that purpose, and that neither of the original corporations is competent to sue for any cause of action subsequent in date to their acceptance of the new act of incorporation.<sup>31</sup>

f. *Right to Consolidate as Contract Right*.—Provisions granting to a corporation the right to consolidate with another corporation, as observed in *Bank v. Tennessee*, 163 U. S. 416, 425, 41 L. Ed. 211, "do not partake of the nature of a contract, which cannot for that reason be in any respect altered or the power recalled by subsequent legislation. Where no act is done under the provision and no vested right is acquired prior to the time when it was repealed, the provision may be validly recalled, without thereby impairing the obligation of a contract."<sup>32</sup>

g. *Informality and Who May Set It Up*.—In regard to the acceptance of the provisions of the consolidation act to be filed with the secretary of state, this is eminently a matter between the state and the corporations whose rights are

Meredith, 1 Wall. 25, 41, 17 L. Ed. 604. See post, "Corporate Existence and Formation of New Corporation," XV, A, 2, a. See, also, the title STOCK AND STOCKHOLDERS.

30. *Acquiescence and estoppel*.—Branch v. Jessup, 106 U. S. 468, 476, 27 L. Ed. 279. See the title RAILROADS.

31. *Colleges*.—Pennsylvania College Cases, 13 Wall. 190, 215, 20 L. Ed. 550.

Where proper care was taken by the legislature to protect the rights of the donors of endowed scholarships in the original institutions, by incorporating into the act uniting the two colleges a provision that the new corporation should discharge and perform those liabilities without diminution or abatement, such contracts were made with the trustees and not with the state, and it is a mistake to suppose that the existence of such a contract between the corporation and an individual would inhibit the legislature from altering, modifying, or amending the charter of the corporation by virtue of a right reserved to that effect, or with the assent of the corporation, if, in view of all the circumstances, the legislature should see fit to exercise that power. Pennsylvania College Cases, 13 Wall. 190, 222, 20 L. Ed. 550.

32. *As contract right and impairment thereof*.—Galveston, etc., R. Co. v. Texas,

170 U. S. 226, 240, 42 L. Ed. 1017.

A right to consolidate with another corporation, contained in a corporate charter, construed in the most liberal spirit in favor of the company, cannot be extended beyond a stipulation on the part of the state, that the company may at any time thereafter, by consolidation with any other railroad company, form and become a new corporation, with such powers and privileges as, at the time when the offer is accepted and acted upon, it may be within the power of the state to confer, and lawful for the new corporation to accept. If acted upon before the law was changed, it might well be that all the powers and privileges originally conferred in the charter, would have vested in the new company. But, as it was not accepted and acted upon until a change in the organic law of the state forbade the creation of corporations capable of holding property exempt from taxation, it must be presumed that when the original company entered into the consolidation it did so in full view of the existing law, and with the intention of forming a new corporation, such as the constitution and laws of the state at that time permitted. St. Louis, etc., R. Co. v. Berry, 113 U. S. 465, 475, 28 L. Ed. 1055, following Memphis, etc., R. Co. v. Railroad Comm'rs, 112 U. S. 609, 28 L. Ed. 837.

affected, and if, on a failure to file such acceptance, the consolidation is to become void, it is the privilege of the state to enforce the forfeiture or annulment, and not of every private person who shows an injustice or injury done to himself.<sup>33</sup>

2. EFFECT ON CORPORATE EXISTENCE, PROPERTY AND LIABILITIES.—a. *Corporate Existence and Formation of New Corporation*.—See, generally, ante, "Effect on Powers and Corporate Existence and Liabilities," XI, C, 1, f. The consolidation of two companies does not necessarily work a dissolution of both, and the creation of a new corporation. Whether such be its effect depends upon the legislative intent manifested in the statute under which the consolidation takes place.<sup>34</sup> It is of no importance to the inquiry, whether a new cor-

33. **Informality and its effect.**—Leavenworth County Comm'rs v. Chicago, etc., R. Co., 134 U. S. 688, 700, 33 L. Ed. 1064. "It is not necessary here to hold that, in a direct proceeding on the part of the state to have a declaration of the nullity of such a consolidation, no evidence can be received to impeach the validity of the original act of consolidation. \* \* \* In such case the certified copy from the secretary's office would not be conclusive, but prima facie, evidence." Leavenworth County Comm'rs v. Chicago, etc., R. Co., 134 U. S. 688, 700, 33 L. Ed. 1064. See the title DOCUMENTARY EVIDENCE.

34. **As dissolution of old and creation of new corporation.**—Central R., etc., Co. v. Georgia, 92 U. S. 665, 23 L. Ed. 757, reaffirmed in Pullman's Palace Car Co. v. Missouri Pac. R. Co., 115 U. S. 587, 594, 29 L. Ed. 499; Wilmington, etc., R. Co. v. Alsbrook, 146 U. S. 279, 300, 36 L. Ed. 972; Keokuk, etc., R. Co. v. Missouri, 152 U. S. 301, 305, 38 L. Ed. 450; Shaw v. Covington, 194 U. S. 593, 48 L. Ed. 1131; Wabash, etc., R. Co. v. Ham, 114 U. S. 587, 595, 29 L. Ed. 235, where it is said to depend upon the terms of the agreement of consolidation, and of the statutes under whose authority that consolidation is effected, whether the old corporations are dissolved into the new one, or are continued in existence under a new name and with new powers. Minneapolis, etc., R. Co. v. Gardner, 177 U. S. 332, 344, 44 L. Ed. 793. Principal case distinguished in Railroad Co. v. Maine, 96 U. S. 499, 511, 24 L. Ed. 836; Railroad Co. v. Georgia, 98 U. S. 359, 362, 25 L. Ed. 185. See, also, Rochester R. Co. v. Rochester, 205 U. S. 236, 255, 51 L. Ed. 784.

**Consolidation is not sale.**—Green County v. Conness, 109 U. S. 104, 106, 27 L. Ed. 872.

"It may be that the consolidation of two corporations, or amalgamation, as it is called in England, if full and complete, may work a dissolution of them both, and its effect may be the creation of a new corporation. Whether such be the effect or not must depend upon the statute under which the consolidation takes place, and of the intention therein manifested. If, in the statute, there be no words of grant of corporate powers, it is difficult to see how a new corporation is created. If it is, it must be by implication; and it

is an unbending rule that a grant of corporate existence is never implied. In the construction of a statute, every presumption is against it. True it is that in *McMahan v. Morrison*, 16 Ind. 172, where three corporations had consolidated under an act of the legislature, authorizing them to merge and consolidate their stock 'and make one joint company,' it was said that the effect of the act and the terms of consolidation under it was a dissolution of the three corporations, and at the same instant the creation of a new corporation with property, liabilities, and stockholders derived from those then passing out of existence. And this language was quoted approvingly by this court in *Clearwater v. Meredith*, 1 Wall. 25, 40, 17 L. Ed. 604. But in neither case was an assertion of this doctrine necessary to the decision made." *Central R., etc., Co. v. Georgia*, 92 U. S. 665, 670, 23 L. Ed. 757. See, also, *Keokuk, etc., R. Co. v. Missouri*, 152 U. S. 301, 307, 38 L. Ed. 450. See, however, *Shields v. Ohio*, 95 U. S. 319, 323, 24 L. Ed. 357, approving, unqualifiedly, the *Clearwater Case*.

In *Central R., etc., Co. v. Georgia*, 92 U. S. 665, 674, 23 L. Ed. 757, it was held that the Georgia statute authorizing the consolidation in question did not contemplate the dissolution of both the old companies and the formation of a new one. On the consolidation only one of them was to go out of existence. See *Keokuk, etc., R. Co. v. Missouri*, 152 U. S. 301, 306, 38 L. Ed. 450; *Wilmington, etc., R. Co. v. Alsbrook*, 146 U. S. 279, 300, 36 L. Ed. 972.

"Nor is it a necessary inference from the provision of the (Georgia) act of August 25, 1872, requiring the board of directors of each company to certify the union and consolidation to the governor of the state, that the union was intended to be a surrender of the charter of both companies, and the acceptance of a new charter. There were sufficient reasons for that requirement, without the large inference attempted to be drawn from it." *Central R., etc., Co. v. Georgia*, 92 U. S. 665, 674, 23 L. Ed. 757.

"Other cases to the same effect, holding that the consolidation did not operate as a dissolution of the constituent companies, are *Chesapeake, etc., R. Co. v. Virginia*, 94 U. S. 718, 24 L. Ed. 310;



poration was created by the union and consolidation, that the corporation acquired under the act new and enlarged powers as well as new stockholders. The gift of new powers to a corporation has never been thought to destroy its identity, much less to change it into a new being. Such gift is not a grant of corporate existence. It assumes corporate life already existing.<sup>25</sup> "That generally the effect of consolidation, as distinguished from a union by merger of one company into another, is to work a dissolution of the companies consolidating, and to create a new corporation out of the elements of the former, is asserted in many cases, and it seems to be a necessary result."<sup>26</sup> Where the ex-

Greene County *v.* Conness, 109 U. S. 104, 27 L. Ed. 872, and Tennessee *v.* Whitworth, 117 U. S. 139, 29 U. S. 833. It may be observed that all these cases turn upon the question whether the new company inherited by consolidation certain privileges and immunities belonging to the constituent companies, or one of them, and that no question arose as to the applicability of a new constitutional inhibition intervening before the consolidation took place. This question, however, did arise in *Shields v. Ohio*, 95 U. S. 319, 24 L. Ed. 357, where it was held that a consolidation under a statute of Ohio of two or more railroad companies worked their dissolution, and that the powers and franchises of the new company thereby formed were subject to 'be altered, revoked or repealed by the general assembly' under a constitutional provision which took effect prior to the consolidation. The statute in that case expressly provided that the consolidated company should be a new corporation and subject to the constitutional provision. A like ruling was made under a similar statute of Maine in *Railroad Co. v. Maine*, 96 U. S. 499, 24 L. Ed. 836. In *Railroad Co. v. Georgia*, 98 U. S. 359, 25 L. Ed. 185, two railroad companies were consolidated by an act of the legislature, which authorized the consolidation of their stocks, conferred upon the consolidated company full corporate powers, and continued to it the franchises, privileges and immunities which the companies had held by their original charters. We held in that case that a new corporation was created, which became subject to the provisions of a statutory code, adopted January 1, 1863, permitting the charters of private corporations to be changed, modified or destroyed at the will of the legislature. The case was distinguished from *Central R. Co. v. Georgia*, 92 U. S. 665, 23 L. Ed. 757, as being a consolidation instead of a merger. 'Nor was it,' said Mr. Justice Strong, 'a mere alliance or confederation of the two. If it had been, each would have preserved its separate existence as well as its corporate name; but the act authorized the consolidation of the stocks of the two companies, thus making them one company in place of two. It contemplated, therefore, that the separate capital of each company should go out of existence as the capital of that company.' To the same effect is *St. Louis, etc., R. Co. v. Berry*, 113 U. S. 465,

28 L. Ed. 1055." *Yazoo, etc., R. Co. v. Adams*, 180 U. S. 1, 21, 45 L. Ed. 395, rehearing denied in S. C., 181 U. S. 580, 45 L. Ed. 1011. See, also, *Keokuk, etc., R. Co. v. Missouri*, 152 U. S. 301, 307, 308, 38 L. Ed. 450; *Joy v. St. Louis*, 138 U. S. 1, 35, 34 L. Ed. 843.

**Upon the other hand**, as said in *Keokuk, etc., R. Co. v. Missouri*, 152 U. S. 301, 307, 38 L. Ed. 450. "We have held that the consolidation acts of Ohio and Maine worked a dissolution of the constituent companies and the incorporation of a new company, and that such company was subject to intermediate acts declaring the charters of corporations subject to be altered, amended, or repealed by the legislature. *Shields v. Ohio*, 95 U. S. 319, 24 L. Ed. 357; *Railroad Co. v. Maine*, 96 U. S. 499, 24 L. Ed. 836. A leading case is that of *Railroad Co. v. Georgia*, 98 U. S. 359, 362, 25 L. Ed. 185."

**35. Gift of new powers.**—*Central R., etc., Co. v. Georgia*, 92 U. S. 665, 673, 23 L. Ed. 757.

**36. Consolidation and merger contrasted.**—*Railroad Co. v. Georgia*, 98 U. S. 359, 363, 25 L. Ed. 185.

"In *McMahan v. Morrison* (16 Ind. 172), the effect of a consolidation was said to be 'a dissolution of the corporations previously existing, and, at the same instant, the creation of a new corporation, with property, liabilities, and stock holders derived from those then passing out of existence.'" *Railroad Co. v. Georgia*, 98 U. S. 359, 363, 25 L. Ed. 185; *Clearwater v. Meredith*, 1 Wall. 25, 40, 17 L. Ed. 604.

In another Pennsylvania case it was said: "Consolidation is a surrender of the old character by the companies, the acceptance thereof by the legislature, and the formation of a new company out of such portions of the old as enter into the new." *Railroad Co. v. Georgia*, 98 U. S. 359, 363, 25 L. Ed. 185.

"If the Memphis and Little Rock Railroad Company, as reorganized by the purchasers at the sale under the decree of foreclosure of the previous mortgages, was a lawful corporation of the state of Arkansas, it was not the same corporation as that chartered by the legislature in 1853, but was a new corporation, subject to the provisions of the constitution and laws in force when it first came into existence, that is to say, in 1877." *Dow v. Beidelman*, 125 U. S. 680, 689, 31 L. Ed.



istence of one constituent company is merged and sunk in that of the resulting corporation, so that its legal identity is destroyed, although the legal identity of the other constituent company remains, it constitutes, strictly speaking, a

841; *Memphis, etc., R. Co. v. Railroad Comm'rs*, 112 U. S. 609, 28 L. Ed. 837.

"When, as in this case, the stock of two companies is consolidated, the stockholders become partners, or quasi partners, in a new concern. Each set of stockholders is shorn of the power which, as a body, it had before. Its action is controlled by a power outside of itself." *Railroad Co. v. Georgia*, 98 U. S. 359, 364, 25 L. Ed. 185.

It was held in *Railroad Co. v. Maine*, 96 U. S. 499, 510, 24 L. Ed. 836, that the consolidated company was, upon the consolidation of the original companies, a new corporation, as distinct from them as though it had been created before their existence. The fact that the powers, privileges, and immunities which they had possessed were conferred upon the new company, so far as they could be exercised or enjoyed by it, in no respect affected its character as a distinct body.

"In *St. Louis, etc., R. Co. v. Berry*, 113 U. S. 465, 28 L. Ed. 1055, a like effect was given to the consolidation of two roads by an agreement which provided that all the property of each company should be taken and deemed to be transferred to the consolidated company 'as such new corporation without further act or deed.' It was held that this created a new corporation, with an existence dating from the time the consolidation took effect." *Keokuk, etc., R. Co. v. Missouri*, 152 U. S. 301, 308, 38 L. Ed. 450.

And in *Pullman's Palace Car Co. v. Missouri Pac. R. Co.*, 115 U. S. 587, 595, 29 L. Ed. 499, it was held that the consolidation statute of Missouri there considered clearly contemplated the actual dissolution of the old corporations and the creation of a new one to take their place.

And such was the holding in *Keokuk, etc., R. Co. v. Missouri*, 152 U. S. 301, 309, 38 L. Ed. 450. See, also, *St. Louis, etc., R. Co. v. Berry*, 113 U. S. 465, 28 L. Ed. 1055; *Shaw v. Covington*, 194 U. S. 593, 48 L. Ed. 1131.

It was held in *Shields v. Ohio*, 95 U. S. 319, 323, 24 L. Ed. 357, approving *Clearwater v. Meredith*, 1 Wall. 25, 17 L. Ed. 604, construing the railroad consolidation statute of Ohio that: "When the consolidation was completed, the old corporations were destroyed, a new one was created, and its powers were 'granted' to it, in all respects, in the view of the law, as if the old companies had never existed, and neither of them had ever enjoyed the franchises so conferred. The same legislative will created and endowed the new corporation. It did one as much as the other. In this respect, there is no ground for any distinction. These views are sustained by several well-considered cases

exactly in point. One of them embodies the unanimous judgment of this court." See, also, *Wabash, etc., R. Co. v. Ham*, 114 U. S. 587, 595, 29 L. Ed. 235; *Railroad Co. v. Georgia*, 98 U. S. 359, 25 L. Ed. 185.

Where the consolidation is to be accomplished by an agreement of the directors of the companies proposing to consolidate, and the agreement is to provide the terms and mode of carrying the same into effect, the name of "the new corporation, which may be the name of either corporation party thereto, or any other name," the number, names and residences of the directors and other officers, the amount of capital stock and the number of shares into which it is to be divided, and the classes and par value, the manner of converting the stock of the consolidating companies into that of the new corporation, and the manner of compensating the stockholders of the old corporations who declined to convert their stock into the stock of the new corporation, and many other details, and it is also provided that "upon the approval of such agreement and act of consolidation, as herein before provided, and upon the filing of the same, or a copy thereof, in the office of the secretary of state, the said corporations, parties thereto, shall be deemed and taken to be one corporation, by the name provided in the said agreement and act, and the stock of the new corporation issued under the terms of such agreement and act of consolidation in exchange for the stock of the former companies, shall be deemed and taken as lawful stock, and subject only to such further payments, calls or assessments, if any, as may be mentioned in the said consolidation agreement, and such new corporation shall possess all the powers, rights and franchises conferred upon each of its constituent corporations, and shall be subject to all the restrictions and duties imposed by the laws of the state," there can be no doubt, therefore, that a new corporation was created with new stockholders, and the case is brought in close similarity to *Shields v. Ohio*, 95 U. S. 319, 24 L. Ed. 357; *Minneapolis, etc., R. Co. v. Gardner*, 177 U. S. 332, 342, 44 L. Ed. 793.

A consolidation of two corporations took place subsequent to the adoption of a state constitution providing that in every case of a grant of corporate franchises, the new corporation became subject to the provisions of such constitution. By the articles of consolidation it was agreed to unite, etc., the several capital stocks, corporate rights, franchises, etc., of every kind, without disturbing the corporate existence of one of the corporations, or the formation of a new distinct

merger, or amalgamation and not a consolidation.<sup>37</sup> But it is impossible to conceive of a corporation existing without stock, or certificates representing the interest of the corporators in the organization. Now, if the act provides that these certificates shall be surrendered, and certificates in another company issued in their place, the property and franchises of the prior companies are gone as much as if they had formally surrendered their charters.<sup>38</sup> It fol-

corporation, unless such result should be necessary to give legal effect to the agreement. It was also provided that the corporate name should be that of the company to be continued; that the capital stock should be fifteen million dollars; that the stockholders of either should have all the rights of stockholders of the consolidated company, whether new shares were issued or not; and that all the rights, powers, privileges, etc., of the constituent companies should pass to the consolidated company, which should be managed by a new set of officers. It was held impossible to escape the conclusion that a new corporation was created in the place of the constituent companies, and hence it became subject to the provisions of the new constitution. The fact that the new name was that of one of the old companies did not make it any the less a new name. *Yazoo, etc., R. Co. v. Adams*, 180 U. S. 1, 45 L. Ed. 395. See, also, *Dow v. Beidelman*, 125 U. S. 680, 689, 31 L. Ed. 841.

In view of the terms of the consolidating agreement, to which reference has already been made, and of the several acts of the legislature of Mississippi authorizing these consolidations, a new corporation was contemplated, and taken together, these several documents should be read as if they had expressly provided, with legislative sanction, for the formation of a new association. *Yazoo, etc., R. Co. v. Adams*, 180 U. S. 1, 22, 45 L. Ed. 395, rehearing denied in S. C., 181 U. S. 580, 45 L. Ed. 1011.

**37. Same.**—Where an act of the legislature empowered one railroad company to subscribe their stock to another railroad company, which was to be done upon such terms as might be stipulated between the two companies, and the terms agreed on were the payment of the former company's debts, the transfer of its assets, and the issue of certificates to its stockholders of their respective number of shares in the latter company, and upon that subscription being effected, the act provided that "all the property, real and personal, owned and held" by the former company should become vested in and be owned and possessed by the latter company, and be "owned and held and possessed by the said company in the same manner that all the other property, real and personal, which has been acquired by the said company, is owned, held and possessed;" and that the road of the former company shall "thenceforward be deemed, to all intents, as well criminal as civil, a part of" the latter

railroad, the rights and privileges of the former company thereupon ceased, and its corporate existence was determined. The legal identity of the latter company remained, while that of the former company was destroyed; and although the transaction was described by the legislature, in the act of 1875, as a consolidation, it amounted rather to a merger or an amalgamation, and need not be held to have resulted in a new corporation. *Wilmington, etc., R. Co. v. Alsbrook*, 146 U. S. 279, 299, 36 L. Ed. 972. See, also, *Rochester R. Co. v. Rochester*, 205 U. S. 236, 255, 51 L. Ed. 784.

In *Central R., etc., Co. v. Georgia*, 92 U. S. 665, 23 L. Ed. 757, it was held that the consolidation act were to provide for surrender of the existing charters of both companies, and the creation of a new company; that the purpose and effect of the consolidation act were to provide for a merger of the Macon Company into the Central Company, and to vest in the latter the right and immunities of the former, but not to enlarge them. It was not doubted that the Macon Company was intended to go out of existence, for, as said by the court through Mr. Justice Strong, provision was made for the surrender of all the shares of its capital stock, and without stockholders it could not exist. The Central Company absorbed the Macon Company, and it ceased to be, just as in the case at bar the merger was to result and did result in the determination of the corporate existence of the former company. *Wilmington, etc., R. Co. v. Alsbrook*, 146 U. S. 279, 300, 301, 36 L. Ed. 972.

**Dissolution by sale of property, etc.**—Although the law under which one corporation acquired the property and franchises of another, does not expressly dissolve the selling corporation, but leaves it without stock, officers, property or franchises, a corporation without shareholders, without officers to manage its business, without property with which to do business, and without the right lawfully to do business, is dissolved by the operation of the law which brings this condition into existence. It is not a mere merger. *Rochester R. Co. v. Rochester*, 205 U. S. 236, 255, 51 L. Ed. 784; *Railroad Co. v. Maine*, 96 U. S. 499, 24 L. Ed. 836; *Keokuk, etc., R. Co. v. Missouri*, 152 U. S. 301, 38 L. Ed. 450; *Yazoo, etc., R. Co. v. Adams*, 180 U. S. 1, 45 L. Ed. 395.

**38. Issue of new certificates of stock.**—*Keokuk, etc., R. Co. v. Missouri*, 152 U. S. 301, 309, 38 L. Ed. 450; *Wilmington, etc., R. Co. v. Alsbrook*, 146 U. S. 279,



lows from this that, when the new corporation came into existence, it came precisely as if it had been organized under a charter granted at the date of the consolidation, and subject to the constitutional provisions then existing.<sup>39</sup>

b. *Property and Debts*.—Upon consolidation, the consolidated corporation succeeds to the property of the consolidating corporations just as it stood in their hands, with the same rights and the same liabilities.<sup>40</sup> The presumption

300, 36 L. Ed. 972. See *Central R., etc., Co. v. Georgia*, 92 U. S. 665, 672, 23 L. Ed. 757.

"While as stated in *Tomlinson v. Branch*, 15 Wall. 460, 21 L. Ed. 189, the presumption is that when two railroads are consolidated each of the united lines will be respectively held with the privileges and burdens originally attaching thereto, subsequent cases have settled the law that where two companies agree together to consolidate their stock, issue new certificates, take a new name, elect a new board of directors, and constituent companies are to cease their functions, a new corporation is thereby formed subject to existing laws. But if, as was the case in *Tomlinson v. Branch*, one road loses its identity and is merged in another, the latter preserving its identity, and issuing new stock in favor of the stockholders of the former, it is not the creation of a new corporation but an enlargement of the old one." *Yazoo, etc., R. Co. v. Adams*, 180 U. S. 1, 19, 45 L. Ed. 395, rehearing denied in S. C., 181 U. S. 580, 45 L. Ed. 1011.

"It is difficult to see how the legislature could provide more clearly for the extinguishment of the prior companies, and the formation of a new one, than by providing that the two companies shall become one; that new certificates of stock shall be issued in exchange for the stock of the constituent companies; and that the consolidation agreement shall be recorded with the secretary of state as the charter of a new company. In our opinion this was the effect of the act in question." *Keokuk, etc., R. Co. v. Missouri*, 152 U. S. 301, 309, 38 L. Ed. 450.

"The result is not a mere union or partnership of two companies, nor the merger of the franchises of one in another, but the extinguishment of one and the creation of another in its place." *Keokuk, etc., R. Co. v. Missouri*, 152 U. S. 301, 310, 38 L. Ed. 450.

39. *Same*.—*Keokuk, etc., R. Co. v. Missouri*, 152 U. S. 301, 310, 38 L. Ed. 450. See ante, "Acceptance of New Legislation as Surrender of Exemption," VIII, C, 4, d.

40. *Property and liens thereon*.—"Upon the consolidation, under express authority of statute, of two or more solvent corporations, the business of the old corporations is not wound up, nor their property sequestered or distributed, but the very object of the consolidation, and of the statutes which permit it, is to continue the business of the old corporations. Whether the old corporations are dissolved into the new corporation, or are

continued in existence under a new name and with new powers, and whether, in either case, the consolidated company takes the property of each of the old corporations charged with a lien for the payment of the debts of that corporation, depend upon the terms of the agreement of consolidation, and of the statutes under whose authority that consolidation is effected." *Wabash, etc., R. Co. v. Ham*, 114 U. S. 587, 595, 29 L. Ed. 235.

In the present case, before the consolidation, no lien of any kind existed in favor of the unsecured equipment bonds, and the consolidation was made under and pursuant to statutes of Ohio, Indiana and Illinois, passed before the issue of those bonds, and to which the contract of the bondholders was therefore subject. The effect of the Ohio consolidation act was to merge the old corporations into the new one, which took their place, succeeded to their property and assumed their liabilities. *Shields v. Ohio*, 95 U. S. 319, 24 L. Ed. 357; *Railway Co. v. Georgia*, 98 U. S. 359, 25 L. Ed. 185. The liability imposed by that statute upon the new corporation for the debts of the old ones is the same as theirs, neither greater nor less. The provision of § 5 that "all rights of creditors, and all liens upon the property of either of said corporations, shall be preserved unimpaired," clearly distinguishes debts secured by lien from debts not so secured, and indicates no intention to create a new lien in favor of creditors who before had none, but simply preserves to each class of creditors the rights belonging to it before the consolidation. *Wabash, etc., R. Co. v. Ham*, 114 U. S. 587, 595, 29 L. Ed. 235.

"The further provisions of this section, that 'the respective corporations may be deemed to be in existence to preserve the same,' and that all debts of either of the old companies shall henceforth attach to the new corporation and be enforced against it to the same extent as if it had contracted them, lead to the same conclusion." *Wabash, etc., R. Co. v. Ham*, 114 U. S. 587, 595, 29 L. Ed. 235.

"The statute of Indiana is less specific in its provisions, but expressly authorizes railroad companies within the state to consolidate with railroad companies in an adjoining state 'in accordance with the laws of the adjoining state,' and, as is well settled by decisions of the supreme court of Indiana, does not give to unsecured creditors of the old companies any lien or precedence as against a subsequent mortgage of the consolidated property." *Wabash, etc., R. Co. v. Ham*, 114 U. S. 587, 596, 29 L. Ed. 235.



is that the property of the corporations will be held respectively subject to the privileges and burdens originally attaching thereto.<sup>41</sup>

**The doctrine of vendor's lien** applies only to sales of real estate. The consolidation of the stock and property of several corporations into one was not a sale; and it did not affect real estate only, but included franchises and personal property.<sup>42</sup>

**Liens Already Attached.**—When two corporations united their vessels and other property used in navigation, and formed a new corporation, in which no money was paid by either party, and in the contract of consolidation made arrangements for the payment of the debts of one or both before any dividends should be declared on the stock, the new corporation cannot avail itself of the doctrine applicable to such a purchaser without notice; and a lien, three years and a half old, will be enforced against one of the vessels so transferred to the new corporation.<sup>43</sup>

c. **Liability on Contract.**—Where the consolidation was merely a change of name, and the consolidated company assumed, by the statutes, all the liabilities of the constituent companies, this includes a liability on an agreement to grant a right of way over railroad tracks on certain terms.<sup>44</sup>

**41. Presumption.**—*Keokuk, etc., R. Co. v. Missouri*, 152 U. S. 301, 305, 38 L. Ed. 450; *Tomlinson v. Branch*, 15 Wall. 460, 21 L. Ed. 189.

In *Tomlinson v. Branch*, 15 Wall. 460, 21 L. Ed. 189, and *Charleston v. Branch*, 15 Wall. 470, 21 L. Ed. 193, this court held that the respective roads and property of the two companies, which had become consolidated in the hands of the South Carolina Railroad Company, retained their original status towards the public and the state the same as if the consolidation had not taken place. *Branch v. Charleston*, 92 U. S. 677, 23 L. Ed. 750. See, also, *Keokuk, etc., R. Co. v. Missouri*, 152 U. S. 301, 305, 38 L. Ed. 450; *Yazoo, etc., R. Co. v. Adams*, 180 U. S. 1, 19, 45 L. Ed. 395, rehearing denied in S. C., 181 U. S. 580, 45 L. Ed. 1011.

"There are numerous cases where a consolidated company has been held liable for the debts of the old companies, and where it has been held to possess the rights of the old companies; but this does not necessarily imply a surrender of all the old charters." *Central R., etc., Co. v. Georgia*, 92 U. S. 665, 671, 23 L. Ed. 757.

**Construction of consolidating act.**—Where, by the act of consolidation it is provided that the rights of all creditors of, and of all liens upon, the property of the corporations, parties to the agreement and the act, shall be preserved unimpaired and the respective corporations shall be deemed to continue in existence to preserve the same, and all debts and liabilities incurred by either of the corporations, except mortgages, shall thenceforth attach to such new corporation and be enforced against it and its property to the same extent as if such debts or liabilities had been incurred or contracted by such new company, it follows that by virtue of that provision the new company formed by the act of consolidation assumed all the obligations of the old companies, except mortgages; or, in other words, that

all debts and all liabilities, except mortgages, incurred by either of those companies, attached to such new corporation and became enforceable against the same and their property to the same extent as if such debts or liabilities had been incurred or contracted by such new corporation. *Bailey v. Railroad Co.*, 22 Wall. 604, 629, 22 L. Ed. 840.

**42. Vendor's lien.**—*Wabash, etc., R. Co. v. Ham*, 114 U. S. 587, 596, 29 L. Ed. 235, citing *Green County v. Conness*, 109 U. S. 104, 27 L. Ed. 872. See the title VENDOR AND PURCHASER.

**43. Existing liens.**—*The Key City*, 14 Wall. 653, 20 L. Ed. 896.

**Taxes.**—See the title TAXATION.

**44. Contract liability.**—*Joy v. St. Louis*, 138 U. S. 1, 35, 34 L. Ed. 843. See the title RAILROADS.

**Contract to convey.**—The obligation of one of the constituent companies to execute a contract for a conveyance of land to a vendee, passed with the property to the defendant, the consolidated company, upon the consolidation of the two companies under one name. Whenever property charged with a trust is conveyed to a third party with notice, he will hold it subject to that trust, which he may be compelled to perform equally with the former owner. The vendee in that case stands in the place of such owner. And this without reference to the articles of union and consolidation. *Union Pac. R. Co. v. McAlpine*, 129 U. S. 305, 314, 32 L. Ed. 673.

Where the property was taken by the trustees under a corporate mortgage executed before consolidation, with notice of the rights of the complainants, and, therefore, subject to their enforcement, the new company cannot set up that mortgage as a release from its obligation to make a conveyance in execution of the contract with the vendees. *Union Pac. R. Co. v. McAlpine*, 129 U. S. 305, 315, 32 L. Ed. 673.

**Limitation to Railroads Owned or Controlled at Time of Consolidation.**—See the title RAILROADS.

3. **EFFECT ON POWERS, PRIVILEGES AND IMMUNITIES**—a. *In General.*—Where corporations are united in such a manner that one continues to exist as a corporation, owning and operating its property, by virtue of its own charter, the corporation thus continuing to exist still holds its immunities and exemptions in respect of the property to which they apply. If, upon the other hand, the consolidation worked a dissolution of the prior corporations, their former privileges and franchises also ceased to exist.<sup>45</sup> The provision in the act authorizing the consolidation, that the new company should have all the powers, privileges, and immunities of the original companies, must be taken with the qualification that it should have them so far as they could be exercised or enjoyed by it, with its different officers and distinct constitution. Where their exercise

**45. Dependent on effect of consolidation on corporate existence.**—Keokuk, etc., R. Co. v. Missouri, 152 U. S. 301, 305, 38 L. Ed. 450. See Philadelphia, etc., R. Co. v. Maryland, 10 How. 376, 13 L. Ed. 461; Tomlinson v. Branch, 15 Wall. 460, 21 L. Ed. 189; Central R., etc., Co. v. Georgia, 92 U. S. 665, 670, 23 L. Ed. 757; Tennessee v. Whitworth, 117 U. S. 139, 29 L. Ed. 833; Georgia R., etc., Co. v. Smith, 128 U. S. 174, 32 L. Ed. 377; Wilmington, etc., R. Co. v. Alsbrook, 146 U. S. 279, 36 L. Ed. 972; Norfolk, etc., R. Co. v. Pendleton, 156 U. S. 667, 672, 39 L. Ed. 574; Minneapolis, etc., R. Co. v. Gardner, 177 U. S. 332, 44 L. Ed. 793; Yazoo, etc., R. Co. v. Adams, 180 U. S. 1, 45 L. Ed. 395. See, also, Rochester R. Co. v. Rochester, 205 U. S. 236, 255, 51 L. Ed. 784. And see post, "Transfer of Rights, Privileges and Immunities," XV, B, 4.

"When two railroad companies unite or become consolidated under the authority of law, the presumption is, until the contrary appears, that the united or consolidated company has all the powers and privileges, and is subject to all the restrictions and liabilities, of those out of which it was created." Tennessee v. Whitworth, 117 U. S. 139, 147, 29 L. Ed. 833; Tomlinson v. Branch, 15 Wall. 460, 21 L. Ed. 189; Branch v. Charleston, 92 U. S. 677, 682, 23 L. Ed. 750; County of Scotland v. Thomas, 94 U. S. 682, 690, 24 L. Ed. 219; Railroad Co. v. Maine, 96 U. S. 499, 512, 24 L. Ed. 836; Green County v. Conness, 109 U. S. 104, 27 L. Ed. 872.

The phrase "for its government" in the consolidating act, qualifying the clause conferring on the consolidated company the powers and privileges of the original corporations, was not intended as a limitation on the powers and privileges of the new corporation. The natural meaning of the word "government" in such a connection is regulation and control, and it was used in that sense here. In reality it neither adds to nor takes from the force of the other words, and simply implies that the new corporation shall have the same charter rights and privileges, and be subject to the same charter restrictions and liabilities, as the old company. Such were the charters of the old

companies, and such was intended to be the charter of the new; no more, no less. As was said in the court below, "the government of the corporation embraces every part of the conduct and business of the company in all its relations to the state, to the general public, to individuals, to its own stockholders," and consequently the grant of powers and privileges for its government was in reality the grant of the powers and privileges of its corporate entity. Tennessee v. Whitworth, 117 U. S. 139, 149, 29 L. Ed. 833.

Where, looking at the legislative intent appearing in the consolidation act, it appears that a new corporation was created by the consolidation effected thereunder in the place and in lieu of the two companies previously existing, whatever franchises, immunities, or privileges it possesses, it holds them solely by virtue of the grant that act made, and subject to the law as it was when the new charter was granted. Railroad Co. v. Georgia, 98 U. S. 359, 363, 25 L. Ed. 185.

"The new company may doubtless receive by transmission from its constituent companies their property, rights, privileges, and franchises, including any immunity from taxation; but it receives them as an heir receives the estate of his ancestor, or as a grantee receives the estate of his grantor, by inheritance, succession, or purchase. The result is not a mere union or partnership of two companies, nor the merger of the franchises of one in another, but the extinguishment of one and the creation of another in its place." Keokuk, etc., R. Co. v. Missouri, 152 U. S. 301, 309, 38 L. Ed. 450.

"In Shields v. Ohio, 95 U. S. 319, 24 L. Ed. 357, it was decided that in cases of corporations created by consolidation, the powers of the new company did not pass to it by transmission from its constituents but resulted from a new legislative grant, that could not transcend the constitutional authority existing at the time it took effect." Louisville, etc., R. Co. v. Palmes, 109 U. S. 244, 254, 27 922. See ante, "Corporate Existence and Formation of New Corporation," XV, A, 2, a.



or enjoyment required other officers or a different constitution, the grant was to that extent necessarily inoperative.<sup>46</sup>

**Limited to Property of Corporation Enjoying Same.**—Where the statute which authorized the consolidation or union of the companies declared that the consolidated or united companies should possess all the rights and privileges which each of the companies enjoyed under its charter, those rights and privileges do not extend beyond that portion of the aggregated property which each had held under its charter.<sup>47</sup>

**Right to Sue.**—Where the two original corporations became merged in the one corporation created by the amendatory and enabling act passed for that purpose, neither of the original corporations is competent to sue for any cause of action subsequent in date to their acceptance of the new act of incorporation.<sup>48</sup>

b. *Power of Legislation over Consolidated Company.*—Where certain Wisconsin corporations were, under an enabling act of Wisconsin, consolidated with others of Illinois on terms which, in effect, required that the consolidated company should, when operating in Wisconsin, be subject to its laws, Wisconsin can legislate for the company in that state precisely as it could have legislated for its own original companies, if no consolidation had taken place.<sup>49</sup>

c. *Exclusive Franchises and Immunity from Regulation.*—An exclusive franchise does not pass to a consolidated corporation, under the words "property," or "assets and effects," used in the consolidating statute to express what passes from the constituent companies to the consolidated company.<sup>50</sup> The new corporation did not inherit a right to such exclusive franchise, and the right to prevent the city from establishing its own similar plant, but took subject to the state of the law at the time of consolidation, as a new corporation, and every-

**46. Same.**—*Railroad Co. v. Maine*, 96 U. S. 499, 509, 510, 24 L. Ed. 836.

Although the act authorizing a consolidation contained the provision that these companies might consolidate upon such terms as they should agree upon, obviously such terms must be consistent with the law existing at the time of the consolidation. It could never have been the intention of the legislature, and if it were it would be vain, to permit these companies to adopt such terms as they chose, if such terms were inconsistent with existing laws. The language indicated evidently refers to the method adopted for the consolidation, whether it was to be anything more than a simple merger, or whether it was to provide for a surrender of the stock of the constituent companies, the issue of new stock, the adoption of a new name and the choice of a new board of directors. Under no circumstances would they be interpreted as conveying rights to the new corporation which the legislature was incompetent to confer. *Yazoo, etc., R. Co. v. Adams*, 180 U. S. 1, 23, 45 L. Ed. 395, rehearing denied in S. C., 181 U. S. 580, 45 L. Ed. 1011.

**Immunity of stockholders from liability.**—See the title STOCK AND STOCKHOLDERS.

**Immunity from taxation.**—See the title TAXATION.

**47. Limitation to property owned.**—*Chesapeake, etc., R. Co. v. Virginia*, 94 U. S. 718, 726, 24 L. Ed. 310, citing

*Philadelphia, etc., R. Co. v. Maryland*, 10 How. 376, 377, 13 L. Ed. 461; *The Delaware Railroad Tax*, 18 Wall. 206, 21 L. Ed. 888; *Tomlinson v. Branch*, 15 Wall. 460, 21 L. Ed. 189; *Central R., etc., Co. v. Georgia*, 92 U. S. 665, 23 L. Ed. 757. See, also, *Wilmington, etc., R. Co. v. Alsbrook*, 146 U. S. 279, 300, 36 L. Ed. 972.

**48. Right to sue.**—*Pennsylvania College Cases*, 13 Wall. 190, 215, 20 L. Ed. 550.

**49. Legislative control.**—*Peik v. Chicago, etc., R. Co.*, 94 U. S. 164, 24 L. Ed. 97. See ante, "Government Regulation and Control," II, D; "Dual Incorporation," II, H, 1.

**50. Exclusive franchise.**—Where a corporation, the original grantee of the exclusive privilege, consolidated with other companies on April 11, 1894, under statutes providing that, when the agreement of consolidation is recorded, etc., "the separate existence of the constituent corporations shall cease, and the consolidated corporations shall become a single corporation in accordance with the said agreement, and subject to all the provisions of this chapter, and other laws relating to it, and shall be vested with all the property, business, credits, assets and effects of the constituent corporations without deed or transfer, and shall be bound for all their contracts and liabilities," the old companies disappear and the new company must claim whatever rights it gets from the law which calls it into being. It is absolutely subject to the constitution and laws then in force. There-



thing in the constitution looked to the abolition and refusal of special privileges and to putting all corporations on an equal footing.<sup>51</sup>

4. **EFFECT ON GUARANTY OF STOCK IN OLD COMPANY.**—Where certain parties guaranteed that stock of a corporation should be at par in Cincinnati at a certain time, the undertaking was that the stock should be at par in Cincinnati, if it maintained the same separate and independent existence that it had when they gave their guaranty. Their undertaking did not extend to another stock, created afterwards, with which they had no concern, and which might be better or worse than the one guaranteed. It is not material whether the new stock was worth more or less than the old. It is sufficient that it is another stock, and represented other interests.<sup>52</sup>

5. **EFFECT ON SUBSCRIPTIONS.**—The legal subsequent consolidation of a corporation with another corporation does not avoid subscriptions already made to its stock.<sup>53</sup>

6. **REMEDIES AND RIGHTS OF ACTION.**—**Proof of Consolidation.**—When a corporation organized by consolidation of other corporations comes into a court of justice, either as plaintiff or defendant in a contest with individuals or other corporations in regard to any matter affecting its rights, its powers, its authority to make contracts, to sue or to be sued, the production of a certified copy

before it can claim the franchises and privileges of its constituent companies by succession, only under the words "property," or "assets and effects," if at all. These words certainly are not happily chosen to express the transfer of a franchise, still less to express the continuance of a right not to be competed with, granted by the legislature to a named corporation, after that corporation shall have ceased to exist. The natural meaning of the words would be that the ordinary property of the consolidating corporations, the property such as any one might own without special franchise and might transfer by deed, shall belong to the new company without deed, but the franchises of the new company would seem to be left to be determined by the general law. The new corporation is to be "subject to all the provisions of this chapter, and other laws relating to it." *Shaw v. Covington*, 194 U. S. 593, 597, 48 L. Ed. 1131.

51. **Same.**—*Shaw v. Covington*, 194 U. S. 593, 599, 48 L. Ed. 1131.

And where a statute provided, in addition, that the provisions of all charters "which are inconsistent with the provisions of this chapter concerning similar corporations, to the extent of such conflict, and all powers, privileges or immunities of any such corporation which could not be obtained under the provisions of this chapter, shall stand repealed on September 28, 1897," and the exercise of the repealed powers was made a crime, and after September 28, 1897, the provisions of the chapter were to apply to all corporations if they would be applicable to such corporations if organized under that chapter, it is a fair question whether this section did not repeal the exclusive privilege given to the old company in 1897, if that privilege survived the consolidation. *Shaw v. Covington*, 194 U. S. 593, 599, 48 L. Ed. 1131.

**Exemption from regulation.**—Assuming that one of several consolidated corporations was exempt from regulation as to its charges to the public for services rendered under its franchises, where the other constituent corporations were not so exempt, as was conceded, the asserted immunity (conceding it *arguendo*), did not extend to so much of the system as passed to the consolidated company from companies not possessing such immunity in their own right; and under this bill relief could not be accorded in respect of part of the system, as the bill sought relief in respect of the entire plants and territory covered by the consolidated corporation, and was not framed in the alternative. *People's Gas Light, etc., Co. v. Chicago*, 194 U. S. 1, 17, 48 L. Ed. 851.

As the circuit court was right, in holding that under the present bill complainant's alleged exemption could not be enforced as to so much of the system as originally belonged to it, then the court was justified in declining to discuss whether by the consolidation the alleged exemption was lost altogether. *People's Gas Light, etc., Co. v. Chicago*, 194 U. S. 1, 17, 48 L. Ed. 851. See the titles **GAS; MUNICIPAL CORPORATIONS; WATER COMPANIES AND WATER WORKS**; and the titles treating of other public service corporations.

52. **Guaranty of stock.**—*Clearwater v. Meredith*, 1 Wall. 25, 41, 17 L. Ed. 604. See the titles **GUARANTY; STOCK AND STOCKHOLDERS**.

53. **Subscriptions.**—*Bates County v. Winters*, 112 U. S. 325, 28 L. Ed. 744; *Livingston County v. First Nat. Bank*, 128 U. S. 102, 32 L. Ed. 359. And see the title **STOCK AND STOCKHOLDERS**.

**County and municipal aid bonds.**—See the title **MUNICIPAL, COUNTY, STATE AND FEDERAL AID**.

of the articles of agreement for consolidation shall end all inquiry into its existence as a corporation, with such powers as the law confers on it.<sup>54</sup>

**B. Succession<sup>55</sup>**—1. **IN GENERAL.—Authority.**—The legislature may enact that the franchises of designated corporations shall, upon their dissolution, voluntary or otherwise, pass to and vest in certain newly created institutions of like kind.<sup>56</sup>

**Privity.**—There is no privity between the preferred stockholders in a corporation whose property has been foreclosed under a mortgage and passed to a new corporation formed of the bondholders, and the new corporation.<sup>57</sup>

2. **LIABILITY OF SUCCESSOR CORPORATION FOR CONTRACTS AND OBLIGATIONS OF PREDECESSOR.**—While a corporation succeeding to the property and franchises of a predecessor corporation cannot take them free from the debts and obligations of such corporation, unless same are otherwise provided for,<sup>58</sup> the

**54. Evidence of consolidation.**—Leavenworth County Comm'rs *v.* Chicago, etc., R. Co., 134 U. S. 688, 701, 33 L. Ed. 1064. See the title DOCUMENTARY EVIDENCE.

It would be burdensome in the extreme, a hardship altogether unnecessary to any proper purpose, to require of a corporation doing an immense business to prove, in every controversy it may have growing out of that business, that all the steps which the law directs for the consolidation proceedings have been strictly complied with. The hardship would be as great on those who sue it for violated duty of contract, or otherwise, to be required to prove in the same manner the existence of the corporation which they bring into court. Leavenworth County Comm'rs *v.* Chicago, etc., R. Co., 134 U. S. 688, 701, 33 L. Ed. 1064.

**55. Consolidation of corporations as question of succession.**—See ante, "Corporate Existence and Formation of New Corporation," XV, A, 2, a.

**Alienation of property and franchises.**—See ante, "To Alienate Franchise, or Property Necessary Thereto," XI, C.

**56. Authority.**—Shields *v.* Ohio, 95 U. S. 319, 323, 24 L. Ed. 357.

There can be no doubt, that the states of Virginia and Maryland, in granting the charter of the Chesapeake and Ohio Canal Company, had the power to authorize a surrender of the charter of the Potomac Company, to the former company with the consent of the stockholders; and to make the provision which they did make for the creditors of the latter company. Smith *v.* Chesapeake, etc., Canal Co., 14 Pet. 45, 48, 10 L. Ed. 347. See ante, "Right to Consolidate and Validity of Consolidation," XV, A, 1.

**57. Privity.**—Sullivan *v.* Portland, etc., R. Co., 94 U. S. 806, 24 L. Ed. 324.

Nor is there any privity between the holders of the first mortgage bonds of the old corporation, the foreclosure having taken place at the instance of the trustees under a second mortgage, and such preferred stockholders. Sullivan *v.* Portland, etc., R. Co., 94 U. S. 806, 24 L. Ed. 324.

**As to succession under foreclosure sale generally.**—See ante, "Private Corpora-

tion Generally," XI, C, 1. And see the title MORTGAGES AND DEEDS OF TRUST.

**Rights acquired under sale.**—See ante, "To Alienate Franchise or Property Necessary Thereto," XI, C.

**58. Liability of successor corporation.**—Pullman's Palace Car Co. *v.* Missouri Pac. R. Co., 115 U. S. 587, 595, 29 L. Ed. 499; Smith *v.* Chesapeake, etc., Canal Co., 14 Pet. 45, 10 L. Ed. 347.

But of course this rule may be changed by the statute of the state, as was the case with the West Virginia statute of 1871, as amended 1877, and construed in Chesapeake, etc., R. Co. *v.* Miller, 114 U. S. 176, 181, 29 L. Ed. 121.

The purchasers of corporate property at execution sale take only the title and interest of the corporation, subject to equities existing against the property in its hands when the judgment was recovered. Galveston Railroad *v.* Cowdrey, 11 Wall. 459, 477, 20 L. Ed. 199. See the title EXECUTIONS.

Where the legislatures of Virginia and Maryland authorized the surrender of the charter granted by those states to the Potomac Company to be made to the Chesapeake and Ohio Canal Company, the stockholders of the Potomac Company assenting to the same, and provision was made in the acts, authorizing the surrender, for the payment of a certain amount of the debts of the Potomac Company by the Chesapeake and Ohio Canal Company, a list of those debts to be made out, and certified by the Potomac Company, this assignment did not impair the obligation of the contract of the Potomac Company with any one of its creditors, nor place him in a worse situation in regard to his demand; the means of payment possessed by the old company are carefully preserved, and, indeed, guaranteed by the new corporation; and if the fact can be established, that some bona fide creditors of the Potomac Company were unprovided for in the new charter, and have, consequently, no redress against the Chesapeake and Ohio Canal Company, it does not follow that they are without remedy. There is no allegation of collusion to defraud, and the responsibility of the canal company cannot ex-

effect of a sale under foreclosure proceedings may be different, and usually passes title free from encumbrances and liability for debts, unless the statute otherwise provides.<sup>59</sup>

**Executory Contracts.**—But it is a well-established principle that the mere purchase of a railway under a foreclosure sale by a new corporation does not of itself make such new corporation liable for the obligations of the old one. It was at liberty to renounce the benefit of such contract, if it chose to do so, or to make such further arrangement with the other party as they might be able to agree upon, but where it did neither, but still maintained possession of the res, it must be held in a court of equity to have adopted such contract, and made it its own.<sup>60</sup>

**Lien and Priority.**—Where one corporation succeeds another by purchase of all its property, assuming all legal debts and liabilities of the old company, this does not affect such property with a trust in favor of unsecured debts so as to give them priority over a mortgage subsequently executed by the new corporation. It does not make them liens.<sup>61</sup>

**Under Reorganization.**—See post, "Reorganization," XVI.

3. **LIABILITY FOR TORTS.**—Where a corporation had transferred all of its property to another corporation and had then ceased to do business of any kind, and was incapable, under its articles of incorporation, of doing any except so far as might be necessary to wind up its affairs, it existed only for purposes of liquidation. It could no more own and run a steamship than it could own and manage any other property, and it could not be sued for torts committed by its

tend beyond the express terms of their contract. *Smith v. Chesapeake, etc., Canal Co.*, 14 Pet. 45, 47, 10 L. Ed. 347.

Upon the whole, the defendants are not liable, under their contract with the Potomac Company, to pay the judgment of the plaintiff; or to pay him a proportionate share of the net revenue of the Potomac Company stock, under the twelfth section. *Smith v. Chesapeake, etc., Canal Co.*, 14 Pet. 45, 48, 10 L. Ed. 347.

As to continuing liability of predecessor, see ante, "To Alienate Franchise, or Property Necessary Thereto," XI, C; "In General," XIII, A, 1.

59. **Liability for debts.**—*Julian v. Central Trust Co.*, 193 U. S. 93, 108, 48 L. Ed. 629.

It is not true by the laws and decisions of North Carolina that in the case of a sale under foreclosure the corporate property shall remain liable for the debts of the old corporation in suits against it until a new domestic corporation is organized to take the place of the old one. The cases cited hold the lessor to a continued liability, notwithstanding a lease. In the case in hand the property and franchise had been sold, and there was no contractual relation between the companies nor permissive operation of the road by the new company. *Julian v. Central Trust Co.*, 193 U. S. 93, 108, 48 L. Ed. 629.

The purchasers, under mortgage foreclosure, of the property and franchises of a corporation (railroad), do not thereby become bound to pay all the debts and perform all the obligations of the corporation whose property they bought. *Hoard v. Chesapeake, etc., Railway*, 123

U. S. 222, 227, 31 L. Ed. 130; *Chesapeake, etc., Co. v. Miller*, 114 U. S. 176, 29 L. Ed. 121.

60. **Executory contracts.**—*Wiggins Ferry Co. v. Ohio, etc., R. Co.*, 142 U. S. 396, 407, 408, 35 L. Ed. 1055. And see, for full treatment, the title RAILROADS.

And where the predecessor corporation has totally abandoned its executory contract, going out of business and transferring its assets and obligations to the new company, the other party has a right to consider it at an end and to demand what is justly due it in that contingency. *Lovell v. St. Louis Mutual Life Ins. Co.*, 111 U. S. 264, 274, 28 L. Ed. 423, citing *United States v. Behan*, 110 U. S. 338, 339, 28 L. Ed. 168.

**Under foreclosure.**—Where a liability rested wholly upon the contract of the corporation by which it was made, it did not run with its property into the hands of those acquiring it under foreclosure and forming a new corporation, and they did not assume the liability expressly or by implication and are not bound by it, nor any claiming under them. *Sullivan v. Portland, etc., R. Co.*, 94 U. S. 806, 24 L. Ed. 324.

61. **Lien and priority.**—*Fogg v. Blair*, 133 U. S. 534, 33 L. Ed. 721.

**Trust fund doctrine.**—See ante, "Corporate Property as Trust Fund," II, E.

The property of a corporation is a trust fund for the payment of its debts, but that doctrine only means that the property must first be appropriated to the payment of the debts of the company before any portion of it can be distributed to the stockholders; it does not mean that the property is so affected by the indebtedness of the company that it can-



successor, nor could a judgment recovered against it be enforced against such successor corporation.<sup>62</sup>

4. **TRANSFER OF RIGHTS, PRIVILEGES AND IMMUNITIES**—a. *In General*.—No corporation can receive by transfer from another an immunity inconsistent with either its charter or the laws of the state then applicable.<sup>63</sup> Where a new corporation is created by the dissolution of several old ones, and the establishment of this in their place, it has new powers, new franchises, and new stockholders.<sup>64</sup>

b. *Special Statutory Exemption or Privilege*.—And the general rule is that a special statutory exemption, such as immunity from taxation, from the right to determine rates of fare, or to control tolls, and the like, does not pass to a new corporation succeeding others by consolidation or purchase, in the absence of express direction to that effect in the statute.<sup>65</sup> It is now the rule, notwith-

not be sold, transferred, or mortgaged to bona fide purchasers for a valuable consideration, except subject to the liability of being appropriated to pay that indebtedness. Such a doctrine has no existence. The case of *Curran v. Arkansas*, 15 How. 304, 307, 14 L. Ed. 705, gives no countenance to anything of the kind. *Fogg v. Blair*, 133 U. S. 534, 541, 33 L. Ed. 721.

62. **Torts of successor**.—*Gray v. National Steamship Co.*, 115 U. S. 116, 121, 29 L. Ed. 309.

"There is neither reason nor sense in attempting to fasten upon the new company a judgment for damages recovered only against the old. If the plaintiff, by mistake, commenced an action against the wrong company, it is a fault of which she cannot complain. At least the new company is not chargeable as though it had itself been sued, and had its day in court. The navigation company never made any pretense of ownership after its affairs were closed up, and neither the plaintiff nor her counsel were ever misled by the action of the representatives of either company." *Gray v. National Steamship Co.*, 115 U. S. 116, 121, 29 L. Ed. 309. See ante, "For Torts," XIII, A, 2.

63. **Must be consistent with charter and laws**.—"And this is true, even though, under legislative authority, the exemption is transferred by words which clearly include it." *Rochester R. Co. v. Rochester*, 205 U. S. 236, 254, 51 L. Ed. 784; *Trask v. Maguire*, 18 Wall. 391, 21 L. Ed. 938; *Shields v. Ohio*, 95 U. S. 319, 24 L. Ed. 357; *Railroad Co. v. Maine*, 96 U. S. 499, 24 L. Ed. 836; *Railroad Co. v. Georgia*, 98 U. S. 359, 25 L. Ed. 185; *Louisville, etc., R. Co. v. Palmes*, 109 U. S. 244, 27 L. Ed. 922; *Memphis, etc., R. Co. v. Railroad Comm'rs*, 112 U. S. 609, 28 L. Ed. 837; *St. Louis, etc., R. Co. v. Berry*, 113 U. S. 465, 28 L. Ed. 1055; *Keokuk, etc., R. Co. v. Missouri*, 152 U. S. 301, 38 L. Ed. 450; *Norfolk, etc., R. Co. v. Pendleton*, 156 U. S. 667, 39 L. Ed. 574; *Mercantile Bank v. Tennessee*, 161 U. S. 161, 171, 40 L. Ed. 656; *Yazoo, etc., R. Co. v. Adams*, 180 U. S. 1, 45 L. Ed. 395; *Grand Rapids, etc., R. Co. v. Osborn*, 193 U. S. 17, 48 L. Ed. 598; *San Antonio*

*Traction Co. v. Altgelt*, 200 U. S. 304, 50 L. Ed. 491.

64. **New powers, franchises and stockholders**.—*Pullman's Palace Car Co. v. Missouri Pac. R. Co.*, 115 U. S. 587, 594, 29 L. Ed. 499; *Clearwater v. Meredith*, 1 Wall. 25, 42, 17 L. Ed. 604; *Central R., etc., Co. v. Georgia*, 92 U. S. 665, 670, 23 L. Ed. 757; *Shields v. Ohio*, 95 U. S. 319, 323, 24 L. Ed. 357; *Railroad Co. v. Maine*, 96 U. S. 499, 508, 24 L. Ed. 836; *Railroad Co. v. Georgia*, 98 U. S. 359, 364, 25 L. Ed. 185; *Louisville, etc., R. Co. v. Palmes*, 109 U. S. 244, 245, 27 L. Ed. 922. See ante, "Corporate Existence and Formation of New Corporation," XV, A, 2, a.

In case of the dissolution of any private corporation, their legal rights would cease, and would not descend or pass to the new corporation, which should be created to succeed it. *Society for Propagation of the Gospel v. New Haven*, 8 Wheat. 464, 486, 5 L. Ed. 662.

65. **General rule as to passage**.—*St. Louis, etc., R. Co. v. Gill*, 156 U. S. 649, 39 L. Ed. 567; *Georgia R., etc., Co. v. Smith*, 128 U. S. 174, 32 L. Ed. 377; *Norfolk, etc., R. Co. v. Pendleton*, 156 U. S. 667, 672, 39 L. Ed. 574; *Mercantile Bank v. Tennessee*, 161 U. S. 161, 171, 40 L. Ed. 656; *Covington, etc., Turnpike Road Co. v. Sandford*, 164 U. S. 578, 41 L. Ed. 560; *Minneapolis, etc., R. Co. v. Gardner*, 177 U. S. 332, 44 L. Ed. 793; *Louisville, etc., R. Co. v. Palmes*, 109 U. S. 244, 27 L. Ed. 922; *Morgan v. Louisiana*, 93 U. S. 217, 23 L. Ed. 860; *Picard v. East Tennessee, etc., R. Co.*, 130 U. S. 637, 32 L. Ed. 1051; *Railroad Co. v. County of Hamblen*, 102 U. S. 273, 26 L. Ed. 152. See the title TAXATION.

And the same rule is applicable where the constituent companies are merely owned and operated by one of them as authorized by the legislature. An exemption held by the latter would not pass to the others unless so provided. *People's Gas Light, etc., Co. v. Chicago*, 194 U. S. 1, 17, 48 L. Ed. 851.

And where a corporation possessing an exemption or immunity absorbs another corporation, the immunity has been held not to extend to property acquired by such succession. *Wilmington, etc., R. Co.*

standing earlier decisions and dicta to the contrary, that a statute authorizing or directing the grant or transfer of the "privileges" of a corporation, which enjoys immunity from taxation or regulation, should not be interpreted as including that immunity.<sup>66</sup>

**A personal privilege** enjoyed by a corporation, does not pass to its successor upon the dissolution of the former, unless expressly so declared by the law under which the new corporation is created.<sup>67</sup>

*v. Alsbrook*, 146 U. S. 279, 300, 36 L. Ed. 972.

A legislative authorization of the transfer of "the property and franchises" (*Morgan v. Louisiana*, 93 U. S. 217, 23 L. Ed. 860; *Picard v. East Tennessee, etc., R. Co.*, 130 U. S. 637, 32 L. Ed. 1051); of "the property" (*Wilson v. Gaines*, 103 U. S. 417, 26 L. Ed. 401; *Louisville, etc., R. Co. v. Palmes*, 109 U. S. 244, 27 L. Ed. 922); of "the charter and works" (*Memphis, etc., R. Co. v. Railroad Comm'rs*, 112 U. S. 609, 28 L. Ed. 837); or of "the rights of franchise and property" (*Norfolk, etc., R. Co. v. Pendleton*, 156 U. S. 667, 39 L. Ed. 574), is not sufficient to include an exemption from the taxing or other power of the state, and it cannot be contended that the word "estate" has any larger meaning. Nor is the word "privileges" sufficiently broad to embrace within its meaning such an exemption, as that when it is added to the other words the legislative intent to transfer the exemption is clearly manifested. *Rochester R. Co. v. Rochester*, 205 U. S. 236, 248, 51 L. Ed. 784, citing *Chesapeake, etc., R. Co. v. Miller*, 114 U. S. 176, 29 L. Ed. 121; *Picard v. East Tennessee, etc., R. Co.*, 130 U. S. 637, 32 L. Ed. 1051; *Wilmington, etc., R. Co. v. Alsbrook*, 146 U. S. 279, 36 L. Ed. 972; *Phoenix Fire, etc., Ins. Co. v. Tennessee*, 161 U. S. 174, 40 L. Ed. 660; *Keokuk, etc., R. Co. v. Missouri*, 152 U. S. 301, 38 L. Ed. 450; *Gulf, etc., R. Co. v. Hewes*, 183 U. S. 66, 46 L. Ed. 86; and qualifying the rule deducible from *Humphrey v. Pegues*, 16 Wall. 244, 21 L. Ed. 326; *Chesapeake, etc., R. Co. v. Virginia*, 94 U. S. 718, 24 L. Ed. 310; *Central R., etc., Co. v. Georgia*, 92 U. S. 665, 23 L. Ed. 757; *Tennessee v. Whitworth*, 117 U. S. 139, 29 L. Ed. 833.

When a corporation succeeds to the rights, powers and capacities of another corporation, it does not thereby, or necessarily, become entitled to an exemption from taxation or regulation belonging to its predecessor. *Covington, etc., Turnpike Road Co. v. Sandford*, 164 U. S. 578, 586, 41 L. Ed. 560.

Where the act under which the sale of the property and franchises of a corporation took place, proceeds to say, that, "upon such conveyance to the purchaser, the said company shall ipso facto be dissolved," from this it necessarily follows that all privileges, which by the terms of its charter were personal to it, ceased with its dissolution. But the statute adds: "And the said purchaser shall forthwith

be a corporation by any name which may be set forth in said conveyance, or in any writing signed by him or them and recorded in the recorder's office of any county wherein the property, so sold or any part thereof, is situated, or where said conveyance is recorded." Thus is formed a new corporate body, succeeding to the title of the property sold and conveyed to it, but deriving its existence from this law and not from the original act of incorporation, which constituted the charter of its predecessor, and with such powers, rights, privileges, franchises and immunities only as are conferred upon it by the law which has brought it into being. *Chesapeake, etc., R. Co. v. Miller*, 114 U. S. 176, 184, 185, 187, 29 L. Ed. 121; *Keokuk, etc., R. Co. v. Missouri*, 152 U. S. 301, 311, 38 L. Ed. 450.

"Its certificate of incorporation is the conveyance to it, by the name it has chosen, as a purchaser at the judicial sale, or set forth in some writing signed by such purchaser, and recorded as required. It is a charter granted under a general law, which the constitution declares to be subject to legislative alteration and amendment." *Chesapeake, etc., R. Co. v. Miller*, 114 U. S. 176, 189, 29 L. Ed. 121. See, also, *Shields v. Ohio*, 95 U. S. 319, 24 L. Ed. 357; *Railroad Co. v. Maine*, 96 U. S. 499, 24 L. Ed. 836; *Railroad Co. v. Georgia*, 98 U. S. 359, 25 L. Ed. 185; *Louisville, etc., R. Co. v. Palmes*, 109 U. S. 244, 27 L. Ed. 922.

**Banking corporations.**—See the title BANKS AND BANKING, vol. 3, p. 12.

**66. Same.**—*Rochester R. Co. v. Rochester*, 205 U. S. 236, 252, 51 L. Ed. 784.

"The principle governing these decisions, so plain that it needs no reasoning to support it, is that those who seek and obtain the benefit of a charter of incorporation must take the benefit under the conditions and with the burdens prescribed by the laws then in force, whether written in the constitution, in general laws or in the charter itself." *Rochester R. Co. v. Rochester*, 205 U. S. 236, 254, 51 L. Ed. 784.

A corporation may exist under and by virtue of the purchase of the charter at a receiver's sale, and the legislative recognition and the assumption of the state that it is a corporation, and yet not have the title to the exemption given by that charter, because it is not in fact or in law the same corporation originally incorporated. *Mercantile Bank v. Tennessee*, 161 U. S. 161, 173, 40 L. Ed. 656.

**67. Personal privilege.**—*Memphis, etc.,*

*c Under Foreclosure Sale.*—In order for rights under a contract with the United States government to pass to the corporation succeeding to the property and franchises of the original contracting corporation, under a foreclosure sale under a mortgage, there must be in the mortgage or decree of sale terms of description including same.<sup>68</sup>

**Franchise to Be a Corporation.**—See ante, "To Alienate Franchise or Property Necessary Thereto," XI, C.

**Right to Organize as New Corporation.**—See ante, "To Alienate Franchise or Property Necessary Thereto," XI, C.

**Exemption from Regulation.**—See the title CARRIERS, vol. 3, pp. 628, 629.

## XVI. Reorganization.<sup>69</sup>

**Rights of Bondholders and Legislative Power.**—The nature of corporate bonds and other obligations secured by mortgage, issued for sale in the market, is such that the right of legislative supervision for the good of all, unless restrained by some constitutional prohibition, seems almost necessarily to form one of their ingredients, and when insolvency is threatened, and the interests of the public, as well as creditors, are imperiled by the financial embarrassments of the corporation, a reasonable "scheme or arrangement" may as well be legalized as an ordinary "composition in bankruptcy." In fact, such "arrangement acts" are a species of bankrupt acts. Their object is to enable corporations created for the good of the public to relieve themselves from financial embarrassments by appropriating their property to the settlement and adjustment of their affairs, so that they may accomplish the purposes for which they were incorporated.<sup>70</sup>

*R. Co. v. Railroad Comm'rs*, 112 U. S. 609, 617, 28 L. Ed. 837; *Railroad Co. v. County of Hamblen*, 102 U. S. 273, 26 L. Ed. 152; *Wilson v. Gaines*, 103 U. S. 417, 26 L. Ed. 401; *Louisville, etc., R. Co. v. Palmes*, 109 U. S. 244, 27 L. Ed. 922; *Picard v. East Tennessee, etc., R. Co.*, 130 U. S. 637, 32 L. Ed. 1051; *Mercantile Bank v. Tennessee*, 161 U. S. 161, 171, 40 L. Ed. 656; *Morgan v. Louisiana*, 93 U. S. 217, 23 L. Ed. 860.

**68. Foreclosure sale.**—*St. Paul, etc., Co. v. United States*, 112 U. S. 733, 28 L. Ed. 861.

In the absence of express statutory direction, or of an equivalent implication by necessary construction, provisions, in restriction of the right of the state to tax the property or to regulate the affairs of its corporations, do not pass to new corporations succeeding, by consolidation or by purchase under foreclosure, to the property and ordinary franchises of the first grantee. *Norfolk, etc., R. Co. v. Pendleton*, 156 U. S. 667, 672, 673, 39 L. Ed. 574. See ante, "Private Corporations Generally," XI, C, 1.

**69. Transfer of property to reorganized corporation on expiration of charter.**—See post, "Distribution of Assets," XVII, C, 5.

**By formation of new corporation.**—See ante, "Succession," XV, B.

**70. Reorganization acts and bondholders' rights.**—*Canada Southern R. Co. v. Gebhard*, 109 U. S. 527, 535, 27 L. Ed. 1020.

"The confirmation and legislation of 'a scheme of arrangement' under such cir-

cumstances is no more than is done in bankruptcy when a 'composition' agreement with the bankrupt debtor, if assented to by the required majority of creditors, is made binding on the nonassenting minority. In no just sense do such governmental regulations deprive a person of his property without due process of law. They simply require each individual to so conduct himself for the general good as not unnecessarily to injure another." *Canada Southern R. Co. v. Gebhard*, 109 U. S. 527, 536, 27 L. Ed. 1020.

This case seems to go farther than the *Gilfillan Case*, decided just before, where it was said that no majority, however large, can compel a minority, small though it be, to enter into such an agreement against their will, and under the constitution of the United States, it is probable that no statute of a state, passed after the bonds were issued, subjecting the minority to the provisions of the agreement without their consent, would be valid. But it seems a proper exercise of legislative power to require a minority to act whenever such an arrangement is proposed, and to provide that all shall be bound who do not, in some direct way, within a reasonable time after notice, signify their refusal to concur. To sustain such legislation it is only necessary to invoke the principle enforced in statutes of limitations, which makes neglect to sue within a specified time conclusive evidence of the abandonment of the cause of action. As was said in *Terry v. Anderson*, 95 U. S. 628, 24 L.



**And where a corporation is a foreign corporation** doing business in the United States and such a scheme of reorganization is lawful and constitutional under the government of its domicile, its creditors suing in the courts of this country are presumed to have contracted with reference to its charter powers and liability as defined by the laws of the government by which it was created, and they cannot complain that such a statute impairs the obligations of their contracts.<sup>71</sup>

**Bankruptcy Charges and Expenses.**—A corporation, after being adjudged a bankrupt, was reorganized as a new corporation, taking over all the property of the original corporation, under a decree of mortgage foreclosure, and issuing new stock. The amount which the assignees in bankruptcy were entitled to receive for their services, as representing all the creditors and all the stockholders, had been determined under an agreement with reference to which the reorganization was made. It clearly appeared from the evidence that the compensation of the assignees in bankruptcy was one of the claims provided for under that agreement although the agreement for reorganization did not specifically state same. It was held that a party who received a large proportion of the stock of the new company took it burdened with a trust to pay a proportionate part of such expenses, and equity will enforce such claim against this stock, although the decree under which the property of the old corporation was sold did not provide therefor, it being so entered upon the conditional promise of defendant and another to pay same in a certain way.<sup>72</sup>

Ed. 365, where the limitation was of actions upon certain legal obligations that embarrassed the entire community at the close of the late civil war, "the obligation of old contracts could not" in this way "be impaired, but their prompt enforcement could be insisted upon or their abandonment claimed." *Gilfillan v. Union Canal Co.*, 109 U. S. 401, 404, 27 L. Ed. 977. See, also, the title RAILROADS.

**71. Foreign corporation.**—*Canada Southern R. Co. v. Gebhard*, 109 U. S. 527, 27 L. Ed. 1020.

Where a Canadian corporation had become financially embarrassed, and was, and had been for a long time, unable to meet its engagements in the ordinary way as they matured, and there was an urgent necessity that something be done for the settlement of its affairs, and a large majority of the creditors and shareholders had agreed on a plan of adjustment which would enable the company to go on with its business, and thus accommodate the public, and to protect the creditors to the full extent of the available value of its corporate property, the Dominion parliament had the legislative power to legalize the plan of adjustment as it had been agreed on by the majority of those interested, and to bind the resident minority creditors by its terms, and under these circumstances the true spirit of international comity requires that schemes of this character, legalized at home, should be recognized in other countries. *Canada Southern R. Co. v. Gebhard*, 109 U. S. 527, 538, 539, 27 L. Ed. 1020.

The fact that the bonds made in Canada were payable in New York is unimportant, except in determining by what law the parties intended their contract should be

governed; and every citizen of a country, other than that in which the corporation is located, may protect himself against all unjust legislation of the foreign government by refusing to deal with its corporations. Citizens of the United States who sue in their courts upon such bonds are bound also, where they are placed on the same terms, as to their rights, as resident bondholders. *Canada Southern R. Co. v. Gebhard*, 109 U. S. 527, 539, 27 L. Ed. 1020. See the title FOREIGN CORPORATIONS.

It is within the just scope of legislative power to require bondholders, interested in common with others in a trust security, to signify their assent to or dissent from a plan proposed by proper persons for the compromise and adjustment of matters of difference affecting their common interests, and the statute involved in this suit is of that character and valid. *Gilfillan v. Union Canal Co.*, 109 U. S. 401, 407, 27 L. Ed. 977.

See, also, *Canada Southern R. Co. v. Gebhard*, 109 U. S. 527, 535, 27 L. Ed. 1020, where, after approving the principal case, it was said to be "eminently proper that where the legislative power exists some statutory provision should be made for binding the minority in a reasonable way by the will of the majority." And, except in the case of the states of the United States which cannot pass laws impairing the obligation of a contract, it was said that such provision might be made in respect to existing as well as prospective obligations.

**72. Expenses of bankruptcy proceedings.**—*Meddaugh v. Wilson*, 151 U. S. 333, 38 L. Ed. 183.

It may be affirmed that the property

## XVII. Insolvency, Winding Up, Dissolution and Forfeiture.

See the titles *ASSIGNMENTS FOR BENEFIT OF CREDITORS*, vol. 2, p. 599; *BANKRUPTCY*, vol. 2, p. 792; *RECEIVERS*.

**A. Insolvency**—1. *JURISDICTION AND GENERAL PRINCIPLES*.—The closing up of affairs of insolvent corporations is a subject over which courts of equity have general jurisdiction.<sup>73</sup>

**Insolvency as Dissolution**.—See post, "What Constitutes Dissolution," XVII, B, 1.

**What Constitutes Insolvency**.—See ante, "Corporate Property as Trust Fund," II, E.

2. *DISTRIBUTION AND PRIORITIES*.—In the case of an insolvent incorporation brought into liquidation, and wound up by judicial process at the suit of a creditor, whether he sues in his own right, or on behalf of himself and other creditors, the rule of distribution is the same, and is founded upon the principle of equality in which equity delights; unless a claimant or some other judgment creditor had, previously to the filing of the bill, obtained a lien at law upon some portion of the property distributed, or could establish a superior equity, existing at the time of the filing of the bill.<sup>74</sup>

**Preference of Creditor for Operating Expenses**.—The doctrine of *Fosdick v. Schall*, giving a preference to the creditor for debts incurred under the head of "operating expenses," has never yet been applied to any case except that

was in equity chargeable with the claim of plaintiffs; that the charge was not incorporated into the decree by virtue of a reliance upon the conditional promise of the defendant and another to pay the said claims if a previous scheme of reorganization, which had failed, had been successful; that the defendant became one of the purchasers and interested in this property with full knowledge of the consideration and the equitable obligation to the plaintiffs; that the arrangement between the parties in interest and himself resulted in fixing the amounts which they should receive absolutely and under no further liability for expenses or otherwise, while he, for the considerations named, assumed all the liabilities, fixed as well as unsettled, growing out of the perfection of the title to that property; that he at one time recognized this liability to plaintiffs as one of those assumed by him in this arrangement with the creditors and others interested, and that it still remains an undischarged obligation resting upon him, and is in equity a lien upon the stock of the new corporation in his hands. *Meddaugh v. Wilson*, 151 U. S. 333, 359, 38 L. Ed. 183.

Having reached the conclusion that the defendant is under obligations to the plaintiffs, there remains the further question as to the measure of such liability. On the one hand, it may be said that the amount of the plaintiff's claim was by agreement fixed at the sum which the defendant promised to pay in case the negotiations were carried through. On the other hand, it is said that if those negotiations had been carried through he was to have received \$590,000 in cash, while under the arrangement as finally consummated he received stock representing

only \$395,000, and that, therefore, to that extent the claim of plaintiffs should be scaled down. The latter is the correct solution, and interest should not be allowed. *Meddaugh v. Wilson*, 151 U. S. 333, 359, 38 L. Ed. 183. See, generally, the title *BANKRUPTCY*, vol. 2, p. 792.

**73. Jurisdiction in equity**.—*Mellen v. Moline Malleable Iron Works*, 131 U. S. 352, 367, 33 L. Ed. 178; *Hollins v. Brierfield Coal, etc., Co.*, 150 U. S. 371, 380, 37 L. Ed. 1113; *Richmond v. Irons*, 121 U. S. 27, 48, 30 L. Ed. 864; *Hawkins v. Glenn*, 131 U. S. 319, 33 L. Ed. 184.

Administration of the assets of an insolvent corporation is within the functions of a court of equity, and the parties being before the court, it has the power to proceed with such administration, even though it might have been objected to the jurisdiction, but was not, that the complainants had not exhausted their legal remedies, being simple contract creditors. This objection might be waived. *Hollins v. Brierfield Coal, etc., Co.*, 150 U. S. 371, 380, 37 L. Ed. 1113; *Brown v. Lake Superior Iron Co.*, 134 U. S. 530, 33 L. Ed. 1021. See the title *CREDITORS' SUITS*.

**74. Rule of distribution**.—*Richmond v. Irons*, 121 U. S. 27, 44, 30 L. Ed. 864; *Curran v. Arkansas*, 15 How. 304, 14 L. Ed. 705; *Ogilvie v. Knox Ins. Co.*, 22 How. 380, 387, 16 L. Ed. 349; *Sawyer v. Hoag*, 17 Wall. 610, 21 L. Ed. 731; *Potts v. Wallace*, 146 U. S. 689, 700, 36 L. Ed. 1135, where it is said that in Pennsylvania such fund cannot be appropriated by individual creditors, by attachments or executions against particular assets, but should be distributed, on equitable principles, among the creditors at large.

of a railroad. *Quære*, whether it should be extended.<sup>75</sup>

**Priority between Corporate Mortgage and Judgment for Tort.**—Under a state statute declaring that judgments for torts should have priority over corporate mortgages as to the property of the corporation defendant embraced in such mortgages, the statute imposes upon the investment made by a corporate company in its plant a responsibility for torts committed by it or any subsequent corporate owner, and that responsibility cannot be avoided by any mortgage or other incumbrance voluntarily placed upon the property. Security to the individual citizen is to go hand in hand with the franchise and privilege granted by the state.<sup>76</sup> It is a remedial, not a penal statute, and to be liberally construed.<sup>77</sup>

**Trust Fund Doctrine.**—See ante, "Corporate Property as Trust Fund," II, E.

**Preferences.**—See ante, "To Prefer Creditors and Assign for Their Benefit," XI, F.

**Stockholders as Creditors.**—See the title STOCK AND STOCKHOLDERS.<sup>78</sup>

**B. Dissolution, Forfeiture and Ouster.**—See ante, "Duration and Determination of Corporate Existence," IV, C, 2.

**Under reserved power,** see ante, "Where Power Reserved to Amend or Repeal," VIII, C, 4.

1. WHAT CONSTITUTES DISSOLUTION—*a. In General.*—The mere payment of liabilities, distribution of assets and cessation of business does not constitute a legal dissolution of a corporation so as to prevent a suit against it;<sup>79</sup> nor the mere appointment of a receiver.<sup>80</sup>

**75. Preference for operating expenses.**—*Wood v. Guarantee Trust, etc., Co.*, 128 U. S. 416, 421, 32 L. Ed. 472.

**Doctrine of Fosdick v. Schall.**—See the title RAILROADS.

**Debts for construction or operating expenses.**—See the title RAILROADS. See, also, the title COUPONS.

**76. Corporate mortgage and judgment for tort.**—*Guardian Trust, etc., Co. v. Fisher*, 200 U. S. 57, 70, 50 L. Ed. 367.

Section 1255 of the Code of North Carolina of 1883 provides that corporate mortgages shall not exempt the property mortgaged from execution for any judgment obtained in the courts of the state against such incorporation for torts (among other causes), any clause or clauses in such mortgage to the contrary notwithstanding. A waterworks company, having executed two mortgages, under the second of which its plant was sold, subject to the first mortgage, to a new corporation, the new corporation executed a further mortgage. Subsequently judgments were rendered against the new corporation for torts, as was recited in the judgment entries. On foreclosure of the mortgages, these judgments were given priority over the mortgagees, notwithstanding the contention of the latter that the judgments were not conclusive in the foreclosure proceedings, as the mortgagees were not parties thereto, and only the interest acquired by the new company was responsible for the damages caused by its negligence. In affirming the decision, held that: Under the statute the mortgagees agreed to accept the judgments as conclusive of the amounts due. And the record entries reciting that neg-

ligence was the basis of the cause of action declared on and of the recovery as adjudged by the state court, show judgments in actions of tort entitled to the priority over the mortgages given by the statute aforesaid. *Guardian Trust, etc., Co. v. Fisher*, 200 U. S. 57, 50 L. Ed. 367.

**77. Section 1255 is not a penal statute,** to be construed strictly, but remedial, and to be liberally construed to carry into effect the intention of the legislature, i. e., to make the property of corporations security against their torts. *Guardian Trust, etc., Co. v. Fisher*, 200 U. S. 57, 50 L. Ed. 367.

**78. Preference of citizens of state as denial of privileges of citizens of other states.**—See the title CONSTITUTIONAL LAW, ante, pp. 474, 476.

**79. What constitutes dissolution.**—That corporations have paid all other liabilities, and thereafter distributed their remaining assets amongst their respective stockholders, and have since made no use of their franchises, and have no agent or officer upon whom process can be served, and no assets out of which any judgment against them could be satisfied, falls far short of a dissolution such as would prevent a suit against the corporations or their trustees as provided by the laws of Wyoming, to establish the validity and amount of the appellants' claim for damages. *Swan Land, etc., Co. v. Frank*, 148 U. S. 603, 611, 37 L. Ed. 577.

**80. Granting that, in the absence of statutory provision to the contrary, suits cannot be maintained and judgments rendered against corporations whose**



**Dissolution by Consolidation and Succession.**—See ante, "Consolidation and Succession," XV.

**By Change of Government.**—See ante, "Statement of Rule," VIII, C, 1, a, (1).

**Necessity for Judicial Ascertainment.**—See post, "Jurisdiction and Procedure to Ascertain and Declare," XVII, B, 3.

**Charter as Contract and Repeal Thereof.**—See ante, "Charter as Contract, and Amendment or Repeal Thereof," VIII, C.

b. *Insolvency.*—A corporation is not required by any duty it owes to creditors to suspend operations the moment it becomes financially embarrassed, or because it may be doubtful whether the objects of its creation can be attained by further effort upon its part. It is in the line of right and of duty when attempting, in good faith, by the exercise of its lawful powers and by the use of all legitimate means, to preserve its active existence, and thereby accomplish the objects for which it was created.<sup>81</sup>

c. *Sale of Property, etc.*—A corporation which sells its property, etc., under a law which leaves it without stock, officers, property or franchises, is impliedly, if not expressly, dissolved by operation of the law which brings this condition into existence.<sup>82</sup>

2. **VOLUNTARY DISSOLUTION AND SURRENDER OF FRANCHISE.**—See ante, "To Alienate Franchise, or Property Necessary Thereto," XI, C. A corporation, by the very terms and nature of its political existence, is subject to a dissolution, by a surrender of its corporate franchises. Every creditor must be presumed to know this and to contract with reference to it, although the obligation of its contracts of course survives.<sup>83</sup> It may be accomplished by the surrender of the corporate franchises with the consent of the state.<sup>84</sup>

3. **JURISDICTION AND PROCEDURE TO ASCERTAIN AND DECLARE.**—See the titles *QUO WARRANTO*; *SCIRE FACIAS*.

a. *In General.*—For the purpose of effecting a dissolution of a corporation grounded upon some alleged forfeiture of its rights and powers, the state must act through its attorney general and by action in the nature of *quo warranto*.<sup>85</sup>

chartered existence has terminated, it is not pretended in this case that that event had taken place by lapse of time, by judicial proceedings, or otherwise, unless, as is insisted, the appointment of a receiver in itself put an end to the bank as a corporate entity, and the general rule is that the legal existence of a corporation cannot be cut short in this way. *Chemical Nat. Bank v. Hartford Deposit Co.*, 161 U. S. 1, 4, 40 L. Ed. 595. See the titles *BANKS AND BANKING*, vol. 3, p. 197; *RECEIVERS*.

81. *Insolvency.*—*Easton v. Iowa*, 188 U. S. 220, 235, 47 L. Ed. 452. See ante, "Insolvency," XVII, A.

Insolvency as ground for dissolution, see post, "Causes of Dissolution and Forfeiture," XVII, B, 4.

82. *By sale of property, etc.*—*Rochester R. Co. v. Rochester*, 205 U. S. 236, 256, 51 L. Ed. 784. See ante, "Corporate Existence and Formation of New Corporation," XV, A, 2, a.

83. *Voluntary dissolution.*—*Chicago Life Ins. Co. v. Needles*, 113 U. S. 574, 584, 28 L. Ed. 1084; *New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 336, 348, 46 L. Ed. 936, reaffirmed in *Brewster v. Cahill*, 194 U. S. 628, 48 L. Ed. 1158; *Mumma v. Potomac Co.*, 8 Pet. 281, 8 L. Ed. 945. See post, "As to Debts, Con-

tracts and Other Liabilities," XVII, C, 2.

In *Mumma v. Potomac Co.*, 8 Pet. 281, 8 L. Ed. 945, such a dissolution was declared, by the act incorporating a successor corporation, to result from its acceptance by the old company and the concomitant surrender of its charter.

And it would be a doctrine new in the law, that the existence of a private contract of the corporation should force upon it a perpetuity of existence, contrary to public policy, and the nature and objects of its charter. *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574, 584, 28 L. Ed. 1084; *Mumma v. Potomac Co.*, 8 Pet. 281, 287, 8 L. Ed. 945.

Although doubts have often been expressed whether a private corporation can be dissolved by the surrender of its corporate franchise into the hands of the government. *Pennsylvania College Cases*, 13 Wall. 190, 215, 20 L. Ed. 550.

84. *Consent of state.*—*Swan Land, etc., Co. v. Frank*, 148 U. S. 603, 611, 37 L. Ed. 577.

And a statutory proceeding to wind up a corporation is not a common-law remedy. *Moran v. Sturges*, 154 U. S. 256, 277, 38 L. Ed. 981.

85. *State action and nature thereof.*—*Planters' Ins. Co. v. Tennessee*, 161 U.

**A private party cannot take advantage of the forfeiture of a corporate charter.**<sup>86</sup>

*b. Necessity for Judgment of Ouster.*—Where there is no judgment of ouster in a quo warranto proceeding against a corporation, nor anything in the judgment which prevents them from continuing to exercise the liberties and privileges which the information charges them to have usurped, the judgment is not final.<sup>87</sup>

**4. CAUSES OF DISSOLUTION AND FORFEITURE**—*a. In General.*—The dissolution of corporations is or may be effected by expirations of their charters, by

S. 193, 197, 40 L. Ed. 667; *New Orleans, etc., Co. v. Louisiana*, 180 U. S. 320, 328, 45 L. Ed. 550. See *Terrett v. Taylor*, 9 Cranch 43, 51, 3 L. Ed. 650; *Wells Co. v. Gastonia Cotton Mfg. Co.*, 198 U. S. 177, 185, 49 L. Ed. 1003. See post, "In General," XVII, B, 4, a.

"It is stated by Chancellor Kent, in his *Commentaries* (vol. 2, p. 378, Comstock's Ed.), that there were two modes of proceeding judicially to ascertain and enforce the forfeiture of a charter for default or abuse of power; the one by scire facias, the other by information in the nature of a quo warranto; both these modes of proceeding against corporations being at the instance and on behalf of the government. The state must be a party to the prosecution, for the judgment is that the parties be ousted, and the franchises seized into the hands of the government." *New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 336, 346, 46 L. Ed. 936, reaffirmed in *Brewster v. Cahill*, 194 U. S. 628, 48 L. Ed. 1158. See, also, *Gates v. Parmly*, 191 U. S. 557, 48 L. Ed. 301; *Weltmer v. Bishop*, 191 U. S. 560, 561, 48 L. Ed. 302; *Coventry v. Davis*, 193 U. S. 668, 48 L. Ed. 840; *Hamburg American Steamship Co. v. Lennan*, 194 U. S. 629, 48 L. Ed. 1157; *Berlin Iron Bridge Co. v. Brennan*, 194 U. S. 630, 48 L. Ed. 1158.

Where a statute authorizes a public officer to bring the company before a judicial tribunal, which, after full opportunity for defense, may determine whether it is insolvent, or its condition such as to render its continuance in business hazardous to the public, or whether it has exceeded its corporate powers, or violated the rules, restrictions or conditions prescribed by law, it is constitutional. And the fact that the suit is to be instituted if, in the opinion of the officer, grounds exist, does not make the proceeding harsh or arbitrary, for the final judgment must depend upon the facts as established by competent evidence. *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574, 583, 28 L. Ed. 1084; *Terrett v. Taylor*, 9 Cranch 43, 51, 3 L. Ed. 650. See ante, "Under Special Statute," XIV, A, 2.

**A federal court has no power to forfeit the charter of a state corporation.** *Northern Securities Co. v. United States*, 193 U. S. 197, 346, 48 L. Ed. 679. See post, "Power of Congress Over Territorial and Federal Corporations," XVII, C, 5, d.

As to conclusiveness of decision of state court, see the titles **APPEAL AND ERROR**, vol. 1, pp. 706, 711; **COURTS**.

**Due process and equal protection of laws.**—Where the decree in a proceeding in the nature of quo warranto in the states named against the corporation, adjudges the charter, under color of which the defendant company claimed corporate existence, to be null and void, and enjoins the officers and stockholders from acting as a corporation, because they were incorporated for an unlawful purpose, the property of the individual corporators is not in any way taken without due process of law, although they were not made parties to the proceeding, nor were they denied the equal protection of the laws. The decree simply holds the property until it can properly be disposed of according to law. *New Orleans, etc., Co. v. Louisiana*, 180 U. S. 320, 331, 45 L. Ed. 550. See, also, the titles **CONSTITUTIONAL LAW**, ante, p. 1; **DUE PROCESS OF LAW**.

**Against de facto corporations.**—See ante, "De Facto Corporations," V, A.

**Necessity for forfeiture proceeding to divest title to land.**—See ante, "Power to Acquire and Hold Lands," XI, B, 2; "Who May Raise Question," XI, B, 4.

**86. Unavailable to private party.**—That is a question for the sovereign power, which may waive it, or enforce it, at its pleasure. *Frost v. Frostburg Coal Co.*, 24 How. 278, 283, 16 L. Ed. 637; *Bank v. Pahquioque Bank*, 14 Wall. 383, 399, 20 L. Ed. 840, 844. See *County of Macon v. Shores*, 97 U. S. 272, 277, 24 L. Ed. 889; *Wells Co. v. Gastonia Cotton Mfg. Co.*, 198 U. S. 177, 185, 49 L. Ed. 1003. See ante, "Nul Tiel Corporation," XIV, E, 1.

**87. Judgment of ouster necessary.**—In order to make the decision a final one, the court, under the opinion expressed by them, should have proceeded to adjudge that the plaintiffs in error do not in any manner use the privileges and franchises in question, and that they be forever absolutely forejudged and excluded from exercising or using the same, or any of them, in future. And semble, that the supreme court of the territory awarded the procedendo to the district court in order to enable it to proceed to final judgment, the supreme court having no power to give a judgment of ouster, in the shape in which the case came before it. *Miners' Bank v. United States*,

failure of any essential part of the corporate organizations that cannot be restored, by dissolution and surrender of their franchises with the consent of the state, by legislative enactment within the constitutional authority, by forfeiture of their franchises and judgment of dissolution declared in regular judicial proceedings, or by other lawful means.<sup>88</sup> It has been further held that the establishment against such a corporation, before a judicial tribunal, that it was insolvent, or that its condition was such as to render its continuance in business hazardous to the public; or that it had exceeded its corporate powers; or that it had violated the rules, restrictions or conditions prescribed by law, constituted a sufficient reason for the state, which created it, to reclaim the franchises and privileges granted to it.<sup>89</sup>

*b. Misuser or Nonuser of Franchises.*—A private corporation created by the legislature may lose its franchises by a misuser or a nonuser of them.<sup>90</sup> It is no

5 How. 213, 214, 12 L. Ed. 121. See, also, *Terrett v. Taylor*, 9 Cranch 43, 51, 3 L. Ed. 650.

The mere breach of conditions subsequent, without judgment of ouster and dissolution, is insufficient to terminate corporate existence. *Davis v. Gray*, 16 Wall. 203, 223, 21 L. Ed. 447.

**88. Causes generally stated.**—*Swan Land, etc., Co. v. Frank*, 148 U. S. 603, 611, 37 L. Ed. 577.

Its authority may be annihilated, although it has not abused its authority, by an act of the legislative body, when deemed necessary or convenient to the public interest. *Chisholm v. Georgia*, 2 Dall. 419, 448, 1 L. Ed. 440; *McDonogh v. Murdoch*, 15 How. 367, 406, 14 L. Ed. 732.

**89. Grounds of exercise.**—*Louisville, etc., R. Co. Kentucky*, 161 U. S. 677, 697, 40 L. Ed. 849, reaffirmed in *Ornstone v. Cary*, 204 U. S. 669, 51 L. Ed. 672; *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574, 583, 28 L. Ed. 1084; *Terrett v. Taylor*, 9 Cranch 43, 51, 3 L. Ed. 650.

Thus, the state which brought a corporation into existence for the purpose of conducting the business of life insurance has implied power to protect the people against it, when its further continuance in business would defeat the object of its creation, and be a fraud upon the public, and on its creditors and policy holders. *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574, 582, 28 L. Ed. 1084.

**Bad faith and fraud in organization.**—The good faith of the incorporators, or whether the company was organized in fraud of the law, are not matters to be inquired into in ordinary suits between the company and individuals or incorporations. If the organization of the company as a corporation was tainted with fraud, it was for the state, by some appropriate proceeding, to annul its charter. *Wells Co. v. Gastonia Cotton Mfg. Co.*, 198 U. S. 177, 185, 49 L. Ed. 1003.

**90. Misuser or nonuser.**—*Terrett v. Taylor*, 9 Cranch 43, 51, 3 L. Ed. 650; *Dartmouth College v. Woodward*, 4 Wheat. 518, 663, 675, 4 L. Ed. 629; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387,

475, 36 L. Ed. 1018 (dissenting opinion); *Chisholm v. Georgia*, 2 Dall. 419, 448, 1 L. Ed. 440; *Given v. Wright*, 117 U. S. 648, 656, 29 L. Ed. 1021, where nonuser is said to be one of the common grounds assigned as a cause of forfeiture.

"The charter of a corporation, says Mr. Justice Blackstone (2 Bl. Com. 484), may be forfeited through negligence or abuse of its franchises, in which case, the law judges, that the body politic has broken the condition upon which it was incorporated, and thereupon the corporation is void." *Dartmouth College v. Woodward*, 4 Wheat. 518, 658, 4 L. Ed. 629.

"For years prior to and at the time of the formation of this corporation it was the unquestionable law that all corporations were created by the state subject to its implied power, if not stated in the charter, to dissolve the corporation for a misuse or for a nonuse of its corporate powers or obligations. The contract contained in a charter is always subject to this power residing in the state. Thus in *Terrett v. Taylor*, 9 Cranch 43, 3 L. Ed. 650, it was stated by the court (p. 51): 'A private corporation created by the legislature may lose its franchises by a misuser or nonuser of them; and they may be resumed by the government under a judicial judgment upon a quo warranto to ascertain and enforce a forfeiture. This is the common law of the land, and is a tacit condition annexed to the creation of every such corporation.'" *New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 336, 346, 46 L. Ed. 936, reaffirmed in *Brewster v. Cahill*, 194 U. S. 628, 48 L. Ed. 1158; *Gates v. Parmly*, 191 U. S. 557, 48 L. Ed. 301; *Weltmer v. Bishop*, 191 U. S. 560, 561, 48 L. Ed. 302; *Coventry v. Davis*, 193 U. S. 668, 48 L. Ed. 840; *Hamburg-American Steamship Co. v. Lennan*, 194 U. S. 629, 48 L. Ed. 1157; *Berlin Iron Bridge Co. v. Brennan*, 194 U. S. 630, 48 L. Ed. 1158.

The offenses of a corporation may be such as to forfeit its existence. *National Bank v. Graham*, 100 U. S. 699, 702, 25 L. Ed. 750. Such as the exaction of illegal rates for services rendered the public. *New Orleans Waterworks Co. v.*



defense to a scire facias against a corporation for nonuser or abuser of its franchises, that the state had incorporated another, was in part managing it, and largely profiting by it; and in consequence of all this, that the revenues of the first company were so far lessened that it could observe its charter no better than it did. No exclusive privileges having been granted, no contract was impaired by so doing.<sup>91</sup>

c. *Failure to Elect Trustees*.—The franchise of a corporation is not taken away or surrendered, nor is the corporation dissolved, by the mere failure to elect trustees.<sup>92</sup>

5. **WAIVER OF FORFEITURE**.—The right of the state to release its claim to a penalty for breach of a charter provision by a corporation is not disputed. Cer-

Louisiana, 185 U. S. 336, 352, 46 L. Ed. 936.

The right of a corporation to exist as a corporation, and authority, in that capacity, to conduct the particular business for which it was created, were granted, subject to the condition that the privileges and franchises conferred upon it should not be abused, or so employed as to defeat the ends for which it was established, and that, when so abused or misemployed, they might be withdrawn or reclaimed by the state, in such way and by such modes of procedure as were consistent with law. Although no such condition is expressed in the company's charter, it is necessarily implied in every grant of corporate existence. *Terrett v. Taylor*, 9 Cranch 43, 51, 3 L. Ed. 650; *Angell & Ames on Corporations*, 9th Ed., § 774, note. *New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 336, 347, 46 L. Ed. 936, reaffirmed in *Brewster v. Cahill*, 194 U. S. 628, 48 L. Ed. 1158; *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574, 580, 28 L. Ed. 1084. See, also, *Gates v. Parmly*, 191 U. S. 557, 48 L. Ed. 301; *Weltmer v. Bishop*, 191 U. S. 560, 561, 48 L. Ed. 302; *Coventry v. Davis*, 193 U. S. 668, 48 L. Ed. 840; *Hamburg American Steamship Co. v. Lennan*, 194 U. S. 629, 48 L. Ed. 1157; *Berlin Iron Bridge Co. v. Brennan*, 194 U. S. 630, 48 L. Ed. 1158; *Eagle Ins. Co. v. Ohio*, 153 U. S. 446, 454, 38 L. Ed. 778; *Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677, 697, 40 L. Ed. 849, reaffirmed in *Ornstine v. Cary*, 204 U. S. 669, 51 L. Ed. 672.

In *Mumma v. Potomac Co.*, 8 Pet. 281, 287, 8 L. Ed. 945, it was said: "A corporation, by the very terms and nature of its political existence, is subject to a dissolution, by a surrender of its corporate franchises, and by a forfeiture of them for willful misuse and nonuse. Every creditor must be presumed to understand the nature and incidents of such a body politic, and to contract with reference to them. And it would be a doctrine new in the law that the existence of a private contract of the corporation should force upon it a perpetuity of existence, contrary to public policy, and the nature and objects of its charter." *New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 336, 348, 46 L. Ed. 936,

reaffirmed in *Brewster v. Cahill*, 194 U. S. 628, 48 L. Ed. 1158; *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574, 584, 28 L. Ed. 1084. See, also, *Gates v. Parmly*, 191 U. S. 557, 48 L. Ed. 301; *Weltmer v. Bishop*, 191 U. S. 560, 561, 48 L. Ed. 302; *Coventry v. Davis*, 193 U. S. 668, 48 L. Ed. 840; *Hamburg-American Steamship Co. v. Lennan*, 194 U. S. 629, 48 L. Ed. 1157; *Berlin Iron Bridge Co. v. Brennan*, 194 U. S. 630, 48 L. Ed. 1158.

Quære, when, if ever, a corporation can cease to operate without forfeiture of its franchises, upon the excuse that it cannot go forward because of expense and want of remuneration. *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 411, 32 L. Ed. 979.

**Louisiana**.—"That the state has power to forfeit the charter of a corporation for an abuse of its privilege is recognized as the law of Louisiana. The Civil Code of that state, art. 447, has for many years authorized a proceeding in the nature of a quo warranto to forfeit the charter for misuse, and it has been held that such article applies to every charter granted since its adoption." *New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 336, 349, 46 L. Ed. 936, reaffirmed in *Brewster v. Cahill*, 194 U. S. 628, 48 L. Ed. 1158.

91. **Defense that state has impaired contract**.—*Turnpike Co. v. State*, 3 Wall. 210, 18 L. Ed. 180. See ante, "Remedy for Infringement and Jurisdiction," VIII, C, 6.

92. **Failure to elect trustees**.—*Speer v. Colbert*, 200 U. S. 130, 144, 50 L. Ed. 403; *Trustees for Vincennes University v. Indiana*, 14 How. 268, 272, 14 L. Ed. 416.

If the board of trustees, by a failure to elect when vacancies occurred, or through any other means, became reduced to a less number than was authorized to act by the charter, the corporation was not thereby dissolved. In such a case, its franchises would be suspended only until its functions were restored by legislative action. If, therefore, the corporation by nonuser had become liable to a judicial process of forfeiture, after such legislative act, such a procedure could not be instituted. *Trustees for Vincennes University v. Indiana*, 14 How. 268, 272, 14 L. Ed. 416.

tainly the power to do so is too well settled to admit of controversy. The repeal of the law imposing the penalty is of itself a remission.<sup>93</sup>

**C. Effects and Consequences.**—See ante, "Consolidation and Succession," XV. On rights and liabilities of stockholders, see the title STOCK AND STOCKHOLDERS.

1. AS TO POWERS GENERALLY.—Semble, that a merely formal conveyance, executed after the expiration of the charter, merely carrying out in form what was already completed and carried out in substance, is valid.<sup>94</sup>

**Effect on License.**—A naked license belonging to a corporation to make and sell a patented article as a part of its business, if it existed, was a mere personal one, and not transferable, and was extinguished with the dissolution of the corporation.<sup>95</sup>

2. AS TO DEBTS, CONTRACTS AND OTHER LIABILITIES.—**Statement of Modern Rule.**—The ancient doctrine, that, upon the repeal of a private corporation, its debts were extinguished, and its real property reverted to its grantors, and its personal property vested in the state, has been so far modified by modern adjudications, that a court of equity will now lay hold of the property of a dissolved corporation, and administer it for the benefit of its creditors and stockholders. The obligation of contracts, made whilst the corporation was in existence, survives its dissolution; and the contracts may be enforced by a court of equity, so far as to subject, for their satisfaction, any property possessed by the corporation at the time. In the view of equity, its property constitutes a trust fund pledged to the payment of the debts of creditors and stockholders.<sup>96</sup> And

**93. Waiver.**—*Maryland v. Baltimore*, etc., R. Co., 3 How. 534, 552, 11 L. Ed. 714. See, also, *United States v. The Schooner Peggy*, 1 Cranch 103, 104, 2 L. Ed. 49; *The General Pinkney v. United States*, 5 Cranch 281, 3 L. Ed. 101; *United States v. The Ship Helen*, 6 Cranch 203, 3 L. Ed. 199; *Trustees for Vincennes University v. Indiana*, 14 How. 268, 272, 14 L. Ed. 416, where it was waived by a legislative act restoring its functions to a suspended corporation.

**94. As to powers.**—The fact that a corporate charter has expired before a deed by the corporation is executed will not necessarily invalidate the deed, where the entire transaction had been concluded, with that exception, years before, and the conveyance was merely to carry it out in form. Certainly stockholders of the grantee corporation, who have long acquiesced, cannot object. *Branch v. Jesup*, 106 U. S. 463, 487, 27 L. Ed. 279.

"Rules applicable to a going corporation remain applicable, notwithstanding it may have become insolvent and ceased to carry on its operations, where, as in this case, it continues in the possession and exercise of all corporate powers essential to the collection of debts, the enforcement of liabilities and the application of assets to the payment of creditors." *Glenn v. Liggett*, 135 U. S. 533, 543, 34 L. Ed. 262; *Hawkins v. Glenn*, 131 U. S. 319, 331, 33 L. Ed. 184.

**95. License.**—*Hapgood v. Hewitt*, 119 U. S. 226, 233, 30 L. Ed. 369. See the titles ASSIGNMENTS, vol. 2, p. 569; PATENTS.

**96. Effect on debts, contracts, etc.**—*Meriwether v. Garrett*, 102 U. S. 473,

512, 26 L. Ed. 197; *Broughton v. Pensacola*, 93 U. S. 266, 268, 23 L. Ed. 896.

"Valid contracts made by a corporation survive even its dissolution by voluntary surrender or sale of its corporate franchises, and the creditors of the corporation, notwithstanding such surrender or sale, may still enforce their claims against the property of the corporation as if no such surrender or sale had taken place." *Railroad Co. v. Howard*, 7 Wall. 392, 410, 19 L. Ed. 117. See *Shields v. Ohio*, 95 U. S. 319, 324, 24 L. Ed. 357; *Curran v. Arkansas*, 15 How. 304, 14 L. Ed. 705.

"In the *Mumma v. Potomac Co.*, 8 Pet. 281, 8 L. Ed. 945, it held that the assignment of all the property of a corporation and the surrender and cancellation of its charter with the consent of the legislature, did not defeat the right of the judgment creditor to satisfaction out of the property which had belonged to it. The power of courts of equity in cases like these was recognized as adequate to maintain the rights of the parties beneficially interested, and this doctrine was repeated and developed in *Curran v. Arkansas*, 15 How. 304, 14 L. Ed. 705." *Bacon v. Robertson*, 18 How. 480, 486, 15 L. Ed. 499.

"Indeed, if it be once admitted that the property of an insolvent trading corporation, while under the management of its officers, is a trust fund in their hands for the benefit of creditors, it follows, that a court of equity, which never allows a trust to fail for want of a trustee, would see to the execution of that trust, although by the dissolution of the corporation, the legal title to its property had been changed. *Mumma v. Potomac Co.*, 8 Pet. 281, 8 L. Ed. 945. \* \* \* And, in this point of view,

certainly the mere suspension of certain of its powers will not have such effect.<sup>97</sup>

3. AS TO PROPERTY.—When corporations are dissolved by writs of scire facias or decrees in equity, at the suit of the sovereign, their moneys and property not essential to the exercise of their franchises are not forfeited, but are left to the ownership of the stockholders.<sup>98</sup>

4. AS TO SUITS BY AND AGAINST.<sup>99</sup>—a. *By Corporation*.—Where the act of incorporation had expired, no action could be maintained at law by the corporation itself.<sup>1</sup> But as the corporation, notwithstanding it may have ceased the prosecution of the objects for which it was organized, could still proceed in the collection of debts, the enforcement of liabilities and the application of its assets to the payment of its creditors, all corporate powers essential to these ends remained unimpaired.<sup>2</sup>

the decision of this court, in *Lenox v. Roberts*, 2 Wheat 373, 4 L. Ed. 264, is applicable." *Curran v. Arkansas*, 15 How. 304, 311, 14 L. Ed. 705.

The dissolution of the corporation, under the acts of Virginia and Maryland (even supposing the act of confirmation of congress out of the way), cannot, in any just sense, be considered, within the clause of the constitution of the United States on this subject, an impairing of the obligation of the contracts of the company, by those states, any more than the death of a private person may be said to impair the obligation of his contracts. The obligation of those contracts survives; and the creditors may enforce their claims against any property belonging to the corporation, which has not passed into the hands of bona fide purchasers; but is still held in trust for the company, or for the stockholders thereof, at the time of its dissolution, in any mode permitted by the local laws. *Mumma v. Potomac Co.*, 8 Pet. 281, 8 L. Ed. 945; *New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 336, 348, 46 L. Ed. 936, reaffirmed in *Brewster v. Cahill*, 194 U. S. 628, 48 L. Ed. 1158.

The contracts of policy holders and creditors of an insurance company are not annihilated by a judgment of forfeiture and dissolution; for, to the extent that the company has any property or assets, their interests can be protected, and are protected by such judgments. *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574, 584, 28 L. Ed. 1084. See ante, "Rights of Third Parties," VIII, C, 1, c.

**Surrender of mortgaged property to mortgages.**—Where a corporation, which has given a mortgage on its property, has become insolvent and can no longer carry on its business, it is not only its legal obligation, but its moral duty, to surrender the mortgaged property to the mortgagees, in order that the latter may protect their interests, and the president is guilty of no wrong in consenting to a judgment and the immediate issue of execution on overdue coupons, although the judgment is no doubt collusive in the sense that it was obtained and consented to for the purpose of giving the trustees in the mortgage a legal excuse to declare the principal and interest of the mortgage to be due and authorize a foreclosure under

the terms of the mortgage. But this is not legal "collusion." *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 189-191, 44 L. Ed. 423.

**97. Suspension of powers.**—"It is not the necessary effect of a repeal of the charter to destroy the obligations of contracts; but if it were, and they were entered into subject to this liability, upon what ground could it be maintained, that merely suspending certain powers of the corporation, its existence being preserved, can be followed by any such consequence? Surely it is not the necessary effect of a prohibition to transact new business, to destroy contracts already made; and if not, how can the right and power to destroy them be considered to grow out of a power to make such a prohibition?" *Curran v. Arkansas*, 15 How. 304, 312, 14 L. Ed. 705.

**98. As to property.**—*Kinhead v. United States*, 150 U. S. 483, 511, 37 L. Ed. 1152 (per Shiras and Field, JJ., dissenting). See ante, "As to Debts, Contracts and Other Liabilities," XVII, C, 2; post, "Distribution of Assets," XVII, C, 5.

"To terminate the charter and thus end the legal life of the company does not take away its property, but, on the contrary, leaves it all to the shareholders of the company after the payment of its debts." *Lake Shore, etc., R. Co. v. Smith*, 173 U. S. 684, 698, 43 L. Ed. 858.

And upon the expiration of the charter the property belongs to the stockholders as tenants in common. *Pewabic Min. Co. v. Mason*, 145 U. S. 349, 356, 36 L. Ed. 732.

**Charitable corporations.**—See the title CHARITIES, vol. 3, p. 675.

**99. What constitutes dissolution affecting suits by and against.**—See ante, "What Constitutes Dissolution," XVII, B, 1.

**1. Suits by corporation.**—*Lenox v. Roberts*, 2 Wheat. 373, 376, 4 L. Ed. 264.

**By assignees.**—See the title ASSIGNMENTS FOR BENEFIT OF CREDITORS, vol. 2, p. 629.

**2. Same.**—*Hawkins v. Glenn*, 131 U. S. 319, 331, 33 L. Ed. 184.

Even if the charter were held to have expired during the pendency of a suit by the corporation, it would not have necessarily affected the jurisdiction of the court to entertain this bill, since it was filed eight months before that time, although it



b. *Against Corporation.*—While no action at law can be maintained against a defunct or dissolved corporation,<sup>3</sup> in equity the rule is different. A creditor may there follow the assets of the corporation into the hands of any one not a bona fide creditor or purchaser, and obtain satisfaction of his claim.<sup>4</sup> But it has been held that this incapacity may be so waived by the receivers of a dissolved corporation, by appearing and defending the action, that a valid and binding judgment against them may be rendered.<sup>5</sup> And a state legislature may make provision by special statute for a case in which a corporation whose functions had ceased, but which yet owned property and owed debts therein, might be sued and the property subjected to the payment of those debts.<sup>6</sup>

**Creditors' Suits.**—See ante, "In General," XIV, A, 1. See the title CREDITORS' SUITS.

might have affected the right of the complainant to a decree. *City R. Co. v. Citizens' St. R. Co.*, 166 U. S. 557, 564, 41 L. Ed. 1114.

**By banks.**—See the title BANKS AND BANKING, vol. 3, p. 178.

**Suits by stockholders.**—See the title STOCK AND STOCKHOLDERS.

**3. Action at law.**—*Curran v. Arkansas*, 15 How. 304, 311, 14 L. Ed. 705; *Mumma v. Potomac Co.*, 8 Pet. 281, 8 L. Ed. 945; *Hapgood v. Hewitt*, 119 U. S. 226, 234, 30 L. Ed. 369; *Pendleton v. Russell*, 144 U. S. 640, 644, 36 L. Ed. 574; *National Bank v. Colby*, 21 Wall. 609, 615, 22 L. Ed. 687.

Where the act incorporating a new company to succeed another, declares, that upon such surrender and acceptance by the old or Potomac corporation "the charter of the Potomac Company shall be, and the same is hereby, vacated and annulled, and all the powers and rights thereby granted to the Potomac Company shall be vested in the company hereby incorporated," by this provision the Potomac Company ceased to exist, and a scire facias on a judgment obtained against the company, before it was so determined, cannot be maintained; for a scire facias cannot be maintained, and a judgment had thereon, against a dead corporation, any more than against a dead man. *Mumma v. Potomac Co.*, 8 Pet. 281, 8 L. Ed. 945.

"With the forfeiture of its rights, privileges, and franchises the corporation was necessarily dissolved, as the decree adjudged. Its existence as a legal entity was thereupon ended; it was then a defunct institution, and judgment could no more be rendered against it in a suit previously commenced than judgment could be rendered against a dead man dying pendente lite. This is the rule with respect to all corporations whose chartered existence has come to an end, either by lapse of time or decree of forfeiture, unless, by statute, pending suits be allowed to proceed to judgment notwithstanding such dissolution. The prolongation of the corporate life for this specific purpose as much requires special legislative enactment as does the original creation of the corporation." *National Bank v. Colby*, 21 Wall. 609, 615, 22 L. Ed. 687. See *Chemical Nat. Bank v. Hartford Deposit*

*Co.*, 161 U. S. 1, 4, 40 L. Ed. 595. See, also, *Pendleton v. Russell*, 144 U. S. 640, 644, 645, 36 L. Ed. 574, citing *Booth v. Clark*, 17 How. 322, 15 L. Ed. 164; *Reynolds v. Stockton*, 140 U. S. 254, 35 L. Ed. 464. See the title RECEIVERS.

**4. In equity.**—*Curran v. Arkansas*, 15 How. 304, 311, 14 L. Ed. 705.

"Whatever technical difficulties exist in maintaining an action at law by or against a corporation after its charter has been repealed, in the apprehension of a court of equity, there is no difficulty in a creditor following the property of the corporation into the hands of anyone not a bona fide creditor or purchaser, and asserting his lien thereon, and obtaining satisfaction of his just debt out of that fund specifically set apart for its payment when the debt was contracted, and charged with a trust for all the creditors when in the hands of the corporation; which trust the repeal of the charter does not destroy. Chancellor Kent, in 2 Com. 307, n., says, 'The rule of the common law has in fact become obsolete. Has never been applied to insolvent or dissolved moneyed corporations in England. The sound doctrine now is, as shown by statutes and judicial decisions, that the capital and debts of banking and other moneyed corporations, constitute a trust fund and pledge for the payment of creditors and stockholders, and a court of equity will lay hold of the fund, and see that it be duly collected and applied.'" *Curran v. Arkansas*, 15 How. 304, 311, 312, 14 L. Ed. 705. See, also, *Hapgood v. Hewitt*, 119 U. S. 226, 234, 30 L. Ed. 369; *Railroad Co. v. Howard*, 7 Wall. 392, 410, 19 L. Ed. 117; *Meriwether v. Garnett*, 102 U. S. 472, 526, 26 L. Ed. 197, per Strong, J., dissenting; *Bacon v. Robertson*, 18 How. 480, 486, 15 L. Ed. 499; *Scammon v. Kimball*, 92 U. S. 362, 367, 23 L. Ed. 483.

**5. Waiver of incapacity by appearance.**—*Habich v. Folger*, 20 Wall. 1, 22 L. Ed. 307. See, also, *Pendleton v. Russell*, 144 U. S. 640, 644, 36 L. Ed. 574. See the title APPEARANCES, vol. 2, p. 445.

**6. State legislation.**—*McGoon v. Scales*, 9 Wall. 23, 31, 19 L. Ed. 545. See the title BANKS AND BANKING, vol. 3, p. 198.

5. **DISTRIBUTION OF ASSETS.—General Assignment in Anticipation of Expiration of Charter.**—See ante, "Compositions or Assignments," XI, F, 2.

**Liability of Directors Conducting Business after Dissolution.**—See the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

**On Dissolution of Charitable Corporations and Failure or Illegality of Objects.**—See the title CHARITIES, vol. 3, pp. 696, 697.

a. *Right of Stockholders to Sale and Distribution.*—The right of the stockholders, in the absence of special agreement, is to a sale of the assets and their conversion into money for distribution after payment of debts. They do not differ from those of a partnership on its dissolution.<sup>7</sup> Any surplus, after payment of liabilities, belongs, by the general laws of equity, to the stockholders.<sup>8</sup> But the liability of a corporation to its stockholders on account of their stock is not a debt. The shares of a stockholder represent his proportion of the property of a corporation; and, upon the winding up of its affairs, the assets remaining after all liabilities are discharged are for division among the stockholders, according to their respective interests. The payment to stockholders upon such a division is for a dividend of the property divided, not for a debt owing by the corporation.<sup>9</sup>

7. *Mason v. Pewabic Min. Co.*, 133 U. S. 50, 59, 33 L. Ed. 524. See the title PARTNERSHIP.

As to liability of directors carrying on business without distribution, see the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

Where the estimate of the value of the property which is to be transferred to the new corporation and the new set of stockholders is an arbitrary estimate made by the majority, and without any power on the part of the dissenting stockholders to take part, or to exercise any influence, in making this estimate, the latter are therefore reduced to the proposition that they must go into this new company, however much they may be convinced that it is not likely to be successful, or whatever other objections they may have to becoming members of that corporation, or they must receive for the property which they have in the old company a sum which is fixed by those who are buying them out. The injustice of this needs no comment. If this be established as a principle to govern the winding up of dissolving corporations, it places any unhappy minority, as regards the interest which they have in such corporation, under the absolute control of a majority, who may themselves, as in this case, constitute the new company, and become the purchasers of all the assets of the old company at their own valuation. *Mason v. Pewabic Min. Co.*, 133 U. S. 50, 58, 33 L. Ed. 524.

"We do not say that there may not be circumstances presented to a court of chancery, which is winding up a dissolved corporation and distributing its assets, that will justify a decree ascertaining their value, or the value of certain parts of them, and making a distribution to partners or shareholders on that basis; but this is not the general rule by which the property in such cases is disposed of in the absence of an agreement." *Mason v. Pewabic Min. Co.*, 133 U. S. 50, 63, 33 L. Ed. 524. See post, "Right of Stock-

holders to Buy at Sale of Property," XVII, C, 5, e.

8. **Right to surplus.**—*Mormon Church v. United States*, 136 U. S. 1, 47, 34 L. Ed. 481. See, also, *Mormon Church v. United States*, 140 U. S. 665, 35 L. Ed. 592; *Lum v. Robertson*, 6 Wall. 277, 18 L. Ed. 742; *Bacon v. Robertson*, 18 How. 480, 15 L. Ed. 499. See ante, "As to Property Rights," XVII, C, 3.

Where a corporate charter is forfeited on quo warranto and the corporation is dissolved, and a trustee, appointed by judicial order made under statute to collect the debts due to it and apply them to the payment of debts which it owes, does so collect them and pay, any surplus, by the laws of Mississippi, and by the general laws of equity, will belong to the stockholders. The trustee cannot deny the title of the stockholders to a distribution. *Lum v. Robertson*, 6 Wall. 277, 18 L. Ed. 742, affirming *Bacon v. Robertson*, 18 How. 480, 15 L. Ed. 499, where the English cases on this point are examined.

The modern rules of the English courts have been adopted in the United States, extending the protection of chancery over the civil rights of members of moneyed corporations, and recognizing the existence of distinct and individual rights in their capital and business. *Bacon v. Robertson*, 18 How. 480, 486, 15 L. Ed. 499.

Nor can a delinquent be permitted to show (not having a meritorious defense to the suit) that the former trustee, the nominal plaintiff, in whose name the suit is brought, is no longer the real party in interest. *Lum v. Robertson*, 6 Wall. 277, 280, 18 L. Ed. 742.

A delinquent debtor cannot in such case plead the judgment of forfeiture as against a trustee seeking to reduce his debt to money for the benefit of the stockholders. *Lum v. Robertson*, 6 Wall. 277, 18 L. Ed. 742.

As to suits to enforce, see ante, "By Corporation," XVII, C, 3, a.

9. "When a corporation is to be wound



**Where an act of incorporation is repealed**, few questions of difficulty can arise. Equity takes charge of all the property and effects which survive the dissolution, and administers them as a trust fund, primarily for the benefit of the creditors. If anything is left, it goes to the stockholders. Even the executory contracts of the defunct corporation are not extinguished.<sup>10</sup>

**Personal and real property acquired by the corporation** during its lawful existence, rights of contract, or choses in action so acquired, and which do not in their nature depend upon the general powers conferred by the charter, are not destroyed by such a repeal; and the courts may, if the legislature does not provide some special remedy, enforce such rights by the means within their power. The rights of the shareholders of such a corporation, to their interest in its property, are not annihilated by such a repeal, and there must remain in the courts the power to protect those rights, although no definition, at once comprehensive and satisfactory, can be here laid down of what those rights and powers are that remain to the stockholders and the creditors of such a corporation after the act of repeal.<sup>11</sup>

*b. Superior Rights of Creditors.*—The bona fide and just creditor of a corporation, dissolved under a judicial sentence for a breach in its charter, has a claim upon the corporate property for the satisfaction of his debt, apart from the reservation in the act of the legislature which directed the prosecution for the forfeiture.<sup>12</sup>

up, there is not, ordinarily, a necessity for an account of profits. After the liabilities are paid, the remaining assets belong to the stockholders, and all that need be done is to make the proper division. For that purpose, it is quite immaterial whether what remains is profit or capital. In either case, it belongs to the stockholders, and is to be distributed among them pro rata. Such a division produces a dividend—that it to say, a part or share of the thing divided. If the division is of profits, then the dividend is of profits; if of capital, then of capital. The dividends declared by a corporation in business usually are, and, except under special circumstances, always should be, from profits. Hence, the word frequently carries with it the idea of a division of profits; but that is not necessarily its only meaning. Its special signification, in any particular case, is always dependent upon the character of the thing divided." *Eyster v. Centennial Board*, 94 U. S. 500, 503, 504, 24 L. Ed. 188.

"If the impaired capital is made good out of the profits, it will be for the purposes of distribution only. Indirectly, therefore, a division of the capital unimpaired would operate as a dividend of profits, because, before the stockholders could be paid in full the receipts of the business must be applied to supply the deficiency arising from depreciation. Such a dividend is prohibited." *Eyster v. Centennial Board*, 94 U. S. 500, 505, 24 L. Ed. 188.

**10. Effect of repeal of charter.**—*Shields v. Ohio*, 95 U. S. 319, 324, 24 L. Ed. 357; *Curran v. Arkansas*, 15 How. 304, 14 L. Ed. 705; *Farrington v. Tennessee*, 95 U. S. 679, 24 L. Ed. 558. See ante, "Corporate Property as Trust Fund," II, E; "Conditions and Consequences of

Amendment or Repeal," VIII, C, 4, g.

**11. Right of property and contracts unaffected.**—*Greenwood v. Freight Co.*, 105 U. S. 13, 19, 26 L. Ed. 961.

**12. Creditors' right.**—*Bacon v. Robertson*, 18 How. 480, 487, 15 L. Ed. 499; *Eyster v. Centennial Board*, 94 U. S. 500, 24 L. Ed. 188; *Wabash, etc., R. Co. v. Ham*, 114 U. S. 587, 29 L. Ed. 235; *Shields v. Ohio*, 95 U. S. 319, 24 L. Ed. 357.

In the distribution of the moneys remaining in the treasury of the Centennial Board of Finance at the close of that corporation, as provided for in § 10 of the act of congress of June 1, 1872 (17 Stat. 203), the appropriation of \$1,500,000, made by the act of Feb. 16, 1876 (19 Stat. 3), had to be paid into the treasury of the United States before any division of assets was made among the stockholders in satisfaction and discharge of the capital stock. *Eyster v. Centennial Board*, 94 U. S. 500, 24 L. Ed. 188.

"Congress might have advanced the money by loan as well as upon the condition it did impose. It might also have subscribed to the stock. If a loan had been made, and there had been no waiver of the legal rights of the government as a creditor, this debt would have preference over all others in the order of payment. If stock had been taken, the government would have participated in the final distribution like any other stockholder. It seemed best, however, not to adopt either of these plans, and another was devised, by which creditors were given a preference, and the United States remitted for their indemnity to the fund which might remain after all the debts were paid. To this the corporation assented, and the stockholders cannot now complain. Creditors were protected, and stockholders not injured." *Eyster v. Cen-*



c. *Law Applicable—Nonuser and Reversion.*—Where an incorporation took place under an act, so far as same was applicable, which provided for its own future amendment by the legislature, except as to rights of property acquired thereunder, and a revision of the Code was enacted before such incorporation, but taking effect after same, which changed the law as to reversion of property for nonuser, and which was in express terms made applicable to all corporations previously incorporated under the aforesaid prior act and still in existence when the Code went into operation, the disposition of its property, upon abandonment and nonuser afterwards occurring, was governed by this revision.<sup>13</sup> No forfeiture of the title of a corporation to its property, on the ground of an abandonment, can be enforced, except by the state, and on payment to the company of the value of the property, of which, in consequence of such abandonment, it takes possession.<sup>14</sup>

d. *Power of Congress over Territorial and Federal Corporations.*—Congress

ennial Board, 94 U. S. 500, 505, 24 L. Ed. 188.

"A law distributing the property of an insolvent trading or banking corporation among its stockholders, or giving it to strangers, or seizing it to the use of the state, would as clearly impair the obligation of its contracts as a law giving to the heirs the effects of a deceased natural person, to the exclusion of his creditors, would impair the obligation of his contracts." *Curran v. Arkansas*, 15 How. 304, 312, 14 L. Ed. 705. See ante, "Corporate Property as Trust Fund," II, E.

**13. Reversion for nonuser, and law governing.**—*McConihay v. Wright*, 121 U. S. 201, 30 L. Ed. 932.

The Virginia act of 1837, relating to the condemnation of land for railroad purposes, provided for a reversion of the property so acquired to the original owner, if neither the company, or on its default, the state, should maintain the railroad as required by the charter. The Code of 1849 contained no such provision, but recognized the absolute property of the stockholders in the property of the corporation, after payment of debts and liabilities, on the expiration or dissolution of the company. *McConihay v. Wright*, 121 U. S. 201, 210, 213, 30 L. Ed. 932.

The effect of cessation of operations by a mining and manufacturing corporation of Virginia, incorporated subject to the provisions of an act concerning railroad companies, so far as same is applicable, is to be determined, not by that act, but by the general code of 1849, passed before its incorporation but taking effect after it, which operated to repeal and amend that act, so far as inconsistent with it, if it was applicable to this corporation. Section 1, c. 61, of that Code, is as follows: "Every company which is governed by the act passed on the 7th day of February, 1817, prescribing certain general regulations for the incorporation of turnpike companies, or by the act passed on the 11th day of March, 1837, prescribing certain general regulations for

the incorporation of railroad companies, and every company which after the commencement of this act shall be incorporated to construct any work of internal improvement, shall be governed by the provisions contained in the 57th chapter and in this chapter, so far as they can apply to such company without violating its charter." *McConihay v. Wright*, 121 U. S. 201, 211, 30 L. Ed. 932.

The circumstance that the charter of a corporation was passed after the enactment of a Code but before it went into operation, did not take it out of the provisions of the Code when it did go into effect, but this circumstance seems entirely immaterial. When the Code went into effect the company was an existing corporation, governed in certain particulars by a prior act. The Code when it went into effect operated upon this company, and from that time became a part of its charter. The title which it afterwards acquired was, therefore, not affected by the provisions of the prior act, but was held by it in accordance with the provisions of the Code. *McConihay v. Wright*, 121 U. S. 201, 214, 30 L. Ed. 932.

**14. Forfeiture enforceable only by state.**—*McConihay v. Wright*, 121 U. S. 201, 215, 30 L. Ed. 932.

It was argued that by the general principles of the common law, the title of the company was forfeited by the abandonment of the property, and a cesser of the uses for which only it could have been acquired, so that it reverted to the original owners, but the court said that it was sufficient to say that the case was governed by the Code as above. *McConihay v. Wright*, 121 U. S. 201, 214, 30 L. Ed. 932.

Where there was no intentional abandonment of the property by the company for the uses for which it was acquired, but the company became insolvent, unable to pay its debts, and to carry on its business, and its property was taken in execution by judgment creditors, a bill in equity being filed by them for the purpose of subjecting its assets to the payment of their claims, one who was a party

had the power to repeal the act of incorporation of the Church of Jesus Christ of Latter-Day Saints, and congress, as the supreme legislature of the territory of Utah, had full power and authority to direct the winding up of the affairs of said church as a defunct corporation, and to order its property to be applied to lawful religious and charitable uses, conformable as near as practicable to those to which it was originally dedicated, which power was distinct from that which might arise from the forfeiture and escheat of the property under the act of 1862.<sup>15</sup>

*e. Right of Stockholders to Buy at Sale of Property.*—Where the term of existence of a corporation has expired, and it is being wound up by a sale of its property under a decree of court in a suit brought therefor by stockholders, stockholders, although a minority in interest, may buy at such sale, and the fact that they are acting in the interest of a corporation owning adjoining and rival mining property to which they afterwards conveyed said property, is not material. There was no wrong or fraud in this, and no deception. Each party evidently knew the interests and relations of the other. There were no fiduciary relations and no leave of court was necessary.<sup>16</sup>

**CORPUS.**—See note 1.

**CORPUS DELICTI.**—See the title CRIMINAL LAW, and the references given.

**CORRECT ENTRY.**—See note 2.

**CORRESPONDENCE.**—As to contracts by, see the title CONTRACTS, ante, p. 552. See, also, references under LETTERS.

to that suit as a judgment creditor, holding a judgment for the amount of the compensation awarded to him for the premises in controversy, which judgment, among others, was paid out of the proceeds of the sale of the very property which his heirs and assigns now seek to recover, having thus obtained the benefit of the sale on which the title of the appellee is founded by receiving a portion of its proceeds, cannot question the effect of that sale as a conveyance of the subsisting title of the company to the land in controversy. *McConihay v. Wright*, 121 U. S. 201, 214, 30 L. Ed. 932. See, generally, as to reversion of condemned property, the title EMINENT DOMAIN.

**15. Power of congress.**—*United States v. Mormon Church*, 150 U. S. 145, 37 L. Ed. 1033. See same case on former appeal and similar holding in *Mormon Church v. United States*, 136 U. S. 1, 34 L. Ed. 481, and also in *Mormon Church v. United States*, 140 U. S. 665, 35 L. Ed. 592.

The subject matter involved having been disposed of by the joint resolution of congress, judicial action not being sought to be controlled by the resolution, but this court having indicated the mode to be pursued to ascertain and define the particular charitable uses, lawful in their character, to which the property should be devoted, in the absence of legislation upon the subject, and this appeal from the decree of the court below to that end having been taken, congress having now

declared such uses, this disposition of the property by the United States renders any further consideration of the case here unnecessary, and the decree below is reversed and the cause remanded to the supreme court of Utah Territory for such further proceedings as to law and justice may appertain, in conformity with the provisions of the aforesaid resolution of congress. *United States v. Mormon Church*, 150 U. S. 145, 148, 149, 37 L. Ed. 1033. See the titles CHARITIES, vol. 3, p. 697; CONSTITUTIONAL LAW, ante, p. 1.

**16. Purchase by stockholders.**—*Pewabic Min. Co. v. Mason*, 145 U. S. 349, 357, 36 L. Ed. 732. See ante, "Right of Stockholders to Sale and Distribution," XVII, C, 5, a.

**1. Corpus.**—In *Jackson v. Ludeling*, 99 U. S. 513, 521, 25 L. Ed. 460, it is said: "A railroad is not land; it is a peculiar species of property, of a compound character, consisting of roadway, embankment, superstructure, and equipment. These constitute the **corpus** of the property."

**2. Correct entry.**—An examiner in the appraiser's department testified that he passed the **entry** in question and endorsed it **correct**, it was held that this merely meant that the **entry** was sufficient to cover the market value of the goods. *Robertson v. Bradbury*, 132 U. S. 491, 496, 33 L. Ed. 405. See, generally, the title REVENUE LAWS.

**CORROBORATION.**—As to corroboration of witnesses, see the titles *ACCOMPLICES AND ACCESSORIES*, vol. 1, p. 67; *WITNESSES*.

**COSERVANTS.**—See the title *FELLOW SERVANTS*.

**COST.**—See note 1.

**1. Cost.**—The United States agreed to pay the owners of a quarry a certain specified price for granite. The owners of the quarry agreed: "to furnish all the labor, tools and materials necessary to cut, dress and box at the quarry all the granite aforesaid;" and the United States agreed to pay them "in lawful money of the United States, the full **cost** of the said labor, tools and materials, and insurance on the same, increased by fifteen per centum thereof." In construing this contract, the court said: "It being found as a fact that the petitioners never did effect or pay for any insurance whatever, we are

clearly of opinion that they are not entitled to recover anything for insurance. The United States have not agreed to obtain insurance, or to become insurers themselves, but only to pay to the petitioners the '**cost** of insurance,' which is as much as to say, reasonable premiums of insurance paid by the petitioners. By the terms of the contract, the United States are no more bound to pay for insurance which has not been effected, than for tools or materials, which have not been used, or for labor which has not been performed." *Tillson v. United States*, 129 U. S. 101, 102, 103, 32 L. Ed. 636.



# **COSTS.**

BY S. BLAIR FISHER.

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#### **I. Scope of Title.**

In this title it is intended to set out the decisions of the United States supreme court relating to the right to and liability for costs, the general principles controlling their allowance and apportionment, the judgment for costs, the taxation of costs, security for costs, and the enforcement of payment of costs; together with such cases as may be necessary for illustration of such general principles. As to costs in particular proceedings and by and against particular persons or classes of persons, see the appropriate titles.

## II. Right to and Liability for Costs.

**A. In Civil Proceedings**—1. **ORIGIN AND BASIS OF LIABILITY.**—**In General.**—Costs in civil actions at law are the creatures of statutes,<sup>1</sup> and are not allowed in the absence of statutory authority.<sup>2</sup> At first, by the common law, no costs were awarded to either party, *eo nomine*.<sup>3</sup> If the plaintiff failed to recover, he was amerced *pro falso clamore*. If he recovered judgment, the defendant was in misericordia for his unjust detention of the plaintiff's debt, and was not therefore punished with the *expensa litis* under that title.<sup>4</sup> This being considered a great hardship, the statute of Gloucester, was passed, giving costs in all cases when the plaintiff recovered damages.<sup>5</sup> This was the first statute giving costs, but was followed by other statutes on the subject; and the right to costs and the manner of giving security therefor is now and has been from an early date, the subject of statutory regulation both in England and in this country.<sup>6</sup>

**Allowance in Discretion of Court in Admiralty and Equity.**—As to the allowance of costs in admiralty in the discretion of the court, see the title **ADMIRALTY**, vol. 1, p. 181. The allowance of costs in equity at the discretion of the court will be treated in a subsequent portion of this title.<sup>7</sup>

2. **ALLOWANCE AND APPORTIONMENT**—a. *In General.*—**Within Regulation and Control of Legislature.**—The whole matter of costs, including the party to or against whom they may be given, the items or sums to be allowed, and the right to costs as depending upon the nature of the suit, upon the amount or value of the thing sued for or recovered, or upon other circumstances, is and always has been within the regulation and control of the legislature, exercising its discretionary power not oppressively to either party, but as the best interests of the litigants and of the public may appear to it to demand,<sup>8</sup> and from early times this power has been exercised through statutes making different rules as to costs,

1. **Of statutory origin.**—*Bradford v. Southern R. Co.*, 195 U. S. 243, 49 L. Ed. 178; *Gulf, etc., R. Co. v. Ellis*, 165 U. S. 150, 41 L. Ed. 66; *Antoni v. Greenhow*, 107 U. S. 769, 27 L. Ed. 468.

2. **Not allowed in absence of statute.**—“By the common law, costs were not recoverable in any action, real, personal or mixed. They were first given by the statute of Gloucester, 6 Edw. I, c. 1, and subsequently, by various statutes; but courts do not allow them, when not given by some statute. 3 Com. Dig. 205, Costs, A. 1; 210, A. 2; 6 Vin. 321; 2 Bac. Abr. 33, 10; 116, A; 1 Str. 615, 617.” Rule No. 37, 5 Pet. 724; dissenting opinion of Baldwin, J., in Rule No. 37, 5 Pet. 724. And see cases cited to preceding text.

3. **No costs, eo nomine at common law.**—*Day v. Woodworth*, 13 How. 363, 14 L. Ed. 182; *Antoni v. Greenhow*, 107 U. S. 769, 27 L. Ed. 468; *Lowe v. Kansas*, 163 U. S. 81, 41 L. Ed. 78.

“By the common law, costs are not recoverable against the opposite party; and he who requires the service to be performed, must pay all legal charges for such service.” *United States v. Ringgold*, 8 Pet. 150, 8 L. Ed. 899.

4. **Common-law rule in case of recovery or failure of plaintiff.**—*Day v. Woodworth*, 13 How. 363, 14 L. Ed. 182; *Lowe v. Kansas*, 163 U. S. 81, 41 L. Ed. 78.

5. **Cost first given by statute of Gloucester** (6 Edw. 1, c. 1).—*Day v. Wood-*

*worth*, 13 How. 363, 14 L. Ed. 182. See, also, the dissenting opinion of Baldwin, J., in Rule No. 37, 5 Pet. 724.

“This was the origin of costs *de incremento*; for when the damages were found by the jury, the judges held themselves obliged to tax the moderate fees of counsel and attorneys that attended the cause. See Bac. Abr. tit. Costs. Under the provisions of this statute every court of common law has an established system of costs, which are allowed to the successful party by way of amends for his expense and trouble in prosecuting his suit.” *Day v. Woodworth*, 13 How. 363, 14 L. Ed. 182.

6. **Subject of statutory regulation in England and the United States.**—See *Lowe v. Kansas*, 163 U. S. 81, 41 L. Ed. 78; *Antoni v. Greenhow*, 107 U. S. 769, 27 L. Ed. 468.

For a review of acts of congress recognizing the right of a party to costs and power of the court to award them to almost any extent, see *Pennsylvania v. Wheeling, etc., Bridge Co.*, 18 How. 460, 15 L. Ed. 449.

7. **Allowance in equity at discretion of court.**—See post, “Discretion of Courts of Equity as to Allowance and Apportionment,” II, A, 2, b, (1), (b).

8. **Allowance and apportionment under legislative control.**—Dissenting opinion in *Gulf, etc., R. Co. v. Ellis*, 165 U. S. 150, 41 L. Ed. 66.



according to the nature of the issue, the amount involved, and the outcome of the suit.<sup>9</sup>

**Jurisdiction Essential to Award of Costs.**—Where a court has no jurisdiction of a case, it cannot award costs, or order execution for them to issue.<sup>10</sup>

**Allowance in Particular Courts.**—The supreme court of the United States has power, in a case of original jurisdiction, to award costs against either of the parties.<sup>11</sup> As to allowance by the supreme court in the exercise of its appellate jurisdiction, see the title *APPEAL AND ERROR*, vol. 2, p. 418. The circuit court may allow costs for or against either party under proper circumstances.<sup>12</sup>

b. *In Original Proceedings*—(1) *On Final Judgment or Decree*—(a) *Allowance to Party Prevailing in Civil Action at Law.*—**In General.**—From an early period, both in England and America, for the purpose of checking unjust litigation, statutes have been enacted allowing the party prevailing in a civil action at law to recover of the unsuccessful one the legal costs which he has expended in obtaining his rights.<sup>13</sup> In some instances, however, this allowance was only to

9. **Power exercised from early date.**—See ante, "Origin and Basis of Liability," II, A, 1. And see post, "Matters Affecting Allowance or Apportionment," II, A, 2, b, (1), (c).

"From early times the legislature and the courts, in England and America, in order to put a check on unjust litigation, have not only, as a general rule, awarded costs to the party prevailing in a civil action, but have, not infrequently, required actual payment of costs, or security for their payment, from the plaintiff in a civil action, or even from the prosecutor in a criminal proceeding. For instance, plaintiffs have been required, by general statute or by special order, to give security for the costs of the action, or to pay the costs of a former suit before suing again for the same cause. *Shaw v. Wallace*, 2 Dall. 179, 1 L. Ed. 339; *Hurst v. Jones*, 4 Dall. 353, 1 L. Ed. 864; *Henderson v. Griffin*, 5 Pet. 151, 159, 8 L. Ed. 79. Third persons allowed to intervene, on condition of giving bond to pay costs, may be compelled to do so by attachment, without remitting the payee to suit upon the bond. *Craig v. Leitensdorfer*, 127 U. S. 764, 771, 32 L. Ed. 322. And in an information to enforce a charitable trust a relator is required, who may be compelled, if the information is not maintained, to pay the costs. *Attorney General v. Smart*, 1 Ves. Sen. 72, and note; *Attorney General v. Butler*, 123 Mass. 304, 309." *Lowe v. Kansas*, 163 U. S. 81, 41 L. Ed. 78.

10. **Jurisdiction essential to award of costs.**—*Mayor v. Cooper*, 6 Wall. 247, 18 L. Ed. 851; *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379, 28 L. Ed. 462. See post, "Dismissal," II, A, 2, b, (1), (c), cc, (bb). And see, also, the titles *JUDGMENTS AND DECREES*; *JURISDICTION*; *SUMMONS AND PROCESS*.

"The court held that it had no jurisdiction whatever of the case, and yet gave a judgment for the costs of the motion, and ordered that an execution should issue to collect them. This was clearly erroneous. If there were no jurisdiction, there was

no power to do anything but to strike the case from the docket. In that view of the subject, the matter was as much *coram non jure* as anything else could be, and the award of costs and execution was consequently void. Such was the necessary result of the conclusions of the court." *Mayor v. Cooper*, 6 Wall. 247, 18 L. Ed. 851.

A sort of mixed action to try the title of the plaintiffs to the undivided half of certain real property, and to obtain a partition of that half, though dealing entirely with the realty, is not an action in rem in the strict sense of the term. It is an action against the parties named and the service of citation on a nonresident by publication, does not authorize the creation of any personal demand against the defendant for costs which could be satisfied out of his property. *Freeman v. Alderson*, 119 U. S. 185, 190, 30 L. Ed. 372.

11. **Power of supreme court to award costs.**—*Pennsylvania v. Wheeling, etc., Bridge Co.*, 18 How. 460, 15 L. Ed. 449; *Missouri v. Illinois*, 202 U. S. 598, 50 L. Ed. 1160.

12. **Award of costs in circuit court.**—As to the award of costs in circuit court as dependent on amount involved or recovered, see post, "Amount or Value of Thing Sued for or Recovered," II, A, 2, b, (1), (c), aa.

As to costs on dismissal by circuit court, see post, "Dismissal," II, A, 2, b, (1), (c), cc, (bb).

As to award of costs on remand by circuit court, see the title *MANDATE AND PROCEEDINGS THEREON*.

As to award of costs on removal, see the title *REMOVAL OF CAUSES*.

13. **Award to party prevailing.**—*Lowe v. Kansas*, 163 U. S. 81, 41 L. Ed. 78; *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379, 28 L. Ed. 462; *United States v. Schurz*, 102 U. S. 378, 407, 26 L. Ed. 167; *Pine River, etc., Co. v. United States*, 186 U. S. 279, 46 L. Ed. 1164; *Pennsylvania v. Wheeling, etc., Bridge Co.*, 18 How. 460, 15 L. Ed. 449; *Kendall v. United States*, 12 Pet. 524, 9 L. Ed. 1181. And see

the prevailing party when plaintiff, and not when defendant.<sup>14</sup>

**Apportionment.**—In actions at law, it is a general rule that the losing parties, or the parties against whom judgment is rendered, are to pay the costs; and no apportionment of the costs is made between them. Each is liable for all, whatever may be their respective interests in the subject matter of the suit.<sup>15</sup>

(b) *Discretion of Courts of Equity as to Allowance and Apportionment.*—**Discretion to Allow.**—It may be stated as a general rule that costs in equity, as in admiralty, are within the sound discretion of the court,<sup>16</sup> and that no appeal will lie from a mere decree respecting costs and expenses, save in the case of manifest abuse of such discretion.<sup>17</sup>

*United States v. Sanborn*, 135 U. S. 271, 34 L. Ed. 112.

“Ordinarily, by the long established practice and universally recognized rule of the common law, in actions at law, the prevailing party is entitled to recover a judgment for costs, the exception being that where there is no jurisdiction in the court to determine the litigation, the cause must be dismissed for that reason, and, as the court can render no judgment for or against either party, it cannot render a judgment even for costs.” *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379, 28 L. Ed. 462.

As to allowance to *United States*, see post, “*The United States*,” II, A, 2, b, (1), (c), bb.

**14. Allowance only when plaintiff the prevailing party.**—See dissenting opinion in *Gulf, etc., R. Co. v. Ellis*, 165 U. S. 150, 41 L. Ed. 66. And see the title CONSTITUTIONAL LAW, ante, p. 1.

**15. Rule in actions at law.**—*Kittredge v. Race*, 92 U. S. 116, 23 L. Ed. 488.

**Rendition of judgment in solido.**—Under the Code of Practice in Louisiana, a suit may be brought and distinct judgments rendered against a defendant, as administratrix of her deceased husband, as widow in community, and as tutrix of his minor heirs. There was no error in this case in rendering judgment against the minor heirs, declaring that each is liable for his or her proportional share of the father's half of the estate, with benefit of inventory. The legal effect is the same as if the judgment had been against the defendant as tutrix; nor was there error in rendering judgment for all the costs against her and the minor heirs in solido. *Kittredge v. Race*, 92 U. S. 116, 23 L. Ed. 488.

**16. Costs in discretion of court of equity.**—*Du Bois v. Kirk*, 158 U. S. 58, 39 L. Ed. 895; *The Scotland*, 118 U. S. 507, 30 L. Ed. 153; *Dodge v. Tulleys*, 144 U. S. 451, 36 L. Ed. 501; *Stuart v. Boulware*, 133 U. S. 78, 33 L. Ed. 568; *Kittredge v. Race*, 92 U. S. 116, 23 L. Ed. 488; *Pennsylvania v. Wheeling, etc., Bridge Co.*, 18 How. 460, 15 L. Ed. 449.

“The court below is always competent to award costs in a chancery suit, in that court, and in case of a mandate, may issue execution therefor.” *Riddle v. Mandeville*, 6 Cranch 86, 3 L. Ed. 161.

**Allowance not controlled by state laws.**—“While contract rights are settled by

the law of the state, that law does not determine the procedure of courts of the United States sitting as courts of equity, or the costs which are taxable there, or control the discretion exercised in matters of allowances. Those courts acquire their jurisdiction and powers from another source than the state. There is no statute of Nebraska in respect to the matter. Even if there were one expressly prohibiting courts of equity from making allowances to trustees or their counsel, such prohibition would not control the proceedings in federal equity courts. They proceed according to the general rules of equity, except so far as such rules are changed by the legislation of congress, and while they may enforce special equitable rights of parties given by state statutes (*Holland v. Challen*, 110 U. S. 15, 28 L. Ed. 52), yet their general powers as courts of equity are not determined and cannot be cut off by any state legislation. It is the general rule of equity, that a trustee called upon to discharge any duties in the administering of his trust is entitled to compensation therefor, and included therein is a reasonable allowance for counsel fees. This is constantly enforced in the federal courts in the various railroad foreclosures that have been and are proceeding therein; and this, irrespective of any state legislation. The subject was exhaustively considered by Mr. Justice Bradley, in the case of *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157. The English and American authorities were fully reviewed, and the power and duty of the court to make reasonable allowance (including counsel fees) to trustees or others acting in that capacity was affirmed. See, also, *Central R., etc., Co. v. Pettus*, 113 U. S. 116, 28 L. Ed. 915. It is unnecessary to more than refer to these decisions.” *Dodge v. Tulleys*, 144 U. S. 451, 36 L. Ed. 501. See the title JURISDICTION.

“Costs in probate cases generally rest in the discretion of the court, and are often not allowed even to the prevailing party. *Summerell v. Clements*, 32 Law Journal (Prob.) 33 and note; *Nichols v. Binns*, 1 Sw. & Tr. 239; *Mitchell v. Gard*, 3 Sw. & Tr. 275; *Davies v. Gregory*, L. R. 3 P. & D. 28; *Mumper's Appeal*, 3 W. & S. 441; *Chapin v. Miner*, 112 Mass. 269.” *McArthur v. Scott*, 113 U. S. 340, 400, 28 L. Ed. 1015. See the title WILLS.

**17. Action of court not reviewable in**

**Apportionment.**—The rule as to the apportionment of costs in actions at law does not apply in equity, but a court of equity, having discretion as to the costs, may impose them all upon one party, or may divide them in such manner as it sees fit.<sup>18</sup>

(c) *Matters Affecting Allowance or Apportionment*—aa. *Amount or Value of Thing Sued for or Recovered.*—**In General.**—In some instances the right to costs is, by statute, made to depend upon the amount or value of the thing sued for or recovered.<sup>19</sup>

**Where Recovery Is within Jurisdiction of Justice of the Peace.**—In some jurisdictions, where an action is brought in a court other than that of a justice of the peace upon a cause of action of which such justice has jurisdiction, the plaintiff is not entitled to costs if the amount of his recovery be within the jurisdictional limit of a justice of the peace.<sup>20</sup>

**Rule in United States Circuit Court.**—It is expressly provided by statute that when, in a circuit court of the United States, a plaintiff in an action at law originally brought there, or a petitioner in equity, other than the United States, recovers less than the sum or value of five hundred dollars, exclusive of costs, in a case which cannot be brought there unless the amount in dispute, exclusive of costs, exceed said sum or value, he shall not be allowed, but, at the discretion of the court, may be adjudged to pay costs.<sup>21</sup>

**absence of manifest abuse of discretion.**—*Canter v. American Ins. Co.*, 3 Pet. 307, 7 L. Ed. 688. See the titles ADMIRALTY, vol. 1, p. 181; APPEAL AND ERROR, vol. 1, p. 988.

Like all questions of costs in courts of equity, allowance to receivers are largely discretionary, and the action of the court below is treated as presumptively correct, "since it has far better means of knowing what is just and reasonable than an appellate court can have," as was remarked by Mr. Justice Bradley in *Trustees v. Greenough*, 105 U. S. 527, 537, 26 L. Ed. 1157; *Stuart v. Boulware*, 133 U. S. 78, 33 L. Ed. 568.

**18. Apportionment of costs.**—*Kittredge v. Race*, 92 U. S. 116, 23 L. Ed. 488.

**19. Amount or value of thing sued for or recovered.**—See dissenting opinion in *Gulf, etc., R. Co. v. Ellis*, 165 U. S. 150, 41 L. Ed. 166.

**20. Recovery within justice's jurisdiction.**—Under the Pennsylvania act of 1745 it was provided that if any person should commence or prosecute any suit made cognizable before a justice, in any other manner than as directed by such act, and should recover less than £ 5, he should not recover any costs in such suit unless he had previously filed in the prothonotary's office, an affidavit of his belief that the cause of action exceeded £ 5. By the act of 1784 this amount was increased to £ 10. *Cooper v. Coats*, 1 Dall. 308, 1 L. Ed. 150. And see *Bunner v. Neil*, 1 Dall. 457, 1 L. Ed. 222.

A plaintiff was not entitled to costs where judgment had been confessed for a large sum but before entering judgment the amount due was reduced by direct payments to less than £ 10, and he had failed to make an affidavit as required by the act of 1745, as to the amount believed to be due. *Cooper v. Coats*, 1 Dall. 308, 1 L. Ed. 150.

"We think this case comes within the express words of the act of assembly, declaring that costs shall not be recovered; and there is no evidence that the plaintiff has entitled himself to the benefit of the exception, by filing a previous affidavit of his belief that the debt exceeded £ 10. It is not our meaning, however, when an action is brought for a sum above £ 10, and the defendant reduced it to less by a set-off, which he might, or might not, have pleaded, that, in such a case, the plaintiff is not entitled to costs. The reason and justice of the thing would then be clearly in his favor." *Cooper v. Coats*, 1 Dall. 308, 1 L. Ed. 150.

Wherever an action is brought for a debt above £ 10, and the amount is reduced below that sum, by a set-off and is thus within the jurisdiction of a justice, the plaintiff ought not to be charged with the costs. *Bailey v. Miller*, 2 Dall. 74, 1 L. Ed. 295. See the titles JUSTICE OF THE PEACE; SET-OFF, RECOUPMENT AND COUNTERCLAIM.

**21. Rule in United States circuit courts.**—*United States Rev. Stat.*, § 968, act of September 24, 1789, ch. 20; act of March 3, 1803, ch. 40. *Green v. Litter*, 8 Cranch 229, 3 L. Ed. 545; *Gordon v. Longest*, 16 Pet. 97, 10 L. Ed. 900; *Williams v. Nottawa*, 104 U. S. 209, 26 L. Ed. 719.

"Taking the 11th and 20th sections of the judiciary act of 1789, ch. 20, in connection, it is clear that the jurisdiction attaches where the property demanded exceeds \$500 in value; and if, upon the trial, the demandant recover less, he is not allowed his costs; but, at the discretion of the court, may be adjudged to pay costs." *Green v. Litter*, 8 Cranch 229, 3 L. Ed. 545.

An action was instituted in the circuit court of Jefferson county, in the state of Kentucky, by a citizen of that state, under an act of the legislature of Kentucky,



bb. *Tender, Payment or Offer of Judgment.*—**Tender.**—To have the effect of stopping interest or costs, a tender must be kept good;<sup>22</sup> and it ceases to have that effect when the money is used by the debtor for other purposes.<sup>23</sup>

**Effect of Payment Pending Suit.**—Where, pending a suit for nonpayment of money, the defendant makes payment, it has been held that he is liable for full costs up to the time of the payment, but is not liable for costs after payment.<sup>24</sup>

**Offer of Judgment.**—In order that an offer of judgment may be considered and be effective to stop costs, such offer should be made in open court, and the court asked to act thereon, after the adverse party has been notified in due form

against a citizen of the state of Pennsylvania, to recover damages, alleging the same in the declaration, to be \$1,000, for having taken on board of the steamboat Guyandotte, commanded by him, a slave belonging to the plaintiff, from the shore of Indiana, on the voyage of the steamboat, proceeding up the Ohio river, from Louisville to Cincinnati. The act of the legislature of Kentucky subjects the master of a steamboat to the penalties created by the law, who shall take on board the steamboat under his command, a slave, from the shore of Ohio, opposite to Kentucky, in the same manner as if he had been taken on board from the shores or rivers within the state. On entering his appearance, the defendant claimed to remove the cause to the circuit court of the United States for the district of Kentucky, he being a citizen of Pennsylvania, and the plaintiff a citizen of Kentucky; and offered to comply with the requisitions of the judiciary act of 1789; the court refused to allow the removal of the cause; deciding that it did not appear to its satisfaction that the damages exceeded \$500. The case went on to trial, and the jury gave a verdict for the plaintiff for \$650; and on a writ of error to the court of appeals of Kentucky, the judgment of the circuit court on the verdict was affirmed; before the court of appeals, the plaintiff in error excepted to the jurisdiction of the court of Jefferson county, and also to the constitutionality of the law of Kentucky on which the suit was founded. Held, that the decision of the court of appeals was erroneous; and the judgment of that court was reversed. It has often been decided, that the sum in controversy in a suit is the damages claimed in the declaration; if the plaintiff recover less than \$500, it cannot affect the jurisdiction of the court; a greater sum having been claimed in his writ; but in such case, the plaintiff does not recover his costs; and, at the discretion of the court, he may be adjudged to pay costs. *Gordon v. Longest*, 16 Pet. 97, 10 L. Ed. 900.

"The damages claimed in the writ and declaration were, unquestionably, the sum in controversy. This is not an open question. It has been often decided, that if the plaintiff shall recover less than \$500, it cannot affect the jurisdiction of the court; a greater sum being claimed in

his writ. But in such case, the plaintiff does not recover his costs; and at the discretion of the court, he may be adjudged to pay costs." *Gordon v. Longest*, 16 Pet. 97, 10 L. Ed. 900. See the title REMOVAL OF CAUSES.

**22. Tender must be kept good.**—*Bissell v. Heyward*, 96 U. S. 580, 24 L. Ed. 678.

**23. Tender ineffective where money used by debtor for other purposes.**—*Bissell v. Heyward*, 96 U. S. 580, 24 L. Ed. 678.

"One of the statements of fact in the case set forth that Bissell tendered the money; and fails to state that he deposited it, or in any manner set it apart or appropriated it for the purpose of the tender. The other states that he used the money, he had thus provided. The legal effect is the same." *Bissell v. Heyward*, 96 U. S. 580, 24 L. Ed. 678. See, generally, the title TENDER.

**24. Payment pending suit.**—A manufacturer of friction matches gave bond to the United States under § 3425, Rev. Stat., to pay such amount as might from time to time be due from him for proprietary internal revenue stamps supplied him on a credit in accordance with the provisions of that section. While the suit against him for nonpayment of the amount was pending, he paid it after deducting his commission allowed under the statute. It was held that he was liable for full costs up to the time of the payment but that he was not liable for costs after payment. *United States v. Goldback*, 102 U. S. 623, 624, 625, 26 L. Ed. 249.

"Neither do we see any error of which the United States can complain in respect to the costs. Full costs were recovered up to the time the debt was paid. This implies that after that time each party must pay his own costs. It is clear a plea of payment puis darrien was waived, because the parties, when submitting the case, agreed on the fact of payment after the suit was commenced, and in terms said that the only issue between them was in respect to the commissions. This stipulation as to what the issue was is equivalent, for the purposes of review here, to an admission of record that proper pleadings had been filed to raise that issue." *United States v. Goldback*, 102 U. S. 623, 26 L. Ed. 249.

to show cause against it. Offers of this kind made out of court cannot be considered.<sup>25</sup>

cc. *Outcome or Disposition of Case*—(aa) *Abatement*.—Where an action has abated it would seem to be error to render judgment against the plaintiff for costs.<sup>26</sup>

(bb) *Dismissal*.—**In General**.—It would seem that, as a general rule, costs may be awarded against the plaintiff upon the dismissal of a suit upon the merits.<sup>27</sup>

**Where Parties Collusively Made for Purpose of Creating Case Cognizable in Circuit Court**.—Under the act of March 3, 1875, ch. 137, it is expressly provided that if it shall appear to the satisfaction of the circuit court at any time after a suit has been brought in such court, that such suit does not really involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable under the act, the said circuit court shall proceed no further therein, but shall dismiss the suit and make such order as to costs as shall be just.<sup>28</sup>

**25. Offers of judgment to be in open court and on due notice**.—*New Providence v. Halsey*, 117 U. S. 336, 29 L. Ed. 904.

Annexed to the brief of the counsel for the defendant in error was a copy of what purported to be an offer to allow the judgment to be reversed as to certain parts stated "and that the court may make such order as to costs incurred in this court as it may deem just." It was held that this offer could not be considered to stop costs. *New Providence v. Halsey*, 117 U. S. 336, 339, 29 L. Ed. 904. See, also, *Bernards Township v. Stebbins*, 109 U. S. 341, 27 L. Ed. 956. See, generally, the title JUDGMENTS AND DECREES.

**26. On abatement**.—See *McCullough v. Virginia*, 172 U. S. 102, 43 L. Ed. 382.

"Finally, it is urged that since the judgment in the trial court and prior to the decision in the court of appeals the general assembly of the state of Virginia passed the act of February 21, 1894, c. 381, Acts General Assembly, 1893-94, p. 381, in terms repealing the statute authorizing this particular form of suit; that no state can be sued without its own consent; that such consent has thus been withdrawn, and therefore the whole proceeding abates and this suit must be dismissed. It is true that such an act was passed, and that in *Maury v. Commonwealth*, 92 Virginia 310, its validity was sustained by the court of appeals, but the judgment in this case did not go upon the effect of that repealing statute. It was not noticed in the opinion, and the decision was not that the suit abate by reason of the repeal of the statute authorizing it, but that the judgment of the trial court be reversed, and a new judgment be entered against the petitioner for costs. If the action had abated, it was error to render judgment against him for costs." *McCullough v. Virginia*, 172 U. S. 102, 43 L. Ed. 382.

**27. Award of costs against plaintiff on dismissal**.—In *Missouri v. Illinois*, 202 U. S. 598, 50 L. Ed. 1160, upon dismissal of a suit by the state of Missouri against the state of Illinois, to restrain the discharge of sewage into the Mississippi River, it was held that the costs might be taxed against the plaintiff.

Where a complainant sought to recover by bill in chancery the proceeds of a judgment which he alleged that his debtor had against a third person, and it turned out that his debtor had only an interest of one-fourth in this judgment, which fourth was collected and the proceeds paid over to the solicitor of the complainant during the pendency of the suit, the bill was properly dismissed at the costs of the complainant. *Rhodes v. Farmer*, 17 How. 464, 15 L. Ed. 152.

The judgment was nominally assigned to the debtor, but his equitable interest in it was only one-fourth, which was all that the complainant was entitled to. This fourth being paid before the decree, together with costs up to that time, it was proper to dismiss the bill at the cost of the complainant. *Rhodes v. Farmer*, 17 How. 464, 15 L. Ed. 152.

**28. Where parties collusively made to create case, etc.**—*Williams v. Nottawa*, 104 U. S. 209, 26 L. Ed. 719.

This suit was brought in the circuit court by a citizen of Indiana against Nottawa, a township in Michigan. It was brought upon bonds, some of which were owned by the plaintiff and some of which were transferred to him by a person whose citizenship was unknown, while others were transferred to him by citizens of Michigan. All of these transfers were simply to "create a case" cognizable in the circuit court. The circuit court rendered judgment for the plaintiff on those bonds which were owned by him and on those transferred by the person of unknown citizenship, but on those transferred by the citizens of Michigan

**For Want of Jurisdiction.**—It may be stated as a general rule that costs will not be awarded where a case is dismissed for want of jurisdiction,<sup>29</sup> at least where such want of jurisdiction is apparent on the face of the pleadings.<sup>30</sup>

(d) *In Proceedings of Particular Nature.*—The right to costs and their allowance and apportionment in particular actions and proceedings will be treated under the appropriate titles in this work.

(e) *In Proceedings by and against Particular Parties*—aa. *In General.*—It would seem that costs cannot properly be taxed against a person before he becomes a party to the suit.<sup>31</sup> As to the liability for costs of particular persons or classes of persons, suing in their individual or representative capacities, see the appropriate titles in this work.

judgment was given in favor of the township. As the amount really owned by the plaintiff was less than \$500 the circuit court did not have jurisdiction and the supreme court remanded the case to the circuit court with instructions to dismiss it at the costs of the plaintiff. *Williams v. Nottowa*, 104 U. S. 209, 211, 212, 26 L. Ed. 719.

**29. Costs not awarded where case dismissed for want of jurisdiction.**—*Citizens' Bank v. Cannon*, 164 U. S. 319, 41 L. Ed. 451; *Northwestern Fuel Co. v. Brock*, 139 U. S. 216, 35 L. Ed. 151; *Smith v. Whitney*, 116 U. S. 167, 29 L. Ed. 601; *Bradstreet Co. v. Higgins*, 114 U. S. 262, 29 L. Ed. 176; *Elk v. Wilkins*, 112 U. S. 94, 28 L. Ed. 643; *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379, 28 L. Ed. 462; *Hornthall v. The Collector*, 9 Wall. 560, 19 L. Ed. 560; *Mayor v. Cooper*, 6 Wall. 247, 250, 18 L. Ed. 851; *Strader v. Graham*, 18 How. 602, 15 L. Ed. 464; *McIver v. Wattles*, 9 Wheat. 650, 6 L. Ed. 182; *Inglee v. Coolidge*, 2 Wheat. 363, 4 L. Ed. 261.

"Where there is no jurisdiction in the court to determine the litigation, the cause must be dismissed for that reason, and, as the court can render no judgment for or against either party, it cannot render a judgment even for costs." *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379, 28 L. Ed. 462.

"When a case is dismissed for want of jurisdiction in the circuit court to enter the action, or render the judgment entered, the power of that court to award costs is gone. *Mayor v. Cooper*, 6 Wall. 247, 250, 18 L. Ed. 851; *Hornthall v. The Collector*, 9 Wall. 560, 566, 19 L. Ed. 560; *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379, 387, 28 L. Ed. 462." *Northwestern Fuel Co. v. Brock*, 139 U. S. 216, 35 L. Ed. 151.

The circuit court having dismissed a bill praying for an injunction against the collection of taxes because of want of jurisdiction, the court was without the power to decree the payment of costs and penalties. If there were no jurisdiction, there was no power to do anything but strike the case from the docket. *Citizens' Bank v. Cannon*, 164 U. S. 319, 41 L. Ed. 451.

"The *Mayor v. Cooper*, 6 Wall. 247, 250, 18 L. Ed. 851, was a case where the

circuit court of the United States had held that it had no jurisdiction of a case, removed to it from a state court, and had sustained a motion to remand for that reason, yet proceeded to give a judgment for the costs for the motion, and ordered that an execution should issue to collect them. This court said: 'The court held that it had no jurisdiction whatever of the case, and yet gave a judgment for the costs of the motion, and ordered that an execution should issue to collect them. This was clearly erroneous. If there were no jurisdiction, there was no power to do anything but to strike the case from the docket. In that view of the subject, the matter was as much *coram non iudice* as anything else could be, and the award of costs and execution were consequently void. Such was the necessary result of the conclusions of the court.' In *Inglee v. Coolidge*, 2 Wheat. 363, 4 L. Ed. 261, it was said by the chief justice that this court does not give costs where a cause is dismissed for want of jurisdiction. In *Hornthall v. The Collector*, 9 Wall. 560, 566, 19 L. Ed. 560, where the circuit court of the United States for the district of Mississippi had dismissed a bill for want of jurisdiction and had awarded costs to the respondents, this court reversed the decree for that reason, and remanded the cause, with directions to dismiss the bill of complaint but without costs." *Citizens' Bank v. Cannon*, 164 U. S. 319, 41 L. Ed. 451.

As to costs on dismissal in supreme court for want of jurisdiction, see the title **APPEAL AND ERROR**, vol. 2, p. 423.

**30. Want of jurisdiction apparent on face of pleadings.**—*Hornthall v. The Collector*, 9 Wall. 560, 19 L. Ed. 560. See the titles **JURISDICTION**; **PLEADING**.

**31. Costs taxable only against parties to suit.**—*Norton v. Switzer*, 93 U. S. 355, 23 L. Ed. 903, in which it was held that costs cannot properly be taxed to an assignee in bankruptcy before he becomes a party to the suit.

Generally as to the rule that a court has no jurisdiction to render a judgment or decree against persons not made parties to the suit or action by service of process or appearance, see the titles **JUDGMENTS AND DECREES**; **JURISDICTION**.



bb. *The United States*—(aa) *Liability for Costs*.—**In General**.—While in at least one early decision the court refused to decide whether, in any case, they could award costs against the United States, but left the question entirely open for future discussion,<sup>32</sup> yet it is now undoubtedly the general rule that no court can render a direct judgment or decree against the United States for costs and expenses, in a suit to which they are a party,<sup>33</sup> either on behalf of any suitor, or any officer of the government.<sup>34</sup> It has been held, however, that it by no means follows, from the above rule, that the United States are not liable for their own costs.<sup>35</sup> Thus it has been held that while no direct suit can be maintained against the United States, yet when an action is brought by the United States, to recover money in the hands of a party who has a legal claim against them for costs, it would be a very rigid principle to deny to him the right of setting up such claim in a court of justice, and turn him around to an application to congress.<sup>36</sup>

**Under Act of 1887.**—By § 15 of the act of March 3, 1887, ch. 359, 24 Stat. L. 505, known as the Tucker act, providing for the bringing of suits against the government of the United States, it is provided that if the government shall put in issue the right of the plaintiff to recover, the court may, in its discretion, allow costs to the prevailing party from the time of joining such issue.<sup>37</sup> It has been held that, under the discretion given to it by this act, the circuit court may properly award to the plaintiff certain costs, in consideration of the frivolous

**32. Liability for costs doubtful in early decisions.**—*La Vengeance*, 3 Dall. 297, 1 L. Ed. 610. See, also, note to *United States v. Simms*, 1 Cranch 252, 259, 2 L. Ed. 98.

In the case of the *La Vengeance*, 3 Dall. 297, 1 L. Ed. 610, the decree of the circuit court was affirmed with costs. On the next day, however, the chief justice directed the words "with costs" to be stricken out, as there appeared to have been some cause for the prosecution. But he observed, in doing this, that the court did not mean to be understood as at all deciding the question, whether, in any case, they could award costs against the United States, but left it entirely open for future discussion. See, also, *United States v. Hooe*, 3 Cranch 73, 2 L. Ed. 370.

**33. United States not liable for costs.**—*United States v. Hooe*, 3 Cranch 73, 2 L. Ed. 370; *United States v. Barker*, 2 Wheat. 395, 4 L. Ed. 271; *The Antelope*, 12 Wheat. 546, 6 L. Ed. 723; *United States v. Ringgold*, 8 Pet. 150, 8 L. Ed. 899; *United States v. McLemore*, 4 How. 286, 11 L. Ed. 977; *United States v. Boyd*, 5 How. 29, 12 L. Ed. 36; *Reeside v. Walker*, 11 How. 272, 13 L. Ed. 693; *United States v. Thompson*, 98 U. S. 486, 25 L. Ed. 194; *United States v. Ryder*, 110 U. S. 729, 28 L. Ed. 308; *Stanley v. Schwalby*, 162 U. S. 255, 40 L. Ed. 960; *United States v. Verdier*, 164 U. S. 213, 41 L. Ed. 407; *Pine River, etc., Co. v. United States*, 186 U. S. 279, 46 L. Ed. 1164.

"The sovereignty of the government not only protects it against suits directly, but against judgments even for cost, when it fails in prosecutions (4 How. 288)." *Reeside v. Walker*, 11 How. 272, 13 L. Ed. 693.

If a judgment for costs be given against the United States by the court below, it must be reversed, as the United States

are not liable, for costs. *United States v. Boyd*, 5 How. 29, 12 L. Ed. 36.

**34. United States v. Ringgold**, 8 Pet. 150, 8 L. Ed. 899; *The Antelope*, 12 Wheat. 546, 6 L. Ed. 723.

**35. Liability of United States for own costs.**—*United States v. Ringgold*, 8 Pet. 150, 8 L. Ed. 899.

**36. United States v. Ringgold**, 8 Pet. 150, 8 L. Ed. 899.

"If the right of the party is fixed by the existing law, there can be no necessity for an application to congress, except for the purpose of remedy. And no such necessity can exist, when this right can properly be set up by way of defense, to a suit by the United States. This rule is fully recognized by this court in the case of the *United States v. Macdaniel*, 7 Pet. 1, 16, 8 L. Ed. 587. That was, like this, an action brought to recover a balance, certified at the treasury, against the defendant, and he set up, by way of defense, a claim which had been rejected at the treasury, for services as agent for the payment of the navy pension fund; and to which claim this court thought him equitably entitled. It is there said by the court, that this action is for a sum of money which happens to be in the hands of the defendant, and the question is, whether he shall be required to surrender it to the government, and then petition congress on the subject. The government seeks to recover money from the defendant, to which he is equitably entitled for services rendered. This court cannot see any right, either legal or equitable, in the government, to the money, for the recovery of which this action is brought." *United States v. Ringgold*, 8 Pet. 150, 8 L. Ed. 899.

**37. Allowance of costs under act of 1887.**—*United States v. Harmon*, 147 U. S. 268, 37 L. Ed. 164.

and vexatious nature of the objections taken to the greater part of the plaintiff's claim.<sup>38</sup>

(bb) *Right to Recover Costs*.—While the rule is well settled, as above stated, that costs cannot be taxed against the United States, yet the rule is believed to be universal, in civil cases at least, that the United States recover the same costs as if they were a private individual.<sup>39</sup>

cc. *States*.—In an action in the United States supreme court between states, the successful state may ask for costs or not as it sees fit.<sup>40</sup>

dd. *Public Officers*.—The general rule that the prevailing party shall recover of the unsuccessful one the legal costs expended by such prevailing party in obtaining his rights, has, in several cases, been held to apply to mandamus proceedings to compel a public officer to perform a duty enjoined upon him.<sup>41</sup> It has been held, however, that where a public officer of a state, holding funds in that capacity, was sued in his official character, but was charged with no delin-

### 38. Awarding of costs against United States for frivolous objections to claim.

—United States *v.* Harmon, 147 U. S. 268, 282, 37 L. Ed. 164.

39. *Right of United States to recover costs*.—Pine River, etc., Co. *v.* United States, 186 U. S. 279, 46 L. Ed. 1164; Missouri *v.* Illinois, 202 U. S. 598, 50 L. Ed. 1160; United States *v.* Sanborn, 135 U. S. 271, 34 L. Ed. 112; United States *v.* Verdier, 164 U. S. 213, 41 L. Ed. 407.

"We know of no case in this court directly adjudicating the liability of unsuccessful defendants for costs in actions brought by the United States, although it was assumed in United States *v.* Sanborn, 135 U. S. 271, 281, 34 L. Ed. 112, where the question arose as to particular fees included in a general bill. Throughout the elaborate opinion of Mr. Justice Harlan, the liability of the defendant for costs was assumed, and such has been the ruling generally in the lower courts, although the reported cases upon the subject are rare. United States *v.* Davis, 54 Fed. Rep. 147. It has been assumed rather than decided." Pine River, etc., Co. *v.* United States, 186 U. S. 279, 46 L. Ed. 1164.

"An inherent vice of petitioner's argument is in the assumption that he and the government stand upon an equality with respect to interest. The truths that in its dealings with individuals public policy demands that the government should occupy an apparently favored position. It may sue, but, except by its own consent, cannot be sued. In the matter of costs it recovers but does not pay, and the liability of the individual would not be affected by the fact he had a judgment against the government which did not carry costs." United States *v.* Verdier, 164 U. S. 213, 41 L. Ed. 407.

\* 40. *Right of successful state to ask for costs*.—Missouri *v.* Illinois, 202 U. S. 598, 50 L. Ed. 1160.

"The main objection is to the allowance of any costs at all. The power of the court to allow costs is not disputed. Pennsylvania *v.* Wheeling, etc., Bridge Co., 18 How. 460, 15 L. Ed. 449. The former de-

cree in this case allowed them, and in the stipulation for the appointment of a special commissioner the parties agreed that the costs should be 'taxed by the court on the final disposal of the case, to be paid in such manner as the court may at that time determine.' But it is said that it is inconsistent with the dignity of a sovereign state to ask for costs; that in boundary cases costs have been divided, and that the suit was not for a pecuniary interest, but only the performance of the duty of a sovereign to its citizens, for which no costs should be imposed. So far as the dignity of the state is concerned, that is its own affair. The United States has not been above taking costs. United States *v.* Sanborn, 135 U. S. 271, 34 L. Ed. 112. As to the supposed rule in boundary cases, it is not absolute. But in many cases of that kind both parties are equally interested to have the boundary settled, and whichever state begins the suit both equally are actors. Thus counter relief was asked by the defendants in Nebraska *v.* Iowa, 143 U. S. 359, 36 L. Ed. 186, and Missouri *v.* Iowa, 160 U. S. 688, 40 L. Ed. 583." Missouri *v.* Illinois, 202 U. S. 598, 50 L. Ed. 1160. See the title BOUNDARIES, vol. 3, p. 461.

41. *Costs of mandamus proceedings against public officers*.—United States *v.* Schurz, 102 U. S. 378, 407, 26 L. Ed. 167; Kendall *v.* United States, 12 Pet. 524, 9 L. Ed. 1181; United States *v.* Boutwell, 17 Wall. 604, 21 L. Ed. 721.

In United States *v.* Boutwell, 17 Wall. 604, 21 L. Ed. 721, which was a case of a writ of mandamus against the defendant as secretary of the treasury, and which the court held to be abated by his retirement from office, it was said: "It is the personal default of the defendant that warrants imputation of the writ, and if the peremptory mandamus be awarded, the costs must fall upon the defendant."

In United States *v.* Schurz, 102 U. S. 378, 26 L. Ed. 167, the above rule was applied in the case of a mandamus directing the secretary of the interior to deliver to the relator a patent to a portion of the public lands. See, generally, the title MANDAMUS.

quency, he was not liable personally for the costs of the plaintiff, and that the court below was right in confining the judgment for costs to the funds in his hands as a public officer.<sup>42</sup>

ee. *Persons Severally Bound and Severally Sued.*—In the case of several persons, severally bound, and severally sued, until one has actually made satisfaction all are liable to make it, and costs may be allowed in all the suits, though only one satisfaction can be recovered.<sup>43</sup>

ff. *Joint Tenants.*—Where a writ of right counts against the tenants jointly it has been held that a joint judgment against the tenants for the costs as well as the land was correct.<sup>44</sup>

gg. *Liability of Attorney for Vexatiously Increasing Costs.*—It is expressly provided by statute that if any attorney, proctor, or other person admitted to conduct causes in any court of the United States, or of any territory, appears to have multiplied the proceedings in any cause before such court, so as to increase costs unreasonably and vexatiously, he shall be required by order of the court, to satisfy any excess of costs so increased.<sup>45</sup>

(2) *On Orders and in Proceedings before and after Verdict, Judgment or Decree*—(a) *Before Verdict, Judgment or Decree*—aa. *Filing Pleadings.*—See, generally, the titles FILING PLEADINGS AND PAPERS; PLEADING.

bb. *Amendment.*—The question of payment of costs as a condition of allow-

**42. Where public officer sued in official capacity but charged with no delinquency.**

—Hauenstein v. Lynham, 131 U. S. cxcii, 26 L. Ed. 125.

"This was a motion to correct the judgment in Hauenstein v. Lynham, 100 U. S. 483, 25 L. Ed. 628. The case is stated in the opinion. Mr. Chief Justice Waite delivered the opinion of the court. This motion is denied. The defendant in error was sued in his official character, as escheator for the commonwealth of Virginia. He was a public officer of the state, and he held the funds sued for in that capacity. He was charged with no official delinquency. Under such circumstances he cannot be made liable personally for the costs of the plaintiffs. The court below was right, therefore, in confining the judgment for costs to the funds in his hands as escheator." Hauenstein v. Lynham, 131 U. S. cxcii, 26 L. Ed. 125. See the title PUBLIC OFFICERS.

**43. Persons severally bound and severally sued.**—Tarin v. Morris, 2 Dall. 115, 1 L. Ed. 312, applying the rule where separate suits were brought against several parties to a note.

Though satisfaction be obtained on a note from the maker, an endorser is liable for costs of a suit brought against him on the same note prior to the time satisfaction was obtained from the maker. Tarin v. Morris, 2 Dall. 115, 1 L. Ed. 312. See the titles BILLS, NOTES AND CHECKS, vol. 3, p. 257; CONTRACTS, ante, p. 552.

**44. Writ of right—Joint judgment against tenants for costs.**—In a writ of right, brought under the statute of Kentucky, where the demandant described his land by metes and bounds, and counted against the tenants jointly, it was held, that this was matter pleadable in abate-

ment only, and that by pleading in bar, the tenants admitted their joint seizin, and lost the opportunity of pleading a several tenancy. The tenants could not, in this case, severally plead, in addition to the mise, or general issue, that neither the plaintiff, nor his ancestor, nor any other under or from whom he derived his title to the demanded premises, were ever actually seized or possessed thereof, or of any part thereof; because it amounted to the general issue, and was an application to the mere discretion of the court, which is not examinable upon a writ of error. Quære, whether the tenants could plead the mise severally, as to the several tenements held by them, parcel of the demandant's premises, without answering or pleading anything as to the residue? Under such pleas, and the replication prescribed by the statute, the mise was joined; the parties proceeded to trial; and the following general verdict was found, viz: "The jury find the demandant hath more mere right to hold the tenement, as he hath demanded, than the tenants, or either of them, have, to hold the respective tenements set forth in their respective pleas, they being parcels of the tenement in the count mentioned." It was held, that this verdict being certain to a common intent, was sufficient to sustain a judgment. It was also held, that a joint judgment against the tenants for the costs, as well as the land, was correct. Liter v. Green, 2 Wheat. 306, 4 L. Ed. 246. See the titles JOINT TENANTS AND TENANTS IN COMMON; WRIT OF RIGHT.

**45. Liability of attorney for costs vexatiously increased.**—United States Rev. Stat., § 982, act of July 22, 1813, ch. 14; act of February 26, 1853, ch. 80. Pennsylvania v. Wheeling, etc., Bridge Co., 18 How. 460, 15 L. Ed. 449.



ing amendments has already been treated in the title AMENDMENTS, vol. 1, p. 303.

cc. *Continuance*.—As to imposition of costs as a condition of allowing a continuance, see the title CONTINUANCES, ante, p. 543.

(b) *After Verdict Judgment or Decree*—aa. *New Trial*.—As to imposition of costs in the case of new trials, see the title NEW TRIALS.

bb. *Opening or Vacating Judgments or Decrees*.—As to the imposition of costs upon opening or vacating judgments or decrees, see the title JUDGMENTS AND DECREES.

cc. *After Remand*.—As to the allowance of costs in proceedings after remand from the appellate court, see the title MANDATE AND PROCEEDINGS THEREON.

c. *In Appellate Proceedings*.—As to the allowance of costs in appellate proceedings, see the title APPEAL AND ERROR, vol. 2, p. 418, et seq.

d. *On Removal of Cause*.—As to costs on removal of cause, see the title REMOVAL OF CAUSES.

3. **LIABILITY OF FUNDS FOR PAYMENT OF COSTS.—In General.**—Where a party asserts his right to payment out of certain funds in court, it has been held to be the usual practice not to allow such party, though successful, his costs out of the funds in court. Such costs are chargeable against the party contesting his right to be paid out of such funds.<sup>46</sup>

**Preservation, Recovery or Administration of Trust Property or Fund.**—When many persons have a common interest in a trust property or fund, and one of them, for the benefit of all and at his own costs and expense, brings a suit for its preservation or administration, the court of equity in which the suit is brought will order that the plaintiff be reimbursed his costs from the trust property or fund itself,<sup>47</sup> or by proportional contribution from those who ac-

**46. General rule as to payment from fund in controversy.**—*National Bank v. Whitney*, 103 U. S. 99, 26 L. Ed. 443.

"The petition of McCormick to be allowed costs out of the fund in court must, according to the usual practice of the court in such cases, be also denied. His costs are chargeable against the bank which contested his right to be paid out of the proceeds in court. If paid out of the fund, they would reduce by their amount the moneys properly applicable to the indebtedness of Whitney." *National Bank v. Whitney*, 103 U. S. 99, 26 L. Ed. 443.

**47. Costs of preservation, recovery or administration of trust property or funds.**—*Hobbs v. McLean*, 117 U. S. 567, 29 L. Ed. 940; *Central R., etc., Co. v. Pettus*, 113 U. S. 116, 28 L. Ed. 915; *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157. See, also, *Peters v. Bain*, 133 U. S. 670, 33 L. Ed. 696. See, generally, the titles BANKRUPTCY, vol. 2, pp. 852, 917; TRUSTS AND TRUSTEES.

A bill was filed not only in behalf of the complainant himself, but in behalf of other bondholders having an equal interest in a fund held by trustees to secure the bondholders; and the bill sought to rescue that fund from waste and destruction arising from the neglect and misconduct of the trustees, and to bring it into court for administration according to the purposes of the trust; and where all this has been done; and done at great expense and trouble on the part of the complainant; and the other bondholders have

come in and participated in the benefits resulting from his proceedings—if the complainant was not a trustee, he at least acted the part of a trustee in relation to the common interest. He may be said to have saved the fund for the cestuis que trust, and to have secured its proper application to their use. Though the bondholder was entitled to, as costs, all necessary expenses of the litigation, he was not entitled to an allowance for his personal services, nor for his private expenses as traveling fares and hotel bills. *Trustees v. Greenough*, 105 U. S. 527, 537, 26 L. Ed. 1157.

Appellees were employed by unsecured creditors to institute a suit on behalf of them and other unsecured creditors to establish a lien on the property of their debtor, the Montgomery and West Point Railroad Company. The court held on the authority of *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157, that an acceptance, by the creditors who did not contract for the institution of the suit, of benefits acquired by the suit, made them liable to contribute to the costs of the suit. *Central R., etc., Co. v. Pettus*, 113 U. S. 116, 125, 28 L. Ed. 915.

**Allowance of solicitor's fee from funds.**—An action was brought by an administrator against one who had wrongfully appropriated funds of a minor and refused to pay them to the administrator on demand. It was held that the costs in such action should be charged against the defendant personally and not against the fund recovered except a fee allowed

cepted the benefits of his efforts.<sup>48</sup> But where one brings adversary proceedings to take the possession of trust property from those entitled to it, in order that he may distribute it to those who claim adversely, and fails in his purpose, it has never been held, so far as known, that such person has any right to demand reimbursement of his expenses out of the trust fund, or contribution from those whose property he sought to misappropriate.<sup>49</sup>

**On a bill of interpleader**, the plaintiffs are, in general, entitled to their costs out of the fund.<sup>50</sup>

**A court of equity, where a mortgage authorizes the payment of the expenses of the mortgagee**, may pay, out of the funds in his hands, the taxed costs, and also such counsel fees in behalf of the complainants as, in the discretion of the court, it may seem right to allow.<sup>51</sup>

**Satisfaction from Property Attached.**—The costs of an action, may, it seems, properly be satisfied out of the property attached or otherwise brought under the control of the court.<sup>52</sup>

**B. In Criminal Proceedings**—1. **IN GENERAL.**—Costs in criminal, as in civil proceedings, are the creature of statute, and a court has no power to award them unless some statute has conferred it.<sup>53</sup>

2. **LIABILITY OF STATE.**—By the common law the public pays no costs. In England the king does not, and the state stands in place of the king.<sup>54</sup> This rule has, however, been changed in some jurisdictions by statutes making the state liable for costs on acquittal of the defendant, or upon his conviction where the defendant shall prove insolvent and unable to pay the costs.<sup>55</sup>

3. **LIABILITY OF DEFENDANT UPON CONVICTION.**—Under the Revised Statutes of the United States when judgment is rendered against a defendant in a prosecution for any fine or forfeiture, he shall be subject to the payment of costs,<sup>56</sup>

the solicitor for recovering the funds, this being chargeable against the funds recovered. *Harrison v. Perea*, 168 U. S. 311, 327, 42 L. Ed. 478.

The defendant in this case, had wrongfully appropriated the funds of a minor. The solicitor who had recovered them was allowed a fee which was charged on the funds recovered. It was held that the court did not err in allowing this fee; as, by the exertions of the solicitor, the fund was recovered and it should properly bear some portion of the expense of the administration. The amount of the fee was within the judicial discretion of the court, and in fixing that amount, the trial court could proceed upon its own knowledge of the value of the solicitor's services. *Harrison v. Perea*, 168 U. S. 311, 325, 42 L. Ed. 478, citing *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157; *Fowler v. Equitable Trust Co.*, 141 U. S. 411, 415, 35 L. Ed. 794.

The circuit court may consider an application for an allowance of costs to counsel out of funds in court where a mandate from the supreme court directs that a party should recover costs. *Mason v. Pewabic Min. Co.*, 153 U. S. 361, 38 L. Ed. 745. See the title **ATTORNEY AND CLIENT**, vol. 2, p. 729.

48. **Reimbursement by contribution.**—*Hobbs v. McLean*, 117 U. S. 567, 29 L. Ed. 940. See the title **CONTRIBUTION AND EXONERATION**.

49. **No allowance to one failing in adversary proceedings to take possession of trust property, etc.**—*Hobbs v. McLean*, 117 U. S. 567, 29 L. Ed. 940.

50. **Plaintiffs on bill of interpleader entitled to costs out of fund.**—*Spring v. South Carolina Ins. Co.*, 8 Wheat. 268, 5 L. Ed. 614. See, generally, the title **INTERPLEADER**.

51. **Where mortgage authorizes payment of expenses of mortgagee.**—*Bronson v. La Crosse, etc., R. Co.*, 2 Wall. 283, 17 L. Ed. 725. See the title **MORTGAGES AND DEEDS OF TRUST**.

"The court may pay out of moneys in the hands of the receiver, or out of the proceeds, the taxed costs of the trustees in the proceedings for the foreclosure of the mortgage, not taxed and received from the defendants in those proceedings; and also such counsel fees in behalf of the trustees as the court, in its discretion, may seem right to allow." *Bronson v. La Crosse, etc., R. Co.*, 2 Wall. 283, 17 L. Ed. 725.

52. **Satisfaction of costs from property attached.**—*Freeman v. Alderson*, 119 U. S. 185, 30 L. Ed. 372.

53. **Court cannot award costs in criminal proceedings unless by statutory authority.**—*Phillips v. Gaines*, 131 U. S., appx. clxix, 25 L. Ed. 733.

54. **State not liable in absence of statute.**—*Phillips v. Gaines*, 131 U. S., appx. clxix, 25 L. Ed. 733.

55. **Statutory provisions as to liability of state.**—*Phillips v. Gaines*, 131 U. S., appx. clxix, 25 L. Ed. 733.

56. **Liability of defendant on conviction in prosecution for fine or forfeiture.**—*In re Swan*, 150 U. S. 637, 37 L. Ed. 1207. See the titles **FINES; PENALTIES AND FORFEITURES**.

and on every conviction for any other offense, not capital, the court may, in its discretion award that the defendant shall pay the costs of the prosecution.<sup>57</sup>

4. **LIABILITY OF INFORMERS UPON PENAL STATUTE OR PRIVATE PROSECUTORS.**—English statutes, from long before the American Revolution, authorized costs against informers upon a penal statute, or against private prosecutors of an indictment or information, to be awarded by the court, either absolutely, or unless the judge, before whom the trial was had, certified that there was probable cause for the prosecution,<sup>58</sup> and by the Revised Statutes of the United States it is expressly provided that if any informer or plaintiff on a penal statute, to whom the penalty or any part thereof, if recovered, is directed to accrue, discontinues his suit or prosecution, or is nonsuited therein, or if, upon trial, judgment is rendered in favor of the defendant, the court shall award to the defendant his costs, unless such informer or plaintiff is an officer of the United States especially authorized to commence such prosecution, and the court, at the trial in open court, certifies upon the record that there was reasonable cause for commencing the same; in which case no costs shall be adjudged to the defendant.<sup>59</sup> Under the Kansas code of criminal procedure the prosecutor is required by statute to pay the costs where the prosecution appears to have been instituted through malice and without probable cause, and such a statute has been held not to contravene the 14th amendment of the constitution of the United States, where such prosecutor has, by virtue of the statute, the right, if seasonably claimed, to be heard, and to introduce evidence, at the trial of the case, upon the question of whether he instituted the prosecution without probable cause and from malicious motives.<sup>60</sup>

### III. Judgment or Decree for Costs.

**Allowance of Costs as Part of Judgment or Decree.**—The allowance of costs is a matter of practice, which need not in the absence of statutory requirement, be a part of the decree or judgment of the court, although it often is so; as the payment of costs is, in most cases, made to depend upon the rules; and when rules do not apply, upon the court's order in directing the taxation of costs.<sup>61</sup> Under § 983 of the Revised Statutes of the United States it is provided that the items therein specified to be taxed as costs are to be included in and form a portion of a judgment or decree against the losing party,<sup>62</sup> and such taxed bills are to be filed with the papers in the case.<sup>63</sup>

**Effect of Judgment for Costs Generally.**—It has been held that a judgment for costs generally, includes all the costs belonging to the suit, whether

57. **Liability in other cases not capital.**—In *re Swan*, 150 U. S. 637, 37 L. Ed. 1207.

58. **English statutes authorizing costs against informers and private prosecutors.**—*Lowe v. Kansas*, 163 U. S. 81, 41 L. Ed. 78.

59. **United States statutes imposing liability on informers or plaintiffs, etc.**—United States Rev. Stat., § 975, embodying the provisions of the act of May 8, 1792, ch. 36, § 5. *Lowe v. Kansas*, 163 U. S. 81, 41 L. Ed. 78. See, generally, the title **PENALTIES AND FORFEITURES**.

"An unofficial informer is liable for costs and damages in case of judgment in favor of the claimants. The informer should come forward and have the information made in his own name. He cannot thus intrude himself on the record after the case is prepared and about to be tried by a jury, and when a condemnation is imminent, and when he has avoided responsibility for costs in thus keeping

back. If the claimants had succeeded they could have no judgment against the United States for costs, nor against him as not being a party to the suit." *Francis v. United States*, 5 Wall. 338, 18 L. Ed. 603.

60. **Liability of prosecutor where prosecution without probable cause and malicious.**—*Kans. Gen. Stat. of 1889 ch. 82, § 326*; *Lowe v. Kansas*, 163 U. S. 81, 41 L. Ed. 78.

61. **Allowance not necessarily a part of judgment or decree.**—*Story v. Livingston*, 13 Pet. 359, 10 L. Ed. 200.

**As to entry of costs nunc pro tunc, as part of original judgment,** see post, "Time," IV, B.

62. **Provision of United States Rev. Stat., § 983.**—*United States v. Sanborn*, 135 U. S. 271, 34 L. Ed. 112.

63. **To be filed with papers in the case.**—*United States v. Sanborn*, 135 U. S. 271, 34 L. Ed. 112. See the titles **FILING PLEADING AND PAPERS; RECORDS**.



prior, or subsequent to the rendition of judgment.<sup>64</sup> If new costs accrue, the judgment opens to receive them.<sup>65</sup>

#### IV. Taxation of Costs.

**A. Manner.**—The clerk of the court is the agent created by law for the performance of the service of taxing costs,<sup>66</sup> and the bill of costs is usually taxed by him under the direction of the court.<sup>67</sup>

**B. Time.**—The costs are perhaps never in fact taxed until after the judgment is rendered; and in many cases, cannot be taxed until afterwards. And where this is the case the amount ascertained is usually, under the direction of the court, entered *nunc pro tunc* as a part of the original judgment. This mode of proceeding is necessary for the purposes of justice, in order to afford the necessary time to examine and decide upon the several items of costs, to which the successful party is lawfully entitled.<sup>68</sup>

**C. Amount and Items Taxable**—1. *IN ORIGINAL PROCEEDINGS*—*a. In General.*—Costs as between party and party, are confined to the taxed costs allowed by the fee bill, and in this they differ from costs as between solicitor and client, which include all reasonable expenses and counsel fees.<sup>69</sup> Although under the federal statutes and those of the various states, the legal taxed costs are far below the real expenses incurred by the litigant, yet it is all the law allows as *expensa litis*.<sup>70</sup> Fees and costs allowed to officers therein named are now regulated by the act of congress, passed for that purpose, which provides that, in lieu of the compensation previously allowed by law to attorneys, solicitors and proctors in the courts of the United States, district attorneys, clerks of the circuit and district courts, marshals, commissioners, witnesses, jurors, and printers, in the several states and territories, a specified compensation and no other, shall be taxed and allowed, except in cases otherwise expressly provided by law.<sup>71</sup>

**64. What included in judgment for costs generally.**—*Peyton v. Brooke*, 3 Cranch 92, 2 L. Ed. 376.

**65. Judgment opens to receive new costs.**—*Peyton v. Brooke*, 3 Cranch 92, 2 L. Ed. 376.

**Addition of costs of alias ca. sa.**—"The judgment is for costs, generally; which includes all the costs belonging to the suit, whether prior, or subsequent to the rendition of the judgment. If new costs accrue; the judgment opens to receive them." *Peyton v. Brooke*, 3 Cranch 92, 2 L. Ed. 376. See the title *SUMMONS AND PROCESS*.

**66. Duty of clerk to tax costs.**—*Byers v. Surget*, 19 How. 303, 15 L. Ed. 670. And see *Craig v. Leitensdorfer*, 127 U. S. 764, 32 L. Ed. 322. See, generally, the title *CLERKS OF COURT*, vol. 3, p. 849.

**67. Under direction of court.**—*Pennsylvania v. Wheeling, etc., Bridge Co.*, 18 How. 460, 15 L. Ed. 449.

**Taxation by judge or clerk.**—By § 983 of the United States Revised Statutes it is provided that the bill of fees of the clerk, marshal, and attorney, and the amount paid printers and witnesses, and lawful fees for exemplification and copies of papers necessarily obtained for use at trials in cases where by law costs are recoverable in favor of the prevailing party shall be taxed by a judge or clerk of the

court. *United States v. Sanborn*, 135 U. S. 271, 34 L. Ed. 112.

**68. Time of taxing costs.**—*Sizer v. Many*, 16 How. 98, 14 L. Ed. 861.

**69. Costs between parties and between solicitor and client distinguished.**—*Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157; *In re Paschal*, 10 Wall. 483, 19 L. Ed. 992.

**As to the meaning of the term "costs of suit" under the 10th section of the Patent Act of 1793**, relating to proceedings for the repeal of a patent, see the title *PATENTS*.

**70. Taxable costs regulated by statute.**—*Day v. Woodworth*, 13 How. 363, 14 L. Ed. 182.

**71. Federal statute regulating taxation of costs.**—*United States Rev. Stat.*, § 823; act, Feb. 26, 1853, ch. 80, 10 Stat., L. 161; Act of March 3, 1855, ch. 175, 10 Stat., L. 670, 671. *United States v. Sanborn*, 135 U. S. 271, 34 L. Ed. 112; *United States v. Waters*, 133 U. S. 208, 33 L. Ed. 594; *United States v. Averill*, 130 U. S. 335, 32 L. Ed. 977; *United States v. McMillan*, 165 U. S. 504, 41 L. Ed. 805; *Flanders v. Tweed*, 15 Wall. 450, 21 L. Ed. 203; *The Baltimore*, 8 Wall. 377, 19 L. Ed. 463.

In the case of *The Baltimore*, 8 Wall. 377, 19 L. Ed. 463, referring to the provision of the statute of February 26, 1853, 10 Stat. 161, part of the first section of which was incorporated in *haec verba* into

b. *Particular Items*—(1) *Fees of Attorneys, Solicitors and Proctors*—(a) *General Provisions as to Taxation*.—By the Revised States of the United States, attorneys, solicitors and proctors, may, on a trial before a jury, in civil or criminal causes or before referees, or on a final hearing in equity or admiralty, tax a docket fee of twenty dollars,<sup>72</sup> but they are restricted to a charge of ten dollars in cases at law where judgment is rendered without a jury.<sup>73</sup> In cases at law when the cause is discontinued, and for scire facias, and other proceedings on recognizances, they may tax a fee of five dollars,<sup>74</sup> and for each deposition taken and admitted in evidence in a cause, two dollars and fifty cents.<sup>75</sup> At-

§§ 823, 824 of the Revised Statutes, it was held that fees and costs allowed to attorneys, solicitors, and proctors in admiralty cases were taxable as costs, as an incident to the trial and judgment. In that case, the court, on page 392, says: "Fees and costs, allowed to the officers therein named, are now regulated by the act of the 26th of February, 1853, which provides in its first section, that in lieu of the compensation now allowed by law to attorneys, solicitors, proctors, district attorneys, clerks, marshals, witnesses, jurors, commissioners and printers, the following and no other compensation shall be allowed. Attorneys, solicitors and proctors may charge their clients reasonably for their services, in addition to the taxable costs, but nothing can be taxed as costs against the opposite party, as an incident to the judgment, for their services, except the costs and fees therein described and enumerated." United States v. Waters, 133 U. S. 208, 33 L. Ed. 594. See the title DISTRICT AND PROSECUTING ATTORNEY.

**Allowance of attorneys' fees in discretion of court independent of statute of 1853.**—"Both before and since the enactment of the statute of 1853, courts in the exercise of their discretion have allowed counsel fees in many cases without question when reviewed by this court. In the Appollon, 9 Wheat. 362, 379, and in *Canter v. American and Ocean Insurance Companies*, 3 Pet. 307, 319, the allowance of counsel fees by the court below was affirmed by this court as a matter within the sound discretion of the court before whom the cause was tried; and those decisions were cited with approval in *Elastic Fabrics Co. v. Smith*, 100 U. S. 110, 25 L. Ed. 547, and *Paper-Bag Cases*, 105 U. S. 766, 772, 26 L. Ed. 959. In *United States v. Ingersoll*, 1 Crabbe 135, suit was brought by the United States against a United States district attorney, for money had and received. He pleaded, as a set-off, among other items, \$5,083.20 for costs taxed and allowed in criminal cases, payment of which had been withheld by the treasury department. It was held that those costs (which were attorney's fees) constituted a fair and legal set-off; and the court laid down the principle, as concisely stated in the syllabus, that 'the allowance of costs to a district attorney is altogether in the jurisdiction of the judge, and not within the power of the officers of the treasury.'" United

States v. Waters, 133 U. S. 208, 33 L. Ed. 594.

**72. Taxation of docket fee on trial before jury or final hearing in equity or admiralty.**—United States Rev. Stat., § 824; act of Feb. 26, 1853, ch. 80, 10 Stat. L. 161, 162. *United States v. Sanborn*, 135 U. S. 271, 34 L. Ed. 112; *Flanders v. Tweed*, 15 Wall. 450, 21 L. Ed. 203.

**Allowance of additional fee to district attorney.**—Section 824, of the Revised Statutes, after limiting the fees to the district attorneys for their official services therein named, each at a specific amount, irrespective of the labor and responsibility involved, provides in its concluding clause that, "When an indictment for crime is tried before a jury and a conviction is had, the district attorney may be allowed, in addition to the attorney's fees herein provided, a counsel fee, in proportion to the importance and difficulty of the cause, not exceeding thirty dollars." United States v. Waters, 133 U. S. 208, 33 L. Ed. 594.

**Taxation of attorneys fee in supreme court.**—A proceeding in the United States supreme court, under its original jurisdiction, against a judge of an inferior court of the United States, to obtain a writ of mandamus requiring him to proceed in a cause pending in court before him, is a civil cause, and a docket fee is, therefore, taxable in favor of the attorney of the prevailing party as part of the costs. *Ex parte Hughes*, 114 U. S. 548, 29 L. Ed. 281. See the title MANDAMUS.

**As to fees of proctors in admiralty,** see the title ADMIRALTY, vol. 1, p. 181.

**73. In cases at law where judgment rendered without jury.**—United States Rev. Stat., § 824. *Flanders v. Tweed*, 15 Wall. 450, 21 L. Ed. 203.

**74. Where cause discontinued, and for scire facias, etc.**—United States Rev. Stat., § 824.

**75. For depositions taken and admitted in evidence.**—United States Rev. Stat., § 824. *Missouri v. Illinois*, 202 U. S. 598, 50 L. Ed. 1160. See the title DEPOSITIONS.

A fee of \$2.50 for each witness examined before an examiner may be charged as costs, on the footing of depositions mentioned in Rev. Stat., § 824. The trouble in having to visit different places is similar to that caused by taking depositions. *Missouri v. Illinois*, 202 U. S. 598, 50 L. Ed. 1160.

torneys, solicitors, and proctors, may, notwithstanding the above provisions, charge to, and receive from their clients, other than the government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective states, or may be agreed upon between the parties;<sup>76</sup> but nothing can be taxed or recovered as costs against the opposite parties as an incident to the judgment, for their services, except the costs and fees therein described and enumerated.<sup>77</sup>

(b) *Discretion of Court as to Amount.*—Under § 7 of the antitrust act of July 2, 1890, allowing a successful plaintiff to recover damages and the costs of the suit, including a reasonable attorneys' fee, for a violation of the provision of the act, the amount of the attorneys' fee to be allowed as costs is within the discretion of the trial court, reasonably exercised.<sup>78</sup>

(c) *Validity of State Statutes Authorizing Taxation as Costs in Favor of Successful Plaintiff in Certain Actions.*—In a number of jurisdictions statutes have been enacted authorizing the taxation of attorneys' fees as costs in favor of the successful plaintiff, without conferring the same right upon a successful defendant, in certain classes of actions, as, for instance, against railroad companies for damage by fires, or on claims for personal services rendered, or labor done, or for damages, or for over charges on freight, or claims for stock killed or injured by the train of any railroad company, or against insurance companies upon policies of insurance, for total loss of property. The constitutionality of these statutes will be found treated in other titles in this work.<sup>79</sup>

(2) *Witness Fees, Expenses, etc.*—The amount paid witnesses, their mileage, and the necessary expenses incurred in summoning them may, it would seem, be properly taxed as an item of costs and included in the judgment.<sup>80</sup> Under

**76. Right of attorney, etc., to charge client a reasonable fee not affected by statute.**—United States Rev. Stat., § 823. United States v. Sanborn, 135 U. S. 271, 34 L. Ed. 112; United States v. Waters, 133 U. S. 208, 33 L. Ed. 594; Flanders v. Tweed, 15 Wall. 450, 21 L. Ed. 203; The Baltimore, 8 Wall. 377, 19 L. Ed. 463.

**As to the right of attorneys to charge and receive reasonable compensation.**—See the title ATTORNEY AND CLIENT, vol. 2, p. 723, et seq.

**77. Nothing may be taxed or recovered as costs in excess of statutory provision.**—United States v. Waters, 133 U. S. 208, 33 L. Ed. 594; Flanders v. Tweed, 15 Wall. 450, 21 L. Ed. 203.

**As to counsel fees as elements of damages,** see the title DAMAGES.

**78. Discretion of court as to allowance under antitrust act.**—Montague v. Lowry, 193 U. S. 38, 48 L. Ed. 608.

In an action under such antitrust act when a verdict was rendered for five hundred dollars, it was held that an attorney's fee of seven hundred and fifty dollars was reasonable, where the trial took five days, and it appeared from the evidence as to what would be a reasonable amount, that seven hundred and fifty to one thousand dollars would be reasonable. Montague v. Lowry, 193 U. S. 38, 48 L. Ed. 608.

"There is one other question which, although of secondary importance, is raised by the plaintiffs in error. After the rendition of the verdict the plaintiff below claimed a reasonable attorney's fee under the seventh section of the act, and made proof of what would be a reasonable sum

therefore, from which it appeared that it would be from \$750 to \$1,000. The trial court awarded to the plaintiff \$750. The verdict being only for \$500, the plaintiffs in error claimed that the allowance was an improper and unreasonable one. The trial took some five days. The judgment in effect pronounced the association illegal. The amount of the attorney's fee was within the discretion of the trial court, reasonably exercised, and we do not think that in this case such discretion was abused." Montague v. Lowry, 193 U. S. 38, 48 L. Ed. 608. See the title MONOPOLIES AND CORPORATE TRUSTS.

**79. Constitutionality of such statutes.**—See the titles CONSTITUTIONAL LAW, ante, p. 1; DUE PROCESS OF LAW; POLICE POWER.

**80. Fees and expenses of witnesses.**—United States Rev. Stat., § 983. United States v. Sanborn, 135 U. S. 271, 34 L. Ed. 112. See the title WITNESSES.

**Expenses of execution of commission.**—In an account of expenses in the execution of a commission moved to be allowed as costs, were charges for swearing and the attendance of witnesses, for agency and for expenses of collecting testimony. The charges for agency and for the collection of testimony were rejected and the charges for swearing and attendance of witnesses were allowed. Lynch v. Wood, 1 Dall. 310, 1 L. Ed. 151.

**Expenses of government witnesses.**—A person employed by the government receives while absent, as a witness for the government, his stipulated salary, and is paid, in that way, for his time, so it is



the act of March 3, 1887, providing for the bringing of suits against the United States, allowing costs to the prevailing party if the United States shall put in issue the right of the plaintiff to recover, from the time of joining such issue, it is further provided that such costs shall include only what is actually incurred for witnesses and for summoning the same, and fees paid to the clerk of the court.<sup>81</sup>

(3) *Fees of Officers of Court.*—By the act of May 9, 1792, which was “an act for regulating processes in the courts of the United States, and providing compensations for the officers of the said court and for jurors and witnesses,” the compensation therein provided for, on behalf of officers and persons concerned in the administration of justice, not payable out of the treasury of the United States, was recoverable as costs of the suit.<sup>82</sup> By the present provisions of the United States Revised Statutes the bill of fees of the clerk and marshal are to be taxed and included in the judgment or decree against the losing party.<sup>83</sup>

not just that he should also receive mileage and per diem. But, instead thereof, he is allowed his necessary expenses, which being audited, by or under the direction of the court upon which he attends as a witness, he is entitled to have paid to him; and the government, being under an obligation to pay them, is entitled to have the amount so audited included in its bill of costs, and in any judgment rendered in its favor. In other words, when the government is successful in a suit the “necessary expenses” of its witnesses, of the class described in Rev. Stat., § 850, providing that necessary expenses of a government clerk shall be paid when sent away as a witness, takes the place, in its bill of costs, of the per diem and mileage which, but for that section, would have been taxed and allowed in its favor. *United States v. Sanborn*, 135 U. S. 271, 34 L. Ed. 112.

“It is not disputed that the United States, if successful in a suit, is entitled to have included in the judgment the statutory fees for per diem and mileage for its witnesses, other than its officers who may be sent away from their places of business to attend upon a court. And we cannot think it was intended by § 850 to deny to the government the right, when successful in a suit, to have even the necessary expenses of witnesses of the class described in that section included in the judgment for costs; or that the United States intended to remit to its defeated adversary not only witnesses’ fees for per diem and mileage, but the necessary expenses of witnesses who happened to be in its employment, and whom it sent away from their places of business to testify in its behalf. As a person of that class receives, while absent, his stipulated salary, and is paid in that way, for his time, it is not deemed just that he should also receive mileage and per diem. But, instead thereof, he is allowed his necessary expenses, which being audited, by or under the direction of the court upon which he attends as a witness, he is entitled to have paid to him; and the government, being under an obligation to pay them, is en-

titled to have the amount so audited included in its bill of costs, and in any judgment rendered in its favor. In other words, when the government is successful in a suit, the ‘necessary expenses’ of its witnesses, of the class described in § 850, take the place, in its bill of costs, of the per diem and mileage which, but for that section, would have been taxed and allowed in its favor, just as a marshal may elect to take his actual traveling expenses instead of mileage where mileage is allowed to him.” *United States v. Sanborn*, 135 U. S. 271, 34 L. Ed. 112.

**The auditing of expenses described in § 850, Rev. Stat.,** providing that necessary expenses of a government clerk shall be paid when sent away as a witness, is primarily under the direction of the court. *United States v. Sanborn*, 135 U. S. 271, 34 L. Ed. 112.

**81. Under act of March 3, 1887.**—*United States v. Harmon*, 147 U. S. 268, 37 L. Ed. 164.

**82. Provision of act of May 9, 1792.**—*Pennsylvania v. Wheeling, etc., Bridge Co.*, 18 How. 460, 15 L. Ed. 449.

In *The Antelope*, 12 Wheat. 546, 6 L. Ed. 723, it was held that under the early acts providing for the fees and compensation to be allowed a marshal, “whether the marshal’s fees and compensation for services rendered the United States be fixed by some positive statutory rule, as in enumerated services, or depend upon what is reasonable and just under the circumstances of the case, as in nonenumerated services, they must be certified to, and paid out of, the treasury, and cannot lawfully constitute any part of the judgment or decree in the cause.”

**83. Fees of clerk and marshal.**—*United States Rev. Stat.*, § 983. *United States v. Sanborn*, 135 U. S. 271, 34 L. Ed. 112.

Under the act of March 3, 1887, allowing costs to the successful plaintiff in an action against the United States, where the latter puts in issue the right of the plaintiff to recover, it is provided that such costs shall include in addition to the expense of witnesses, the fees paid to the

(4) *Fees for Exemplifications and Copies of Papers.*—Lawful fees for exemplifications and copies of papers necessarily obtained for use on trials, may properly be taxed as costs.<sup>84</sup>

(5) *Amounts Paid to Printers.*—Section 983 of the United States Revised Statutes includes the amount paid to printers among the items to be taxed and included in the judgment or decree.<sup>85</sup>

(6) *Expenses of Preserving Attached Property.*—It has been held that plaintiffs in a suit for dissolution of a partnership, who are personally liable for attached property held by an officer, may recover as costs a reasonable amount for expenses incurred in preserving the property.<sup>86</sup>

c. *When Several Actions Are Instituted against Parties Who Might Be Joined in One Action.*—When several actions or processes are instituted, in a court of the United States or one of the territories, against persons who might legally be joined in one action or process touching the matter in dispute, the party pursuing the same shall not recover, on all of the judgments therein which may be rendered in his favor, the costs of more than one action or process, unless special cause for said several actions or processes is satisfactorily shown on motion in open court.<sup>87</sup>

2. IN APPELLATE PROCEEDINGS.—See the title APPEAL AND ERROR, vol. 2, p. 426, et seq.

**D. Remedy for Erroneous Taxation.**—The usual method of correcting an erroneous taxation of costs would seem to be by a motion to retax.<sup>88</sup>

clerk of the court. *United States v. Harmon*, 147 U. S. 268, 37 L. Ed. 164.

**Generally, as to fees and compensation of clerks and marshals,** see the titles CLERKS OF COURT, vol. 3, p. 849; UNITED STATES MARSHALS.

**84. Fees for exemplifications, etc.**—*United States Rev. Stat.*, § 983. *United States v. Sanborn*, 135 U. S. 271, 34 L. Ed. 112. See the titles DOCUMENTARY EVIDENCE; RECORDS.

**85. Amount paid to printers.**—*United States v. Sanborn*, 135 U. S. 271, 34 L. Ed. 112. And see the title APPEAL AND ERROR, vol. 2, p. 426.

**Disbursement for printing objections to filing of reply in mandamus proceedings.**—It has been held that objections to the filing of the reply in mandamus proceedings in the United States supreme court were in the nature of pleadings in the cause, and that the disbursements for printing such objections were, therefore, taxable as costs of printing the record. *Ex parte Hughes*, 114 U. S. 548, 29 L. Ed. 281. See the title MANDAMUS.

**86. Expenses of preserving attached property.**—*Burns v. Rosenstein*, 135 U. S. 449, 34 L. Ed. 193.

"After the decree below there was a report by the clerk as to the taxation of costs. The parties having been heard in respect thereto, an order was made allowing costs to the plaintiffs to the amount of \$973.34. The report shows that the plaintiffs claimed a certain amount for expenses connected with the preservation and keeping of the personal property (not including the vessels) attached on the writ. The court disallowed five-eighths of that sum. The only objection urged in this court to the taxation of costs was the

allowance of any sum whatever to plaintiffs for the preservation of the attached property. This objection cannot be sustained. It was said in *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157, that 'ordinarily a decree will not be reviewed in this court for costs merely in a suit in equity although the court had entire control of costs as well as the merits where it has possession of the case on appeal from final decree.' There is nothing in the record to take the present case out of the general rule. The allegations of the original bill justified the issuing of the attachment. It was right that the property taken under it should be cared for, and as the court found that the plaintiffs were entitled to a decree against the defendants, a judgment for costs properly followed; and we perceive no reason why the plaintiffs should not have been allowed, as part of their costs, a reasonable amount for the expenses incurred in preserving the attached property, and for which they became primarily liable to the officer keeping it. We cannot say, upon the record before us, that the court below exceeded its discretion in apportioning the expenses thus incurred." *Burns v. Rosenstein*, 135 U. S. 449, 34 L. Ed. 193.

**87. Where several actions brought against parties who might legally be joined in one action.**—*United States Rev. Stat.*, § 977, act of July 22, 1813. *Pennsylvania v. Wheeling, etc., Bridge Co.*, 18 How. 460, 15 L. Ed. 449.

**88. Motion to retax costs.**—*Sully v. American Nat. Bank*, 179 U. S. 68, 45 L. Ed. 89; *Pennsylvania v. Wheeling, etc., Bridge Co.*, 18 How. 460, 15 L. Ed. 449. See the title APPEAL AND ERROR, vol. 2, p. 427.

## V. Manner of Enforcing Payment of Costs.

**In General.**—Payment of costs may be enforced by attachment,<sup>89</sup> or by execution.<sup>90</sup>

**Payment of Past Costs as Condition of Allowing Further Proceedings.**—The plaintiff may be required, by order of the court, to pay the costs of a former suit before suing again for the same cause.<sup>91</sup>

## VI. Security for, or Prepayment of Costs.

**A. Necessity.**—1. **IN GENERAL.**—From early times the legislature and the courts, in England and America, have not only awarded costs to the party prevailing in a civil action, but have, not infrequently, required actual payment of costs, or security for that payment, from the plaintiff in a civil action, or even from the prosecutor in a criminal proceeding.<sup>92</sup> Such security may properly be required in case of a nonresident plaintiff,<sup>93</sup> and has been required as a condition of allowing intervention.<sup>94</sup>

2. **WHERE UNITED STATES THE PLAINTIFF.**—It is provided by § 1001 of the United States Revised Statutes that whenever any process issues from the circuit court, by the United States, no bond, obligation, or other security shall be required from the United States, either to prosecute the suit, or to answer in damages or costs.<sup>95</sup> The adoption of the state practice "as near as may be" does not have the effect to abrogate the provision of § 1001, so as to require the United

89. **Attachment.**—The parties on one side in a suit, on their giving bonds to pay all costs which from that time forward might be adjudged against them, were allowed by the court to intervene as assignees of the claim of one of the original parties. It was held that the court had power and it was its duty to enforce the payment of the costs against such parties, and attachments were ordered to be issued against them and their sureties to compel the payment of the amount of the taxed costs. *Craig v. Leitensdorfer*, 127 U. S. 764, 770, 771, 32 L. Ed. 322, cited in *Lowe v. Kansas*, 163 U. S. 81, 41 L. Ed. 78. See, generally, the title **ATTACHMENT AND GARNISHMENT**, vol. 2, p. 660.

90. **Execution.**—*Pennsylvania v. Wheeling, etc., Bridge Co.*, 18 How. 421, 15 L. Ed. 435; *Riddle v. Mandeville*, 6 Cranch 86, 2 L. Ed. 161.

91. **Requirement of payment of former costs as conditions of allowing second suit.**—*Lowe v. Kansas*, 163 U. S. 81, 41 L. Ed. 78; *Shaw v. Wallace*, 2 Dall. 179, 1 L. Ed. 339; *Hurst v. Jones*, 4 Dall. 353, 1 L. Ed. 864; *Henderson v. Griffin*, 5 Pet. 151, 8 L. Ed. 79.

In an action of ejectment which had been non prossed, the costs remained unpaid. In a subsequent action between the same parties for the same land the defendant objected to the trial of the second action until payment of costs of the former trial. The court held that the objection was reasonable, and that the defendant cannot be compelled to proceed to trial until payment of the costs of the former trial. *Hurst v. Jones*, 4 Dall. 353, 1 L. Ed. 864.

Where the court ordered the costs to be paid, of a former ejectment brought by the plaintiffs, in the names of other

persons, but for their use, before the plaintiff could prosecute a second suit, in his own name, for the same land, this was not a judicial decision that the right of the plaintiffs in the first suit was the same with that of the plaintiffs in the second suit; it was perfectly consistent with the justice of the case, that when the plaintiffs sued the same defendant, in their own name, for the same land, they should reimburse him for the past costs to which they had subjected him, before they should be permitted to proceed further. Rules of this kind are granted by the court to meet the justice and exigencies of cases as they occur; not depending solely on the interest which those who are subjected to such rules may have in the subject matter of suits which they bring and prosecute in the names of others; but on a variety of circumstances, which, in the exercise of a sound discretion, may furnish a proper ground for their interference. *Henderson v. Griffin*, 5 Pet. 151, 8 L. Ed. 79.

92. **Statutory requirement of security.**—*Lowe v. Kansas*, 163 U. S. 81, 41 L. Ed. 78.

**As to the statutory origin of costs,** the power of the legislature to regulate, etc., see ante, "Origin and Basis of Liability," II, A, 1.

93. **Requirement of security from non-resident plaintiff.**—*Shaw v. Wallace*, 2 Dall. 179, 1 L. Ed. 339; *Chicago, etc., R. Co. v. Ohle*, 117 U. S. 123, 29 L. Ed. 837.

94. **Requirement from interveners.**—In *Craig v. Leitensdorfer*, 127 U. S. 764, 32 L. Ed. 322, interveners were required by order of court to give bonds for costs with sureties. See, generally, the title **INTERVENTION**.

95. **Provision of Revised Statutes, § 1001.**—*United States v. Bryant*, 111 U. S. 499, 28 L. Ed. 496.



States to give a bond for costs and damages, as a condition of obtaining an order for seizure of property sued for, under the provisions of a state code for the recovery of specific chattels.<sup>96</sup>

3. **IN APPELLATE PROCEEDINGS.**—See the title **APPEAL AND ERROR**, vol. 1, p. 181.

4. **SUITS IN FORMA PAUPERIS.**—**Right of Poor Persons to Sue without Prepayment or of Security for Costs.**—As has been seen, costs are the creatures of statute, and it is settled that authority to permit the prosecution of a suit or action in forma pauperis must be given by statute.<sup>97</sup> It is expressly provided by statute that any citizen of the United States entitled to commence any suit or action in any court of the United States, may commence and prosecute to conclusion any such suit or action without being required to prepay fees or costs, or give security therefor before or after bringing suit or action, upon filing in said court a statement under oath, in writing, that, because of his poverty, he is unable to pay the costs of said suit or action which he is about to commence, or to give security for the same, and that he believes he is entitled to the redress he seeks by such suit or action, and setting forth briefly the nature of his alleged cause of action.<sup>98</sup> It is further provided that after any such suit or action shall have been brought, or that is now pending, the plaintiff may answer and avoid a demand for fees or security for costs by filing a like affidavit, and willful false swearing in any affidavit, shall be punishable as perjury is in other cases.<sup>99</sup>

**Procedure in Such Suits.**—In suits in forma pauperis the officers of court are required to issue and serve all process, and perform all duties, and witnesses shall attend as in other cases, and the plaintiff shall have the same remedies as are provided by law in other cases.<sup>1</sup> The court may request any attorney of such court to represent such poor person, if it deems the cause worthy of a trial, and may dismiss any such cause brought under the act authorizing suits in forma pauperis if it be made to appear that the allegation of poverty is untrue, or if said court be satisfied that the alleged cause of action is frivolous or malicious.<sup>2</sup>

**Rendition of Judgment for Costs.**—A judgment may be rendered for

96. **United States not required to give bond for costs and damages.**—United States *v.* Bryant, 111 U. S. 499, 28 L. Ed. 496.

97. **Right to sue in forma pauperis dependent on statute.**—Bradford *v.* Southern R. Co., 195 U. S. 243, 49 L. Ed. 178. And see ante, "Origin and Basis of Liability," H. A, 1.

98. **Statutory provision giving right to sue in forma pauperis.**—Act of July 20, 1892, ch. 209, 27 Stat. L. 252, § 1. Galloway *v.* Ft. Worth Bank, 186 U. S. 177, 46 L. Ed. 1111; Bradford *v.* Southern R. Co., 195 U. S. 243, 49 L. Ed. 178.

99. **Answer and avoidance of demand for fees or security.**—Act of July 20, 1892, ch. 209, 27 Stat. L. 252, § 2. Bradford *v.* Southern R. Co., 195 U. S. 243, 49 L. Ed. 178.

"The first section relates to the commencement and carrying forward of a suit or action without plaintiff being required to prepay fees or costs or to give security therefor, whether the fees or costs accrue at the beginning or during the progress of the suit or action. The application is to be made at the outset, and the order, if granted, covers the fees

or costs, accruing when or after the suit or action is commenced. And this result is secured by the words 'and its prosecution to conclusion.' That conclusion is the termination of the suit or action in the court where it is commenced. The second section provides for a similar application after the suit or action has been brought. The words 'suit or action' are used in both sections, and the applicant is required to set forth 'his alleged cause of action.'" Bradford *v.* Southern R. Co., 195 U. S. 243, 49 L. Ed. 178. See, also, Galloway *v.* Ft. Worth Bank, 186 U. S. 177, 46 L. Ed. 1111. See the title **APPEAL AND ERROR**, vol. 1, p. 333.

**Provision inapplicable to proceedings in supreme court.**—This act relating to suits in forma pauperis has been repeatedly held to be inapplicable to appellate proceedings in the supreme court. See the title **APPEAL AND ERROR**, vol. 2, p. 425.

1. **Procedure as in other suits or actions.**—Act of July 20, 1892, ch. 209, 27 Stat. L. 252, § 3.

2. **Power of court to assign attorney or dismiss case.**—Act of July 20, 1892, ch. 209, 27 Stat. L. 252, § 4. Bradford *v.* Southern R. Co., 195 U. S. 243, 49 L. Ed. 178.

costs at the conclusion of a suit in forma pauperis as in other cases.<sup>3</sup> The United States shall not, however, be liable for any of the costs thus incurred.<sup>4</sup>

**B. Application.—Time.**—It has been held that a defendant may, at any time, move that a rule be granted for security for costs to be given by plaintiff who is a nonresident, if it does not delay the trial.<sup>5</sup>

**An affidavit for the purpose of requiring security for costs** on the ground of nonresidence, may, it would seem, be made on information and belief as to such nonresidence,<sup>6</sup> and, where the defendant is a corporation, it may be filed on its behalf by an officer of the corporation.<sup>7</sup>

**COSURETIES.**—See the titles CONTRIBUTION AND EXONERATION, ante, p. 595; PRINCIPAL AND SURETY; SUBROGATION.

**COTENANTS.**—See the title JOINT TENANTS AND TENANTS IN COMMON.

**COTTON.**—See note 1.

**COTTON EXCHANGE.**—See the title EXCHANGES.

**COUNCIL.**—As to city councils, see the title MUNICIPAL CORPORATIONS.

**COUNSEL.**—See the title ATTORNEY AND CLIENT, vol. 2, p. 705.

**COUNSEL FEES.**—See the titles ADMIRALTY, vol. 1, p. 181; APPEAL AND ERROR, vol. 1, p. 989; ATTORNEY AND CLIENT, vol. 2, p. 723; COSTS; DAMAGES.

**COUNTERCLAIM.**—See the title SET-OFF, RECOUPMENT AND COUNTERCLAIM.

**COUNTERFEITING.**—See the title FORGERY AND COUNTERFEITING.

**3. Rendition of judgment for costs.**—Act of July 20, 1892, ch. 209, 27 Stat. L. 252, § 5. *Radford v. Southern R. Co.*, 195 U. S. 243, 49 L. Ed. 178.

**4. United States not liable for costs.**—Act of July 20, 1892, ch. 209, 27 Stat. L. 202, § 5. *Bradford v. Southern R. Co.*, 195 U. S. 243, 49 L. Ed. 178.

**5. Motion at any time if trial not delayed.**—*Shaw v. Wallace*, 2 Dall. 179, 1 L. Ed. 339.

**6. Affidavit on information and belief.**—*Chicago, etc., R. Co. v. Ohle*, 117 U. S. 123, 29 L. Ed. 837.

**7. Affidavit by officer of corporation.**—*Chicago, etc., R. Co. v. Ohle*, 117 U. S. 123, 29 L. Ed. 837. See the titles AFFIDAVITS, vol. 1, p. 200; CORPORATIONS, ante, p. 621.

**1. Manufacturers of cotton.**—See *Fisk v. Arthur*, 103 U. S. 431, 26 L. Ed. 529; *Arthur v. Zimmermann*, 96 U. S. 125, 24 L. Ed. 770; *Arthur v. Herman*, 96 U. S. 141, 24 L. Ed. 812; *Kohlsaat v. Murphy*, 96 U. S. 153, 24 L. Ed. 844; *Barber v. Schell*, 107 U. S. 617, 27 L. Ed. 490. See, generally, the title REVENUE LAWS.

**Cotton braid.**—See *Arthur v. Zimmermann*, 96 U. S. 125, 24 L. Ed. 770. See, generally, the title REVENUE LAWS.

**Cotton laces—Cotton inspections.**—See *Barber v. Schell*, 107 U. S. 617, 27 L. Ed. 490. See, generally, the title REVENUE LAWS.

**Cotton webbing.**—See *Beard v. Nichols*, 120 U. S. 260, 30 L. Ed. 652.

# COUNTIES.

BY FRANK STUART.

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**CROSS REFERENCES.**

See the titles BRIDGES, vol. 3, p. 516; CLERKS OF COURT, vol. 3, p. 849; CONSTITUTIONAL LAW, ante, p. 1; COURTS; DISTRICT AND PROSECUTING ATTORNEYS; HEALTH; INJUNCTIONS; JUDGES; JUSTICE OF THE PEACE; LIMITATION OF ACTIONS AND ADVERSE POSSESSION; MANDAMUS; MUNICIPAL CORPORATIONS; MUNICIPAL, COUNTY, STATE AND FEDERAL AID; MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES; NOTARY PUBLIC; PAUPERS; PUBLIC LANDS; PUBLIC OFFICERS; SCHOOLS; SHERIFFS AND CONSTABLES; SPECIFIC PERFORMANCE; STREETS AND HIGHWAYS; SUMMONS AND PROCESS; TAXATION; TOWNS AND TOWNSHIPS.

**I. Definition, Status, Functions and General Consideration.**

**A. Definition.**—The several counties are nothing more than certain portions of territory into which the state is divided for the more convenient exercise of the powers of government. They form together one political body in which the sovereignty resides.<sup>1</sup>

**B. Status.**—**Status as Corporation.**—Counties<sup>2</sup> are public,<sup>3</sup> municipal corporations.<sup>4</sup>

**1. County defined.**—*Maryland v. Baltimore*, etc., R. Co., 3 How. 534, 549, 11 L. Ed. 714. See the title STATES.

**2. Counties as corporations.**—Counties are corporations. *Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1, 33 L. Ed. 231; *Lincoln County v. Luning*, 133 U. S. 529, 530, 33 L. Ed. 766; *Davenport v. County of Dodge*, 105 U. S. 237, 241, 26 L. Ed. 1018; *Commissioners of Laramie County v. Commissioners of Albany County*, 92 U. S. 307, 23 L. Ed. 552; *Worcester v. Worcester*, etc., *Street R. Co.*, 196 U. S. 539, 549, 49 L. Ed. 591; *Mount Pleasant v. Beckwith*, 100 U. S. 514, 524, 25 L. Ed. 699; *Board of County Commissioners v. Sellev*, 99 U. S. 624, 25 L. Ed. 333; *Ex parte Rowland*, 104 U. S. 604, 613, 26 L. Ed. 861; *County of Greene v. Daniel*.

102 U. S. 187, 193, 26 L. Ed. 99; *Lynde v. The County*, 16 Wall. 6, 11, 21 L. Ed. 272; *Boone County v. Burlington*, etc., R. Co., 139 U. S. 684, 35 L. Ed. 319.

**Contra in Nebraska.**—The word "corporation," as used in § 15, art. 3, of the constitution of Nebraska, which went into effect November 1, 1875, does not apply to a county. *Sherman County v. Simons*, 109 U. S. 735, 740, 27 L. Ed. 1093. See the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

**3. Public corporations.**—*Commissioners of Laramie County v. Commissioners of Albany County*, 92 U. S. 307, 310, 23 L. Ed. 552. See the titles CORPORATIONS, ante, p. 621; MUNICIPAL CORPORATIONS.

**4. Municipal corporations.**—Commis-

**County as Political Body.**—Counties are mere political bodies.<sup>5</sup>

**Relation of Counties Inter Se.**—The individual counties of the various states do not bear the same relation towards each other, as the states constituting the union stand in relation to one another.<sup>6</sup>

**Relation between State and Counties.**—The relation between the state and its counties is different from that which exists between the state and the individual.<sup>7</sup>

**County as Part of State.**—While the county is territorially a part of the state, yet politically it is also a corporation created by and with such powers as are given to it by the state. In this respect it is a part of the state only in that remote sense in which any city, town, or other municipal corporation may be said to be a part of the state.<sup>8</sup> A county is a mere political,<sup>9</sup> or territorial subdivision of the state.<sup>10</sup>

sioners of Laramie County *v.* Commissioners of Albany County, 92 U. S. 307, 23 L. Ed. 552; Board of Commissioner *v.* Lucas, 93 U. S. 108, 115, 23 L. Ed. 822; Mount Pleasant *v.* Beckwith, 100 U. S. 514, 25 L. Ed. 699; Crampton *v.* Zabriskie, 101 U. S. 601, 25 L. Ed. 1070; Bullitt County *v.* Washer, 130 U. S. 142, 32 L. Ed. 885; Lake County *v.* Graham, 130 U. S. 674, 32 L. Ed. 1065; Lincoln County *v.* Luning, 133 U. S. 529, 33 L. Ed. 766; Metropolitan R. Co. *v.* District of Columbia, 132 U. S. 1, 33 L. Ed. 231; Boone County *v.* Burlington, etc., R. Co., 139 U. S. 684, 35 L. Ed. 319; Flanigan *v.* Sierra County, 196 U. S. 553, 49 L. Ed. 597; Sherman County *v.* Simons, 109 U. S. 735, 740, 27 L. Ed. 1093; Chaffee County *v.* Potter, 142 U. S. 355, 363, 35 L. Ed. 1040; Worcester *v.* Worcester, etc., Street R. Co., 196 U. S. 539, 549, 49 L. Ed. 591. See Enfield *v.* Jordan, 119 U. S. 680, 685, 30 L. Ed. 523.

**Contra in Nebraska.**—The supreme court of Nebraska has expressly held that in Nebraska a county was not considered to be a municipal corporation. *Sherman County v. Simons*, 109 U. S. 735, 740, 27 L. Ed. 1093.

"The authority given by the act of February 18th, 1875, to Sherman and other counties, to fund the indebtedness evidenced by county warrants, by giving their bonds in exchange therefor, does not of itself make them municipal corporations." *Sherman County v. Simons*, 109 U. S. 735, 740, 27 L. Ed. 1093. See the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES. See, generally, the title MUNICIPAL CORPORATIONS.

**Towns and townships.**—See the title TOWNS AND TOWNSHIPS.

**5. Political bodies.**—Claiborne County *v.* Brooks, 111 U. S. 400, 406, 28 L. Ed. 470; Hill *v.* Memphis, 134 U. S. 198, 205, 33 L. Ed. 887; Merrill *v.* Monticello, 138 U. S. 673, 689, 34 L. Ed. 1069; Police Jury *v.* Britton, 15 Wall. 566, 21 L. Ed. 251; Concord *v.* Robinson, 121 U. S. 165, 167, 30 L. Ed. 885; Commissioners of Laramie County *v.* Commissioners of Albany County, 92 U. S. 307, 23 L. Ed. 552; Worcester *v.* Worcester, etc., Street R. Co., 196 U. S. 539, 549, 49 L. Ed. 591; Mount Pleasant *v.* Beckwith, 100 U. S. 514, 524, 25 L. Ed. 699; Board of Commissioners *v.*

Sellew, 99 U. S. 624, 25 L. Ed. 333; Rogers Locomotive Works *v.* American Emigrant Co., 164 U. S. 559, 576, 41 L. Ed. 552; County Court *v.* United States, 105 U. S. 733, 737, 26 L. Ed. 1220; Maryland *v.* Baltimore, etc., R. Co., 3 How. 534, 549, 11 L. Ed. 714; Bank *v.* Dyer, 14 Pet. 141, 10 L. Ed. 391; Lincoln County *v.* Luning, 133 U. S. 529, 530, 33 L. Ed. 766.

**6. Relation of counties inter se.**—The county of Alexandria, in the District of Columbia, cannot be regarded as standing in the same relation to the county of Washington that the states of this Union stand in relation to one another. *Bank v. Dyer*, 14 Pet. 141, 10 L. Ed. 391. See the title STATE.

The counties of Washington and Alexandria together constitute the territory of Columbia, and are united under one territorial government; that has been formed by the acts of congress into one separate political community; and the counties which constitute it resemble different counties in the same state; and do not stand towards one another in the relations of distinct and separate governments. Residents of the county of Alexandria were not "beyond seas," in respect to the county of Washington. *Bank v. Dyer*, 14 Pet. 141, 10 L. Ed. 391. See the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION.

**7. Relation between state and counties.**—Board of Commissioners *v.* Lucas, 93 U. S. 108, 115, 23 L. Ed. 822. See the title MUNICIPAL CORPORATIONS.

**8. County as part of state.**—Metropolitan R. Co. *v.* District of Columbia, 132 U. S. 1, 33 L. Ed. 231; Lincoln County *v.* Luning, 133 U. S. 529, 530, 33 L. Ed. 766. See the title MUNICIPAL CORPORATIONS.

**9. Political subdivision.**—Rogers Locomotive Works *v.* American Emigrant Co., 164 U. S. 559, 576, 41 L. Ed. 552; County Court *v.* United States, 105 U. S. 733, 737, 26 L. Ed. 1220; Commissioners of Laramie County *v.* Commissioners of Albany County, 92 U. S. 307, 312, 23 L. Ed. 552; Maryland *v.* Baltimore, etc., R. Co., 3 How. 534, 549, 11 L. Ed. 714; Enfield *v.* Jordan, 119 U. S. 680, 685, 30 L. Ed. 523.

**10. Territorial subdivision.**—Board of County Commissioners *v.* Lewis, 133 U.



**County as Legal Entity.**—A county is in many ways a distinct legal entity from its citizens.<sup>11</sup>

**C. Functions.**—Counties are constituted for the purpose of local police and administration,<sup>12</sup> and are parts of the machinery employed in carrying on the affairs of the state.<sup>13</sup> The functions of a county are wholly of a public nature.<sup>14</sup> A county is created for the benefit of its citizens.<sup>15</sup>

**D. General Consideration.—Origin.**—Civil and geographical divisions of the state into counties had its origin in the necessities and conveniences of the people.<sup>16</sup>

**County as Political Unit.**—In Maryland and most of the southern states, the political unit of territory is the county, though this is sometimes divided into parishes and election districts for limited purposes.<sup>17</sup>

## II. Composition.

Counties are composed of all the inhabitants of the territory included in the political organization.<sup>18</sup>

## III. Creation, Subdivision, Alteration and Abolition.

**A. Creation**—1. BY WHOM CREATED.—Counties are created by authority of the legislature.<sup>19</sup>

2. DE FACTO ORGANIZATION.—**Legislative Recognition.**—When the leg-

S. 198, 204, 33 L. Ed. 604; *Washer v. Bullitt County*, 110 U. S. 558, 564, 28 L. Ed. 249; *Commissioner of Laramie County v. Commissioners of Albany County*, 92 U. S. 307, 312, 23 L. Ed. 552; *Maryland v. Baltimore, etc., R. Co.*, 3 How. 534, 549, 11 L. Ed. 714; *Lincoln County v. Luning*, 133 U. S. 529, 530, 33 L. Ed. 766.

**11. Legal entity.**—*Stanly County v. Coler*, 190 U. S. 437, 47 L. Ed. 1126. See *Davenport v. County of Dodge*, 105 U. S. 237, 241, 26 L. Ed. 1018. See, also, the title CORPORATIONS, ante, p. 621.

**12. Purpose of counties.**—*Claiborne County v. Brooks*, 111 U. S. 400, 406, 28 L. Ed. 470; *Hill v. Memphis*, 134 U. S. 158, 205, 33 L. Ed. 887; *Merrill v. Monticello*, 138 U. S. 673, 689, 34 L. Ed. 1069; *Police Jury v. Britton*, 15 Wall. 566, 21 L. Ed. 251; *Washer v. Bullitt County*, 110 U. S. 558, 564, 28 L. Ed. 249; *Concord v. Robinson*, 121 U. S. 165, 167, 30 L. Ed. 885.

**13. Engaged in affairs of state.**—*Commissioners of Laramie County v. Commissioners of Albany County*, 92 U. S. 307, 310, 23 L. Ed. 552; *Maryland v. Baltimore, etc., R. Co.*, 3 How. 534, 549, 11 L. Ed. 714; *Rogers Locomotive Works v. American Emigrant Co.*, 164 U. S. 559, 576, 41 L. Ed. 552; *Worcester v. Worcester, etc., Street R. Co.*, 196 U. S. 539, 549, 49 L. Ed. 591; *Mount Pleasant v. Beckwith*, 100 U. S. 514, 524, 25 L. Ed. 699; *Washer v. Bullitt County*, 110 U. S. 558, 564, 28 L. Ed. 249; *New Orleans v. New Orleans Water Works Co.*, 142 U. S. 79, 90, 35 L. Ed. 943; *Railroad Co. v. County of Otoe*, 16 Wall. 667, 676, 21 L. Ed. 375. See the title TAXATION.

**14. Functions of public nature.**—*Commissioners of Laramie County v. Commissioners of Albany County*, 92 U. S. 307, 23 L. Ed. 552; *Worcester v. Worcester, etc., Street R. Co.*, 196 U. S. 539, 49 L. Ed.

591; *Washer v. Bullitt County*, 110 U. S. 558, 564, 28 L. Ed. 249.

**15. Benefit of citizens.**—*Stanly County v. Coler*, 190 U. S. 437, 47 L. Ed. 1126. See the title MUNICIPAL, COUNTY, STATE AND FEDERAL AID.

**16. Origin of counties.**—*Commissioner of Laramie County v. Commissioners of Albany County*, 92 U. S. 307, 312, 23 L. Ed. 552.

**17. County as political unit.**—*Enfield v. Jordan*, 119 U. S. 680, 685, 30 L. Ed. 523, reaffirmed in *O'Neill, etc., R. Co. v. Manhattan Trust Co.*, 172 U. S. 642, 43 L. Ed. 1180. See ante, "Status," I, B; "Functions," I, C; post, "Purpose of Division," III, B, 2.

**18. Composition.**—*Commissions of Laramie County v. Commissioners of Albany County*, 92 U. S. 307, 23 L. Ed. 552; *Worcester v. Worcester, etc., Street R. Co.*, 196 U. S. 539, 549, 49 L. Ed. 591; *Mount Pleasant v. Beckwith*, 100 U. S. 514, 524, 25 L. Ed. 699. See the title MUNICIPAL CORPORATIONS.

**19. Creation.**—*Commissioners of Laramie County v. Commissioners of Albany County*, 92 U. S. 307, 23 L. Ed. 552; *Metro-politan R. Co. v. District of Columbia*, 132 U. S. 1, 33 L. Ed. 231; *Lincoln County v. Luning*, 133 U. S. 529, 530, 33 L. Ed. 766; *Mount Pleasant v. Beckwith*, 100 U. S. 514, 524, 25 L. Ed. 699; *Worcester v. Worcester, etc., Street R. Co.*, 196 U. S. 539, 49 L. Ed. 591; *Board of County Commissioners v. Lewis*, 133 U. S. 198, 33 L. Ed. 604. See the title MUNICIPAL CORPORATIONS.

The legislature of the state of Kansas had sufficient power delegated to it by art. 9, § 1, of the constitution, to organize a county in any manner it saw fit. *Board of County Commissioner v. Lewis*, 133 U. S. 198, 33 L. Ed. 604.

islature recognizes as valid a de facto county, such recognition operates to cure all defects in steps leading up to the organization and makes a de jure out of what before was only a de facto corporation.<sup>20</sup> But in order to constitute a valid legislative recognition there must be a de facto organization upon which this legislative recognition may act.<sup>21</sup>

**Effect of Abolition.**—On the abolition of a de facto county, the state takes whatever title the county had to its realty situated therein.<sup>22</sup>

**B. Alteration, Consolidation, Division and Abolition of Counties.**—

1. **POWER TO ALTER, CONSOLIDATE, DIVIDE OR ABOLISH.**—See post, "General Consideration," VI, A.

2. **PURPOSE OF DIVISION.**—Counties are divided into smaller sections solely for political and special purposes.<sup>23</sup>

3. **POLITICAL SUBDIVISIONS.**—Counties are generally divided into smaller sections for political purposes.<sup>24</sup>

4. **ADJUSTMENT OF RIGHTS AND LIABILITIES.**—**Power to Apportion.**—Old counties may be divided, or new counties may be formed from parts of two or more existing counties; and the legislature, if it sees fit, may apportion the common property and the common burdens, even to the extent of providing that

**20. Legislative recognition of de facto corporation.**—Board of County Commissioners *v. Lewis*, 133 U. S. 198, 202, 33 L. Ed. 604; Harper County Commissioners *v. Rose*, 140 U. S. 71, 75, 35 L. Ed. 344. See the title CORPORATIONS, ante, p. 621.

Where the governor recognizes and proclaims a county as a de facto organization, the subsequent recognition of the validity of the organization of the county by the legislature of the state makes the same valid and binding. Harper County Commissioners *v. Rose*, 140 U. S. 71, 75, 35 L. Ed. 344, citing Board of County Commissioner *v. Lewis*, 133 U. S. 198, 33 L. Ed. 604.

**Power of legislature to recognize.**—The ample power delegated by the constitution of the state of Kansas by article 9, § 1, to the legislature, included not only the power to organize a county in any manner it saw fit, but also to validate by recognition any organization already existing, no matter how fraudulent the proceedings therefor had been. Board of County Commissioners *v. Lewis*, 133 U. S. 198, 202, 33 L. Ed. 604. See Harper County Commissioners *v. Rose*, 140 U. S. 71, 75, 35 L. Ed. 344.

**Estoppel to deny liability on bonds.**—See the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

**Liability for debts previously contracted.**—See post, "Release of County from Liability on Debts Previously Contracted," VIII, C, 1, b. See, also, the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

**21. Necessity for de facto organization.**—Board of County Commissioners *v. Lewis*, 133 U. S. 198, 202, 33 L. Ed. 604. See the title CORPORATIONS, ante, p. 621.

**22. Abolition of de facto county.**—Greer

County *v. Texas*, 197 U. S. 235, 49 L. Ed. 736. See Meriwether *v. Garrett*, 102 U. S. 472, 26 L. Ed. 197. See the titles MUNICIPAL CORPORATIONS; PUBLIC LANDS.

**23. Purpose of division.**—Enfield *v. Jordan*, 119 U. S. 680, 685, 30 L. Ed. 523.

**24. Political subdivisions.**—Enfield *v. Jordan*, 119 U. S. 680, 685, 30 L. Ed. 523.

"In Delaware the countries are divided into hundreds." Enfield *v. Jordan*, 119 U. S. 680, 685, 30 L. Ed. 523, reaffirmed in O'Neill, etc., *R. Co. v. Manhattan Trust Co.*, 172 U. S. 642, 43 L. Ed. 1180.

"In Maryland and most of the southern states the county is divided into parishes and election districts for limited purposes." Enfield *v. Jordan*, 119 U. S. 680, 685, 30 L. Ed. 523.

**Precincts.**—"Precincts in Nebraska are but political subdivisions of a county. They have no corporate existence, and cannot contract or be contracted with. They have no corporate officers, and can neither sue nor be sued. Certain officers are elected by the voters of precincts for political, administrative, and judicial purposes, but they are in no sense the representatives of the people of the territory as a municipality. State *v. Dodge County*, 10 Neb. 20. Precincts are governed by the county commissioners, the governing board of the county, and by the appropriate officers of the state. Their relation to a county is like that of a ward to a city. Having no corporate existence, no separate municipal authority, they cannot say against the supreme court of the state, in the case last cited, 'enter into contracts directly or indirectly, nor assume obligations which a court might be called on to enforce.'" Davenport *v. County of Dodge*, 105 U. S. 237, 241, 26 L. Ed. 1018. See the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

a certain portion of the property of the old county shall be transferred to the new corporation.<sup>25</sup>

**Vested Interests—Process.**—The subsequent division of a county, cannot divest a vested interest, nor deprive an officer of the power to finish a process which was rightly begun.<sup>26</sup>

**C. Attachment of Territory for Special Purposes.**—On the attachment of unorganized territory to another county for revenue purposes, the authorities of the county to which the territory is attached have control of the attached territory.<sup>27</sup>

#### IV. Boundaries.

**A. Power to Define, Alter, Extend or Limit.**—A state has power to define the boundaries of its counties.<sup>28</sup> The state has power to alter, extend or limit the boundaries of a county.<sup>29</sup>

**B. What Constitutes.**—See the title *BOUNDARIES*, vol. 3, p. 507.

**25. Power to apportion rights and liabilities.**—*Commissioners of Laramie County v. Commissioners of Albany County*, 92 U. S. 307, 313, 23 L. Ed. 552, approved in *Mount Pleasant v. Beckwith*, 100 U. S. 514, 525, 25 L. Ed. 699. See the title *MUNICIPAL CORPORATIONS*.

**Necessity for statute to provide for apportionment.**—"Regulation upon the subject may be prescribed by the legislature; but, if they omit to make any provision in that regard, the presumption must be that they did not consider that any legislation in the particular case was necessary. Where the legislature does not prescribe any such regulations, the rule is that the old corporation owns all the public property within her new limits, and is responsible for all debts contracted by her before the act of separation was passed. Old debts she must pay, without any claim for contribution; and the new subdivision has no claim to any portion of the public property except what falls within her boundaries, and to all that the old corporation has no claim." *Commissioners of Laramie County v. Commissioners of Albany County*, 92 U. S. 307, 315, 23 L. Ed. 552. See *Mount Pleasant v. Beckwith*, 100 U. S. 514, 525, 25 L. Ed. 699.

Where the legislature of Wyoming Territory organized two new counties, and included within their limits a part of the territory of an existing county, but made no provision for apportioning debts or liabilities, held, that the old county, being solely responsible for the debts and liabilities it had previously incurred, had, on discharging them, no claim upon the new counties for contribution. *Commissioners of Laramie County v. Commissioners of Albany County*, 92 U. S. 307, 23 L. Ed. 552.

**26. Vested interests—Process.**—*Tyrell v. Rountree*, 7 Pet. 464, 468, 8 L. Ed. 749. See, generally, the titles *IMPAIRMENT OF OBLIGATION OF CONTRACTS*; *SUMMONS AND PROCESS*.

**Illustration.**—On the 12th of February, 1807, an attachment was regularly issued by the court of Williamson county, Ten-

nessee, and was, on the 13th of the same month, levied on a tract of land, the property of the defendant in the suit; judgment by default was entered on the 15th of October, 1807; the property was, on motion, condemned, and a writ of venditioni exponas issued on the 24th, which came into the hands of the sheriff on the 28th of October, who sold the property under it, on the 2d of January, 1808; the county of Williamson was divided, on the 16th of November, 1807, and that part of the land for which this ejectment was brought, lay in the new county, called Maury. Held, that the process of execution for the sale of the land, under which it was sold by the sheriff, was a direction to the sheriff to sell the specific property which was already in his possession, by virtue of the attachment, and was already condemned by the competent tribunal; the subsequent division of the county could not divest his vested interest, nor deprive the officer of the power to finish a process which was already begun. *Tyrell v. Rountree*, 7 Pet. 464, 8 L. Ed. 749. See the titles *EXECUTIONS*; *SUMMONS AND PROCESS*.

**27. Attachment of unorganized county for revenue purposes.**—The unorganized territory in Nebraska west of Lincoln county and the unorganized county of Cheyenne having been attached by statute to the county of Lincoln, in Nebraska, for revenue purposes, the authorities of Lincoln county were the proper authorities to levy taxes upon property thus placed under their charge. *Railroad Co. v. Pension*, 18 Wall. 5, 6, 21 L. Ed. 787. See the title *TAXATION*.

**28. Power to define boundaries.**—*Manchester v. Massachusetts*, 139 U. S. 240, 264, 35 L. Ed. 159. See the titles *BOUNDARIES*, vol. 3, p. 507; *STATES*.

If the state of Georgia has practically settled the limits of Franklin county, such settlement ought to have been conclusive on the circuit court. *Patterson v. Jenks*, 2 Pet. 216, 7 L. Ed. 402. See the title *COURTS*.

**29. Commissioners of Laramie County v. Commissioners of Albany County**, 92



## V. Property.

**A. Power to Acquire and Dispose of Realty.**—Statutes are frequently enacted providing that counties shall have power to acquire real property.<sup>30</sup>

**B. Removing or Designating New Sites for County Buildings.**—The power to remove or designate new sites for county buildings is generally given to the county commissioners.<sup>31</sup>

## VI. Legislative Control.

**A. General Consideration.—General Statement.**—In the absence of constitutional restrictions,<sup>32</sup> counties are within the absolute control of the legislature.<sup>33</sup>

U. S. 307, 308, 23 L. Ed. 552. See ante, "Adjustment of Rights and Liabilities," II, B, 4; post, "Legislative Control," VI.

**30. Acquisition of realty—Pennsylvania.**—Under the act of March 11th, 1752, of the province of Pennsylvania, authorizing the county trustees to purchase and take title to a piece of property situated in some convenient place in the town of Easton, in trust and for the use of the inhabitants of the county of Northampton, the trustees acquired a legal estate in fee to the land, the beneficial use, or equitable estate being in the inhabitants of the county. *Stuart v. Eaton*, 170 U. S. 383, 42 L. Ed. 1078.

In *Stuart v. Eaton*, 170 U. S. 383, 42 L. Ed. 1078, it was held that under the act of March 11th, 1752, of the province of Pennsylvania authorizing the county trustees to purchase realty for the purpose of erecting a courthouse thereon, a conveyance in fee made to the county trustees in trust for the inhabitants of the county, vested the fee simple estate in the county trustee, and the estate vested in the trustees was not conditioned or limited to the time the property was used by the county as a situation for the courthouse, since the grant contained no technical terms creating a condition or limitation, and the grant in the habendum clause conveyed to the trustees by name and "their heirs and assigns forever."

**New Jersey.**—Under the laws of New Jersey, the board of chosen freeholders of the county of Hudson had no authority, Dec. 14, 1876, to purchase lands whereon to erect a courthouse, and to issue in payment therefor bonds payable out of the amount appropriated and limited for the fiscal year commencing Dec. 1, 1877. *Crampton v. Zabriskie*, 101 U. S. 601, 25 L. Ed. 1070. See the titles MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES; TAXATION.

**Disposition of property.**—See the title PUBLIC LANDS.

**31. Power to remove or designate new sites for county buildings given to county commissioners.**—Board of Commissioners *v. Sallinger*, 119 U. S. 176, 30 L. Ed. 377.

The provisions contained in the proviso, § 5 of the act of legislature of North Carolina of February 22, 1877, limiting the powers of the board of county commis-

sioners to remove or designate new sites for other county buildings, except in conjunction with the justices of the peace of the county, applies to those commissioners only who were chosen thereafter, under the provisions of the act, and hence does not affect those previously chosen. Board of Commissioners *v. Sallinger*, 119 U. S. 176, 30 L. Ed. 377.

**What constitutes a removal.**—The destruction of a courthouse by fire, and the renting of another building to be used as a courthouse in another place is not a removal or designation of new site within the act of legislature of North Carolina of 1868, chapter 20, providing that the site of no county building shall be changed unless by the unanimous vote of the county commissioners previously had and notice given. So the occupation of a rented building as a courthouse for five years, and the change of the county's title from that of lessee to the ownership in fee by a purchase thereof is not a change or removal of the site of a courthouse. Board of Commissioners *v. Sallinger*, 119 U. S. 176, 30 L. Ed. 377.

**32. Absence of constitutional restrictions.**—Commissioners of Laramie County *v. Commissioners of Albany County*, 92 U. S. 307, 308, 23 L. Ed. 552; *Mount Pleasant v. Beckwith*, 100 U. S. 514, 25 L. Ed. 699; *Worcester v. Worcester*, etc., Street R. Co., 196 U. S. 539, 49 L. Ed. 591; Board of Commissioners *v. Lucas*, 93 U. S. 108, 23 L. Ed. 822; *Lake County v. Rollins*, 130 U. S. 622, 674, 32 L. Ed. 1060.

**33. Legislative control.**—*Mount Pleasant v. Beckwith*, 100 U. S. 514, 25 L. Ed. 699; *Rogers Locomotive Works v. American Emigrant Co.*, 164 U. S. 559, 576, 41 L. Ed. 552; *Worcester v. Worcester*, etc., Street R. Co., 196 U. S. 539, 49 L. Ed. 591; *Commissioners of Laramie County v. Commissioners of Albany County*, 92 U. S. 307, 308, 23 L. Ed. 552; *New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79, 90, 35 L. Ed. 943; Board of Commissioners *v. Lucas*, 93 U. S. 108, 23 L. Ed. 822; *Maryland v. Baltimore*, etc., R. Co., 3 How. 534, 11 L. Ed. 714; *Washer v. Bullitt County*, 110 U. S. 558, 564, 28 L. Ed. 249. Compare *Newton v. Board of County Commissioners*, 100 U. S. 548, 25 L. Ed. 710; *Crenshaw v. United States*, 134 U. S. 99, 105, 33 L. Ed. 825.

"Unless the constitution otherwise pro-

**Necessity for Consent of People Composing County.**—In exercising control over counties it is not necessary for the legislature to obtain the consent of the people composing the county.<sup>34</sup>

**Notice.**—And in such case it is not necessary that notice be given the persons constituting the county.<sup>35</sup>

**B. Power to Enlarge, Diminish, or Consolidate.**—See ante, "General Consideration," VI, A.

**C. Power over Officers.**—The officers of a county are nothing more than local agents of the state; and their power may be revoked or enlarged and their acts may be set aside or confirmed at the pleasure of the paramount authority, so long as private rights are not thereby violated.<sup>36</sup> And the legislature may abolish any county office created by a public law.<sup>37</sup>

**D. Contracts of Acceptance of State as Binding on County.**—See the title MUNICIPAL, COUNTY, STATE AND FEDERAL AID.

**E. Property and Revenues.—General Consideration.**—The local government of a county can have no will contrary to the will of the state, and it is subject to the paramount authority of the state, in respect as well of its acts as of its property and revenues held for public purposes. The state made it, and can, in its discretion, unmake it, and administer such property and revenue through other instrumentalities.<sup>38</sup>

**Liability for Public Improvement.**—The state may even impose on one county the expense of an improvement by which it mainly is benefited, but in which the whole state is interested.<sup>39</sup>

**Restitution of Property.**—Unless restrained by provisions of its constitution, the legislature of a state possesses the power to direct a restitution to taxpayers of a county of property exacted from them by taxation, into whatever

vides, the legislature still has authority to amend the charter of such a corporation, enlarge or diminish its powers, extend or limit its boundaries, divide the same into two or more, consolidate two or more into one, overrule its action whenever it is deemed unwise, impolitic, or unjust, and even abolish the municipality altogether, in the legislative discretion." Commissioners of Laramie County *v.* Commissioners of Albany County, 92 U. S. 307, 308, 23 L. Ed. 552. See *New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79, 90, 35 L. Ed. 943. See the titles CORPORATIONS, ante, p. 621; MUNICIPAL CORPORATIONS.

**Apportionment of rights and liabilities on consolidation or division.**—See ante, "Adjustment of Rights and Liabilities," III, B, 4.

**Removal of county seat.**—See post, "Power to Remove," VII, A, 2.

**Power to alter, define, or extend boundaries.**—See ante, "Power to Define, Alter, Extend or Limit," IV, A.

**34. Necessity for consent of governed.**—Commissioners of Laramie County *v.* Commissioners of Albany County, 92 U. S. 307, 310, 23 L. Ed. 552; *Worcester v. Worcester, etc.*, Street R. Co., 196 U. S. 539, 549, 49 L. Ed. 591; *Mount Pleasant v. Beckwith*, 100 U. S. 514, 524, 25 L. Ed. 699. See the title MUNICIPAL CORPORATIONS.

**35. Notice.**—Commissioners of Laramie County *v.* Commissioners of Albany County, 92 U. S. 307, 312, 23 L. Ed. 552.

See the title MUNICIPAL CORPORATIONS.

**36. Power over officers.**—Commissioners of Laramie County *v.* Commissioners of Albany County, 92 U. S. 307, 312, 23 L. Ed. 552. See the title PUBLIC OFFICERS.

The powers and duties of county commissioners depend upon the will of the legislature, and may be modified and changed, and the manner of their appointment regulated at the pleasure of the state. *Maryland v. Baltimore, etc.*, R. Co., 3 How. 534, 540, 11 L. Ed. 714.

**37. Abolition of office.**—*Newton v. Board of County Commissioners*, 100 U. S. 548, 559, 25 L. Ed. 710; *Hall v. Wisconsin*, 103 U. S. 5, 10, 26 L. Ed. 302. See the titles CONSTITUTIONAL LAW, ante, p. 1; IMPAIRMENT OF OBLIGATION OF CONTRACTS; PUBLIC OFFICERS.

**38. Property and revenues.**—*Rogers Locomotive Works v. American Emigrant Co.*, 164 U. S. 559, 576, 41 L. Ed. 552. See the title MUNICIPAL CORPORATIONS.

**39. Liability for public improvements.**—*County of Mobile v. Kimball*, 102 U. S. 691, 26 L. Ed. 238; *Washer v. Bullitt County*, 110 U. S. 558, 564, 28 L. Ed. 249; *Charlotte, etc., R. Co. v. Gibbes*, 142 U. S. 386, 395, 35 L. Ed. 1051. See the titles CONSTITUTIONAL LAW, ante, p. 1; MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES; STATE.

form the property may be changed, so long as it remains in possession of the municipality. The exercise of this power infringes upon no provision of the federal constitution.<sup>40</sup>

**Power on Compromise of Indebtedness Created by Detachment of Certain Portions.**—The legislature of a state has power to authorize a county on compromising and settling an indebtedness, created before certain parts thereof were detached therefrom, and made into separate counties, to act for the portions detached.<sup>41</sup>

**Release or Remittance of Forfeiture Imposed by State for Benefit of County.**—Where a state statute provides for a penalty or forfeiture, on certain contingencies, of a specific sum of money to the state, for the use of the county, the legislature has power to remit and release the penalty, or forfeiture, and direct a discontinuance of any suit brought to recover the same.<sup>42</sup>

**Taxation.**—See the title **TAXATION**.

**F. Ratification of Invalid Acts.**—The legislature has power to ratify and validate the acts of a county, even though the acts were absolutely unauthorized in the first instance.<sup>43</sup>

## VII. Government and Officers of Counties.

**A. County Seats**—1. **LOCATION AND ESTABLISHMENT.**—The designation of the county seat of a county in Dakota, or providing for its designation by popular election, was a matter properly belonging to the legislative department of the territorial government. It was not a matter by itself for judicial cognizance. But where the law of the territory submitted the designation of the county seat to the voters of the county and prescribed a mode of contesting the validity of the election, then the designation of a county seat under the law became the sub-

**40. Restitution of property.**—Board of Commissioners *v.* Lucas, 93 U. S. 108, 23 L. Ed. 822. See the title **CONSTITUTIONAL LAW**, ante, p. 1. See, also, the titles **MUNICIPAL CORPORATIONS**; **TAXATION**.

**41. Compromise of indebtedness on detachment.**—Carter County *v.* Sinton, 120 U. S. 517, 30 L. Ed. 701.

**Illustration.**—The legislature of the state of Kentucky had power under the constitution to authorize the county court of Carter County, on compromising and settling a bonded indebtedness, created before certain parts of the county of Carter were detached therefrom and made into the separate and distinct counties of Boyd and Elliott, to act for the counties of Boyd and Elliott, and bind them by the terms of the compromise. Carter County *v.* Sinton, 120 U. S. 517, 30 L. Ed. 701. See the titles **COMPROMISE AND SETTLEMENT**, vol. 3, p. 980; **MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES**.

**42. Release of forfeiture imposed for benefit of county.**—Maryland *v.* Baltimore, etc., R. Co., 3 How. 534, 11 L. Ed. 714; Rogers Locomotive Works *v.* American Emigrant Co., 164 U. S. 559, 576, 41 L. Ed. 552. See, generally, the title **PENALTIES AND FORFEITURES**.

**Illustration.**—The state of Maryland, in 1836, passed a law directing a subscription of \$3,000,000 to be made to the capital stock of the Baltimore and Ohio Railroad Company, with the following proviso,

"That if the said company shall not locate the said road in the manner provided for in this act, then, and in that case, they shall forfeit \$1,000,000 to the state of Maryland for the use of Washington County. In March, 1841, the state passed another act repealing so much of the prior act as made it the duty of the company to construct the road by the route therein prescribed, remitting and releasing the penalty, and directing the discontinuance of any suit brought to recover the same. The proviso was a measure of state policy, which it had a right to change, if the policy was afterwards discovered to be erroneous, and neither the commissioners, nor the county, nor any one of its citizens acquired any separate or private interest under it, which could be maintained in a court of justice. It was a penalty inflicted upon the company as a punishment for disobeying the law; and the assent of the company to it, as a supplemental charter, is not sufficient to deprive it of the character of a penalty." Maryland *v.* Baltimore, etc., R. Co., 3 How. 534, 11 L. Ed. 714, approved in Rogers Locomotive Works *v.* American Emigrant Co., 164 U. S. 559, 576, 41 L. Ed. 552. See the titles **MUNICIPAL, COUNTY, STATE AND FEDERAL AID**; **PENALTIES AND FORFEITURES**.

**43. Ratification of invalid acts.**—Thompson *v.* Lee County, 3 Wall. 327, 18 L. Ed. 177; Lee County *v.* Rogers, 7 Wall. 181, 19 L. Ed. 160; Otoe County *v.* Baldwin,



ject of judicial cognizance—a case or controversy arising upon such proceeding being taken, to which the judicial power of the territory attached.<sup>44</sup>

2. **REMOVAL**—a. *Power to Remove*.—The establishment of a county seat at a particular place does not constitute a contract with the citizens thereof, and hence the state has power to remove such county seat at any time.<sup>45</sup>

b. *Proceedings*.—See ante, “Removing or Designating New Sites for County Buildings,” V, B.

**B. Board of Supervisors.—Definition and Creation.**—The board of supervisors is a corporation created by statute.<sup>46</sup>

**Powers.**—The board of supervisors is a corporation authorized to contract for the county.<sup>47</sup>

**Liabilities.**—Where a judgment has been rendered against a county, the repeal of a statute prescribing the duties of the supervisors in such case, and declaring that a failure on their part to perform their duties prescribed under the statute, will render them personally liable, does not relieve the supervisors of their personal common-law liability, the statute is merely cumulative, and the common-law personal liability is not affected by the repeal of the statute.<sup>48</sup>

**C. County Court**—1. **DEFINITION.**—The “county court,” is that tribunal to which the legislature has committed the management of the general financial interests of the county.<sup>49</sup>

111 U. S. 1, 28 L. Ed. 331; *Grenada County Supervisors v. Brogden*, 112 U. S. 261, 28 L. Ed. 704.

**Illustrations.**—See the titles MUNICIPAL, COUNTY, STATE AND FEDERAL AID; MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

44. *Smith v. Adams*, 130 U. S. 167, 173, 32 L. Ed. 895, affirmed in *Oklahoma v. Board of County Commissioners*, 181 U. S. 615; *Hurlbut Land & Cattle Co. v. Truscott*, 165 U. S. 719, 41 L. Ed. 1185. See the titles APPEAL AND ERROR, vol. 1, p. 846; COURTS.

**Contracts for construction of courthouse.**—See post, “Contract for Erection of Courthouse,” VIII, A, 3, a, (4).

**As to duty of county to erect courthouses,** see post, “Particular Duties,” VIII, B, 2.

45. **Power to remove county seat.**—*Newton v. Board of County Commissioners*, 100 U. S. 548, 25 L. Ed. 710; *Crenshaw v. United States*, 134 U. S. 99, 105, 33 L. Ed. 825. See the titles CONSTITUTIONAL LAW, ante, p. 1; IMPAIRMENT OF OBLIGATION OF CONTRACTS.

**Illustrations.**—By an act of the legislature of Ohio, passed February 16, 1846, it was provided that, upon the fulfillment of certain terms and conditions by the proprietors or citizens of the town of Canfield, in Mahoning County, the county seat should be “permanently established” at that town. Those terms and conditions having been complied with, the county seat was established accordingly. On April 9, 1874, the legislature passed an act providing for the removal of the county seat to Youngstown. Certain citizens of Canfield thereupon filed their bill setting forth that the act of 1846, and the proceeding thereunder, constituted, within the

meaning of the constitution, an executed contract the obligation of which was impaired by the later act, and praying for a perpetual injunction against the contemplated removal. Held: 1. That no such contract existed. 2. That the act of 1846 was a public law relating to a public subject with respect to which the legislature which enacted it had no power to bind a subsequent one. 3. That if that act and the proceedings under it constituted a contract, it was satisfied on the part of the state by establishing the county seat at Canfield, with the intent that it should remain there. 4. That there was no stipulation that the county seat should remain there in perpetuity. 5. That the practical interpretation of the phrase “permanently established,” which has been in long and frequent use in the statutes of Ohio with respect to county seats established otherwise than temporarily, is, though by no means conclusive, entitled to consideration. *Newton v. Board of County Commissioners*, 100 U. S. 548, 25 L. Ed. 710, approved in *Crenshaw v. United States*, 134 U. S. 99, 105, 33 L. Ed. 825. See the titles CONSTITUTIONAL LAW, ante, p. 1; IMPAIRMENT OF OBLIGATION OF CONTRACTS.

46. **Definition and creation of board of supervisors.**—*Mercer County v. Cowles*, 7 Wall. 118, 121, 19 L. Ed. 86; *Lincoln County v. Luning*, 133 U. S. 529, 531, 33 L. Ed. 766.

47. **Powers of board of supervisors.**—*Mercer County v. Cowles*, 7 Wall. 118, 122, 19 L. Ed. 86; *Lincoln County v. Luning*, 133 U. S. 529, 531, 33 L. Ed. 766.

48. **Personal liability of board of supervisors.**—*Amy v. The Supervisors*, 11 Wall. 136, 20 L. Ed. 101. See, generally, the title ACTIONS, vol. 1, p. 107.

49. **County court defined.**—*Meriwether v. Muhlenburg County Court*, 120 U. S.

2. **WHAT CONSTITUTES.**—As a general rule, when any power is conferred or duty imposed by statute upon the county court, the term is understood to mean a court held by the presiding judge alone, and not in conjunction with the justices, and should be held so to mean even when used in connection with fiscal matters, if it relates to mere ministerial duties.<sup>50</sup>

3. **SOURCE OF AUTHORITY AND JURISDICTION.**—County courts while acting as the governing bodies of their counties possess no implied powers. Authority must be conferred on them by law to act, or they cannot act at all.<sup>51</sup>

4. **POWERS.**—See ante, "Source of Authority and Jurisdiction," VII, C, 3.

5. **DUTIES.**—One of the duties of the county court is to superintend and control the erection of county buildings.<sup>52</sup>

6. **PROCEEDINGS**—a. *Jurisdiction.*—See the titles COURTS; JURISDICTION.

b. *Record of Proceedings.*—**Necessity.**—The proceedings of a county court of Missouri can be shown only by its record.<sup>53</sup> The acts of agents appointed by the county courts of Kentucky are not in every case required to appear of record.<sup>54</sup>

**Contents of Record.**—The records of a county court need not disclose every step taken in the formation of a contract with a third party.<sup>55</sup>

**D. County Commissioners**—1. **STATUTORY PROVISIONS.**—Statutes have been enacted in various states providing for the appointment, qualification and duties of county commissioners.<sup>56</sup>

354, 359, 30 L. Ed. 653. See the title COURTS.

The "county court" is a court held by the presiding judge alone. *Meriwether v. Muhlenburg County Court*, 120 U. S. 354, 361, 30 L. Ed. 653.

**50. What constitutes the county court.**—*Meriwether v. Muhlenburg County Court*, 120 U. S. 354, 357, 30 L. Ed. 653; *Bullitt County v. Washer*, 130 U. S. 142, 151, 32 L. Ed. 885. See, generally, the title JUSTICE OF THE PEACE.

**Notification to stop work.**—Where a formal and official notification is received by a contractor to stop work on a county building, signed by the judge of the county court, and the county attorney, it is not necessary to examine the records of that court to ascertain whether it was authorized by an order made by the judge in conjunction with the justices, and duly entered of record, the contractor is justified in stopping work immediately as directed by order of the county judge and county attorney and in resorting to his action upon the contract. *Bullitt County v. Washer*, 130 U. S. 142, 151, 32 L. Ed. 885.

**Levying tax to pay judgment.**—The justice of the peace of Muhlenburg County, Kentucky, do not constitute a necessary part of the county court when levying a tax to pay a judgment rendered against the county, under § 9 of the act of the legislature of Kentucky of February 24th, 1868, amending the charter of the Elizabeth Town and Paducah Railroad Co. *Meriwether v. Muhlenburg County Court*, 120 U. S. 354, 355, 30 L. Ed. 653. See the titles MUNICIPAL, COUNTY, STATE AND FEDERAL AID; TAXATION.

**51. Source of authority and jurisdiction of county court.**—*County Court v. United States*, 105 U. S. 733, 737, 26 L. Ed. 1220.

**52. Duties of county court.**—When the

county court of Kentucky, constituted as the law requires and in the manner prescribed, entered into a contract for the erection of a courthouse, and charged the county with the amount specified therein, its jurisdiction in that special mode of organization extended no further. It then became the legitimate province of the county court, held by the county judge alone, to superintend and control the erection of the structure. *Bullitt County v. Washer*, 130 U. S. 142, 151, 32 L. Ed. 885.

**53. Necessity for record of proceedings of county court.**—*County of Macon v. Shores*, 97 U. S. 272, 24 L. Ed. 889.

**54. Acts of agents appointed by county court.**—*Bullitt County v. Washer*, 130 U. S. 142, 32 L. Ed. 885. See, generally, the title PRINCIPAL AND AGENT.

**55. Contents of record of county court.**—Under the statutes of Kentucky when the records of the county court show affirmatively an adjudication of the necessity of the contract; an appropriation for the preliminary work; the appointment of an agent to make the contract; and a recognition of the contract by directing the levy of taxes to pay the contractor and his assignees for the work done, it is not necessary that the record should also show affirmatively, in order to fix a liability on the county, that the contract was reported to the court; nor that the contract was made by a particular party; nor that the contract was filed; nor that there was an acceptance of the contract by the county judge; nor the fact that the contract assumed to bind the county for the whole cost, nor the fact that the judge and the county commissioners were given power to make the contract. *Bullitt County v. Washer*, 130 U. S. 142, 32 L. Ed. 885.

**56. Statutory provisions respecting county commissioners—Kansas.**—Board of

2. **DEFINITION, OBJECT, PURPOSE AND GENERAL CONSIDERATION.—County Commissioners.**—County commissioners are the legal representatives of a county.<sup>57</sup>

3. **CREATION AND ORGANIZATION.**—See ante, "Definition, Object, Purpose and General Consideration," VII, D, 2.

**General Consideration.**—The board of county commissioners, must be lawfully created.<sup>58</sup> There can be no de facto county commissioner where there exists no office to fill.<sup>59</sup>

**Members.**—The judge of probate is, ex officio, a member of the court of county commissioners.<sup>60</sup>

4. **DUTIES**—a. *Nature.*—The duties of the court of county commissioners are administrative, not judicial.<sup>61</sup> In performing his duties as a member of the court of county commissioners, the judge of probate acts not as a judge of probate, but as county commissioner.<sup>62</sup>

b. *Specific Duties.*—See the titles **TAXATION; TOWNS AND TOWNSHIPS.**

c. *Proceedings to Enforce Duties.*—See the title **MANDAMUS.**

**E. Levy Court.**—The Levy court of Washington County, in the District of Columbia, if not a corporation in the full sense of the term, is a quasi corporation.<sup>63</sup>

**F. County Officers and Agents**—1. **DEFINITION AND GENERAL CONSIDERATION.**—A county "officer" is one by whom the county performs its usual political functions or offices of government; who exercises continuously, and as a part of the regular and permanent administration of government, its public powers,

County Commissioners *v.* Sellew, 99 U. S. 624, 25 L. Ed. 333.

**Nebraska.**—Boone County *v.* Burlington, etc., R. Co., 139 U. S. 684, 694, 35 L. Ed. 319.

**57. County commissioners defined.**—Labette County Commissioners *v.* Moulton, 112 U. S. 217, 28 L. Ed. 698; Harshman *v.* Knox County, 122 U. S. 306, 320, 30 L. Ed. 1152. See the titles **MANDAMUS; TAXATION.**

County commissioners are the governing board of a county. Davenport *v.* County of Dodge, 105 U. S. 237, 241, 26 L. Ed. 1018.

"County commissioners are a corporate body, and the members who compose it are chosen by the people of the county. But like similar corporations in every other county in the state, it is created for the purposes of government, and clothed with certain defined and limited powers to enable it to perform those public duties which, according to the laws and usages of the state, are always intrusted to local county tribunals. Formerly they were appointed in all of the counties annually, by the executive department of the government, and were then denominated the Levy Court of the county; and in some of the counties they are still constituted in that manner, the legislature commonly retaining the old mode of appointment, or directing an election by the people, as the citizens of any particular county may prefer. But, however chosen, their powers and duties depend upon the will of the legislature, and are modified and changed, and the manner of their appointment regulated at the pleasure of

the state." Maryland *v.* Baltimore, etc., R. Co., 3 How. 534, 550, 11 L. Ed. 714.

**Court of county commissioners.**—The court of county commissioners, while called a "court," is in fact the board of officers through whom the affairs of the county are managed. Ex parte Rowland, 104 U. S. 604, 613, 26 L. Ed. 861.

**58. Creation and organization of board of county commissioners.**—The supreme court of Tennessee has repeatedly adjudged, after careful and full consideration, that no such board as the board of commissioners of Shelby County ever had a lawful existence; that it was an unauthorized and illegal body; that its members were usurpers of the functions and powers of the justices of the peace of the county; and that their action in holding the county court was utterly void. Norton *v.* Shelby County, 118 U. S. 425, 441, 30 L. Ed. 178.

**59. De facto county commissioners.**—Norton *v.* Shelby County, 118 U. S. 425, 441, 30 L. Ed. 178. See the titles **DE FACTO OFFICERS; PUBLIC OFFICERS.**

**60. Judge of probate as member of court of county commissioners.**—Ex parte Rowland, 104 U. S. 604, 613, 26 L. Ed. 861.

**61. Nature of duties of board of county commissioners.**—Ex parte Rowland, 104 U. S. 604, 613, 26 L. Ed. 861.

**62. Ex parte Rowland,** 104 U. S. 604, 613, 26 L. Ed. 861.

**63. Levy court.**—Levy Court *v.* Woodward, 2 Wall. 501, 17 L. Ed. 851. See Maryland *v.* Baltimore, etc., R. Co., 3 How. 534, 540, 11 L. Ed. 714. See, also, the title **DISTRICT OF COLUMBIA.**



trusts, or duties.<sup>64</sup> The officers of a county are nothing more than local agents of the state.<sup>65</sup>

2. **PURPOSE AND POWERS.**—County officers are the creatures of the statute law, brought into existence for public purposes, and have no authority beyond that conferred upon them by the author of their being.<sup>66</sup>

3. **DUTIES.**—See the particular sections throughout this title. See, also, the particular titles relating to public officers.

4. **TERMINATION OF AUTHORITY.**—See the title TOWNS AND TOWNSHIPS.

5. **ABOLITION OF OFFICE.**—See ante, "Power over Officers," VI, C.

6. **PARTICULAR OFFICERS OR AGENTS**—a. *Bridge Commissioners.*—See the title BRIDGES, vol. 3, p. 516.

b. *Clerks.*—See the title CLERKS OF COURT, vol. 3, p. 849.

c. *Commissioners of the Poor.*—See the title PAUPERS.

d. *County Attorney.*—See the title DISTRICT AND PROSECUTING ATTORNEY.

e. *Coroners.*—See the title CORONERS, ante, p. 620.

f. *Judge.*—See the title JUDGES.

g. *Justices of the Peace.*—See the title JUSTICE OF THE PEACE.

h. *Notary Public.*—See the title NOTARY PUBLIC.

i. *Register.*—See the title RECORDING ACTS.

j. *Road Overseer.*—See the title STREETS AND HIGHWAYS.

k. *School Commissioners.*—See the title SCHOOLS.

l. *Sheriffs and Constables.*—See the title SHERIFFS AND CONSTABLES.

m. *Surveyor.*—See the titles BOUNDARIES, vol. 3, p. 486; PUBLIC LANDS.

### VIII. Powers, Duties and Liabilities.

**A. Powers**—1. **GENERAL CONSIDERATION.**—Corporate rights and privileges are usually possessed by counties.<sup>67</sup>

2. **SOURCE, EXTENT AND MANNER OF EXERCISE.**—**Source.**—Counties derive all their powers from the source of their creation—the legislature,<sup>68</sup> except where the constitution of the state otherwise provides.<sup>69</sup>

**Extent and Manner of Exercise.**—A county acts wholly under a delegated authority, and can exercise no power which is not in express terms, or by fair implication, conferred upon it.<sup>70</sup> Counties have only such powers as the

64. **County "officer."**—*Sheboygan County v. Parker*, 3 Wall. 93, 18 L. Ed. 33. See the titles MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES; PUBLIC OFFICERS.

65. *Commissioners of Laramie County v. Commissioners of Albany County*, 92 U. S. 307, 312, 23 L. Ed. 552.

66. **Purpose and powers of county officers.**—*Supervisors v. United States*, 18 Wall. 71, 77, 21 L. Ed. 771.

67. *Mount Pleasant v. Beckwith*, 100 U. S. 514, 524, 25 L. Ed. 699; *Commissioners of Laramie County v. Commissioners of Albany County*, 92 U. S. 307, 310, 23 L. Ed. 552; *Worcester v. Worcester, etc., Street R. Co.*, 196 U. S. 539, 49 L. Ed. 591.

**For whom powers exercised.**—The powers of a county are conferred to be exercised for the welfare of its citizens; this is true even of its ordinary and governmental functions, and is especially true of the power to subscribe to the stock of a railroad company. *Stanly County v. Coler*, 190 U. S. 437, 446, 47 L. Ed. 1126. See the title MUNICIPAL, COUNTY, STATE AND FEDERAL AID.

68. **Source of powers.**—*Commissioners of Laramie County v. Commissioners of*

*Albany County*, 92 U. S. 307, 308, 23 L. Ed. 552; *Lincoln County v. Luning*, 133 U. S. 529, 530, 33 L. Ed. 766; *Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1, 33 L. Ed. 231; *County Court v. United States*, 105 U. S. 733, 737, 26 L. Ed. 1220; *Mount Pleasant v. Beckwith*, 100 U. S. 514, 524, 25 L. Ed. 699. See ante, "By Whom Created," III, A, 1.

**Effect of grant of powers to counties by legislature.**—But it is settled law, that the legislature, in granting this power does not divest itself of any power over the inhabitants of the district, which it possessed, before the charter was granted. *Commissioners of Laramie County v. Commissioners of Albany County*, 92 U. S. 307, 308, 23 L. Ed. 552. See post, "Legislative Control," VI.

69. **Constitution providing otherwise.**—*Commissioners of Laramie County v. Commissioners of Albany County*, 92 U. S. 307, 308, 23 L. Ed. 552; *Mount Pleasant v. Beckwith*, 100 U. S. 514, 524, 25 L. Ed. 699. See ante, "General Consideration," VI, A.

70. **Extent of powers.**—*Thompson v. Lee County*, 3 Wall. 327, 330, 18 L. Ed. 177; *Lincoln County v. Luning*, 133 U. S. 529,

legislature of their respective states see fit to delegate to them, but all the powers that are delegated may be exercised in any proper way and at all proper times.<sup>71</sup>

3. **ORDINARY CORPORATE POWERS**—a. *Power to Contract and Be Contracted with*—(1) *In General*.—A county can contract and be contracted with.<sup>72</sup>

(2) *Power to Borrow Money*—(a) *Source of Power*.—The power of a county to borrow money must be conferred by statute, or it does not exist.<sup>73</sup>

(b) *Submission to Voters*.—It is usual when the legislature confers the power on a county to borrow money for county expenses to provide for a submission of the question to the voters of the county.<sup>74</sup>

(c) *Limitations on Amount of Indebtedness*.—**Power to Dispense with Constitutional Limitations**.—It is not within the power of a legislature to dispense with constitutional limitations on the amount of county indebtedness, either directly or indirectly, by the creation of a ministerial commission whose finding shall be taken in lieu of the facts.<sup>75</sup>

530, 33 L. Ed. 766; *Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1, 33 L. Ed. 231; *County Court v. United States*, 105 U. S. 733, 737, 26 L. Ed. 1220; *Commissioners of Laramie County v. Commissioners of Albany County*, 92 U. S. 307, 308, 23 L. Ed. 552; *Mount Pleasant v. Beckwith*, 100 U. S. 514, 524, 25 L. Ed. 699.

71. **Manner of exercise**.—*County Court v. United States*, 105 U. S. 733, 737, 26 L. Ed. 1220.

72. **Contracts**.—*Davenport v. County of Dodge*, 105 U. S. 237, 241, 26 L. Ed. 1018. See the title **CONTRACTS**, ante, p. 552.

73. **Source of power to borrow money**.—*Wells v. Board of Supervisors*, 102 U. S. 625, 630, 26 L. Ed. 122; *Ritchie v. Franklin County*, 22 Wall. 67, 68, 22 L. Ed. 825. See *Police Jury v. Britton*, 15 Wall. 566, 21 L. Ed. 251.

The legislature has delegated to the counties of Kansas the power to borrow money for the erection of county buildings and to issue bonds therefor. *Board of County Commissioners v. Lewis*, 133 U. S. 198, 203, 33 L. Ed. 604. See the title **MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES**.

**Power of taxation as conferring power of borrowing money**.—The power to levy taxes does not vest a county with the power to borrow money. *Wells v. Board of Supervisors*, 102 U. S. 625, 630, 26 L. Ed. 122. See the title **TAXATION**.

**Power to issue bonds therefor**.—See the title **MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES**.

74. **Submissions to voters**.—The submission to the voters of a county, under the Code of Iowa, of the question "whether the county judge at the time of levying the annual taxes shall levy a special tax of a specified number of mills on a dollar of valuation, for the purpose of constructing a courthouse in the county; the tax to be levied from year to year until a sufficient amount is raised for said purpose, not to exceed," etc., is (by implication) a submission of the question whether money shall be borrowed to build the courthouse and negotiable bonds be sold as the means of borrowing; this, though the same section of the code enacts that

the county judge may submit to the voters the question "whether money may be borrowed to aid in the erection of public buildings;" and though the question submitted to the voters as above mentioned be submitted only in virtue of an enactment immediately following, that "when the question so submitted involves the expenditures of money, the proposition of the question must be accompanied by a provision to levy a tax for the payment thereof in addition to the usual taxes." This, at least as respects the holders, bona fide and for value, of bonds so issued, when the bonds declare on their face that "all of said bonds are issued in accordance with a vote of the people of said county." *Lynde v. The County*, 16 Wall. 6, 21 L. Ed. 272.

The county judge being, by the Code of Iowa, the officer designated to decide whether the voters have given the required sanction to the borrowing of money and issuing of bonds, his execution and issue of bonds setting forth on their face that "all of said bonds are issued in accordance with a vote of the people of said county," and that "the people have voted the levying of sufficient taxes," etc., is conclusive evidence against the county of the popular sanction so far as respects holders bona fide and for value. *Lynde v. The County*, 16 Wall. 6, 7, 21 L. Ed. 272. See the title **MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES**.

**Consent of voters to pay debts previously contracted**.—Though a statute may require that no bonds be issued by counties to make roads unless the voters have approved the expenditure, there is nothing in the constitution of the state of Missouri which forbids the legislature from conferring on counties the authority to borrow money for the purpose named without such approval, the legislature can confer on counties the power to borrow money to pay debts already contracted for this purpose without such consent. *Ritchie v. Franklin County*, 22 Wall. 67, 68, 22 L. Ed. 825. See the title **STREETS AND HIGHWAYS**.

75. **Creation of ministerial commission**.—*Lake County v. Graham*, 130 U. S. 674,

**To What Debts Applicable.**—Constitutional limitations on the amount of indebtedness that a county may assume are applicable to any and all indebtedness, created in any manner, or for whatever purpose.<sup>76</sup> But, in calculating that limit, debts contracted before the adoption of the constitution are not to be considered.<sup>77</sup>

(3) *Power to Issue Bonds and Other Securities.*—See the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

(4) *Contract for Erection of Courthouse.*—The power of a county to erect a courthouse involves and implies the power to contract for its erection, but the power to contract does not involve and imply the power to execute notes, bonds, and other commercial paper as evidence or security for the contract.<sup>78</sup>

b. *Power to Sue and Be Sued.*—See post, "Capacity to Sue and Be Sued," XII, B.

c. *Power to Acquire and Hold Property.*—See ante, "Power to Acquire and Dispose of Realty," V, A.

4. **GOVERNMENTAL AND LEGISLATIVE FUNCTIONS**—a. *In General.*—Counties are usually invested with certain subordinate legislative powers, to facilitate due administration of their own internal affairs, and to promote the general welfare of the municipality.<sup>79</sup>

b. *Power of Legislation.*—A county has no inherent right of legislation,<sup>80</sup> or power to adopt governmental regulations, nor can they exercise any other powers in that regard than such as are expressly or impliedly derived from their charters, or other statutes of the state.<sup>81</sup>

c. *Power to Manage Affairs of Railroad.*—The management of the affairs of a railroad company is no part of the proper business of a county.<sup>82</sup>

d. *County Aid.*—See the title MUNICIPAL, COUNTY, STATE AND FEDERAL AID.

e. *Taxation.*—See the titles MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES; TAXATION.

684, 32 L. Ed. 1065; *Doon Township v. Cummings*, 142 U. S. 366, 375, 35 L. Ed. 1044. See the titles MUNICIPAL CORPORATIONS; MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

**Validity of bonds issued in excess of limitation.**—See the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

76. **To what debts applicable.**—*Lake County v. Rollins*, 130 U. S. 662, 32 L. Ed. 1060; *Doon Township v. Cummings*, 142 U. S. 366, 375, 35 L. Ed. 1044; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 21, 43 L. Ed. 341; *Lake County v. Graham*, 130 U. S. 674, 32 L. Ed. 1065.

**Illustration.**—Article 11, § 6, in the constitution of Colorado is a limitation upon the power of the county to contract any and all indebtedness, including county warrants for ordinary county expenses, such as witnesses' fees, jurors' fees, election costs, charges for board of prisoners, county treasurers' commissions, etc. *Lake County v. Rollins*, 130 U. S. 662, 32 L. Ed. 1060, approved in *Lake County v. Graham*, 130 U. S. 674, 32 L. Ed. 1065; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 21, 43 L. Ed. 341. See the titles MUNICIPAL CORPORATIONS; MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

77. **Debts contracted before adoption of constitution.**—*Lake County v. Graham*,

130 U. S. 674, 32 L. Ed. 1065; *Doon Township v. Cummins*, 142 U. S. 366, 375, 35 L. Ed. 1044. See the title MUNICIPAL CORPORATIONS.

78. **Contract for erection of courthouse.**—*Claiborne County v. Brooks*, 111 U. S. 400, 406, 28 L. Ed. 470. See ante, "County Seats," VII, A. See the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

79. **Governmental and legislative functions.**—*Commissioners of Laramie County v. Commissioners of Albany County*, 92 U. S. 307, 23 L. Ed. 552. See the title CONSTITUTIONAL LAW, ante, p. 1.

80. **Legislation.**—*Thompson v. Lee County*, 3 Wall. 327, 330, 18 L. Ed. 177; *Commissioners of Laramie County v. Commissioners of Albany County*, 92 U. S. 307, 308, 23 L. Ed. 552; *Mount Pleasant v. Beckwith*, 100 U. S. 514, 524, 25 L. Ed. 699. See the title CONSTITUTIONAL LAW, ante, p. 1.

81. **Source of power to legislate or adopt governmental regulations.**—*Commissioners of Laramie County v. Commissioners of Albany County*, 92 U. S. 307, 308, 23 L. Ed. 552; *Mount Pleasant v. Beckwith*, 100 U. S. 514, 524, 25 L. Ed. 699.

82. **Management of railroads.**—*Board of Commissioners v. Lucas*, 93 U. S. 108, 116, 23 L. Ed. 822. See the title RAILROADS.



5. BY WHOM EXERCISED.—The affairs of a county can only be administered by its officers, and to their attention and duty its interests must be entrusted.<sup>83</sup>

**B. Duties**—1. GENERAL CONSIDERATION.—Counties are subject to certain legal obligations and duties.<sup>84</sup>

2. PARTICULAR DUTIES.—The erection of courthouses, jails and bridges is amongst the ordinary political or administrative duties of all counties.<sup>85</sup>

**C. Liabilities**—1. ON CONTRACTS—*a. Liability to Assignee of Contract.*—A partial assignment by a contractor of a contract with a county, for the performance of work, although known to the county, if not assented to by the county will not subject the county to a liability to the assignee, or prevent a settlement with the original contractor.<sup>86</sup>

*b. Release of County from Liability on Debts Previously Contracted.*—No change in the political organization of a county is sufficient to release a county from its debts previously contracted.<sup>87</sup> The debts of a county, contracted during a valid organization, remain the obligations of the county, although for a time the organization be abandoned and there be no officers to be reached by the process of the courts.<sup>88</sup>

*c. Implied Contracts.*—**In General.**—Liabilities may be incurred by counties independent of the statutes.<sup>89</sup>

**Ultra Vires Contracts.**—The obligation to do justice rests upon all persons, natural or artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation.<sup>90</sup>

**83. Powers of county exercised by officers.**—*Stanly County v. Coler*, 190 U. S. 437, 447, 47 L. Ed. 1126; *Board of County Commissioners v. Sellew*, 99 U. S. 624, 627, 25 L. Ed. 333. See the titles MUNICIPAL, COUNTY, STATE AND FEDERAL AID; MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

The powers of a county in Kansas are exercised by boards of county commissioners chosen by the electors. *Board of County Commissioners v. Sellew*, 99 U. S. 624, 25 L. Ed. 333. See ante, "County Commissioners," VII, D.

**Operation of courts upon agents.**—As a county can only act through its agents, the courts will operate upon the agents through the corporation. *Board of County Commissioners v. Sellew*, 99 U. S. 624, 627, 25 L. Ed. 333. See post, "Actions by and against Counties," XII.

**84. Duties.**—*Mount Pleasant v. Beckwith*, 100 U. S. 514, 524, 25 L. Ed. 699; *Commissioners of Laramie County v. Commissioners of Albany County*, 92 U. S. 307, 310, 23 L. Ed. 552; *Worcester v. Worcester, etc., Street R. Co.*, 196 U. S. 539, 49 L. Ed. 591.

The duties of a county are to be exercised for the welfare of its citizens. This is true even of its ordinary and governmental functions. It is especially true of the power to subscribe to the stock of a railroad company. *Stanly County v. Coler*, 190 U. S. 437, 47 L. Ed. 1126. See the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

**By whom duties exercised.**—See ante, "By Whom Exercised," VIII, A, 5.

**85. Particular duties.**—*Claiborne County v. Brooks*, 111 U. S. 400, 406, 28 L. Ed. 470; *Merrill v. Monticello*, 138 U. S. 673,

689, 34 L. Ed. 1069. See the titles BRIDGES, vol. 3, p. 516; MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES; PRISONS AND PRISONERS. See, also, ante, "County Seats," VII, A.

**86. Partial assignment—Assent of county.**—*Delaware County Commissioners v. Diebold Safe, etc., Co.*, 133 U. S. 473, 33 L. Ed. 674.

**Illustrations.**—See the titles ASSIGNMENTS, vol. 2, p. 570; WORKING CONTRACTS.

**87. Release of county from debts previously contracted.**—*Board of County Commissioners v. Lewis*, 133 U. S. 198, 33 L. Ed. 604.

**Release of county from liability on county bonds.**—See the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

**88. Effect of temporary abandonment on liability for debts.**—*Board of County Commissioners v. Lewis*, 133 U. S. 198, 205, 33 L. Ed. 604. See the titles MUNICIPAL CORPORATIONS; MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

**Liability on county bonds.**—See the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

**89. Implied contracts.**—*Marsh v. Fulton County*, 10 Wall. 676, 684, 19 L. Ed. 1040; *Aldrich v. Chemical Nat. Bank*, 176 U. S. 618, 44 L. Ed. 611; *Louisiana v. Wood*, 102 U. S. 294, 299, 26 L. Ed. 153; *Logan County Nat. Bank v. Townsend*, 139 U. S. 67, 75, 35 L. Ed. 107; *Chapman v. Board of County Commissioners*, 107 U. S. 348, 27 L. Ed. 378. See the title IMPLIED CONTRACTS.

**90. Ultra vires contracts.**—*Marsh v. Fulton County*, 10 Wall. 676, 19 L. Ed.

2. ENFORCEMENT OF LIABILITIES—*a. Claims against Counties*—(1) *Presentation of Claims*.—**Nature**.—The presentation of a demand to the county court is not the commencement of a suit against the county.<sup>91</sup>

**What Claims Must Be Presented**.—An unliquidated claim or account is within the meaning of a statute providing that claims against a county should be presented for auditing before payment.<sup>92</sup> But a statute providing that claims must be presented for auditing before payment has no application to bonds and coupons.<sup>93</sup>

(2) *Hearing and Determination*—(a) *Nature of Proceedings*.—Although the proceedings of county commissioners, in passing upon claims against a county, are in some respects assimilated to proceedings before a court, yet those proceedings are in the nature, not of a trial inter partes, but of an allowance or disallowance, by officers representing the county, of a claim against it.<sup>94</sup>

(b) *Proceedings on Hearing*.—At the hearing before the commissioners, there is no representative of the county, except the commissioners themselves; they may allow the claim, either upon evidence introduced by the plaintiff, or without other proof than their own knowledge of the truth of the claim.<sup>95</sup>

(c) *Collateral Attack*.—The decision of county commissioners if not appealed from cannot be collaterally attacked.<sup>96</sup>

1040; *Aldrich v. Chemical Nat. Bank*, 176 U. S. 618, 44 L. Ed. 611; *Logan County Nat. Bank v. Townsend*, 139 U. S. 67, 75, 35 L. Ed. 107; *Thomas v. West Jersey R. Co.*, 101 U. S. 71, 25 L. Ed. 950; *Louisiana v. Wood*, 102 U. S. 294, 26 L. Ed. 153; *Chapman v. Board of County Commissioners*, 107 U. S. 348, 355, 27 L. Ed. 378; *Salt Lake City v. Hollister*, 118 U. S. 256, 263, 30 L. Ed. 176. See, generally, the title **ILLEGAL CONTRACTS**.

**Illustrations**.—Where realty is deeded to a county for a poor house, under an agreement with the county commissioners, to pay therefor in a definite time without regard to the condition of the county treasury, such agreement so far as it relates to the time and mode of payment is void; but if the contract for the sale itself has been executed on the part of the vendor by the delivery of the deed, and his title at law has actually passed to the county; as the agreement between the parties has failed by the reason of the legal disability of the county to perform its part according to its condition, the right of the vendor to rescind the contract and to a restitution of his title would seem to be as clear as it would be just, unless some valid reason to the contrary can be shown. *Chapman v. Board of County Commissioners*, 107 U. S. 348, 27 L. Ed. 378, approved in *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 59, 35 L. Ed. 55. See the title **RESCISSIION, CANCELLATION AND REFORMATION**.

If a lawful contract, as for the purchase of realty for a poor house, is made with a county, on an agreement to pay therefor in a mode which as to the county is ultra vires, the vendor may waive a strict performance of the contract, and wait a reasonable length of time for the county to pay in a lawful mode, under the statute authorizing the purchase, before the statute of limitations will commence to run, otherwise he may sue for a rescission

of the contract and a reconveyance of the land on the ground of failure of consideration. *Chapman v. Board of County Commissioners*, 107 U. S. 348, 27 L. Ed. 378.

**91. Nature of presentation of claims**.—*Chicot County v. Sherwood*, 148 U. S. 529, 37 L. Ed. 546.

**92. Unliquidated claims**.—*Lincoln County v. Luning*, 133 U. S. 529, 33 L. Ed. 766; *County of Greene v. Daniel*, 102 U. S. 187, 26 L. Ed. 99.

**93. Bonds and coupons**.—*County of Greene v. Daniel*, 102 U. S. 187, 26 L. Ed. 99; *Lincoln County v. Luning*, 133 U. S. 529, 532, 33 L. Ed. 766. See the titles **BONDS**, vol. 2, p. 382; **COUPONS**; **MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES**.

**Illustration**.—The holder of bonds, or of the coupons attached thereto, of a county, issued in payment of a stock subscription to a railroad is not required to present them when due, to the court of county commissioners, for allowance before commencing suit to enforce payment thereon. *County of Greene v. Daniel*, 102 U. S. 187, 26 L. Ed. 99, approved in *Lincoln County v. Luning*, 133 U. S. 529, 532, 33 L. Ed. 766. See the title **MUNICIPAL, COUNTY, STATE AND FEDERAL AID**.

**94. Nature of proceedings on hearing and determining allowance of claims**.—*Delaware County Commissioners v. Diebold Safe, etc., Co.*, 133 U. S. 473, 486, 33 L. Ed. 674; *Upshur County v. Rich*, 135 U. S. 467, 476, 34 L. Ed. 196; *Chicot County v. Sherwood*, 148 U. S. 529, 533, 37 L. Ed. 546.

**95. Proceeding on hearing of claims**.—*Delaware County Commissioners v. Diebold Safe, etc., Co.*, 133 U. S. 473, 487, 33 L. Ed. 674; *Chicot County v. Sherwood*, 148 U. S. 529, 533, 37 L. Ed. 546.

**96. Collateral attack of decision of county commissioner**.—*Delaware County*

(d) *Appeal*.—An appeal may be had from the decision of the county commissioners on a claim presented to them for auditing.<sup>97</sup> An appeal from the decision of county commissioners on a claim prescribed to them for auditing is tried and determined by the circuit court of the county as an original cause, and upon the complaint filed before the commissioners.<sup>98</sup>

(e) *Removal of Causes*.—See the title REMOVAL OF CAUSES.

b. *Actions*.—See post, "Actions by and against Counties," XII.

3. DISCHARGE OF LIABILITIES.—Where a statute confers an extraordinary power on the boards of police and authorizes them to create a new liability for their respective counties, and provides a special way of discharging that liability, the liability and the mode of discharge are provided for in the same statute, hence, the mode prescribed is exclusive of all others.<sup>99</sup>

## IX. Finances.

**In General.**—This subject will be found elsewhere under other more appropriate titles.<sup>1</sup>

**Injunction to Restrain Illegal Disposition of Revenues.**—Unless otherwise provided by legislative enactment, a resident taxpayer has the right to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county, or the illegal creation of a debt which he in common with other property holders may otherwise be compelled to pay.<sup>2</sup>

## X. County Aid.

See the title MUNICIPAL, COUNTY, STATE AND FEDERAL AID.

## XI. County Bonds.

See the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

## XII. Actions by and against Counties.

**A. General Consideration.**—A suit against a county is a suit against parts thereof, which have been previously detached, but which have remained liable for the debts of the portion from which they were previously detached.<sup>3</sup>

*Commissioners v. Diebold Safe, etc., Co.*, 133 U. S. 473, 486, 33 L. Ed. 674; *Chicot County v. Sherwood*, 148 U. S. 529, 37 L. Ed. 546. See, generally, the title JUDGMENTS AND DECREES.

97. **Right of appeal from decision of county commissioner.**—*Delaware County Commissioners v. Diebold Safe, etc., Co.*, 133 U. S. 475, 33 L. Ed. 674; *Chicot County v. Sherwood*, 148 U. S. 529, 533, 37 L. Ed. 546; *Upshur County v. Rich*, 135 U. S. 467, 476, 34 L. Ed. 196. See the title APPEAL AND ERROR, vol. 1, p. 333.

98. **Trial and determination on appeal from decision of county commissioner.**—*Delaware County Commissioners v. Diebold Safe, etc., Co.*, 133 U. S. 473, 487, 33 L. Ed. 674; *Chicot County v. Sherwood*, 148 U. S. 529, 533, 37 L. Ed. 546.

99. **Discharge of liability.**—*Wells v. Board of Supervisors*, 102 U. S. 625, 631, 26 L. Ed. 122. See the title ACTIONS, vol. 1, p. 106.

1. **Finances.**—See the titles INJUNCTIONS; MUNICIPAL, COUNTY, STATE AND FEDERAL AID; MUNICIPAL CORPORATIONS; MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES; TAXATION.

2. **Injunction to restrain illegal disposition of revenues.**—*Crampton v. Zabriskie*,

101 U. S. 601, 25 L. Ed. 1070. See the titles INJUNCTIONS; TAXATION.

**Illustration.**—After the supreme court of New Jersey had decided that the resolution adopted by a board of chosen freeholders of New Jersey for the purchase of land for a courthouse, and, payment therefore was illegal, A., the vendor of the lands, brought an action on said bonds against the board. Thereupon certain resident taxpayers filed their bill, praying that A. be restrained from prosecuting that action or one to recover the value of the lands, that the board be enjoined from paying the bonds, and directed to convey the lands to A., and that he be required to accept a deed therefore. Held, that they were entitled to the relief prayed for. *Crampton v. Zabriskie*, 101 U. S. 601, 25 L. Ed. 1070, approved in *Chapman v. Board of County Commissioners*, 107 U. S. 348, 27 L. Ed. 378. See the title INJUNCTIONS.

3. **Suit against county is suit against parts thereof.**—*Carter County v. Sinton*, 120 U. S. 517, 30 L. Ed. 701. See ante, "Property and Revenues," VI. E. See the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.



**B. Capacity to Sue and Be Sued.**—The capacity of a county to sue and be sued is generally conferred by statute.<sup>4</sup> A county may sue and be sued by virtue of its quasi public nature.<sup>5</sup>

**C. Name in Which Action Brought.—Constitutional and Statutory Provisions.**—The constitution or statutes of a state usually declare that actions by or against a county shall be brought in the name of the county commissioners.<sup>6</sup>

**Independent of Statute.**—But if there exists no statute or constitutional provision on the subject, an action brought against a county by its corporate name, if objected to, may be amended at the trial under statutes providing therefor, but it furnishes no ground for reversing the judgment.<sup>7</sup>

**D. Jurisdiction.**—See the title COURTS.

**E. Form of Action.**—See the titles INJUNCTIONS; MANDAMUS.

**F. Limitations and Laches.**—See the titles LACHES; LIMITATION OF ACTIONS AND ADVERSE POSSESSION.

**G. Process.**—See the titles MANDAMUS; SUMMONS AND PROCESS.

**H. Payment of Judgments against Counties.**—This subject will be treated in subsequent titles.<sup>8</sup>

**COUNTS.**—See, generally, the titles INDICTMENTS, INFORMATIONS AND COMPLAINTS; PLEADING. As to joinder of counts, see the title ACTIONS, vol. 1, p. 111.

**COUNTRY.**—See note 1.

**4. Right to sue and be sued conferred by statute.**—*Chicot County v. Sherwood*, 148 U. S. 529, 37 L. Ed. 546; *Board of County Commissioners v. Sellew*, 99 U. S. 624, 627, 25 L. Ed. 333; *Lincoln County v. Luning*, 133 U. S. 529, 530, 33 L. Ed. 766; *County of Greene v. Daniel*, 102 U. S. 187, 193, 26 L. Ed. 99.

**Alabama.**—"A county in Alabama is a body corporate, capable of suing and being sued. Code, § 815 (897)." *County of Greene v. Daniel*, 102 U. S. 187, 193, 26 L. Ed. 99.

**Arkansas.**—*Chicot County v. Sherwood*, 148 U. S. 529, 37 L. Ed. 546.

**Kansas.**—"In the state of Kansas counties are capable of suing and being sued." *Board of County Commissioners v. Sellew*, 99 U. S. 624, 25 L. Ed. 333.

**Nevada.**—*Lincoln County v. Luning*, 133 U. S. 529, 530, 33 L. Ed. 766.

**5. Suing and being sued by virtue of quasi public nature.**—The Levy court of Washington County, in the District of Columbia, if not a corporation in the full sense of the term, is a quasi corporation; and can sue and be sued in regard to any matter in which, by law, it has rights to be enforced, or is under obligations, which it refuses to fulfill. *Levy Court v. Woodward*, 2 Wall. 501, 17 L. Ed. 851. See ante, "Levy Court," VII, E.

**6. Name in which action brought under statute—Kansas.**—The name by which counties can sue and are sued in Kansas is the "board of county commissioners of the county of"—Board of County Commissioners *v. Sellew*, 99 U. S. 624, 25 L. Ed. 333, approved in *Boone County v. Burlington, etc., R. Co.*, 139 U. S. 684, 694, 35 L. Ed. 319.

A writ of mandamus against a county

in Kansas directed to the board of county commissioners is proper. *Board of County Commissioners v. Sellew*, 99 U. S. 624, 25 L. Ed. 333. See the title MANDAMUS.

**North Carolina.**—Neither the constitution nor the statutes of the state of North Carolina declare the name by which a county shall be sued. *Commissioners v. Bank of Commerce*, 97 U. S. 374, 24 L. Ed. 1060.

**7. Suits against counties independent of statute.**—In an action on certain coupons originally attached to bonds issued by the county of Pickens, South Carolina, the holder of them made as sole defendants to his complaint certain persons whom he named "as county commissioners" of said county. No objection was taken to the pleadings, nor any misnomer suggested. Verdict and judgment for the plaintiff. Held, that, if the action should have been brought against the county by its corporate name, the misdescription, if objected to, was, by the statutes of that state, amendable at the trial; but it furnishes no ground for reversing the judgment. *Commissioners v. Bank of Commerce*, 97 U. S. 374, 24 L. Ed. 1060.

**8. Payment of judgments against counties.**—See the titles JUDGMENTS AND DECREES; MANDAMUS; MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES; TAXATION.

**1. Country.**—In *Stairs v. Peaslee*, 18 How. 521, 526, 15 L. Ed. 474, it is said: "The word country in the revenue laws of the United States has always been construed to embrace all the possessions of a foreign state however widely separated, which are subject to the same supreme executive and legislative control." See, generally, the title REVENUE LAWS.

**COUNTRY ROCK.**—See note 1.

**COUNTY AID.**—See the title MUNICIPAL, COUNTY, STATE AND FEDERAL AID.

**COUNTY BOARD.**—See the title COUNTIES, ante, p. 825.

**COUNTY BOND.**—See the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

**COUNTY COMMISSIONERS.**—See the title COUNTIES, ante, p. 825.

**COUNTY COURTS.**—See the title COUNTIES, ante, p. 825.

**COUNTY OFFICERS AND AGENTS.**—See the title COUNTIES, ante, p. 825.

**COUNTY ORDERS OR WARRANTS.**—See the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

**COUNTY ROADS.**—See the title STREETS AND HIGHWAYS.

**COUNTY SEAT.**—See the title COUNTIES, ante, p. 825.

**COUNTY TREASURER.**—See the title COUNTIES, ante, p. 825.

**COUPLED WITH AN INTEREST.**—See, also, the title POWERS. "By the phrase coupled with an interest, is not meant an interest in the exercise of the power, but an interest in the property on which the power is to operate."<sup>2</sup>

**COUPLING CARS.**—See the title MASTER AND SERVANT.

1. **Country rock.**—In *Iron Silver Min. Co. v. Cheesman*, 116 U. S. 529, 534, 29 L. Ed. 712, it is said: "Generally, the veins are found in what, when the mineral is taken out of them, constitute clefts or fissures in the surrounding rock, with a well-defined wall above and below of different kinds of rock, as porphyry on one side, above or below, and limestone on the other. So long as these enclosing walls can be distinctly and continuously traced, and the mineral matter of the same character found between them, there can be no doubt that it is the same vein. But sometimes the cleft between the enclos-

ing rocks, called in mining parlance the **country rock**, diminishes so as to be scarcely perceptible. Sometimes for a short distance the fissure disappears entirely and again is found distinctly to exist a little further on. Again it is seen that, though the underlying and superposing **country rock** is there, the mineral deposit ceases to be found, but, following the fissure, it reappears again very soon." See, generally, the title MINES AND MINERALS.

2. *Taylor v. Burns*, 203 U. S. 120, 126, 51 L. Ed. 116; *Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. Ed. 589.

## COUPONS.

BY A. P. WALKER.

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### CROSS REFERENCES.

See the titles **BILLS, NOTES AND CHECKS**, vol. 3, p. 257; **BONDS**, vol. 3, p. 382; **INTEREST**; **JUDGMENTS AND DECREES**; **LIS PENDENS**; **MANDAMUS**; **MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES**; **RAILROADS**; **RES ADJUDICATA**; **TAXATION**.



## I. Definition, Nature and Purpose.

Coupons are written contracts for the payment of a definite sum of money, on a given day.<sup>1</sup> They are substantially but copies of the stipulations in the body of the bond in respect to the interest,<sup>2</sup> and are so attached to the bond that they may be cut off by the holder as matter of convenience in collecting the interest, or to enable him to realize the interest due or to become due by negotiating the same to bearer in business transactions, without the trouble of presenting the bond every time an installment of interest falls due.<sup>3</sup>

**The coupon is not an independent instrument**, like a promissory note for a sum of money, but is given for interest thereafter to become due upon the bond, which interest is parcel of the bond, and partakes of its nature.<sup>4</sup>

**Favorably Viewed by Courts.**—The great convenience and use of coupons in the interests of business and commerce commend them to the most favorable view of the court.<sup>5</sup>

## II. Form, Requisites and Validity.

**A. Form in General.**—Coupons are complete instruments in themselves; and the form of the coupons does not change their nature.<sup>7</sup>

**B. Seals and Signature.**—Coupons are specialties.<sup>8</sup>

**1. Definition.**—*Aurora City v. West*, 7 Wall. 82, 105, 19 L. Ed. 42; *Edwards v. Bates County*, 163 U. S. 269, 272, 41 L. Ed. 155; *Knox County v. Aspinwall*, 21 How. 539, 544, 16 L. Ed. 208; *White v. The Vermont, etc., R. Co.*, 21 How. 575, 16 L. Ed. 221; *Cromwell v. County of Sac*, 96 U. S. 51, 58, 62, 24 L. Ed. 681; *Cromwell v. County of Sac*, 94 U. S. 351, 362, 24 L. Ed. 195; *Murray v. Lardner*, 2 Wall. 110, 121, 19 L. Ed. 857.

Coupons are separable obligations for the interest payable upon demand. *Railway Co. v. Sprague*, 103 U. S. 756, 761, 26 L. Ed. 554. Coupons are evidences of the sums due for interest on the bonds. *Walnut v. Wade*, 103 U. S. 683, 26 L. Ed. 526; *Ohio v. Frank*, 103 U. S. 697, 26 L. Ed. 531.

"The coupon is simply a mode agreed on between the parties for the convenience of the holder in collecting the interest as it becomes due." *The City v. Lamson*, 9 Wall. 477, 484, 19 L. Ed. 725.

**Not an extinguishment of interest.**—Coupons are not received, or intended to have the effect of extinguishing the interest due on the bonds; as this collateral security, or rather, this evidence of the interest, upon well-settled principles, cannot have that effect without an express agreement between the parties. There is no extinguishment till payment. Contemporaneous coupons do not operate as an extinguishment of the interest, unless there has been an express agreement to that effect. *The City v. Lamson*, 9 Wall. 477, 19 L. Ed. 725.

**2. Copies of stipulations of bond.**—*Lexington v. Butler*, 14 Wall. 282, 283, 297, 20 L. Ed. 809; *The City v. Lamson*, 9 Wall. 477, 483, 19 L. Ed. 725.

**3. Mode of collecting or realizing interest.**—*Lexington v. Butler*, 14 Wall. 282, 283, 297, 20 L. Ed. 809; *The City v. Lamson*, 9 Wall. 477, 19 L. Ed. 725.

**4. Not an independent instrument.**—*The City v. Lamson*, 9 Wall. 477, 483, 19 L. Ed. 725. See, also, *Cromwell v. County of Sac*, 96 U. S. 51, 58, 24 L. Ed. 681. See the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION.

**5. Favorably viewed by courts.**—*The City v. Lamson*, 9 Wall. 477, 484, 19 L. Ed. 725. See post, "In General," III, A, 1.

**6. Form in general.**—*Koshkonong v. Burton*, 104 U. S. 668, 26 L. Ed. 886, citing *Knox County v. Aspinwall*, 21 How. 539, 16 L. Ed. 208; *Clark v. Iowa City*, 20 How. 583, 22 L. Ed. 427, and *Amy v. Dubuque*, 98 U. S. 470, 25 L. Ed. 228.

**Promissory note.**—Coupons are sometimes in the form of negotiable promissory notes. See *Thomson v. Lee County*, 3 Wall. 327, 328, 18 L. Ed. 177; *Koshkonong v. Burton*, 104 U. S. 668, 26 L. Ed. 886.

**Bill of exchange.**—Coupons are sometimes in the form of a bill of exchange. *Queensburg v. Culver*, 19 Wall. 83, 22 L. Ed. 100; *Moran v. Commissioners*, 2 Black 722, 17 L. Ed. 342.

**Interest warrants.**—Coupons may be in the form of an interest warrant. *Woods v. Lawrence County*, 1 Black 386, 17 L. Ed. 122.

**7. Walnut v. Wade**, 103 U. S. 683, 26 L. Ed. 526; *Ohio v. Frank*, 103 U. S. 697, 26 L. Ed. 531. See ante, "Definition, Nature and Purpose," I.

**8. Seals.**—*Amy v. Dubuque*, 98 U. S. 470, 25 L. Ed. 228; *Clark v. Iowa City*, 20 Wall. 583, 22 L. Ed. 427. See, also, the titles BONDS, vol. 3, p. 382; SEALS AND SEALED INSTRUMENTS.

**Municipal aid bonds.**—Under some circumstances, a municipal corporation issuing and delivering bonds and coupons, in aid of railroad enterprises, may be liable thereon, notwithstanding they are unattested by its corporate seal. *Kosh-*

**Signature of Municipal and County Bonds and Coupons.**—See the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

**C. Certainty.**—See post, "In General," III, A, 1.

**D. Payee.**—Designation of a payee is not essential to the validity of a coupon.<sup>9</sup>

**E. Place of Payment.**—The designation of a place of payment is not essential to the validity of a bond and attached coupon.<sup>10</sup>

**A municipal corporation** may make its bonds and coupons payable at a place outside the state.<sup>11</sup>

**F. Issuance**—1. **AUTHORITY TO ISSUE.**—A grant to a municipal corporation of express power to issue bonds bearing interest carries with it the power to attach to those bonds interest coupons.<sup>12</sup>

2. **WHAT CONSTITUTES ISSUANCE.**—As to what constitutes issuance of municipal or county bonds and coupons, see the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

### III. Rights of Holder, Negotiability and Transfer.

**A. Bonds and Attached Coupons**—1. **IN GENERAL.**—Coupons attached as interest warrants to bonds for the payment of money, as well as the bonds to which they are attached, when they are payable to order and are indorsed in blank, or are made payable to bearer, are transferable by delivery, and are subject to the same rules and regulations, so far as respects the title and rights of the holder, as negotiable bills of exchange and promissory notes.<sup>13</sup> Holders of such instruments, if the same are indorsed in blank or are payable to bearer,

*konong v. Burton*, 104 U. S. 668, 673, 26 L. Ed. 886. See the titles MUNICIPAL, COUNTY, STATE AND FEDERAL AID; MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

**9. Payee.**—*Woods v. Lawrence County*, 1 Black 386, 17 L. Ed. 122.

**10. Place of payment.**—*Parsons v. Jackson*, 99 U. S. 434, 25 L. Ed. 457. See post, "In General," III, A, 1.

**11. Municipal bonds and coupons.**—*Thomson v. Lee County*, 3 Wall. 327, 18 L. Ed. 177; *Lexington v. Butler*, 14 Wall. 282, 289, 20 L. Ed. 809; *Lynde v. The County*, 16 Wall. 6, 13, 21 L. Ed. 272. See the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

**12. Authority to issue.**—*Atchison Board of Education v. De Kay*, 148 U. S. 591, 37 L. Ed. 573. See the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

**13. Pass by delivery.**—*Lexington v. Butler*, 14 Wall. 282, 295, 20 L. Ed. 809; *Mercer County v. Hackett*, 1 Wall. 83, 17 L. Ed. 548; *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. Ed. 520; *Meyer v. Muscatine*, 1 Wall. 384, 17 L. Ed. 564; *Supervisors v. Schenck*, 5 Wall. 772, 18 L. Ed. 556; *Aurora City v. West*, 7 Wall. 82, 19 L. Ed. 42; *White v. The Vermont, etc., R. Co.*, 21 How. 575, 16 L. Ed. 221; *Commissioners v. Clark*, 94 U. S. 278, 279, 24 L. Ed. 59; *Morgan v. United States*, 113 U. S. 476, 491, 28 L. Ed. 1044; *Moran v. Commissioners*, 2 Black 722, 17 L. Ed. 342; *Murray v. Lardner*, 2 Wall. 110, 122, 19 L. Ed. 857; *Smith v. Sac County*, 11 Wall. 139, 155, 20 L. Ed. 102, opinion of Clifford, J., dissenting; *Thompson v. Lee County*, 3 Wall. 327, 18 L. Ed. 177; *Knee-*

*land v. Lawrence*, 140 U. S. 209, 212, 35 L. Ed. 492; *Goodman v. Simonds*, 20 How. 343, 15 L. Ed. 934. See, also, *Manufacturing Co. v. Bradley*, 105 U. S. 175, 26 L. Ed. 1034; *Superior City v. Ripley*, 138 U. S. 93, 97, 34 L. Ed. 914.

**Corporate coupon bonds**, of the ordinary kind, payable to bearer, pass by delivery. *Murray v. Lardner*, 2 Wall. 110, 19 L. Ed. 857; *Goodman v. Simonds*, 20 How. 343, 15 L. Ed. 934.

"Bonds for the payment of money, with interest warrants attached, are now universally classed with bills of exchange and promissory notes as negotiable instruments." *Smith v. Sac County*, 11 Wall. 139, 150, 20 L. Ed. 102; *Aurora City v. West*, 7 Wall. 82, 105, 19 L. Ed. 42. See to the same effect, *Thomson v. Lee County*, 3 Wall. 327, 18 L. Ed. 177; *Meyer v. Muscatine*, 1 Wall. 384, 17 L. Ed. 564; *Mercer County v. Hackett*, 1 Wall. 83, 17 L. Ed. 548; *Goodman v. Simonds*, 20 How. 343, 364, 15 L. Ed. 934.

They are everywhere encouraged as a safe and convenient medium for the settlement of balances among mercantile men, and any course of judicial decision calculated to withdraw such instruments from the operation of the general rules of commercial law usually applied in controversies respecting the title to the same, or to restrain or impede their free and unembarrassed circulation, would be contrary to the soundest principles of public policy. *Smith v. Sac County*, 11 Wall. 139, 150, 20 L. Ed. 102; *Goodman v. Simonds*, 20 How. 343, 364, 15 L. Ed. 934; *Railway Co. v. Sprague*, 103 U. S. 756, 763, 26 L. Ed. 554. See ante, "Definition, Nature and Purpose," I.

are as effectually shielded from the defense of prior equities between the original parties, if unknown to them at the time of the transfer, as the holders of any other class of negotiable instruments.<sup>14</sup>

**By universal usage** and consent they have all the qualities and incidents of commercial paper.<sup>15</sup>

**Good Faith of Purchaser.**—A party who takes negotiable coupon bonds before due for a valuable consideration, without knowledge of any defect of title, in good faith, can hold them against all the world.<sup>16</sup>

**A suspicion that there is a defect of title** in the holder, or a knowledge of circumstances that might excite such suspicion in the mind of a cautious person, or even gross negligence at the time, will not defeat the title of the purchaser.<sup>17</sup> That result can be produced only by bad faith, which implies guilty knowledge or willful ignorance.<sup>18</sup>

14. *Kneeland v. Lawrence*, 140 U. S. 209, 210, 35 L. Ed. 492; *Murray v. Lardner*, 2 Wall. 110, 19 L. Ed. 857; *Smith v. Sac County*, 11 Wall. 139, 150, 20 L. Ed. 102, opinion of Clifford, J., dissenting.

Such instruments are protected in the possession of an indorsee, not merely because they are negotiable, but also because of their general convenience in mercantile affairs. *Smith v. Sac County*, 11 Wall. 139, 20 L. Ed. 102; *Railway Co. v. Sprague*, 103 U. S. 756, 763, 26 L. Ed. 554.

**Certificates of indebtedness to a railroad company or bearer**, each for \$1,000, lawful money of the United States, payable on a day certain, with interest, etc., payable annually on the first day, etc., at a specified banking house, on the presentation and surrender of the respective interest coupons thereto annexed, are negotiable and a bona fide holder is entitled to the rights of a holder of negotiable paper taken in the ordinary course of business before maturity. *Humboldt Township v. Long*, 92 U. S. 642, 23 L. Ed. 752.

15. **Universal usage.**—*Smith v. Sac County*, 11 Wall. 139, 150, 20 L. Ed. 102; *Aurora City v. West*, 7 Wall. 82, 105, 19 L. Ed. 42; *Thomson v. Lee County*, 3 Wall. 327, 18 L. Ed. 177; *Meyer v. Muscatine*, 1 Wall. 384, 17 L. Ed. 564; *Mercer County v. Hackett*, 1 Wall. 83, 17 L. Ed. 548; *Goodman v. Simonds*, 20 How. 343, 364, 15 L. Ed. 934.

16. **Good faith.**—*Hotchkiss v. National Banks*, 21 Wall. 354, 359, 22 L. Ed. 645; *Murray v. Lardner*, 2 Wall. 110, 19 L. Ed. 857; *Railway Co. v. Sprague*, 103 U. S. 756, 763, 26 L. Ed. 554; *Humboldt Township v. Long*, 92 U. S. 642, 23 L. Ed. 752; *Cromwell v. County of Sac*, 96 U. S. 51, 24 L. Ed. 681.

17. **Suspicion of defect of title.**—*Hotchkiss v. National Banks*, 21 Wall. 354, 359, 22 L. Ed. 645; *Murray v. Lardner*, 2 Wall. 110, 19 L. Ed. 857; *Railway Co. v. Sprague*, 103 U. S. 756, 763, 26 L. Ed. 554; *Cromwell v. County of Sac*, 96 U. S. 51, 24 L. Ed. 681. See *Parsons v. Jackson*, 99 U. S. 434, 440, 25 L. Ed. 457.

**Absence of certificate of preferred stock attached to bond.**—*In May*, 1863,

the Milwaukee and St. Paul Railway Company issued coupon bonds, by each of which the company acknowledged its indebtedness to certain persons named, or bearer, in the sum of \$1,000, and promised to pay the amount to the bearer on the 1st day of January, 1893, at the office of the company in the city of New York, with semi-annual interest at the rate of seven per cent. per annum, on the presentation and surrender of the coupons annexed as they severally became due. Immediately following this acknowledgment of indebtedness and promise of payment, there was in each of the instruments a further agreement of the company to make what was termed "the scrip preferred stock," attached to the bond, full-paid stock at any time within ten days after any dividend should have been declared and become payable on such preferred stock, upon surrender, in the city of New York, of the bond and the unmatured interest warrants. To each of the bonds there was originally attached by a pin the certificate of scrip preferred stock thus referred to, which stated that the complainant was entitled to ten shares of the capital stock of the company, designated as "scrip preferred stock;" and that upon the surrender of the certificate and accompanying bond, and all unmatured coupons thereon, as provided in the agreement, he should be entitled to receive ten shares of full-paid preferred stock. Three of these bonds with certificates attached were stolen from the plaintiff, and were taken by the defendants as collateral security for notes discounted by them, without actual notice of any defect in the title of the holder; but the certificates were at the time detached from the bonds: Held, the absence of the certificates originally attached to the bonds, when the latter were taken by the defendants, was not of itself a circumstance sufficient to put the defendants upon inquiry as to the title of the holder. *Hotchkiss v. National Banks*, 21 Wall. 354, 22 L. Ed. 645.

18. *Hotchkiss v. National Banks*, 21 Wall. 354, 22 L. Ed. 645; *Murray v. Lardner*, 2 Wall. 110, 19 L. Ed. 857; *Railway Co. v. Sprague*, 103 U. S. 756, 763, 26 L.



**Coupon bonds containing an agreement independent of the pecuniary obligation,** are not thereby rendered nonnegotiable.<sup>19</sup>

**The mere presence of overdue and unpaid interest coupons** upon negotiable bonds purchased before maturity of the principal does not render the

Ed. 554; *Cromwell v. County of Sac*, 96 U. S. 51, 24 L. Ed. 681; *Parsons v. Jackson*, 99 U. S. 434, 25 L. Ed. 457; *Lytle v. Lansing*, 147 U. S. 59, 37 L. Ed. 78.

**Uncertainty as to amount payable.**—Certain bonds of a railroad company in Louisiana, promising to pay to the bearer either £225 sterling in London, or \$1,000 in New York or in New Orleans, declared that the president of the company was authorized to fix by his indorsement the place of payment. On their back were printed the following words: "I hereby agree that the within bond and the interest coupons thereto attached shall be payable in —." The blank for the place of payment was not filled. The bonds were never issued by the company, but were seized and carried off during the late war. They, and the past due coupons thereto attached, were purchased in New York for a very small consideration. Held: 1. That, in the absence of the required indorsement, the uncertainty of the amount payable is a defect which deprives the bonds of the character of negotiability. 2. That the purchaser was affected with notice of their invalidity, and does not sustain the position of a bona fide holder without notice. *Parsons v. Jackson*, 99 U. S. 434, 25 L. Ed. 457, distinguished in *Railway Co. v. Sprague*, 103 U. S. 756, 762, 26 L. Ed. 554.

"The uncertainty of the amount payable, in the absence of the required indorsement, is of itself a defect which deprives these instruments of the character of negotiability. As they stand, they amount to a promise to pay so many pounds, or so many dollars—without saying which. One of the first rules in regard to negotiable paper is that the amount to be paid must be certain, and not be made to depend on a contingency. 1 Daniel, Neg. Inst., § 53. And although it is held that *id certum est quod certum reddi potest*—a maxim which would have given the bonds negotiability in this instance, had the requisite indorsement been made—yet, without such indorsement, the uncertainty remains, and operates as an intrinsic defect in the security itself." *Parsons v. Jackson*, 99 U. S. 434, 25 L. Ed. 457.

**Imperfection as to the place of payment** is strong evidence of want of genuineness, where the bonds expressly declare that they are to be payable at the place which should be determined by the president's indorsement, and that the sum payable should depend on that indorsement; and yet no indorsement appears thereon. The court said: "We do not say that this defect would have invalidated the bonds if they had in fact been

issued by the company, and the amount had been certain; but it was a pregnant warning to the purchasers to inquire whether they had been issued or not. These facts, taken in connection with the price at which the bonds were offered, were abundantly sufficient to affect the purchasers with notice of any invalidity in their issue." *Parsons v. Jackson*, 99 U. S. 434, 25 L. Ed. 457. See *Railroad Co. v. Sprague*, 103 U. S. 756, 762, 26 L. Ed. 554.

**19. Effect of independent agreement.**—*Hotchkiss v. National Banks*, 21 Wall. 354, 22 L. Ed. 645.

**Agreement respecting scrip preferred stock.**—In May, 1863, the Milwaukee and St. Paul Railway Company issued coupon bonds, by each of which the company acknowledged its indebtedness to certain persons named, or bearer, in the sum of \$1,000, and promised to pay the amount to bearer on the 1st day of January, 1893, at the office of the company in the city of New York, with semi-annual interest at the rate of seven per cent. per annum, on the presentation and surrender of the coupons annexed as they severally became due. Immediately following this acknowledgment of indebtedness and promise of payment, there was in each of the instruments a further agreement of the company to make what was termed "the scrip preferred stock," attached to the bond, full-paid stock at any time within ten days after any dividend should have been declared and become payable on such preferred stock, upon surrender, in the city of New York, of the bond and the unmatured interest warrants. To each of the bonds there was originally attached by a pin the certificate of scrip preferred stock thus referred to, which stated that the complainant was entitled to ten shares of the capital stock of the company, designated as "scrip preferred stock;" and that upon the surrender of the certificate and accompanying bond, and all unmatured coupons thereon, as provided in the agreement, he should be entitled to receive ten shares of full-paid preferred stock. Three of these bonds with certificates attached were stolen from the plaintiff, and were taken by the defendants as collateral security for notes discounted by them, without actual notice of any defect in the title of the holder; but the certificates were at the time detached from the bonds: Held, that the bonds were negotiable instruments notwithstanding the agreement respecting the scrip preferred stock contained in them, that agreement being independent of the pecuniary obligation of the company. *Hotchkiss v. National Banks*, 21 Wall. 354, 22 L. Ed. 645.

bonds to which they are attached and the subsequently maturing coupons dishonored paper, so as to subject them, in the hands of a purchaser for value, to defenses good against the original holder.<sup>20</sup>

**Purchasers of coupon bonds from purchasers, who were bona fide purchasers,** occupy the position of bona fide purchasers for value.<sup>21</sup>

**Notice of Invalidity Contained in Recitals.**—The holder of coupons attached to bonds is not entitled to recover thereon, when sufficient notice of the objection to the validity of the bonds is contained in their recitals.<sup>22</sup>

**Lis Pendens.**—See the title *LIS PENDENS*.

**Bonds Issued without Authority by Municipality or County.**—See the title *MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES*.

**Want of Title in Seller.**—The purchaser of negotiable coupon bonds, before due, without notice and in good faith, is unaffected by want of title in the seller.<sup>23</sup>

**20. Overdue coupons attached.**—*Railway Co. v. Sprague*, 103 U. S. 756, 762, 26 L. Ed. 554, qualifying *Parsons v. Jackson*, 99 U. S. 434, 25 L. Ed. 457, and approving *Cromwell v. County of Sac*, 96 U. S. 51, 24 L. Ed. 681. See, to the same effect, *Morgan v. United States*, 113 U. S. 476, 502, 28 L. Ed. 1044.

"The nonpayment of an instalment of interest when due could not affect the negotiability of the bonds or of the subsequent coupons. Until their maturity, a purchaser for value, without notice of their invalidity as between antecedent parties, would take them discharged from all infirmities." *Cromwell v. County of Sac*, 96 U. S. 51, 24 L. Ed. 681; *Railway Co. v. Sprague*, 103 U. S. 756, 26 L. Ed. 554, qualifying *Parsons v. Jackson*, 99 U. S. 434, 25 L. Ed. 457.

This was a slight circumstance, and, taken in connection with the fact that previous coupons had been paid, was entirely insufficient to excite suspicion even of any illegality or irregularity in the issue of the bonds. *Cromwell v. County of Sac*, 96 U. S. 51, 24 L. Ed. 681; *Railway Co. v. Sprague*, 103 U. S. 756, 26 L. Ed. 554, qualifying *Parsons v. Jackson*, 99 U. S. 434, 25 L. Ed. 457.

"To hold otherwise," said this court in *Cromwell v. County of Sac*, 96 U. S. 51, 58, 24 L. Ed. 681, "would throw discredit upon a large class of securities issued by municipal and private corporations, having years to run, with interest payable annually or semi-annually." And the doctrine was reaffirmed in *Railway Co. v. Sprague*, 103 U. S. 756, 26 L. Ed. 554." *Morgan v. United States*, 113 U. S. 476, 502, 28 L. Ed. 1044.

"In *Parsons v. Jackson*, 99 U. S. 434, 25 L. Ed. 457, the bonds of the railroad company which were the subject of controversy had never been issued, but had been stolen from its office. They were made payable either in New Orleans, New York, or London, as the president of the company might by indorsement on the bonds determine. They did not contain his indorsement designating the place of payment; they were offered in the New York market and sold for a very small

consideration. Coupons for several years, due and unpaid, were attached to them. The court held that all these circumstances affected the purchaser with notice of the invalidity of the bonds. It is true the court said that the presence of the past-due and unpaid coupons was of itself an evidence of dishonor sufficient to put the purchaser on inquiry. But the case did not turn on this circumstance alone. There were other significant indications of the invalidity of the bonds, and the opinion must be restricted to the case before the court." *Railway Co. v. Sprague*, 103 U. S. 756, 762, 26 L. Ed. 554.

**Municipal bond.**—*Cromwell v. County of Sac*, 96 U. S. 51, 24 L. Ed. 681.

**Bonds of railroad company.**—*Railway Co. v. Sprague*, 103 U. S. 756, 26 L. Ed. 554.

**United States bonds.**—*Texas v. Hardenberg*, 10 Wall. 68, 19 L. Ed. 839. See, also, *Morgan v. United States*, 113 U. S. 476, 490, 28 L. Ed. 1044; *National Bank v. Texas*, 20 Wall. 72, 83, 22 L. Ed. 295; *Huntington v. Texas*, 16 Wall. 402, 412, 21 L. Ed. 316.

**21. Purchasers from purchasers for value.**—*Commissioners v. Bolles*, 94 U. S. 104, 24 L. Ed. 46; *Scotland County v. Hill*, 132 U. S. 107, 110, 33 L. Ed. 261; *Porter v. Pittsburg Bessemer Steel Co.*, 122 U. S. 267, 30 L. Ed. 1210; *Gunnison County Comm'rs v. Rollins*, 173 U. S. 255, 43 L. Ed. 689; *Montclair v. Ramsdell*, 107 U. S. 147, 27 L. Ed. 431; *Cromwell v. County of Sac*, 96 U. S. 51, 55, 24 L. Ed. 681; *Lytle v. Lansing*, 147 U. S. 59, 37 L. Ed. 78, citing *Stewart v. Lansing*, 104 U. S. 505, 26 L. Ed. 866.

**22. Notice of invalidity contained in recitals.**—*Harshman v. Bates County*, 92 U. S. 569, 23 L. Ed. 747.

Where, upon their face, the coupons refer to the bonds to which they were attached, and purport to be for the semi-annual interest accruing thereon, the purchaser of them is charged with notice of all which the bonds contain. *McClure v. Township of Oxford*, 94 U. S. 429, 24 L. Ed. 129.

**23. Want of title in seller.**—*Morgan v. United States*, 113 U. S. 476, 491, 28 L.



2. **OVERDUE BONDS.**—Purchasers of overdue or matured coupon bonds take nothing but the actual right and title of their vendor.<sup>24</sup>

**B. Detached Coupons.**—1. **IN GENERAL.**—Coupons containing negotiable words, when severed from the bonds to which they were attached, cease to be incidents of the bonds, and become in fact independent claims.<sup>25</sup> Each matured coupon upon a negotiable bond is a separable promise, distinct from the promises to pay the bond or other coupons; when detached from the bonds they are separate obligations,<sup>25a</sup> capable of separate ownership,<sup>26</sup> transferrable by delivery,<sup>27</sup>

Ed. 1044; *Murray v. Lardner*, 2 Wall. 110, 118, 19 L. Ed. 857; *Texas v. White*, 7 Wall. 700, 19 L. Ed. 227; *Smith v. Sac County*, 11 Wall. 139, 20 L. Ed. 102, opinion of Clifford, J., dissenting; *Goodman v. Simonds*, 20 How. 343, 15 L. Ed. 934.

**Corporate coupon bonds.**—A purchaser of corporate coupon bonds, in good faith, is unaffected by want of title in the vendor. *Murray v. Lardner*, 2 Wall. 110, 19 L. Ed. 857; *Goodman v. Simonds*, 20 How. 343, 15 L. Ed. 934.

**Custodian clothed with apparent power of disposition.**—Where coupon bonds, complete in form and transmissible by delivery, are placed by the maker or owner in the custody of one who is thereby clothed with an apparent power of disposition, and the custodian avails himself of the opportunity thus afforded him to negotiate them to an innocent party, the title of the holder is not to be tested by principles applicable to stolen securities, but by principles properly applicable to the transaction as it actually occurred. That the title to such securities may pass by virtue of such a transaction is clear upon principle and sustained by authority. *Pittsburg, etc., R. Co. v. Long Island Loan, etc., Co.*, 172 U. S. 493, 511, 43 L. Ed. 528, citing *Railway Co. v. Sprague*, 103 U. S. 756, 26 L. Ed. 554. See, also, the title **ESTOPPEL**.

24. **Overdue bonds.**—*Texas v. White*, 7 Wall. 700, 19 L. Ed. 227; *Morgan v. United States*, 113 U. S. 476, 491, 28 L. Ed. 1044.

This rule applies to the coupon bonds of the United States. *Morgan v. United States*, 113 U. S. 476, 491, 28 L. Ed. 1044.

25. **Independent claims.**—*Hartman v. Greenhow*, 102 U. S. 672, 684, 26 L. Ed. 271; *Walnut v. Wade*, 103 U. S. 683, 26 L. Ed. 526; *Clark v. Iowa City*, 20 Wall. 583, 22 L. Ed. 427; *Ohio v. Frank*, 103 U. S. 697, 26 L. Ed. 531.

25a. **Separate cause of action.**—*Edwards v. Bates County*, 163 U. S. 269, 272, 41 L. Ed. 155; *Nesbit v. Riverside Independent District*, 144 U. S. 610, 36 L. Ed. 562; *New York, etc., R. Co. v. Pennsylvania*, 153 U. S. 628, 645, 38 L. Ed. 846; *Koshkonong v. Burton*, 104 U. S. 668, 26 L. Ed. 886; *Hartman v. Greenhow*, 102 U. S. 672, 684, 26 L. Ed. 271; *Clark v. Iowa City*, 20 Wall. 583, 22 L. Ed. 427.

"It may be detached from the bond and sold by itself. Indeed, the title to several matured coupons of the same bond may be in as many different persons, and upon each a distinct and separate action be

maintained. So, while the promises of the bond and of the coupons in the first instance are upon the same paper, and the coupons are for interest due upon the bond, yet the promise to pay the coupons is as distinct from that to pay the bond, as though the two promises were placed in different instruments, upon different paper." *Nesbit v. Riverside Independent District*, 144 U. S. 610, 619, 36 L. Ed. 562; *Edwards v. Bates County*, 163 U. S. 269, 272, 41 L. Ed. 155.

It is an immaterial circumstance that the coupons when purchased were detached from the bonds. *Thompson v. Perrine*, 106 U. S. 589, 27 L. Ed. 298.

26. **Separate ownership.**—*New York, etc., R. Co. v. Pennsylvania*, 153 U. S. 628, 645, 38 L. Ed. 846; *Walnut v. Wade*, 103 U. S. 683, 26 L. Ed. 526; *Ohio v. Frank*, 103 U. S. 697, 26 L. Ed. 531; *Koshkonong v. Burton*, 104 U. S. 668, 26 L. Ed. 886; *Hartman v. Greenhow*, 102 U. S. 672, 684, 26 L. Ed. 271; *Clark v. Iowa City*, 20 Wall. 583, 22 L. Ed. 427; *Stewart v. Lansing*, 104 U. S. 505, 510, 26 L. Ed. 866; *Ketchum v. Duncan*, 96 U. S. 659, 24 L. Ed. 868.

27. **Pass by delivery.**—*New York, etc., R. Co. v. Pennsylvania*, 153 U. S. 628, 645, 38 L. Ed. 846; *Koshkonong v. Burton*, 104 U. S. 668, 26 L. Ed. 886; *Walnut v. Wade*, 103 U. S. 683, 26 L. Ed. 526; *Hartman v. Greenhow*, 102 U. S. 672, 684, 26 L. Ed. 271; *Clark v. Iowa City*, 20 Wall. 583, 22 L. Ed. 427; *Ohio v. Frank*, 103 U. S. 697, 26 L. Ed. 531; *Ketchum v. Duncan*, 96 U. S. 659, 24 L. Ed. 868; *Cromwell v. County of Sac*, 94 U. S. 351, 362, 24 L. Ed. 195; *Stewart v. Lansing*, 104 U. S. 505, 26 L. Ed. 866.

**As payment or extinguishment.**—A transfer of possession is presumptively a transfer of title and not an extinguishment or payment of the coupon. The question, as between payment and purchase, is one of fact rather than of law to be settled by the evidence, largely presumptive, generally, in the case. It is a question of intention of the parties. *Wood v. Guarantee Trust, etc., Co.*, 128 U. S. 416, 424, 32 L. Ed. 472; *Ketchum v. Duncan*, 96 U. S. 659, 24 L. Ed. 868.

"Interest coupons are instruments of a peculiar character. The title to them passes from hand to hand by mere delivery. A transfer of possession is presumptively a transfer of title. And especially is this true when the transfer is made to the one who is not a debtor, to one who is under no obligation to receive them or to pay them. A holder is not



and possessing all the essential attributes of commercial paper.<sup>28</sup>

**Must Be Payable Unconditionally.**—To be negotiable coupons must be payable unconditionally and not out of a particular fund.<sup>29</sup>

If for any cause the bonds are canceled or paid before maturity, the coupons detached therefrom do not lose their negotiable character.<sup>30</sup>

2. RIGHTS OF HOLDER—*a. In General*—Holders of detached interest coupons if the same are indorsed in blank or are made payable to bearer, stand upon the same footing as the holders of negotiable bills of exchange or promissory notes, and are as effectually shielded from the defense of prior equities between the original parties to the instrument, if unknown to them at the time of the

warranted to believe that such a person intended to extinguish the coupons when he hands over the sum called for by them and takes them into his possession. It is not in accordance with common experience for one man to pay the debt of another, without receiving any benefit from his act." *Ketchum v. Duncan*, 96 U. S. 659, 662, 24 L. Ed. 868; *Wood v. Guarantee Trust, etc., Co.*, 128 U. S. 416, 423, 32 L. Ed. 472.

"It is within the common knowledge that interest coupons, alike those that are not due and those that are due, are passed from hand to hand; the receiver paying the amount they call for, without any intention on his part to extinguish them, and without any belief in the other party that they are extinguished by the transaction. In such a case, the holder intends to transfer his title, not to extinguish the debt." *Ketchum v. Duncan*, 96 U. S. 659, 663, 24 L. Ed. 868; *Wood v. Guarantee Trust, etc., Co.*, 128 U. S. 416, 423, 32 L. Ed. 472.

"In multitudes of cases, coupons are transferred by persons who are not the owners of the bonds from which they have been detached. To hold that in all these cases the coupons are paid and extinguished, and not transferred or assigned, unless there was something more to show an assent of the person parting with the possession that they should remain alive, and be available in the hands of the person to whom they were delivered, would, we think, be inconsistent with the common understanding of business men." *Ketchum v. Duncan*, 96 U. S. 659, 663, 24 L. Ed. 868; *Wood v. Guarantee Trust, etc., Co.*, 128 U. S. 416, 423, 32 L. Ed. 472.

Where a sale of interest coupons, compared with payment, is prejudicial to the holder's interest, by continuing the burden of the coupons upon the common security, and lessening its value in reference to the principal debt, the intent to sell should be clearly proved. But the intent to sell, or the assent of the former owner to a sale, need not have been expressly given. It may be inferred from the circumstances of the transaction. It often is. *Ketchum v. Duncan*, 96 U. S. 659, 662, 24 L. Ed. 868; *Wood v. Guarantee Trust, etc., Co.*, 128 U. S. 416, 423, 32 L. Ed. 472.

A third person with his own money took up maturing interest coupons on the

bonds of a corporation, without knowledge of the holders. It was held that it is a question of fact rather than of law to be settled by the evidence, whether a payment, or a purchase which leaves the coupons outstanding, was intended. *Wood v. Guarantee Trust, etc., Co.*, 128 U. S. 416, 32 L. Ed. 472.

**28. Commercial paper.**—*New York, etc., R. Co. v. Pennsylvania*, 153 U. S. 628, 645, 38 L. Ed. 846; *Hartman v. Greenhow*, 102 U. S. 672, 684, 26 L. Ed. 271; *Clark v. Iowa City*, 20 Wall. 583, 22 L. Ed. 427; *Thomson v. Lee County*, 3 Wall. 327, 18 L. Ed. 177; *Aurora City v. West*, 7 Wall. 82, 105, 19 L. Ed. 42; *Mercer County v. Hackett*, 1 Wall. 83, 17 L. Ed. 548; *Lexington v. Butler*, 14 Wall. 282, 20 L. Ed. 809; *Queensbury v. Culver*, 19 Wall. 83, 22 L. Ed. 100; *Knox County v. Aspinwall*, 21 How. 539, 16 L. Ed. 208; *Ketchum v. Duncan*, 96 U. S. 659, 24 L. Ed. 868; *Roberts v. Bolles*, 101 U. S. 119, 122, 25 L. Ed. 880.

Coupons being written contracts for the payment of a definite sum of money on a given day, and, being drawn and executed in a given mode, for the very purpose that they may be separated from the bonds, it is held that they are negotiable. *Cromwell v. County of Sac*, 94 U. S. 351, 362, 24 L. Ed. 195; *Knox County v. Aspinwall*, 21 How. 539, 544, 16 L. Ed. 208; *White v. The Vermont, etc., R. Co.*, 21 How. 575, 16 L. Ed. 221; *Aurora City v. West*, 7 Wall. 82, 105, 19 L. Ed. 42; *Murray v. Lardner*, 2 Wall. 110, 121, 19 L. Ed. 857; *Edwards v. Bates County*, 163 U. S. 269, 272, 41 L. Ed. 155.

**29. Must be payable unconditionally.**—*United States Mortgage Co. v. Sperry*, 138 U. S. 313, 34 L. Ed. 969.

**An interest warrant signed by a guardian**, who contracted for exemption from personal liability for the principal debt or the interest thereon, and which is practically payable out of a particular fund, is not a security of the class of overdue coupons, so drawn as to be negotiable according to general commercial law. *United States Mortgage Co. v. Sperry*, 138 U. S. 313, 34 L. Ed. 969.

**30. Bonds canceled or paid before maturity.**—*Clark v. Iowa City*, 20 Wall. 583, 22 L. Ed. 427; *Hartman v. Greenhow*, 102 U. S. 672, 684, 26 L. Ed. 271; *Walnut v. Wade*, 103 U. S. 683, 26 L. Ed. 526; *Ohio v. Frank*, 103 U. S. 697, 26 L. Ed. 531.

transfer, as the holders of any other class of negotiable instruments.<sup>31</sup> They are subject to the same commercial rules and regulations, so far as respects the title and rights of the holder, as negotiable bills of exchange and promissory notes.<sup>32</sup>

**Overdue coupons** detached from a bond which has not matured are negotiable by the law merchant.<sup>33</sup>

**A purchaser of dishonored coupons** has no greater rights than the holder from whom he obtained them.<sup>34</sup>

b. *Transfer as Payment or Extinguishment*.—See ante, "In General," III, A, 1.

c. *Transfer as Guaranty of Payment*.—A mere transfer or assignment of interest coupons does not import a guaranty of payment. At most, it warrants title, not solvency of the debtor, or collectibility.<sup>35</sup>

d. *Lis Pendens*.—See the title LIS PENDENS.

e. *Interest*.—See the titles CONFLICT OF LAWS, vol. 3, p. 1020; INTEREST.

f. *Priorities*.—Overdue coupons cut from bonds which are afterwards sold to a bona fide purchaser, such coupons remaining the property of the company issuing bonds, are not entitled to any preference over, or of even co-equal rights with the holder of the bonds and subsequently maturing coupons.<sup>36</sup>

**Bond and Coupons Secured by Mortgage**.—See post, "Bonds and Coupons Secured by Mortgage," IV.

#### IV. Bonds and Coupons Secured by Mortgage.

Where a mortgage was given as a security for the principal of the bonds as well as the interest with no priority to either, detached interest coupons have no equity superior to that of the bonds from which they were taken, or the subsequently maturing coupons. Such mortgage places all bondholders and coupon holders on the same level.<sup>37</sup>

**31. Rights of holder**.—*Lexington v. Butler*, 14 Wall. 282, 283, 295, 296, 20 L. Ed. 809, citing *Moran v. Commissioners*, 2 Black 722, 17 L. Ed. 342, and *Mercer County v. Hackett*, 1 Wall. 83, 17 L. Ed. 548; *Smith v. Sac County*, 11 Wall. 139, 150, 20 L. Ed. 102, opinion of Clifford, J., dissenting.

**Coupons cut from state bonds**.—The rule applies to coupons detached from state bonds. *Hartman v. Greenhow*, 102 U. S. 672, 684, 26 L. Ed. 271.

**Coupons cut from municipal bonds**.—This rule applies to coupons detached from municipal bonds. *Smith v. Sac County*, 11 Wall. 139, 149, 150, 20 L. Ed. 102, opinion of Clifford, J., dissenting, citing *White v. The Vermont, etc., R. Co.*, 21 How. 575, 16 L. Ed. 221; *Murray v. Lardner*, 2 Wall. 110, 19 L. Ed. 857; *Moran v. Commissioners*, 2 Black 722, 17 L. Ed. 342; *Mercer County v. Hackett*, 1 Wall. 83, 17 L. Ed. 548; *Gelpcke v. Dubuque*, 1 Wall. 175, 176, 17 L. Ed. 520; *Meyer v. Muscatine*, 1 Wall. 384, 385, 17 L. Ed. 564.

**32. Smith v. Sac County**, 11 Wall. 139, 150, 20 L. Ed. 102, opinion of Clifford, J., dissenting.

**33. Overdue coupons**.—*Thompson v. Perrine*, 106 U. S. 589, 27 L. Ed. 298.

**34. Dishonored coupons**.—*Wood v. Guarantee Trust, etc., Co.*, 128 U. S. 416, 32 L. Ed. 472.

Where coupons long after they were dishonored, come into the hands of an

assignee, any defense existing against then in the hands of his assignor is available against the assignee. Payment is such a defense, and that being a question of fact largely, and the master and the lower court having sustained the defense of payment, this finding will not be disturbed. *Wood v. Guarantee Trust, etc., Co.*, 128 U. S. 416, 421, 32 L. Ed. 472.

**35. As guaranty of payment**.—*Ketchum v. Duncan*, 96 U. S. 659, 671, 24 L. Ed. 868.

**36. Priorities**.—*Wood v. Guarantee Trust, etc., Co.*, 128 U. S. 416, 32 L. Ed. 472.

The assignor of the overdue coupons was engaged in floating these bonds. They were not, as the testimony and the history of the case shows, good bonds. He was very careful to prevent anything from transpiring that would injure their credit. He cut off the coupons that were due and unpaid, so long as the bonds remained in his possession, and put up some money to redeem coupons which fell due on bonds that had been sold, so long as he was still engaged in selling other bonds. It would be inequitable to allow him to bring forward these coupons as the basis of any preference over, or of even coequal rights with, those to whom he sold his bonds; and the holder having taken these coupons when overdue, had no greater rights than he had in this respect. *Wood v. Guarantee Trust, etc., Co.*, 128 U. S. 416, 425, 32 L. Ed. 472.

**37. Bond and coupons secured by mort-**

In case of sale of property mortgaged to secure the payment of bonds and the coupons thereto attached, on account of default of payment of interest or principal, all the bonds of the same class and the interest accrued thereon, are entitled to a pro rata of the proceeds.<sup>38</sup>

## V. Collection or Enforcement.

**A. Separate Cause of Action.**—Each matured coupon upon a negotiable bond gives rise to a separate cause of action.<sup>39</sup> Thus suit may be sustained upon matured coupons in advance of or without reference to the maturity of the bonds to which they were attached.<sup>40</sup> And each detached coupon is a complete instrument, capable of sustaining a separate action, in the proper forum, without reference to or independently of the ownership of the bonds to which they were attached.<sup>41</sup>

**gage.**—*Ketchum v. Duncan*, 96 U. S. 659, 670, 671, 24 L. Ed. 868.

"The mortgage was given as a security for the principal of the bonds as well as the interest, with no priority to either. The coupons are mere representatives of the claim for interest. The obligation of the debtor evidenced by them cannot be higher, nor entitled to greater privileges, than it would be had the bonds, in their body, undertaken the payment of interest. Cutting them from the several bonds of which they were a part, and transferring them to other holders, can give them no increased equities, so far as we can perceive. Had they been assigned with a guaranty of payment, it may well be they would be entitled to payment before the assignors could claim the fund. Then they might have an equity to prior payment growing out of the guaranty. But there was no such undertaking of the assignors in this case." *Ketchum v. Duncan*, 96 U. S. 659, 670, 24 L. Ed. 868.

"A mere transfer or assignment does not import a guaranty. At most, it warrants title, not solvency of the debtor, or collectibility of the chose assigned. A transfer or assignment of a claim, or part of a claim, secured by a mortgage given to protect that claim, in common with other claims contemporaneously originating, would seem to refer the transferee to the common security, and measure his rights and equities by that. It is in vain to urge that as between the person transferring and the transferee there is an equity, or even moral obligation, if it was the intention of the parties to participate, 'pari passu,' in the proceeds of the property pledged as a security. And such an intention may well be inferred from an assignment or transfer without guaranty. The meaning of such a transfer without more is that the transferee takes precisely the rights of the person from whom he obtains his title, and no more. But certainly such a transfer cannot have the effect of giving to the transferee greater rights than those created by the mortgage. *Dunham v. Cincinnati, etc., R. Co.*, 1 Wall. 254, 17 L. Ed. 584." *Ketchum v. Duncan*, 96 U. S. 659, 671, 24 L. Ed. 868.

**38.** *Dunham v. Cincinnati, etc., R. Co.*, 1 Wall. 254, 17 L. Ed. 584.

Where a mortgage given by a railway company to secure a number of bonds provides that in case of a sale or other proceedings to coerce payment of interest or principal, all bonds and the interest accrued shall be a lien in common therewith, and the interest accrued thereon shall be equally due and payable, and entitled to a pro rata dividend of the proceeds of sale—with this superadded declaration, however, to wit, "but in no case shall the principal of any bond be considered as due until twenty years from the date thereof" (this being the term which the bonds on their faces had to run)—it is error, after a sale, under the mortgage, within the twenty years, to give precedence to the overdue interest warrants. The superadded clause will be interpreted only as excluding an inference that a bondholder might bring an action for the principal before it became due by its terms. *Dunham v. Cincinnati, etc., R. Co.*, 1 Wall. 254, 17 L. Ed. 584.

**39. Separate cause of action.**—*Edward v. Bates County*, 163 U. S. 269, 272, 41 L. Ed. 155; *Nesbit v. Riverside Independent District*, 144 U. S. 610, 36 L. Ed. 562.

Such instruments are so far distinct contracts for the payment of money that when they become due they may be sued on separately from the bond. *Brine v. Insurance Co.*, 96 U. S. 627, 631, 24 L. Ed. 858; *Cromwell v. County of Sac*, 96 U. S. 51, 24 L. Ed. 681.

**40. With respect to maturity of bonds.**—*Edwards v. Bates County*, 163 U. S. 269, 272, 41 L. Ed. 155; *Amy v. Dubuque*, 98 U. S. 470, 473, 25 L. Ed. 228; *Waite v. Santa Cruz*, 184 U. S. 302, 328, 46 L. Ed. 552; *Koshkonong v. Burton*, 104 U. S. 668, 26 L. Ed. 886; *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. Ed. 520; *The City v. Lamson*, 9 Wall. 477, 19 L. Ed. 725; *Lexington v. Butler*, 14 Wall. 282, 20 L. Ed. 809; *Genoa v. Woodruff*, 92 U. S. 502, 23 L. Ed. 586; *Elgin v. Marshall*, 106 U. S. 578, 27 L. Ed. 249; *Clark v. Iowa City*, 20 Wall. 583, 22 L. Ed. 427; *Knox County v. Aspinwall*, 21 How. 539, 16 L. Ed. 208.

**41. Respecting ownership of bonds.**—*Waite v. Santa Cruz*, 184 U. S. 302, 328, 46 L. Ed. 552; *Knox County v. Aspinwall*,



**Production of Bonds.**—Suit may be maintained upon unpaid negotiable coupons or interest warrants without the production of the bonds to which they had been attached.<sup>42</sup>

**Indorsement.**—Suit may be maintained upon such coupons although they were never indorsed.<sup>43</sup>

**If for any cause the bonds are canceled or paid before maturity,** the coupons detached therefrom do not lose their validity, nor their ability to support separate actions.<sup>44</sup>

**B. Jurisdiction.—Federal Courts.**—See the titles COURTS; MANDAMUS. **Amount in Controversy.**—See the title COURTS.

**C. Form of Remedy.—Assumpsit.**—See the title ASSUMPSIT, vol. 2, p. 656.

**Mandamus.**—See the title MANDAMUS.

**D. Limitation of Actions.**—See the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION.

**E. Presentation for Allowance and for Payment.—Presentation for Payment.**—It is not necessary to present bonds and the coupons, which have been issued by a county to the court which issued them, for allowance before bringing suit to enforce their payment.<sup>45</sup>

21 How. 539, 16 L. Ed. 208; *Amy v. Dubuque*, 98 U. S. 470, 25 L. Ed. 228; *Elgin v. Marshall*, 106 U. S. 578, 27 L. Ed. 249; *New York, etc., R. Co. v. Pennsylvania*, 153 U. S. 628, 645, 38 L. Ed. 846; *Clark v. Iowa City*, 20 Wall. 583, 22 L. Ed. 427; *Hartman v. Greenhow*, 102 U. S. 672, 684, 26 L. Ed. 271; *Koshkonong v. Burton*, 104 U. S. 668, 26 L. Ed. 886; *Thomson v. Lee County*, 3 Wall. 327, 18 L. Ed. 177.

A holder of coupons which have been cut off from the bond to which they were originally attached, may bring suit on them, if they represent interest already due, notwithstanding he be no longer holder of the bond to which they belonged, or be without interest in them. *The City v. Lamson*, 9 Wall. 477, 19 L. Ed. 725; *Thomson v. Lee County*, 3 Wall. 327, 18 L. Ed. 177.

**42. Production of bonds.**—*Knox County v. Aspinwall*, 21 How. 539, 16 L. Ed. 208; *Aurora City v. West*, 7 Wall. 82, 105, 19 L. Ed. 42; *Cromwell v. County of Sac*, 96 U. S. 51, 24 L. Ed. 681; *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. Ed. 520; *Amy v. Dubuque*, 98 U. S. 470, 25 L. Ed. 228; *Kenosha v. Lamson*, 154 U. S. 573, 19 L. Ed. 725; *Lexington v. Butler*, 14 Wall. 282, 20 L. Ed. 809; *The City v. Lamson*, 9 Wall. 477, 19 L. Ed. 725; *Walnut v. Wade*, 103 U. S. 683, 26 L. Ed. 526; *Clark v. Iowa City*, 20 Wall. 583, 22 L. Ed. 427; *Ohio v. Frank*, 103 U. S. 697, 26 L. Ed. 531; *White v. The Vermont, etc., R. Co.*, 21 How. 575, 16 L. Ed. 221; *Murray v. Lardner*, 2 Wall. 110, 121, 19 L. Ed. 857; *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. Ed. 195; *Genoa v. Woodruff*, 92 U. S. 502, 23 L. Ed. 586; *Thomson v. Lee County*, 3 Wall. 327, 18 L. Ed. 177; *Mineral Point v. Lee*, 154 U. S. 552, 18 L. Ed. 456; *Edwards v. Bates County*, 163 U. S. 269, 272, 41 L. Ed. 155.

If the holder of the coupon declares properly, he need not produce the bond. *The City v. Lamson*, 9 Wall. 477, 19 L. Ed. 725. See post, "Declaration," IV, G.

**Admission in evidence.**—Where coupons are detached from and not annexed to any bond, the fact that the absence of the bond was not accounted for is no ground of objection to the admission in evidence of the coupons sued on. *Walnut v. Wade*, 103 U. S. 683, 26 L. Ed. 526; *Ohio v. Frank*, 103 U. S. 697, 26 L. Ed. 531.

**43. Indorsement.**—*Walnut v. Wade*, 103 U. S. 683, 26 L. Ed. 526; *Ohio v. Frank*, 103 U. S. 697, 26 L. Ed. 531.

**44. Effect of cancellation or payment of bond.**—*Clark v. Iowa City*, 20 Wall. 583, 22 L. Ed. 427; *Hartman v. Greenhow*, 102 U. S. 672, 684, 26 L. Ed. 271; *Walnut v. Wade*, 103 U. S. 683, 26 L. Ed. 526; *Ohio v. Frank*, 103 U. S. 697, 26 L. Ed. 531.

**45. Presentation for payment.**—*County of Greene v. Daniel*, 102 U. S. 187, 26 L. Ed. 99; *Lincoln County v. Luning*, 133 U. S. 529, 533, 33 L. Ed. 766.

"The claim was, to all intents and purposes, audited by the court when the bonds were issued. The validity and amount of the liability were then definitely fixed, and warrants on the treasury given, payable at a future day." *County of Greene v. Daniel*, 102 U. S. 187, 194, 26 L. Ed. 99; *Lincoln County v. Luning*, 133 U. S. 529, 533, 33 L. Ed. 766.

**Alabama.**—A court commissioner in Alabama, pursuant to the act of December 31, 1868, subscribed for stock in a railroad company, and issued bonds of the county in payment therefor. Neither the bonds nor the coupons thereto attached were presented for allowance, but suit was brought to enforce their payment. It was held that the holder was not required to present them when due to that court for allowance, before commencing suit, to enforce their payment. *County of Green v. Daniel*, 102 U. S. 187, 26 L. Ed. 99.

**Nevada.**—Sections 1950 and 1964-5-6 of the general statutes of the state of Nevada, referring to claims and accounts and

**Presentation for Payment.**—The fact that interest coupons are made payable at a particular place does not make a presentation for payment at that place necessary before a suit can be maintained to collect them, or interest thereon when past due, hence it is not necessary to aver or prove a presentation of them for payment there.<sup>46</sup>

**F. Parties.**—Although a precinct is the promissor, a suit against the county on coupons cut from special bonds issued by the county for the precinct is a proper suit.<sup>47</sup>

**G. Declaration.—Recital of Bond by Way of Inducement.**—In suing on coupons, which have been cut off from the bonds to which they were originally attached, it is proper enough to recite the bonds in such general way as explains and brings into view the relation which the coupons originally held to the bonds, and in some respects still hold.<sup>48</sup>

**Filing Copies with Declaration.**—In Illinois copies of the bonds and coupons declared upon, which are filed with the declaration, constitute part of the pleadings in the case.<sup>49</sup>

**Averment That Plaintiff Is Bearer.**—In a suit upon coupons payable to bearer it is necessary to allege in the declaration that the plaintiff is the bearer or holder.<sup>50</sup>

**Presentation for Payment.**—See ante, "Presentation for Allowance and for Payment," V, E.

**H. Plea.—Sufficiency on General Demurrer.**—See the title DEMURRERS.

**Non Est Factum.**—In an action to recover on bonds and coupons, a plea of non est factum does not put in issue the fact that the plaintiff was holder or impose upon him the necessity of showing either that he, or any prior holder of the bonds, was a purchaser for value.<sup>51</sup>

**Plea Denying Execution of County Bonds.**—See the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.<sup>52</sup>

**I. Findings of Court.**—A statement in a finding of a court that the plaintiff became the holder by transfer before maturity of detached coupons, does not imply that he was a purchaser in any sense or received them on any consideration.<sup>53</sup>

requiring them to be presented to the county commissioners and county auditor for allowance and approval, have application to unliquidated claims and accounts only, and do not apply to bonds and coupons. *Lincoln County v. Luning*, 133 U. S. 529, 533, 33 L. Ed. 766.

**46. Presentation for payment.**—*Walnut v. Wade*, 103 U. S. 683, 26 L. Ed. 526. See, to the same effect, *Wallace v. McConnell*, 13 Pet. 136, 10 L. Ed. 95; *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. Ed. 520; *Aurora City v. West*, 7 Wall. 82, 19 L. Ed. 42; *Genoa v. Woodruff*, 92 U. S. 502, 23 L. Ed. 586; *Ohio v. Frank*, 103 U. S. 697, 26 L. Ed. 531.

**47. Parties.**—*Blair v. Cuming Co.*, 111 U. S. 363, 28 L. Ed. 457.

**48. Recital of bond by way of inducement.**—*The City v. Lamson*, 9 Wall. 477, 19 L. Ed. 725.

Such preamble or inducement is unnecessary and may well be rejected as surplusage. *The City v. Lamson*, 9 Wall. 477, 485, 19 L. Ed. 725.

The suit does not by such recital—that is to say, by one in the nature of inducement and by way of preamble only—become a suit upon the bond. It is still a suit on the coupons. *The City v. Lamson*, 9 Wall. 477, 19 L. Ed. 725.

The production of the coupon, at the trial, will show the relation it bears to the bond, and a count upon the coupons is all that can be material. *The City v. Lamson*, 9 Wall. 477, 19 L. Ed. 725.

**49. Filing copies with declaration.**—*Nauvoo v. Ritter*, 97 U. S. 389, 391, 24 L. Ed. 1050.

**50. Averment that plaintiff bearer.**—*Pendleton County v. Amy*, 13 Wall. 297, 20 L. Ed. 579.

**51. Non est factum.**—*Montclair v. Ramsdell*, 107 U. S. 147, 158, 27 L. Ed. 431. See, also, the title BONDS, vol. 3, p. 382.

It is not competent, under the plea of non est factum, to prove either fraud or illegality in the inception of the bonds, in order to remove the presumption of bona fide ownership for value which arises from the mere possession of the bonds, and thus compel plaintiff to show that he paid value for them. *Montclair v. Ramsdell*, 107 U. S. 147, 158, 27 L. Ed. 431.

**52. General issue in action of assumpsit.**—See the title ASSUMPSIT, vol. 2, p. 656.

**53. Findings of court.**—*Smith v. Sac County*, 11 Wall. 139, 20 L. Ed. 102.

**J. Directing Verdict.**—The usual rules as to directing a verdict apply in actions to recover on coupons.<sup>54</sup>

**K. Evidence**—1. **PRESUMPTIONS AND BURDEN OF PROOF.**—See post, "Presumption from Possession," V, K, 3, a; "Burden of Proof," V, K, 3, b.

2. **ORDER OF PROOF.**—The logical and orderly mode of a trial where it was intended to investigate the issue whether the plaintiffs were bona fide holders without notice of the bonds and coupons sued on would be this: To sustain their claim the plaintiffs produce the bonds and coupons. The execution not being put in issue, this establishes the plaintiff's case, and establishes presumptively that they are holders for value before maturity without notice. The defendant then produces such proof as he may possess that the plaintiffs were not holders for value, or that they received the coupons after maturity, or that they had notice of the defects alleged.<sup>55</sup>

3. **BONA FIDE OWNERSHIP**—a. *Presumption from Possession.*—The prima facie presumption from the possession of ordinary coupon bonds and the attached coupons is that the holder acquired the bonds before they were due, that he paid a valuable consideration for the same, and that he took them without notice of any defect which would render the instruments invalid.<sup>56</sup>

**Possession of uncanceled interest coupons** raises the presumption that the holder became such in the usual course of business, for value, at their date and before they became payable.<sup>57</sup>

b. *Burden of Proof.*—The burden of proof, on the question of good faith in a holder of coupon bonds, lies on the party who assails the right claimed by the party in possession.<sup>58</sup> It is nevertheless undoubtedly true that circumstances

**54. Directing verdict.**—Where the holder of the coupons, by producing them on the trial, and by other proof, shows a clear right to recover, and the matters put in evidence by the defendant do not tend to defeat that right, it is not error to instruct the jury to find for him. *County of Macon v. Shores*, 97 U. S. 272, 24 L. Ed. 889.

All the defenses relied on in an action to recover on coupons detached from county bond involved questions of law only, except that as to bona fide ownership, and the court correctly decided the legal propositions in favor of the plaintiff. It was held that it was not error to instruct the jury to bring in a verdict for the plaintiff if they believed he was a bona fide holder and owner of the coupons sued for. *County of Ralls v. Douglass*, 105 U. S. 728, 732, 26 L. Ed. 957.

**55. Order of proof.**—*Chambers County v. Clews*, 21 Wall. 317, 323, 22 L. Ed. 517.

"The question and order of proof in these respects would be the same, whether the trial was had upon the general issue or upon the special plea." *Chambers County v. Clews*, 21 Wall. 317, 323, 22 L. Ed. 517.

**56. Presumption from possession.**—*Lexington v. Butler*, 14 Wall. 282, 283, 20 L. Ed. 809; *Ketchum v. Duncan*, 96 U. S. 659, 24 L. Ed. 868; *Railway Co. v. Sprague*, 103 U. S. 756, 760, 26 L. Ed. 554. See *Smith v. Sac County*, 11 Wall. 139, 20 L. Ed. 102.

"As holder he is presumed to have acquired them in good faith and for value. *Goodman v. Simonds*, 20 How. 343, 15

L. Ed. 934; *Murray v. Lardner*, 2 Wall. 110, 19 L. Ed. 857; *Shaw v. Railroad Co.*, 101 U. S. 557, 25 L. Ed. 892; *Swift v. Smith*, 102 U. S. 442, 26 L. Ed. 193." *Montclair v. Ramsdell*, 107 U. S. 147, 158, 27 L. Ed. 431.

One having possession of negotiable coupon bonds is prima facie their owner. Where he asserts in the most positive manner that they were his property, the fact that he was an officer of the company did not of itself preclude him from dealing in them, or throw the slightest suspicion on his title. *Railway Co. v. Sprague*, 103 U. S. 756, 760, 26 L. Ed. 554.

Where municipal aid bonds purport to have been issued by authority of law, and being, by the regular indorsement thereof, made payable to bearer, so that they lawfully circulated from holder to holder by delivery, and the plaintiff having purchased four of the number in market overt, became the lawful indorsee and holder of the same, together with the coupons annexed; the prima facie presumption in such a case is that the holder acquired the bonds before they were due, that he paid a valuable consideration for the same, and that he took them without notice of any defect which would render the instrument invalid. *Lexington v. Butler*, 14 Wall. 282, 283, 20 L. Ed. 809.

**57. Possession of uncanceled interest coupons.**—*Ketchum v. Duncan*, 96 U. S. 659, 660, 24 L. Ed. 868; *Lexington v. Butler*, 14 Wall. 282, 283, 20 L. Ed. 809.

**58. Burden of proof.**—*Hotchkiss v. National Banks*, 21 Wall. 354, 359, 22 L. Ed. 645; *Murray v. Lardner*, 2 Wall. 110,



may be shown in connection with the origin of such bonds and coupons, which will devolve upon the holder the burden of showing that he did give value for them before maturity.<sup>59</sup> Proof of circumstances in the nature of fraud or illegality in the inception of the bonds will devolve upon the holder the burden of showing that he purchased for value before maturity.<sup>60</sup>

c. *Admissibility*.—Where ownership was alleged in the petition, and this ownership in good faith, at the maturity of the coupons and for value, was denied in the answer, evidence as to bona fide ownership is not only proper but necessary.<sup>61</sup>

4. **PRESENTATION FOR PAYMENT**.—See ante, "Presentation for Allowance and for Payment," V, E.

**L. Judgment.—Interest**.—See the titles **INTEREST**; **JUDGMENTS AND DECREES**.

**Merger**.—See the titles **JUDGMENTS AND DECREES**; **MERGER**.

**Conclusiveness and Estoppel**.—See the title **RES ADJUDICATA**. See, also, the title **JUDGMENTS AND DECREES**.

122, 19 L. Ed. 857; *National Bank v. Texas*, 20 Wall. 72, 22 L. Ed. 295; *Smith v. Sac County*, 11 Wall. 139, 147, 155, 20 L. Ed. 102; *Texas v. White*, 7 Wall. 700, 19 L. Ed. 227; *Morgan v. United States*, 113 U. S. 476, 491, 28 L. Ed. 1044; *Hotel Co. v. Wade*, 97 U. S. 13, 14, 24 L. Ed. 917; *Goodman v. Simonds*, 20 How. 343, 15 L. Ed. 934; *Collins v. Gilbert*, 94 U. S. 753, 24 L. Ed. 170.

The burden of proof in respect to notice and want of good faith is on the claimant of the bonds as against the purchaser. *Morgan v. United States*, 113 U. S. 476, 491, 28 L. Ed. 1044; *Texas v. White*, 7 Wall. 700, 19 L. Ed. 227; *Murray v. Lardner*, 2 Wall. 110, 118, 19 L. Ed. 857.

The burden of proof is on him who assails the bona fides of a purchaser of coupon bonds, payable to bearer, before maturity. *Murray v. Lardner*, 2 Wall. 110, 121, 19 L. Ed. 857; *Kneeland v. Lawrence*, 140 U. S. 209, 212, 35 L. Ed. 492.

"The rule may perhaps be said to resolve itself into a question of honesty or dishonesty, for guilty knowledge and willful ignorance alike involve the result of bad faith. They are the same in effect. Where there is no fraud there can be no question. \* \* \* Fraud established, whether by direct or circumstantial evidence, is fatal to the title of the holder." *Murray v. Lardner*, 2 Wall. 110, 121, 19 L. Ed. 857.

59. *Smith v. Sac County*, 11 Wall. 139, 146, 147, 20 L. Ed. 102.

60. *Smith v. Sac County*, 11 Wall. 139, 147, 148, 20 L. Ed. 102.

In *Smith v. Sac County*, 11 Wall. 139, 20 L. Ed. 102, the county judge in fact signed, sealed, and delivered the bonds and coupons for the building of a courthouse at Fort Dodge, in the county of Webster, and state of Iowa, and not within the county of Sac; and the contractor, Meservy, gave one of said

bonds as a gratuity to the county judge as soon as the same were delivered by said county judge to said Meservy, and no courthouse was ever built by said contractor or any other person in pursuance of said contract. Besides the plaintiff had, perhaps unnecessarily, but expressly, averred that he had paid value, and this had been denied by defendant, so that the issue was fairly raised by the pleadings. He not only failed to prove that he gave value, but it did not appear that he offered any evidence to that effect. It was held that the onus of showing that he gave value for the bonds was cast on the plaintiff.

Coupon bonds of a municipality were executed by commissioners to a railroad company pursuant to an order of a county judge, which was annulled and reversed by the supreme court before they were issued, in a proceeding of which both the commissioners and the railroad company had notice. It was held that, as between the railroad company and the municipality, they were invalid. In an action on coupons detached therefrom, the plaintiff must establish his bona fide ownership of them in order to make out his right to recover from the municipality. *Stewart v. Lansing*, 104 U. S. 505, 26 L. Ed. 866.

61. *Admissibility*.—*County of Ralls v. Douglass*, 105 U. S. 728, 732, 26 L. Ed. 957.

Where, in an action against a county, to recover the amount due on coupons detached from bonds issued by it in payment of its subscription to the capital stock of a railroad company, the declaration avers that the plaintiff is a bona fide holder of them for value before maturity, and such averment is traversed, it is competent for him, notwithstanding the presumption of law in his favor, to maintain the issue by direct affirmative proof. *County of Macon v. Shores*, 97 U. S. 272, 24 L. Ed. 889.

**COURSE.**—See, also, **DUE COURSE OF LAW.** See note 1.

**COURSES AND DISTANCES.**—See the title **BOUNDARIES**, vol. 3, p. 465.

**COURSE OF BUSINESS.**—See the titles **BANKRUPTCY**, vol. 2, p. 935; **BILLS, NOTES AND CHECKS**, vol. 3, p. 298.

**COURSE OF PROCEEDING.**—See the title **AMENDMENTS**, vol. 1, pp. 308, 309.

**COURSE OF THE VEIN.**—See note 2.

**COURT AND JURY.**—See references under **QUESTIONS OF LAW AND FACT.**

**COURT COMMISSIONERS.**—See the title **UNITED STATES COMMISSIONERS.**

**COURTHOUSE.**—See the titles **COUNTIES**, ante, p. 825; **EMINENT DOMAIN.**

**COURT RULES.**—See the title **RULES OF COURT.**

**COURT OF CLAIMS.**—See the titles **APPEAL AND ERROR**, vol. 1, p. 505; **COURTS; UNITED STATES.**

**COURT OF PRIVATE LAND CLAIMS.**—See the titles **APPEAL AND ERROR**, vol. 1, p. 799; **PUBLIC LANDS.**

**COURT REPORTER.**—See the title **REPORTS AND REPORTERS.**

1. **Course.**—In *The Britannia*, 153 U. S. 130, 142, 38 L. Ed. 660, it is said: "A vessel which voluntarily becomes motionless cannot properly be said to keep her **course**. The word **course**, both from its etymology and the primary meaning given to it by lexicographers, signifies a running or moving forward—a continuous progression or advance." See, generally, the title **COLLISION**.

2. **Course of the vein.**—Upon the meaning of this term as used in the mining law, the court, in *Iron Silver Min. Co. v. Elgin Min., etc., Co.*, 118 U. S. 196, 208, 30 L. Ed. 98, said: "This view of the controlling effect of the end lines of the surface location is also sustained by the decision of this court in the *Flagstaff case*. *Mining Co. v. Tabet*, 98 U. S. 463, 470, 25 L. Ed. 253. There the court said that 'the most

practicable rule is to regard the **course of the vein** as that which is indicated by surface outcrop, or surface explorations and workings,' and that 'it is on this line that claims will naturally be laid, whatever be the character of the surface, whether level or inclined,' and that the end lines of the claim, properly so called, 'are those which are crosswise of the general **course of the vein** on the surface.' The court suggested that the law might be imperfect in this respect, and that perhaps the true **course of the vein** should correspond with its strike or the line of a level run through it; but it added that this 'can rarely be ascertained until considerable work has been done, and after claims and locations have become fixed.'" See, generally, the title **MINES AND MINERALS**.

# COURTS.

BY J. N. CLAYBROOK.

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## I. Definitions and Distinctions.

**A. Definitions**—1. **COURTS**.—A court is a place in which justice is judicially administered. It is the exercise of judicial power, by the proper officer or officers, at a time and place appointed by law.<sup>1</sup> A board of commissioners for the settlement of private land claims,<sup>2</sup> extradition commissioner,<sup>3</sup>

**1. Definition of court.**—Todd *v. United States*, 158 U. S. 278, 284, 39 L. Ed. 982.

"Bouvier says (Law Dict.) in giving a definition of the word 'court' and the different styles of court, 'that the one common and essential feature in all courts is a judge or judges—so essential, indeed, that they are even called the court as distinguished from the accessory and subordinate officers.' So, too, in Bacon's Abridgement, a court is defined as an incorporeal political being, which requires for its existence the presence of the judges." Dissenting opinion in *United States v. Finnell*, 185 U. S. 236, 248, 46 L. Ed. 890 (where several definitions from decisions of state courts are quoted with approval).

**County courts defined.**—See the title COUNTIES, ante, p. 825.

**Circuit court as "court of commonwealth."**—The circuit court of the United States is "a court of the commonwealth" within the meaning of the stipulation of a foreign corporation doing business within the state agreeing that process issued in any suit brought in any court of the commonwealth may be served upon its agents. *Ex parte Schollenberger*, 96 U. S. 369, 24 L. Ed. 853.

**Probate court as "county court."**—As probate courts in Mississippi are organized for each county, and are courts of record, having a seal, the judge thereof is "a judge of a county court" within the meaning of an act of congress permitting depositions in evidence which are taken before "a judge of a county court." *Fowler v. Merrill*, 11 How. 375, 393, 13 L. Ed. 736.

**Courts of ordinary in Georgia** are courts of original, exclusive and general jurisdiction over decedents' estates. *Veach v. Rice*, 131 U. S. 293, 314, 33 L. Ed. 163.

The ordinary, in South Carolina, is the court in which wills are proved; in which letters testamentary and letters of administration are granted. He judges whether the applicant be entitled to administration or not, and rejects or admits the claim, according to his opinion of the law. *Griffith v. Frazier*, 8 Cranch 1, 22, 3 L. Ed. 471.

**2. Board of Commissioners to settle private land claims.**—*United States v. Ritchie*, 17 How. 525, 15 L. Ed. 236.

**3. Extradition commissioners are not courts of the United States**, and congress may delegate to the district courts the power of appointing them. *Rice v. Ames*,

a state railroad commission,<sup>4</sup> or a board of special inquiry for the examination of emigrants, as to their right to land,<sup>5</sup> are not courts in any proper sense of that term.

2. **COURTS OF UNITED STATES.**—The courts of the District of Columbia,<sup>6</sup> or of the territories,<sup>7</sup> or those courts established by military authority in conquered territory,<sup>8</sup> are not courts of the United States.

3. **COURTS OF GENERAL JURISDICTION.**—A court of general jurisdiction whose decisions are conclusive unless removed to an appellate court, is one which is competent by its constitution to decide on its own jurisdiction, and to exercise it to a final judgment, without setting forth in its proceedings the facts and evidence on which it is rendered, and whose record is absolute verity, not to be impugned by averment or proof to the contrary.<sup>9</sup>

4. **COURTS OF LIMITED OR INFERIOR JURISDICTION.**—While all courts from which an appeal lies are inferior courts, in relation to the appellate court before which their judgment may be carried, they are not inferior courts, in the technical sense of those words.<sup>10</sup> Inferior courts in a technical sense are those which

180 U. S. 371, 45 L. Ed. 577. See, generally, the title EXTRADITION.

4. **State railroad commission.**—The Mississippi Railroad Commission is not a court, but a mere administrative agency of the state. *Mississippi Railroad Commission v. Illinois Cent. R. Co.*, 203 U. S. 335, 51 L. Ed. 209.

5. **A board of special inquiry for the examination of immigrants**, as to right to land, is an instrument of executive power, and not a court and its decisions cannot constitute *res judicata* in a technical sense. *Pearson v. Williams*, 202 U. S. 281, 284, 50 L. Ed. 1029. See the titles ALIENS, vol. 1, p. 210; RES ADJUDICATA.

6. **Courts of District of Columbia.**—See post, "Whether Courts of United States," X, B.

7. **Courts of territories.**—See post, "Whether Courts of United States," IX, A.

8. **Courts established by military authority.**—*Ex parte Vallandigham*, 1 Wall. 243, 251, 17 L. Ed. 589; *Jecker v. Montgomery*, 13 How. 498, 515, 14 L. Ed. 240. See, generally, the title MILITARY LAW.

The courts, established or sanctioned in Mexico during the war by the commanders of the American forces, were nothing more than the agents of the military power, to assist it in preserving order in the conquered territory, and to protect the inhabitants in their persons and property while it was occupied by the American arms. They were subject to the military power, and their decisions under its control, whenever the commanding officer thought proper to interfere. They were not courts of the United States, and had no right to adjudicate upon a question of prize or no prize. *Jecker v. Montgomery*, 13 How. 498, 515, 14 L. Ed. 240.

"Nor is a military commission a court within the meaning of the 14th section of the judiciary act of 1789. That act is denominated to be one to establish the judicial courts of the United States, and the 14th section declares that all the 'be-

fore mentioned courts' of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, agreeably to the principles and usages of law. The words in the section, 'the before mentioned' courts, can only have reference to such courts as were established in the preceding part of the act, and excludes the idea that a court of military commission can be one of them." *Ex parte Vallandigham*, 1 Wall. 243, 251, 17 L. Ed. 589.

9. **Courts of general jurisdiction.**—*Grignon v. Astor*, 2 How. 319, 340, 11 L. Ed. 283.

The superior court of Massachusetts is a court of general jurisdiction. *Randall v. Brigham*, 7 Wall. 523, 535, 19 L. Ed. 285.

The inferior court of common pleas for the county of Hunterdon, in the state of New Jersey, in May, 1779, had a general jurisdiction in all cases of inquisition for treason, and its judgment, although erroneous, was not void, inasmuch as the court had jurisdiction of the cause. *Kempe v. Kennedy*, 5 Cranch 173, 3 L. Ed. 70.

A county court having authority and jurisdiction to hear and determine all cases at common law or in chancery within the counties, and "all such other matters as by particular statute" may be made cognizable therein, is a court of general jurisdiction. *Harvey v. Tyler*, 2 Wall. 328, 17 L. Ed. 871.

**Status of United States courts.**—See post, "Courts of Limited Jurisdiction," VII, A, 2.

**Presumption of jurisdiction.**—See the title JURISDICTION.

10. **Courts from which appeal may be taken.**—*Kempe v. Kennedy*, 5 Cranch 173, 185, 3 L. Ed. 70; *Grignon v. Astor*, 2 How. 319, 340, 11 L. Ed. 283; *Ex parte Watkins*, 3 Pet. 193, 203, 7 L. Ed. 650; *Ex*



are erected on such principles that their judgments, taken alone, are to be entirely disregarded, and the proceedings must show their jurisdiction.<sup>11</sup>

**B. Courts Distinguished from Judges.**—While the words "court" and "judge" are used interchangeably in the federal statutes,<sup>12</sup> strictly speaking, a court is not a judge, nor a judge a court.<sup>13</sup> And a decision of a judge at chambers is not a decision of a court.<sup>14</sup>

## II. Object of Courts.

The object in establishing judicial tribunals is that controversies between parties, which may be the subject of litigation, shall be finally determined.<sup>15</sup>

## III. Establishment.

No foreign power can, of right, institute or erect any court of judicature of any kind within the jurisdiction of the United States, except such as is warranted by, and in pursuance of, treaties.<sup>16</sup> The establishment of the various courts of the United States, District of Columbia, and of the territories is treated elsewhere in this title.<sup>17</sup>

## IV. Terms and Sessions.

**A. In General.**—In this country all courts have terms and vacations.<sup>18</sup> The existence of a term does not depend on the fact that any business is transacted thereat.<sup>19</sup> The terms of particular courts are treated elsewhere in this title.<sup>20</sup>

*parte* Lothrop, 118 U. S. 113, 30 L. Ed. 108.

Where congress provides that the judicial power of a territory shall be vested in a supreme court and such inferior courts as the legislative council may by law prescribe, the legislature may establish courts having jurisdiction concurrent with every other court of the territory provided it is inferior to the supreme court. *Ex parte* Lothrop, 118 U. S. 113, 30 L. Ed. 108; *American Ins. Co. v. Canter*, 1 Pet. 511, 7 L. Ed. 243.

**11. Inferior courts in technical sense.**—*Ex parte* Watkins, 3 Pet. 193, 204, 7 L. Ed. 650; *Kempe v. Kennedy*, 5 Cranch 173, 3 L. Ed. 70; *Grignon v. Astor*, 2 How. 319, 340, 11 L. Ed. 283.

An inferior court in the technical sense is one which is so construed that its judgment can be looked through for the facts and evidence which are necessary to sustain it, and whose decision is not evidence of itself to show jurisdiction and its lawful exercise. *Grignon v. Astor*, 2 How. 319, 340, 11 L. Ed. 283.

**Status of United States courts.**—See post, "Whether Courts of Inferior Jurisdiction," VII, A, 3.

**12. Court and judge interchangeable terms federal statutes.**—*United States, Petitioner*, 194 U. S. 194, 48 L. Ed. 931. See, also, the title JUDGES.

**13. Court distinguished from judge.**—*Todd v. United States*, 158 U. S. 278, 284, 39 L. Ed. 982; *McKnight v. James*, 155 U. S. 685, 687, 39 L. Ed. 310. See, generally, the title JUDGES.

**14. Decision of judge not decision of court.**—*McKnight v. James*, 155 U. S. 685, 687, 39 L. Ed. 310; *Carper v. Fitzgerald*, 121 U. S. 87, 30 L. Ed. 882 (holding that

a decision of a judge at chambers was not reviewable by the supreme court, where the statute only gave jurisdiction to review decisions of courts). See the title APPEAL AND ERROR, vol. 1, p. 944.

**15. Object of courts.**—*Johnson Co. v. Wharton*, 152 U. S. 252, 257, 38 L. Ed. 429.

Courts are instituted to carry into effect the laws of a country. *United States Bank v. Owens*, 2 Pet. 527, 538, 7 L. Ed. 508.

**16. Power of foreign power to establish court in United States.**—*The Betsey*, 3 Dall. 6, 15, 1 L. Ed. 485 (holding that the admiralty jurisdiction which was formerly exercised by French consuls, not being so warranted, was not of right).

**17. Establishment of particular courts.**—As to establishment of federal courts in general, see post, "Organization and Establishment," VII, A, 1.

As to establishment of court of claims, see post, "Establishment and Nature," VII, F, 1.

As to establishment of court of claims, see post, "Establishment, Organization, etc.," IX, B.

**18. Terms and sessions.**—*Bronson v. Schulten*, 104 U. S. 410, 415, 26 L. Ed. 797.

**19. McDowell v. United States**, 159 U. S. 596, 600, 40 L. Ed. 271.

When court "actually in session" or "open for business" so as to entitle clerk to per diem compensation, see the title CLERKS OF COURT, vol. 3, p. 855.

**20. Terms of particular courts.**—As to terms of circuit court of United States, see post, "Terms and Sessions," VII, C, 3.

As to terms of courts of District of

**B. Fiction That Term Consists of but One Day.**—The fiction of the law that a term consists of but one day is tolerated by the courts only for the purposes of justice, and cannot be invoked to antedate the judicial rejection of a claim, so as to render operative a grant which would otherwise be without effect.<sup>21</sup>

**C. Commencement and Termination.**—The time of the commencement of every term, if there be half a dozen a year, is fixed by statute and the end of it by the final adjournment of the court for that term.<sup>22</sup>

**D. Continuance**—1. **POWER OF DE FACTO JUDGE.**—The orders of a de facto judge continuing a term from day to day are sufficient to keep the term alive.<sup>23</sup>

2. **CONTINUANCE AS CLOSING TERM.**—A general order of continuance does not of itself close a term.<sup>24</sup>

**E. Adjournment.**—See the title **ADJOURNMENTS**, vol. 1, p. 118.

## V. Powers.

**A. Implied Powers.**—Courts of limited jurisdiction cannot exercise any implied powers.<sup>25</sup>

**B. Power Over Officers.**—It is well settled that courts have general power and control over their own officers.<sup>26</sup>

**C. Power to Punish for Contempt.**—See the title **CONTEMPT**, ante, p. 531.

**D. Control Over Judgments.**—See the title **JUDGMENTS AND DECREES**.

**E. Enforcement of Judgments and Decrees.**—The jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until that judgment shall be satisfied.<sup>27</sup>

Columbia, see post, "Terms of Court," X, D.

As to term of territorial courts, see post, "Terms and Sessions," IX, D.

**21. Fiction that term consists of but one day.**—*Newhall v. Sanger*, 92 U. S. 761, 23 L. Ed. 769.

**22. Commencement and termination.**—*Bronson v. Schulten*, 104 U. S. 410, 415, 26 L. Ed. 797.

"This is the case with regard to all of the courts of the United States, and if there be exceptions in the state courts, they are unimportant." *Bronson v. Schulten*, 104 U. S. 410, 415, 26 L. Ed. 797.

**23. Power of de facto judge to continue term.**—*McDowell v. United States*, 159 U. S. 596, 602, 40 L. Ed. 271. See the title **JUDGES**.

**24. Continuance as closing term.**—*McDowell v. United States*, 159 U. S. 596, 600, 40 L. Ed. 271.

"A simple illustration will demonstrate this. Suppose at the commencement of any regular term of this court a general order be entered continuing all matters to the succeeding term, no one would contend that such an order of itself adjourned the term, or prevented the court from adjourning from day to day until such time as it saw fit to order a final adjournment. The officers attending after the continuance of the cases and until the final order of adjournment would unquestionably receive their per diems for attendance upon a term of the court." *McDowell v. United States*, 159 U. S. 596, 600, 40 L. Ed. 271.

A declaration that the process, etc., shall be "continued, of course," means simply continued without any special or-

der, and was obviously designed to prevent that failure of right which in many cases might otherwise result from the absence of a judge. *McDowell v. United States*, 159 U. S. 596, 600, 40 L. Ed. 271.

**25. Implied powers of courts of limited jurisdiction.**—*Yeaton v. Lynn*, 5 Pet. 224, 8 L. Ed. 105 (holding the orphans' court of Alexandria to be such a court and without any implied power as to the revocation of letters testamentary).

**26. Power over officers.**—Ex parte *Bollman*, 4 Cranch 75, 94, 2 L. Ed. 554. See the titles **CLERKS OF COURT**, vol. 3, p. 849; **SHERIFFS AND CONSTABLES**; **UNITED STATES MARSHALS**.

**27. Power to enforce judgments and decrees.**—*Riggs v. Johnson County*, 6 Wall. 166, 187, 18 L. Ed. 768; *Central Nat. Bank v. Stevens*, 169 U. S. 432, 464, 42 L. Ed. 807; *United States v. Allred*, 155 U. S. 591, 594, 39 L. Ed. 273; *Griffin v. Thompson*, 2 How. 244, 257, 11 L. Ed. 253; *Covell v. Heyman*, 111 U. S. 176, 28 L. Ed. 390; *Wayman v. Southard*, 10 Wheat. 1, 6 L. Ed. 253. See, also, *Mills v. Duryee*, 7 Cranch 481, 485, 3 L. Ed. 411; *Ward v. Todd*, 103 U. S. 327, 329, 26 L. Ed. 339. See the title **EXECUTIONS**.

"There is inherent in every court a power to supervise the conduct of its officers, and the execution of its judgments and process. Without this power courts would be wholly impotent and useless." *United States v. Allred*, 155 U. S. 591, 594, 39 L. Ed. 273; *Griffin v. Thompson*, 2 How. 244, 11 L. Ed. 253.

To deprive a court of the power to execute its decrees is to essentially impair its jurisdiction. *Central Nat. Bank v. Stevens*, 169 U. S. 432, 464, 42 L. Ed. 807.

## VI. Decisions.

**A. Duty to Decide Questions.**—It is the duty of courts to decide questions within their jurisdiction and properly brought before them. They have no more right to decline the exercise of jurisdiction which is given than to usurp that not given.<sup>28</sup>

**B. Departure from Legal Rules in Hard Cases.**—Settled principles of law cannot, with safety to the public, be disregarded in order to remedy the hardships of special cases.<sup>29</sup>

**C. Rule of Stare Decisis.**—See the title *STARE DECISIS*.

**D. Comity as Controlling Decisions of Co-Ordinate Tribunals.**—Where a court is doubtful as to the way in which a question before it should be decided, it should through comity follow the decisions of courts of co-ordinate jurisdiction on the same question.<sup>30</sup> Comity applies only to questions which have been actually decided, and which arose under the same facts.<sup>31</sup>

**E. Rules of Decision in Federal Courts.**—See post, "State Laws as Rules of Decision in Federal Courts," VII, J.

## VII. Federal Courts.

**A. General Principles**—1. **ORGANIZATION AND ESTABLISHMENT.**—It is provided by the constitution of the United States that "the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may, from time to time, ordain and establish."<sup>22</sup> This provision makes it the duty of congress to organize courts inferior to the supreme court as well as to organize that court itself.<sup>23</sup> Except in the cases specially enumerated in the constitution and of which the supreme court may take cognizance, without an enabling act of congress, the distribution of the judicial power of the United States among the courts of the United States is a matter entirely within the control of the legislative branch of the government.<sup>34</sup> Congress cannot im-

**28. Duty to decide questions.**—*Cohens v. Virginia*, 6 Wheat. 264, 403, 5 L. Ed. 257, quoted in dissenting opinion of Harlan, J., in *Taylor v. Beckham* (No. 1), 178 U. S. 548, 592, 44 L. Ed. 1187.

**New questions.**—It is no objection to a principle that it is new, where the occasion for it could not have arisen sooner. *Sawyer v. Hoag*, 17 Wall. 610, 21 L. Ed. 731.

**29. Departure from legal rules in hard cases.**—*Buchanan v. Litchfield*, 102 U. S. 278, 293, 26 L. Ed. 138. See, also, 200 Chests of Tea, 9 Wheat. 430, 443, 6 L. Ed. 128.

The fact that if a court decides a question of forfeiture under the revenue laws in favor of the claimant, a wide door will be opened for fraud on the revenue laws, will not influence the court in making its decision. 200 Chests of Tea, 9 Wheat. 430, 443, 6 L. Ed. 128.

**30. Comity as controlling decisions of courts of co-ordinate jurisdiction.**—*Mast Foss & Co. v. Stover Mfg. Co.*, 177 U. S. 485, 489, 44 L. Ed. 856. As to definition of comity in this aspect, see *COMITY*, vol. 3, p. 948.

**31. Application to questions not considered by prior court.**—Comity has no application to questions not considered by the prior court. *Mast Foss & Co. v. Stover Mfg. Co.*, 177 U. S. 485, 489, 44 L. Ed. 856.

This rule of comity has no application in patent cases, to alleged anticipating devices not laid before the prior court. As to such the action of the court is purely original, though the fact that such anticipating devices were not called to the attention of the prior court is likely to open them to suspicion. It is scarcely necessary to say, however, that when the case reaches the supreme court it should not reverse the action of the court below if it thinks it correct upon the merits, though it is of opinion that sufficient weight was not given to the doctrine of comity. *Mast Foss & Co. v. Stover Mfg. Co.*, 177 U. S. 485, 489, 44 L. Ed. 856. See the title *PATENTS*.

**32. Constitutional provision as to courts.**—Const. U. S., art. 3, § 1.

**33. Duty of congress as to establishment of circuits.**—*Martin v. Hunter*, 1 Wheat. 304, 330, 4 L. Ed. 97.

**34. Power of congress as distribution of judicial powers.**—*Johnson Co. v. Wharton*, 152 U. S. 252, 260, 38 L. Ed. 429; *Cary v. Curtis*, 3 How. 236, 245, 11 L. Ed. 576; *Rhode Island v. Massachusetts*, 12 Pet. 657, 721, 9 L. Ed. 1233; *Chisholm v. Georgia*, 2 Dall. 419, 433, 1 L. Ed. 440; *Stuart v. Laird*, 1 Cranch 299, 2 L. Ed. 115; *Livingston v. Story*, 9 Pet. 632, 9 L. Ed. 255; *United States v. Union Pac. R. Co.*, 98 U. S. 569, 25 L. Ed. 143; *Railway Co. v. Whitton*, 13 Wall. 270, 20 L. Ed. 571; *Case of The Sewing Machine*



pose upon the courts of the United States any duties not strictly judicial;<sup>35</sup> and, on the other hand, it cannot confer the judicial power of the United States on any but a United States court.<sup>36</sup>

**2. COURTS OF LIMITED JURISDICTION.**—The courts of the United States are all limited in their nature and constitution, and have not the powers inherent in courts existing by prescription or by the common law.<sup>37</sup> The jurisdiction of the United States courts is not *prima facie* general but special. A party must assign a good reason for suing in the United States courts, and if the fact is denied, upon which he bases his right to sue in those courts, he must prove it.<sup>38</sup>

**3. WHETHER COURTS OF INFERIOR JURISDICTION.**—The courts of the United States are courts of limited, but not of inferior jurisdiction.<sup>39</sup> Indeed, it has been held that the district courts of the United States are courts of superior

Companies, 18 Wall. 553, 577, 21 L. Ed. 914.

The organization of the judicial power, the definition and distribution of the subjects of jurisdiction in the federal tribunals and the modes of their action and authority, have been, and of right must be, the work of the legislature. *Cary v. Curtis*, 3 How. 236, 245, 11 L. Ed. 576.

It was necessarily left to the legislative power to organize the supreme court, to define its powers consistently with the constitution, as to its original jurisdiction; and to distribute the residue of the judicial power between this and the inferior courts, which it was bound to ordain and establish, defining their respective powers, whether original or appellate, by which and how it should be exercised. *Rhode Island v. Massachusetts*, 12 Pet. 657, 721, 9 L. Ed. 1233.

The discretion of congress as to the number, the character, the territorial limits of the courts among which it shall distribute this judicial power, is unrestricted except as to the supreme court. *United States v. Union Pac. R. Co.*, 98 U. S. 569, 602, 25 L. Ed. 143.

Congress has the power to establish circuit and district courts, in any and all the states of the Union, and to confer on them equitable jurisdiction, in cases coming within the constitution; it falls within the express words of the constitution. *Livingston v. Story*, 9 Pet. 632, 9 L. Ed. 255.

**35. Judicial duties only to be imposed on courts.**—*Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 485, 38 L. Ed. 1047; *Hayburn's Case*, 2 Dall. 409, 1 L. Ed. 436; *Gordon v. United States*, 117 U. S., appx., 697, 704; *La Abra Silver Min. Co. v. United States*, 175 U. S. 423, 456, 44 L. Ed. 223; *Murray v. Hoboken, Land, etc.*, Co., 18 How. 272, 284, 15 L. Ed. 372.

**36. Upon what courts judicial power may be conferred.**—*Ex parte Milligan*, 4 Wall. 2, 121, 18 L. Ed. 281 (cannot be conferred on a military commission); *Robertson v. Baldwin*, 165 U. S. 275, 278, 41 L. Ed. 715; *Martin v. Hunter*, 1 Wheat. 304, 4 L. Ed. 97; *Houston v. Moore*, 5 Wheat. 1, 27, 5 L. Ed. 19.

Congress cannot confer jurisdiction upon any courts, but such as exist under the constitution and laws of the United States, although the state courts may exercise jurisdiction on cases authorized by the laws of the state, and not prohibited by the exclusive jurisdiction of the federal courts. *Houston v. Moore*, 5 Wheat. 1, 27, 5 L. Ed. 19; *Claffin v. Houseman*, 93 U. S. 130, 137, 23 L. Ed. 833; *Kendall v. United States*, 12 Pet. 524, 645, 9 L. Ed. 1181.

**37. Federal courts are courts of limited jurisdiction.**—*Maxfield v. Levy*, 4 Dall. 330, 1 L. Ed. 854; *McCormick v. Sullivant*, 10 Wheat. 192, 194, 6 L. Ed. 300; *Grignon v. Astor*, 2 How. 319, 340, 11 L. Ed. 283; *Kempe v. Kennedy*, 5 Cranch 173, 185, 3 L. Ed. 70; *Kennedy v. Bank*, 8 How. 586, 611, 12 L. Ed. 1209; *Cary v. Curtis*, 3 How. 236, 245, 11 L. Ed. 576; *Fink v. O'Neal*, 106 U. S. 272, 280, 27 L. Ed. 196.

**38. Maxfield v. Levy**, 4 Dall. 330, 1 L. Ed. 854.

"The courts of the United States are all of limited jurisdiction, and their proceedings are erroneous, if the jurisdiction be not shown upon them. Judgments rendered in such cases may certainly be reversed, but this court is not prepared to say that they are absolute nullities, which may be totally disregarded." *Kempe v. Kennedy*, 5 Cranch 173, 185, 3 L. Ed. 70.

**39. Whether courts of inferior jurisdiction.**—*McCormick v. Sullivant*, 10 Wheat. 192, 6 L. Ed. 300; *Kennedy v. Bank*, 8 How. 586, 611, 12 L. Ed. 1209; *Kempe v. Kennedy*, 5 Cranch 173, 185, 3 L. Ed. 70; *Grignon v. Astor*, 2 How. 319, 340, 11 L. Ed. 283.

The inferior courts of the United States are all of limited jurisdiction; but they are not, on that account, inferior courts, in the technical sense of those words, whose judgments, taken alone, are to be disregarded. If the jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous, and may, upon a writ of error or appeal, be reversed for that cause, but they are not absolute nullities. *McCormick v. Sullivant*, 10 Wheat. 192, 200, 6 L. Ed. 300; *Grignon v. Astor*, 2 How. 319, 340, 11 L. Ed. 283. See, also, *Kempe v. Kennedy*, 5

jurisdiction in favor of the validity of whose proceedings when collaterally attacked is every intendment.<sup>40</sup>

4. JURISDICTION—*a. Jurisdiction as Dependent on Statute*—(1) *Supreme Court*.—See post, "Supreme Court," VII, E. And see the title APPEAL AND ERROR, vol. 1, p. 406.

(2) *Inferior Courts*.—While all federal judicial power has its origin in the constitution, it is well settled that the courts of the United States inferior to the supreme court possess no jurisdiction other than that especially conferred upon them by act of congress. Being statutory courts, they can possess no jurisdiction but such as the statute confers.<sup>41</sup>

Cranch 173, 185, 3 L. Ed. 70; Skillern v. May, 6 Cranch 267, 3 L. Ed. 220.

40. *United States district courts are courts of superior jurisdiction*.—"Its jurisdiction in any case will be presumed, unless it appears affirmatively on the face of the record that it had not been acquired." *Martin v. Gray*, 142 U. S. 236, 240, 35 L. Ed. 997.

41. *Inferior courts*.—Case of Sewing Machine Companies, 18 Wall. 553, 577, 21 L. Ed. 914; *Daniels v. Railroad Co.*, 3 Wall. 250, 254, 18 L. Ed. 224; *The Assessors v. Osbornes*, 9 Wall. 567, 577, 19 L. Ed. 748; *Sheldon v. Sill*, 8 How. 441, 448, 12 L. Ed. 1147; *Turner v. Bank*, 4 Dall. 8, 1 L. Ed. 718; *McIntire v. Wood*, 7 Cranch 504, 506, 3 L. Ed. 420; *Kendall v. United States*, 12 Pet. 524, 616, 9 L. Ed. 1181; *Cary v. Curtis*, 3 How. 236, 245, 11 L. Ed. 576; *Stevenson v. Fain*, 195 U. S. 165, 167, 49 L. Ed. 142; *Railway Co. v. Whitton*, 13 Wall. 270, 271, 20 L. Ed. 571; *Ex parte Wisner*, 203 U. S. 449, 459, 51 L. Ed. 264; *Kentucky v. Powers*, 201 U. S. 1, 24, 50 L. Ed. 633; *Ex parte Bollman*, 4 Cranch 75, 2 L. Ed. 554; *United States v. Hudson*, 7 Cranch 32, 3 L. Ed. 259; *United States v. Eckford*, 6 Wall. 484, 18 L. Ed. 920; *Jones v. United States*, 137 U. S. 202, 34 L. Ed. 691; *Holmes v. Goldsmith*, 147 U. S. 150, 37 L. Ed. 118; *Railroad Co. v. Mississippi*, 102 U. S. 135, 141, 26 L. Ed. 96; *Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257; *Osborn v. United States Bank*, 9 Wheat. 738, 6 L. Ed. 204; *The Mayor v. Cooper*, 6 Wall. 247, 18 L. Ed. 851; *Gold-Washing, etc., Co. v. Keyes*, 96 U. S. 199, 24 L. Ed. 656; *Tennessee v. Davis*, 100 U. S. 257, 25 L. Ed. 648; *Johnson Co. v. Wharton*, 152 U. S. 252, 260, 38 L. Ed. 429; *United States Bank v. Deveaux*, 5 Cranch 61, 3 L. Ed. 38.

"Courts which originate in the common law possess a jurisdiction which must be regulated by their common law, until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction." *Kentucky v. Powers*, 201 U. S. 1, 24, 50 L. Ed. 633; *Ex parte Bollman*, 4 Cranch 75, 2 L. Ed. 554.

Except in the cases of which the supreme court is given, by the constitution, original jurisdiction, the judi-

cial power of the United States is to be exercised in its original or appellate form, or both, as the wisdom of congress may direct. *Railroad Co. v. Mississippi*, 102 U. S. 135, 141, 26 L. Ed. 96; *Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257; *Osborn v. United States Bank*, 9 Wheat. 738, 6 L. Ed. 204; *The Mayor v. Cooper*, 6 Wall. 247, 18 L. Ed. 851; *Gold-Washing, etc., Co. v. Keyes*, 96 U. S. 199, 24 L. Ed. 656; *Tennessee v. Davis*, 100 U. S. 257, 25 L. Ed. 648.

"As regards all courts of the United States inferior to this tribunal, two things are necessary to create jurisdiction, whether original or appellate. The constitution must have given to the court the capacity to take it, and an act of congress must have supplied it. Their concurrence is necessary to vest it." *The Mayor v. Cooper*, 6 Wall. 247, 252, 18 L. Ed. 851.

*Circuit courts* do not derive their judicial power, immediately, from the constitution, as appears with sufficient explicitness from the constitution itself, as the first section of the third article provides that "the judicial power of the United States shall be vested in one supreme court and in such inferior courts as the congress may from time to time ordain and establish." Consequently the jurisdiction of the circuit court in every case must depend upon some act of congress, as it is clear that congress, inasmuch as it possesses the power to ordain and establish all courts inferior to the supreme court, may also define their jurisdiction. Courts created by statute can have no jurisdiction in controversies between party and party but such as the statute confers. *Case of Sewing Machine Companies*, 18 Wall. 553, 577, 21 L. Ed. 914.

The jurisdiction of the circuit courts depends upon some act of congress. *Stevenson v. Fain*, 195 U. S. 165, 167, 49 L. Ed. 142; *Turner v. Bank*, 4 Dall. 8, 1 L. Ed. 718; *McIntire v. Wood*, 7 Cranch 504, 3 L. Ed. 420.

*Courts exercising special statutory jurisdiction*.—Where the jurisdiction which the court exercises is a special one, created by act of congress, and its mode of proceeding and powers are regulated and defined by the law, it cannot, under any supposed analogy to proceedings in chancery, exercise any power beyond that which the act or acts of congress have

b. *Power of Congress to Prescribe Jurisdiction*.—While congress cannot extend the jurisdiction of the courts of the United States, beyond the limits of the constitution,<sup>42</sup> it is well settled that, subject to this limitation, it may confer such jurisdiction on them as it sees fit.<sup>43</sup>

c. *Power of States to Extend or Restrict Jurisdiction*.—(1) *In General*.—The jurisdiction of the circuit court of the United States has been defined and limited by acts of congress, and can neither be restricted nor enlarged by the statutes of a state.<sup>44</sup>

given. *United States v. Knight*, 1 Black 488, 489, 17 L. Ed. 80; *East Tennessee, etc., R. Co. v. Southern Tel. Co.*, 112 U. S. 306, 28 L. Ed. 746; *Thatcher v. Powell*, 6 Wheat. 119, 5 L. Ed. 221; *Shelby v. Bacon*, 10 How. 56, 13 L. Ed. 326.

**Restitution of property captured in violation of neutrality.**—In the absence of any act of congress on the subject, the courts of the United States would have authority, under the general law of nations, to decree restitution of property captured in violation of their neutrality, under a commission issued within the United States, or under an armament, or augmentation of the armament, or crew, of the capturing vessel, within the same. *The Estrella*, 4 Wheat. 298, 4 L. Ed. 574.

**42. Jurisdiction not to be extended beyond the limits of constitution.**—*Hodgson v. Bowerbank*, 5 Cranch 303, 3 L. Ed. 108; *New Orleans v. United States*, 10 Pet. 662, 735, 9 L. Ed. 573; *Houston v. Moore*, 5 Wheat. 1, 27, 5 L. Ed. 19; *Claffin v. Houseman*, 93 U. S. 130, 137, 23 L. Ed. 833; *Kendall v. United States*, 12 Pet. 524, 645, 9 L. Ed. 1181.

Congress cannot, by legislation, enlarge the federal jurisdiction, nor can it be enlarged under the treaty-making power. *New Orleans v. United States*, 10 Pet. 662, 735, 9 L. Ed. 573.

**43. Power to prescribe jurisdiction.**—*Case of Sewing Machine Companies*, 18 Wall. 553, 577, 21 L. Ed. 914; *United States v. Union Pac. R. Co.*, 98 U. S. 569, 25 L. Ed. 143; *Johnson Co. v. Wharton*, 152 U. S. 252, 260, 38 L. Ed. 429; *Livingston v. Story*, 9 Pet. 632, 9 L. Ed. 255; *Railway Co. v. Whitton*, 13 Wall. 270, 272, 20 L. Ed. 571; *Cary v. Curtis*, 3 How. 236, 245, 11 L. Ed. 576; *Rhode Island v. Massachusetts*, 12 Pet. 657, 721, 9 L. Ed. 1233; *Chisholm v. Georgia*, 2 Dall. 419, 433, 1 L. Ed. 440; *Stuart v. Laird*, 1 Cranch 299, 2 L. Ed. 115; *Murray v. Hoboken Land, etc., Co.*, 18 How. 272, 15 L. Ed. 372; *Fong Yue Ting v. United States*, 149 U. S. 715, 37 L. Ed. 905; *Osborn v. United States Bank*, 9 Wheat. 738, 821, 6 L. Ed. 204; *Claffin v. Houseman*, 93 U. S. 130, 137, 23 L. Ed. 833.

Congress, it may be conceded, may confer such jurisdiction upon the circuit courts as it may see fit, within the scope of the judicial power of the constitution, not vested in the supreme court, but as such tribunals are neither created by the constitution nor is their jurisdiction defined by that instrument, it follows that inasmuch as they are created by an act

of congress it is necessary, in every attempt to define their power, to look to that source as the means of accomplishing that end. *Case of Sewing Machine Companies*, 18 Wall. 553, 577, 21 L. Ed. 914.

“Congress can neither withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time, there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.” *Murray v. Hoboken Land, etc., Co.*, 18 How. 272, 284, 15 L. Ed. 372.” *Fong Yue Ting v. United States*, 149 U. S. 698, 715, 37 L. Ed. 905.

“In those cases in which original jurisdiction is given to the supreme court, the judicial power of the United States cannot be exercised in its appellate form. In every other case, the power is to be exercised in its original or appellate form, or both, as the wisdom of congress may direct. With the exception of these cases, in which original jurisdiction is given to this court, there is none to which the judicial power extends, from which the original jurisdiction of the inferior courts is excluded by the constitution. Original jurisdiction, so far as the constitution gives a rule, is coextensive with the judicial power. We find, in the constitution, no prohibition to its exercise, in every case in which the judicial power can be exercised.” *Osborn v. United States Bank*, 9 Wheat. 738, 821, 6 L. Ed. 204.

**Power to provide for exclusive jurisdiction.**—Where a right arises under a law of the United States, congress may, if it see fit, give to the federal courts exclusive jurisdiction. *The Moses Taylor*, 4 Wall. 411, 429, 18 L. Ed. 397; *Martin v. Hunter*, 1 Wheat. 304, 334, 4 L. Ed. 97; *Claffin v. Houseman*, 93 U. S. 130, 137, 23 L. Ed. 833.

**44. Extension or restriction by states in general.**—*Southern Pac. Co. v. Denton*, 146 U. S. 202, 209, 36 L. Ed. 943; *Railway Co. v. Whitton*, 13 Wall. 270, 20 L. Ed. 571; *Phelps v. Oaks*, 117 U. S. 236, 29



(2) *Extension of Jurisdiction*.—The jurisdiction of the circuit court of the United States depends upon the acts passed by congress pursuant to the power conferred upon it by the constitution of the United States, and cannot be enlarged by any statute of a state.<sup>45</sup>

(3) *Restriction of Jurisdiction*.—(a) *In General*.—State laws which in themselves,<sup>46</sup> or by the construction placed upon them by the highest court of

L. Ed. 888; *Parker v. Ormsby*, 141 U. S. 81, 35 L. Ed. 654; *Young v. Bank*, 4 Cranch 384, 397, 2 L. Ed. 655; *Borer v. Chapman*, 119 U. S. 587, 600, 30 L. Ed. 532; *Mexican Cent. R. Co. v. Pinkney*, 149 U. S. 194, 206, 37 L. Ed. 699; *Watson v. Tarpley*, 18 How. 517, 520, 15 L. Ed. 509; *New York v. Commissioners of Taxes*, 2 Black 620, 633, 17 L. Ed. 451; *Blake v. McClung*, 172 U. S. 239, 255, 43 L. Ed. 432.

The state of Virginia in November, 1792, passed an act for establishing a bank in the town of Alexandria, which act incorporated the bank, and in addition to the privilege of summary process for the recovery of debts, deprived its debtors of the right of appeal. It was held that the act incorporating the bank only professed to regulate, and could regulate, only those courts which were established under the authority of Virginia, and could not affect the judicial proceedings of a court of the United States, or of any other state. *Young v. Bank*, 4 Cranch 384, 397, 2 L. Ed. 655.

The character of the case is always open to examination, for the purpose of determining whether, *ratione materiæ*, the courts of the United States are incompetent to take jurisdiction thereof. State rules on the subject cannot deprive them of it. *Arrowsmith v. Gleason*, 129 U. S. 86, 99, 32 L. Ed. 630; *Barrow v. Hunton*, 99 U. S. 80, 85, 25 L. Ed. 407.

Where there is no law prohibiting suit against a municipal corporation, the right to sue it in the courts of the United States on an obligation for the payment of money is not defeated by the mere fact that in the courts of the state the remedy for the recovery of money from a municipal corporation on a liquidated demand is by mandamus against the proper officer, to require him to do his duty under the law with respect to the discharge of the obligation which has been entered into, and for such purposes, in that jurisdiction, an independent judgment in an action at law against the corporation is not necessary. *Chickaming v. Carpenter*, 106 U. S. 663, 665, 27 L. Ed. 307.

45. *Extension of jurisdiction*.—*Goldey v. Morning News*, 156 U. S. 518, 523, 39 L. Ed. 517; *The Steamboat Orleans v. Phoebeus*, 11 Pet. 175, 9 L. Ed. 677; *The Glide*, 167 U. S. 606, 612, 42 L. Ed. 296; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 209, 36 L. Ed. 943; *Railway Co. v. Whitton*, 13 Wall. 270, 20 L. Ed. 571; *Phelps v. Oaks*, 117 U. S. 236, 29 L. Ed. 888; *Parker v. Ormsby*, 141 U. S. 81, 35 L. Ed. 654; *Blake v. McClung*, 172 U. S.

239, 255, 43 L. Ed. 432; *Ex parte McNiel*, 13 Wall. 236, 20 L. Ed. 624.

"The local laws can never confer jurisdiction on the courts of the United States. They can only furnish rules to ascertain the rights of parties; and thus assist in the administration of the proper remedies, where the jurisdiction is vested by the laws of the United States. *The Steamboat Orleans v. Phoebeus*, 11 Pet. 175, 184, 9 L. Ed. 677." *The Glide*, 167 U. S. 606, 612, 42 L. Ed. 296.

Although a state statute cannot confer jurisdiction on a federal court, it may yet give a right, to which, other things allowing, such a court may give effect. *Ex parte McNiel*, 13 Wall. 236, 20 L. Ed. 624.

**State laws cannot enlarge admiralty jurisdiction.**—See the title ADMIRALTY, vol. 1, p. 126.

46. **State laws interfering with or restricting federal jurisdiction.**—*Railway Co. v. Whitton*, 13 Wall. 270, 287, 20 L. Ed. 571; *Insurance Co. v. Morse*, 20 Wall. 445, 453, 22 L. Ed. 365; *Payne v. Hook*, 7 Wall. 425, 427, 19 L. Ed. 260; *The Moses Taylor*, 4 Wall. 411, 18 L. Ed. 397; *Davis v. Gray*, 16 Wall. 203, 221, 21 L. Ed. 447; *Ex parte McNiel*, 13 Wall. 236, 20 L. Ed. 624; *Robinson v. Campbell*, 3 Wheat. 212, 223, 4 L. Ed. 372; *Smyth v. Ames*, 169 U. S. 466, 569, 42 L. Ed. 819; *Cowley v. Northern Pac. R. Co.*, 159 U. S. 569, 583, 40 L. Ed. 263; *Smith v. Reeves*, 178 U. S. 436, 444, 44 L. Ed. 1140; *Julian v. Central Trust Co.*, 193 U. S. 93, 114, 48 L. Ed. 629; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 209, 36 L. Ed. 943; *Watson v. Tarpley*, 18 How. 517, 520, 15 L. Ed. 509; *Blake v. McClung*, 172 U. S. 239, 255, 43 L. Ed. 432; *New York v. Commissioners of Taxes*, 2 Black 620, 633, 17 L. Ed. 451; *Goldey v. Morning News*, 156 U. S. 518, 523, 39 L. Ed. 517; *In re Tyler*, 149 U. S. 164, 189, 37 L. Ed. 689; *Riggs v. Johnson County*, 6 Wall. 166, 18 L. Ed. 768; *United States v. Peters*, 5 Cranch 115, 136, 3 L. Ed. 53; *Hyde v. Stone*, 20 How. 170, 15 L. Ed. 874; *Smyth v. Ames*, 169 U. S. 466, 42 L. Ed. 819; *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 111, 42 L. Ed. 964; *Cowles v. Mercer County*, 7 Wall. 118, 19 L. Ed. 86; *Lincoln County v. Luning*, 133 U. S. 529, 33 L. Ed. 766; *Chicot County v. Sherwood*, 148 U. S. 529, 37 L. Ed. 546; *Farmers', etc., Nat. Bank v. Dearing*, 91 U. S. 29, 23 L. Ed. 196; *United States v. Thompson*, 98 U. S. 486, 490, 25 L. Ed. 194; *Madisonville Traction Co. v. St. Bernard Min. Co.*, 196 U. S. 239, 253, 49 L. Ed. 462; *Reagan v. Farmers' Loan, etc., Co.*, 154 U. S. 362, 38 L. Ed. 1014.

"A party by going into a national court

the state,<sup>47</sup> tend to interfere with or restrict the jurisdiction of the federal courts, are not binding on the federal courts. Thus where a state law provides a substantial right of action, the federal courts may enforce it, in cases where the parties are citizens of different states, although the law of the state provides that the remedy in the state courts shall be exclusive.<sup>48</sup>

does not lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality." *Davis v. Gray*, 16 Wall. 203, 221, 21 L. Ed. 447; *Ex parte McNiel*, 13 Wall. 236, 20 L. Ed. 624; *Robinson v. Campbell*, 3 Wheat. 212, 223, 4 L. Ed. 372; *Smyth v. Ames*, 169 U. S. 466, 469, 42 L. Ed. 819; *Cowley v. Northern Pac. R. Co.*, 159 U. S. 569, 583, 40 L. Ed. 263; *Smith v. Reeves*, 178 U. S. 436, 444, 44 L. Ed. 1140.

The legislature of a state cannot annul the judgments, nor determine the jurisdiction, of the courts of the United States. *United States v. Peters*, 5 Cranch 115, 3 L. Ed. 53.

State laws, whether general or enacted for the particular case, cannot in any manner limit or effect the operation of the process or proceedings in the federal courts. *Riggs v. Johnson County*, 6 Wall. 166, 195, 18 L. Ed. 768; *Weber v. Lee County*, 6 Wall. 210, 18 L. Ed. 781; *United States v. Peters*, 5 Cranch 115, 136, 3 L. Ed. 53.

Congress may adopt state laws for such a purpose directly or confide the authority to adopt them to the federal courts, but their whole efficacy when adopted depends upon the enactment of congress, and they are neither controlled nor controllable by any state regulations. *Riggs v. Johnson County*, 6 Wall. 166, 195, 18 L. Ed. 768; *Weber v. Lee County*, 6 Wall. 210, 18 L. Ed. 781; *United States v. Peters*, 5 Cranch 115, 136, 3 L. Ed. 53; *Boyle v. Zacharie*, 6 Pet. 648, 658, 8 L. Ed. 532.

The legislature of a state cannot determine the jurisdiction of the courts of the United States, and the action of such courts in according a remedy denied to the courts of a state does not involve a question of power. *In re Tyler*, 149 U. S. 164, 189, 37 L. Ed. 689.

A state statute providing that the assessment of property for taxation shall be deemed and held to be a step in the collection of taxes, and inhibiting an interference by mandamus, summary process or any other proceeding, and confining the remedy of the taxpayer for illegal assessment and taxation, to the payment of taxes under protest, and bringing suit against the county treasurer for recovery back, does not defeat the jurisdiction of the federal courts to accord a remedy thus denied to the state courts. *In re Tyler*, 149 U. S. 164, 37 L. Ed. 689.

The fact that the state laws do not authorize a suit to be brought in its courts against a foreign corporation doing business within the state for a tort committed abroad, does not defeat the jurisdiction

of the circuit court of a suit by a citizen of another state. *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 42 L. Ed. 964.

By a statute of Pennsylvania, passed in 1836, "assignees for the benefit of creditors and other trustees" were directed to record the assignment, file an inventory of the property conveyed, which should be sworn to, have it appraised, and give bond for the faithful performance of the trust, all of which proceedings were to be had in one of the state courts. That court was vested with the power of citing the assignees before it, at the instance of a creditor who alleged that the trust was not faithfully executed. The assignees of the bank of the United States, chartered by Pennsylvania, recorded the assignment as directed, and filed accounts of their receipts and disbursements in the prescribed court, which were sanctioned by that court. A citizen of the state of Kentucky afterwards filed a bill in the circuit court of the United States for the eastern district of Pennsylvania, against these assignees, who pleaded to the jurisdiction of the court. Held, that the circuit court had jurisdiction. *Shelby v. Bacon*, 10 How. 56, 13 L. Ed. 326.

**State laws as clogging or defeating right to remove.**—See the title REMOVAL OF CAUSES.

**Jurisdiction not to be defeated by state rules of practice.**—See post, "Federal Jurisdiction Not Affected by State Practice," VII, K, 3, g.

**47. Construction of statute so as to restrict federal jurisdiction.**—*Clements v. Berry*, 11 How. 398, 411, 13 L. Ed. 745; *Julian v. Central Trust Co.*, 193 U. S. 93, 114, 48 L. Ed. 629.

"Whilst we follow the construction of a state statute, established by the supreme court of the state, care must be taken that our jurisdiction and practice shall not be limited or controlled by the statutes or decisions of the state, beyond the acts of congress." *Clements v. Berry*, 11 How. 398, 411, 13 L. Ed. 745.

**48. Where state law makes remedy in state court exclusive.**—*Railway Co. v. Whitton*, 13 Wall. 270, 20 L. Ed. 571; *Hayes v. Pratt*, 147 U. S. 557, 37 L. Ed. 279; *Lawrence v. Nelson*, 143 U. S. 215, 36 L. Ed. 130; *Security Trust Co. v. Black River Nat. Bank*, 187 U. S. 211, 47 L. Ed. 147; *Cowles v. Mercer County*, 7 Wall. 118, 19 L. Ed. 86; *Ellis v. Davis*, 109 U. S. 485, 497, 27 L. Ed. 1006; *Chicot County v. Sherwood*, 148 U. S. 529, 37 L. Ed. 546.

"Whenever a general rule as to property or personal rights, or injuries to either, is established by state legislation, its enforcement by a federal court in a case between proper parties is a matter



(b) *Suits between Citizens of Different States.*—The jurisdiction of the courts of the United States over controversies between citizens of different states cannot be impaired by the laws of the states, which prescribe the modes of redress in their own courts, or which regulate the distribution of their judicial power.<sup>49</sup>

of course, and the jurisdiction of the court, in such case, is not subject to state limitation." *Railway Co. v. Whitton*, 13 Wall. 270, 286, 20 L. Ed. 571; *Smith v. Reeves*, 178 U. S. 436, 443, 44 L. Ed. 1140.

In all cases where a general right is conferred by a state statute, it can be enforced in a state court. *Railway Co. v. Whitton*, 13 Wall. 270, 286, 20 L. Ed. 571. It cannot be withdrawn from the cognizance of such federal court by any provision of state legislation that it shall only be enforced in a state court. *Railway Co. v. Whitton*, 13 Wall. 270, 286, 20 L. Ed. 571.

**49. Suits between citizens of different states.**—*Hess v. Reynolds*, 113 U. S. 73, 77, 28 L. Ed. 927; *Onachita County v. Wolcott*, 103 U. S. 559, 26 L. Ed. 505; *Reagan v. Farmers' Loan, etc., Co.*, 154 U. S. 362, 391, 38 L. Ed. 1014; *Chickaming v. Carpenter*, 106 U. S. 663, 665, 27 L. Ed. 307; *Cowles v. Mercer County*, 7 Wall. 118, 19 L. Ed. 86; *Lincoln County v. Luning*, 133 U. S. 529, 33 L. Ed. 766; *Chicot County v. Sherwood*, 148 U. S. 529, 37 L. Ed. 546; *Suydam v. Broadnax*, 14 Pet. 67, 10 L. Ed. 357; *Loeb v. Columbia Township Trustees*, 179 U. S. 472, 486, 45 L. Ed. 280; *Railway Co. v. Whitton*, 13 Wall. 270, 286, 20 L. Ed. 571; *Ridings v. Johnson*, 128 U. S. 212, 32 L. Ed. 401; *Kirby v. Lake Shore, etc., Railroad*, 120 U. S. 130, 137, 30 L. Ed. 569; *Ellis v. Davis*, 109 U. S. 485, 498, 27 L. Ed. 1006; *Blake v. McClung*, 172 U. S. 239, 255, 43 L. Ed. 432; *Rio Grande R. Co. v. Gomila*, 132 U. S. 478, 485, 33 L. Ed. 400; *Clark v. Bever*, 139 U. S. 96, 103, 35 L. Ed. 88; *Payne v. Hook*, 7 Wall. 425, 19 L. Ed. 260; *Arrowsmith v. Gleason*, 129 U. S. 86, 98, 32 L. Ed. 630; *Hyde v. Stone*, 20 How. 170, 15 L. Ed. 874; *Smyth v. Ames*, 169 U. S. 466, 517, 42 L. Ed. 819; *Scott v. Neely*, 140 U. S. 106, 35 L. Ed. 358; *Mississippi Mills v. Cohn*, 150 U. S. 202, 37 L. Ed. 1052; *Union Bank v. Jolly*, 18 How. 503, 504, 15 L. Ed. 472; *Madisonville Traction Co. v. St. Bernard Min. Co.*, 196 U. S. 239, 253, 49 L. Ed. 462.

"Whenever a citizen of a state can go into the courts of a state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the federal courts to maintain a like defense. A state cannot tie up a citizen of another state, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the state to protect property rights, a citizen of another state may invoke the jurisdiction of the federal courts. *Cowles v. Mercer*

*County*, 7 Wall. 118, 19 L. Ed. 86; *Lincoln County v. Luning*, 133 U. S. 529, 33 L. Ed. 766; *Chicot County v. Sherwood*, 148 U. S. 529, 37 L. Ed. 546." *Reagan v. Farmers' Loan, etc., Co.*, 154 U. S. 362, 391, 38 L. Ed. 1014; *Smyth v. Ames*, 169 U. S. 466, 517, 42 L. Ed. 819.

The statutes of nearly every state provide for the institution of numerous suits, such as for partition, foreclosure, and the recovery of real property in particular courts and in the counties where the land is situated, yet it never has been pretended that limitations of this character could affect, in any respect, the jurisdiction of the federal court over such suits where the citizenship of one of the parties was otherwise sufficient. *Railway Co. v. Whitton*, 13 Wall. 270, 286, 20 L. Ed. 571.

The laws of a state, limiting the remedies of its citizens in its own courts, cannot be applied to prevent the citizens of other states from suing in the courts of the United States in that state, for the recovery of any property or money there, to which they may be legally or equitably entitled. *Union Bank v. Jolly*, 18 How. 503, 504, 15 L. Ed. 472.

**Suit against railroad commission.**—A state cannot defeat the jurisdiction of the federal courts of a suit against a state railroad commission by a citizen of another state. *Reagan v. Farmers' Loan, etc., Co.*, 154 U. S. 362, 391, 38 L. Ed. 1014.

**Action for death by wrongful act.**—A statute of Wisconsin provides that "whenever the death of a person shall be caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured; provided, that such action shall be brought for a death caused in this state, and in some court established by the constitution and laws of the same." Held, that the proviso requiring the action to be brought in a court of the state does not prevent a nonresident plaintiff from removing the action, under the act of congress of March 2d, 1867, to a federal court and maintaining it there. *Railway Co. v. Whitton*, 13 Wall. 270, 271, 20 L. Ed. 571.

**Suits against counties.**—The statutes of a state limiting the jurisdiction of suits against counties to circuit courts held within such counties can have no appli-



(c) *Restrictions on Equity Jurisdiction*.—The statute of a state cannot control the mode of procedure in equity cases in federal courts, nor deprive them of their separate equity jurisdiction.<sup>50</sup>

(d) *Remedies against Decedents' Estates*.—A foreign creditor may establish his debt in the courts of the United States against the personal representative of a decedent, notwithstanding the fact that the laws of the state relative to the administration and settlement of decedents' estates do in terms limit the right to establish such demands to a proceeding in the probate courts of the state.<sup>51</sup>

d. *Restriction of Jurisdiction by Recent Statutes*.—The recent acts of congress have tended more and more to contract the jurisdiction of the courts of the United States, which had been enlarged by intermediate acts, and to restrict

cation to courts of the national government. *Cowles v. Mercer County*, 7 Wall. 118, 19 L. Ed. 86; *Ouachita County v. Wolcott*, 103 U. S. 559, 26 L. Ed. 505; *Chicot County v. Sherwood*, 148 U. S. 529, 37 L. Ed. 546; *Loeb v. Columbia Township Trustees*, 179 U. S. 472, 486, 45 L. Ed. 280; *Lincoln County v. Luning*, 133 U. S. 529, 33 L. Ed. 766.

A citizen of another state may sue a county in the federal courts for that state, although the state statute exempts the county from suit in any court, except that claims may be presented against it to the county court for allowance or rejection, and the allowance or rejection reviewed on appeal in the manner provided for by the state statute. *Chicot County v. Sherwood*, 148 U. S. 529, 37 L. Ed. 546.

Counties in Illinois, by the law of their organization, are exempted from suit elsewhere than in the circuit courts of the county. But a county in Illinois is not thereby exempted from liability to suit in national courts. The power to contract with citizens of other states implies liability to suit by citizens of other states, and no statute limitation of suability can defeat a jurisdiction given by the constitution. *Cowles v. Mercer County*, 7 Wall. 118, 122, 19 L. Ed. 86.

A statute providing for the presentation of county warrants at a certain time, does not defeat the jurisdiction of the federal courts of a suit therein between citizens of different states, but a failure to make such presentment is a good defense, even in the federal courts. *Ouachita County v. Wolcott*, 103 U. S. 559, 26 L. Ed. 505.

**50. Equity jurisdiction cannot be impaired.**—*Cummings v. National Bank*, 101 U. S. 153, 157, 25 L. Ed. 903; *Kirby v. Lake Shore, etc., Railroad*, 120 U. S. 130, 137, 30 L. Ed. 569; *Ellis v. Davis*, 109 U. S. 485, 498, 27 L. Ed. 1006; *Payne v. Hook*, 7 Wall. 425, 19 L. Ed. 260; *Borer v. Chapman*, 119 U. S. 587, 600, 30 L. Ed. 532; *Hayes v. Pratt*, 147 U. S. 557, 570, 37 L. Ed. 279; *Watts v. Camors*, 115 U. S. 353, 362, 29 L. Ed. 406; *Green v. Creighton*, 23 How. 90, 16 L. Ed. 419; *Lawrence v. Nelson*, 143 U. S. 215, 223, 36 L. Ed. 130. See, generally, the title EQUITY, and see the following section.

**51. Remedies against decedent's es-**

**tates.**—*Union Bank v. Jolly*, 18 How. 503, 15 L. Ed. 472; *Lawrence v. Nelson*, 143 U. S. 215, 36 L. Ed. 130; *Byers v. McAuley*, 149 U. S. 608, 37 L. Ed. 867; *Security Trust Co. v. Black River Nat. Bank*, 187 U. S. 211, 227, 47 L. Ed. 147; *Green v. Creighton*, 23 How. 90, 16 L. Ed. 419; *Hayes v. Pratt*, 147 U. S. 557, 570, 37 L. Ed. 279; *Suydam v. Broadnax*, 14 Pet. 67, 10 L. Ed. 357; *Rio Grande R. Co. v. Gomila*, 132 U. S. 478, 485, 33 L. Ed. 400; *Ridings v. Johnson*, 128 U. S. 212, 32 L. Ed. 401; *Hess v. Reynolds*, 113 U. S. 73, 77, 28 L. Ed. 927; *Borer v. Chapman*, 119 U. S. 587, 599, 30 L. Ed. 532; *Williams v. Benedict*, 8 How. 107, 112, 12 L. Ed. 1007. See, generally, the title EXECUTORS AND ADMINISTRATORS.

"The general equity jurisdiction of the circuit court of the United States to administer, as between citizens of different states, the assets of a deceased person within its jurisdiction, cannot be defeated or impaired by laws of a state undertaking to give exclusive jurisdiction to its own courts. *Green v. Creighton*, 23 How. 90, 16 L. Ed. 419; *Payne v. Hook*, 7 Wall. 425, 19 L. Ed. 260." *Lawrence v. Nelson*, 143 U. S. 215, 223, 36 L. Ed. 130.

Neither the principle of convenience, nor the statutes of a state, can deprive the United States courts of jurisdiction to hear and determine a controversy between citizens of different states, when such a controversy is distinctly presented, because the judgment may affect the administration or distribution in another forum of the assets of the decedent's estate. *Hess v. Reynolds*, 113 U. S. 73, 77, 28 L. Ed. 927.

The circuit court for any district embracing a particular state will have jurisdiction of an equity proceeding against an administrator (if according to the received principles of equity a case for equitable relief is stated), notwithstanding that by a peculiar structure of the state probate system such a proceeding could not be maintained in any court of the state. *Payne v. Hook*, 7 Wall. 425, 19 L. Ed. 260.

A suit to set aside fraudulent sale made by an executor under orders of probate court, may be brought in the federal court, although the state laws make the jurisdiction of the probate court exclusive in

it more nearly within the limits of the earlier statutes.<sup>52</sup> The general object of the act of 1887 is to contract, not to enlarge, the jurisdiction of the circuit courts of the United States.<sup>53</sup>

*e. Jurisdiction to Give Complete Relief.*—Where the federal court has once obtained jurisdiction of the subject matter and of the parties, it is not exhausted

such cases. *Johnson v. Waters*, 111 U. S. 640, 28 L. Ed. 547; *Arrowsmith v. Gleason*, 129 U. S. 86, 99, 32 L. Ed. 630.

Where a suit was brought in the United States court by citizens of another state against a citizen of Mississippi, who appeared to the suit, pleaded and then died, after which the suit was revived against his administrators, and judgment obtained against them, the following proceedings of the probate court afford no bar to the recovery of the claim: A declaration by the probate court that the estate was insolvent, and a reference of the matter to a commissioner in insolvency. A publication notifying the creditors of the estate to appear and file their claims, or be forever barred of their demands. A report by the commissioner, leaving out the claim in question, which report was confirmed by the court. *Union Bank v. Jolly*, 18 How. 503, 15 L. Ed. 472.

Where the estate turned out not to be insolvent, but a fund remained in hand for distributees, the creditors can recover by a bill in chancery against the administrators, notwithstanding the proceedings in the probate court. *Union Bank v. Jolly*, 18 How. 503, 504, 15 L. Ed. 472.

The plaintiffs, merchants of New York, instituted a suit in the circuit court of Alabama, against the administrators of the maker of a note, dated in New York, and payable in New York. The act of the assembly of Alabama provides, that the estate of a deceased person, which is declared to be insolvent, shall be distributed by the executors or administrators, according to the provisions of the statute, among the creditors; and that no suit or action shall be commenced or sustained against any executor or administrator, after the estate of the deceased has been represented as insolvent, except in certain cases not of the description of that on which this suit was instituted. Held, that the insolvency of the estate, judicially declared under the statute of Alabama, was not sufficient in law to abate a suit instituted in the circuit court of the United States, by a citizen of another state, against the representatives of a citizen of Alabama. *Suydam v. Broadnax*, 14 Pet. 67, 10 L. Ed. 357.

The constitutional and legal rights of a citizen of the United States, to sue in the circuit courts of the United States, do not permit an act of insolvency, completely executed under the authority of a state, to be a good bar against a recovery upon a contract made in another state. *Suydam v. Broadnax*, 14 Pet. 67, 10 L. Ed. 357.

**52. Tendency of recent act is to control jurisdiction.**—*Martin v. Baltimore,*

*etc.*, R. Co., 151 U. S. 673, 687, 38 L. Ed. 311; *Wabash Western Railway v. Brown*, 164 U. S. 271, 277, 41 L. Ed. 431; *Pullman's Palace Car Co. v. Speck*, 113 U. S. 84, 28 L. Ed. 925; *Smith v. Lyon*, 133 U. S. 315, 33 L. Ed. 635; *In re Pennsylvania Co.*, 137 U. S. 451, 34 L. Ed. 738; *Fisk v. Henarie*, 142 U. S. 459, 35 L. Ed. 1079; *Shaw v. Quincy Min. Co.*, 145 U. S. 444, 36 L. Ed. 768.

**53. Purpose of act of 1887.**—*Ex parte Wisner*, 203 U. S. 449, 459, 51 L. Ed. 264; *Martin v. Baltimore, etc.*, R. Co., 151 U. S. 673, 687, 38 L. Ed. 311; *Pullman's Palace Car Co. v. Speck*, 113 U. S. 84, 28 L. Ed. 925; *Smith v. Lyon*, 133 U. S. 315, 33 L. Ed. 635; *In re Pennsylvania Co.*, 137 U. S. 451, 34 L. Ed. 738; *Fisk v. Henarie*, 142 U. S. 459, 35 L. Ed. 1079; *Shaw v. Quincy Min. Co.*, 145 U. S. 444, 36 L. Ed. 768; *Wabash Western Railway v. Brown*, 164 U. S. 271, 277, 41 L. Ed. 431; *Mexican Nat. R. Co. v. Davidson*, 157 U. S. 201, 208, 39 L. Ed. 672; *McCormick Harvesting Machine Co. v. Walthers*, 134 U. S. 41, 33 L. Ed. 833; *Tennessee v. Union, etc., Bank*, 152 U. S. 454, 462, 38 L. Ed. 511; *Hanrick v. Hanrick*, 153 U. S. 192, 197, 38 L. Ed. 685; *McDonnell v. Jordon*, 178 U. S. 229, 238, 44 L. Ed. 1048.

"The object of the act of March 3, 1887, was to restrict the jurisdiction of the circuit court and to restrain the volume of litigation, which, through the expansion of federal jurisdiction in respect to the removal of causes, had been pouring into the courts of the United States. *Smith v. Lyon*, 133 U. S. 315, 33 L. Ed. 635; *In re Pennsylvania Co.*, 137 U. S. 451, 34 L. Ed. 738; *Fisk v. Henarie*, 142 U. S. 459, 35 L. Ed. 1079." *Missouri Pac. R. Co. v. Fitzgerald*, 160 U. S. 556, 583, 40 L. Ed. 536.

The statute leaves out the provision that if the party has the diverse citizenship required by the statute he may be sued in any district where he may be found at the time of the service of process. The omission of these words, and the increase of the amount in controversy necessary to the jurisdiction of the circuit court, and the repeal of so much of the former act as allowed plaintiffs to remove causes from the state courts to those of the United States, and many other features of the new statute, show the purpose of the legislature to restrict rather than to enlarge the jurisdiction of the circuit courts, while, at the same time, a suit is permitted to be brought in any district where either plaintiff or defendant resides. *Smith v. Lyon*, 133 U. S. 315, 319, 33 L. Ed. 635.

by rendition of judgment but the case may be retained by it 'until the judgment is satisfied and complete relief afforded to the parties.<sup>54</sup>

f. *What Courts Decide Questions of Jurisdiction.*—It belongs to the United States courts to determine the question of their own jurisdiction, the ultimate arbiter being the supreme court of the United States.<sup>55</sup>

5. **POWER TO ISSUE WRITS.**—The courts of the United States have power to issue writs of scire facias and all writs not specifically provided for by that statute which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.<sup>56</sup> The issuance of writs is only authorized by this section when necessary in the exercise of jurisdiction already possessed.<sup>57</sup> This section has been held to authorize the issuance of executions.<sup>58</sup>

**B. District Courts.**—1. **BOUNDARIES OF DISTRICT.**—Where a district of the United States is coextensive with a state, and the state boundaries are changed, the district changes with them.<sup>59</sup>

2. **WHO MAY HOLD DISTRICT COURT.**—As a general rule the district courts are held by the district judges, but the circuit court may designate judges of other districts to sit in any case whenever the public interest requires it,<sup>60</sup> and

**54. Jurisdiction to give complete relief.**—*Ward v. Todd*, 103 U. S. 327, 26 L. Ed. 339; *Riggs v. Johnson County*, 6 Wall. 166, 187, 18 L. Ed. 768; *Central Nat. Bank v. Stevens*, 169 U. S. 432, 464, 42 L. Ed. 807; *United States v. Allred*, 155 U. S. 591, 594, 39 L. Ed. 273; *Griffin v. Thompson*, 2 How. 244, 257, 11 L. Ed. 253; *Ober v. Gallagher*, 93 U. S. 199, 23 L. Ed. 829.

**55. What court decides questions of jurisdiction.**—*Freeman v. Howe*, 24 How. 450, 459, 16 L. Ed. 749; *United States v. Peters*, 5 Cranch 115, 3 L. Ed. 53; *Ableman v. Booth*, 21 How. 506, 16 L. Ed. 169; *New York v. Commissioners of Taxes*, 2 Black 620, 633, 17 L. Ed. 451.

**56. Power to issue writs.**—*Rev. Stat.*, § 716; *Riggs v. Johnson County*, 6 Wall. 166, 189, 18 L. Ed. 768; *McIntire v. Wood*, 7 Cranch 504, 3 L. Ed. 420; *McClung v. Silliman*, 6 Wheat. 598, 5 L. Ed. 340; *Wayman v. Southard*, 10 Wheat. 1, 22, 6 L. Ed. 253; *Bath County v. Amy*, 13 Wall. 244, 249, 20 L. Ed. 539; *United States Bank v. Halstead*, 10 Wheat. 51, 6 L. Ed. 264; *Stockton v. Bishop*, 2 How. 74, 11 L. Ed. 184; *Hardeman v. Anderson*, 4 How. 640, 11 L. Ed. 1138; *Ex parte Milwaukee R. Co.*, 5 Wall. 188, 18 L. Ed. 676; *Hudson v. Parker*, 156 U. S. 277, 281, 39 L. Ed. 424.

The circuit court of Tennessee, as a court of equity, cannot award a writ of hab. facias possessionem to enforce its decree. *Wallen v. Williams*, 7 Cranch 602, 3 L. Ed. 452.

**Power of supreme court.**—See the title **APPEAL AND ERROR**, vol. 1, pp. 394, 404, 921.

**Mandamus.**—See the title **MANDAMUS**.

**Certiorari.**—See the titles **APPEAL AND ERROR**, vol. 1, pp. 403, 409, 498, 921; **CERTIORARI**.

**Habeas corpus.**—See the title **HABEAS CORPUS**.

**Injunctions.**—See the title **INJUNCTIONS**.

**57. Necessity for jurisdiction to exist.**—*In re Massachusetts*, 197 U. S. 482, 488, 49 L. Ed. 845; *McClung v. Silliman*, 6 Wheat. 598, 5 L. Ed. 340; *Bath County v. Amy*, 13 Wall. 244, 248, 20 L. Ed. 539; *Riggs v. Johnson County*, 6 Wall. 166, 18 L. Ed. 768.

**58. Executions.**—*Wayman v. Southard*, 10 Wheat. 1, 6 L. Ed. 253; *United States Bank v. Halstead*, 10 Wheat. 51, 6 L. Ed. 264. See, generally, the title **EXECUTIONS**.

The words of the 14th section of the judiciary act of 1789, c. 20, are understood by the court to comprehend executions. An execution is a writ, which is certainly "agreeable to the principles and usages of law." There is no reason for supposing that the general term "writs," is restrained by the words, "which may be necessary for the exercise of their respective jurisdictions," to original process, or to process anterior to judgments. The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied. Many questions arise on the process subsequent to the judgment, in which jurisdiction is to be exercised. It is, therefore, no unreasonable extension of the words of the act, to suppose an execution necessary for the exercise of jurisdiction. *Wayman v. Southard*, 10 Wheat. 1, 22, 6 L. Ed. 253.

**59. Boundaries of district.**—*Devoe Mfg. Co., Petitioner*, 108 U. S. 401, 27 L. Ed. 764.

**60. Who may hold district court.**—*Ball v. United States*, 140 U. S. 118, 128, 35 L. Ed. 377; *McDowell v. United States*, 159 U. S. 596, 40 L. Ed. 271, where it was held that congress might provide for one district judge holding court in the district of another. See the title **JUDGES**.

Under § 596 of the Revised Statutes, the circuit judge, whenever in his judgment the public interest so required, could designate and appoint the district judge



in case of the disability of the district judge it may be held by the circuit justice,<sup>61</sup> or by the circuit judge.<sup>62</sup>

3. JURISDICTION—*a. Admiralty Jurisdiction.*—See the titles ADMIRALTY, vol. 1, p. 119; PRIZE.

*b. Suits by United States or Officers.*—The district courts of the United States have jurisdiction of all suits at common law brought by the United States, or by any officer thereof authorized by law to sue.<sup>63</sup>

*c. Suits for Penalties and Forfeitures.*—The district courts have jurisdiction of all suits for penalties and forfeitures incurred under any law of the United States.<sup>64</sup> Thus the district courts have jurisdiction of suits for penalties and forfeitures under United States customs laws,<sup>65</sup> laws relating to internal rev-

of any judicial district in his circuit to hold the district or circuit court in place of, or in aid of, any other district judge within the same circuit. *Ball v. United States*, 140 U. S. 118, 128, 35 L. Ed. 377.

The section did not authorize the circuit judge to empower the district judge to act in another district after the judgeship in the latter district becomes vacant, but a judge so authorized and acting was at least a *de facto* judge. *Ball v. United States*, 140 U. S. 118, 128, 35 L. Ed. 377.

As to *de facto* judges, see the title JUDGES.

61. Power of circuit justice to hold district court.—Act of March 2, 1809 (2 Stat. 534); *Wallace v. Loomis*, 97 U. S. 146, 24 L. Ed. 895.

62. Power of circuit judge to hold district court.—Act of April 10, 1869 (16 Stat. 44); *Wallace v. Loomis*, 97 U. S. 146, 24 L. Ed. 895.

63. Suits by United States or officers.—Rev. Stat., § 563; *Postmaster-General v. Early*, 12 Wheat. 136, 145, 6 L. Ed. 577; *Southwick v. Postmaster-General*, 2 Pet. 442, 447, 7 L. Ed. 479.

The district court has jurisdiction of all suits brought by the postmaster general. *Southwick v. Postmaster-General*, 2 Pet. 442, 447, 7 L. Ed. 479.

The jurisdiction of the district courts, over suits brought by the postmaster general for debts and balances due the general postoffice, is unquestionable. *Postmaster-General v. Early*, 12 Wheat. 136, 148, 6 L. Ed. 577.

The circuit courts have concurrent jurisdiction of suits by postmaster general. *Postmaster-General v. Early*, 12 Wheat. 136, 148, 6 L. Ed. 577; *Southwick v. Postmaster-General*, 2 Pet. 442, 447, 7 L. Ed. 479.

64. Suits for penalties and forfeitures.—Rev. Stat., § 563; *Lees v. United States*, 150 U. S. 476, 478, 37 L. Ed. 1150; *First Nat. Bank v. Morgan*, 132 U. S. 141, 142, 33 L. Ed. 282; *Coffey v. United States*, 116 U. S. 427, 433, 29 L. Ed. 681; *United States v. Mooney*, 116 U. S. 104, 29 L. Ed. 550; *The Cassius*, 2 Dall. 365, 1 L. Ed. 418; *Evans v. Bollen*, 4 Dall. 342, 1 L. Ed. 859; *United States v. 350 Chests of Tea*, 12 Wheat. 486, 497, 6 L. Ed. 702; *Helwig v. United States*, 188 U. S. 605, 610, 47 L. Ed. 614; *In re Keasbey & Mattison Co.*, 160 U. S. 221, 40 L. Ed. 402; *Insley v.*

*United States*, 150 U. S. 512, 515, 37 L. Ed. 1163; *In re Cooper*, 143 U. S. 472, 498, 36 L. Ed. 232; *Brady v. Daly*, 175 U. S. 148, 44 L. Ed. 109; *Gelston v. Hoyt*, 3 Wheat. 246, 312, 4 L. Ed. 381; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 390, 12 L. Ed. 465. See, also, *Slocum v. Mayberry*, 2 Wheat. 1, 4 L. Ed. 169, where it was held that the state court had no jurisdiction.

Suit for damages for infringement of dramatic copyright.—An action under § 4966 of the Revised Statutes to recover damages against a person who publicly performs or presents a copyrighted dramatic composition without the consent of the proprietor thereof, is not one to recover a penalty or forfeiture so as to be cognizable exclusively in the district courts, but is one arising under the copyright laws of which the circuit court had jurisdiction. *Brady v. Daly*, 175 U. S. 148, 44 L. Ed. 109.

65. Suits under customs laws.—*United States v. Mooney*, 116 U. S. 104, 29 L. Ed. 550; *In re Keasbey & Mattison Co.*, 160 U. S. 221, 40 L. Ed. 402; *Helwig v. United States*, 188 U. S. 605, 47 L. Ed. 614; *The Cassius*, 2 Dall. 365, 1 L. Ed. 418; *Evans v. Bollen*, 4 Dall. 342, 1 L. Ed. 859.

A suit for the recovery of penalties and forfeitures under the custom laws are not suits of a civil nature at common law or in equity within the meaning of the act of March 3, 1875, conferring jurisdiction over such causes upon the circuit courts. *United States v. Mooney*, 116 U. S. 104, 29 L. Ed. 550.

The first section of the judiciary act of 1875 did not take away the exclusive jurisdiction conferred by earlier statutes of the district courts of the United States for suits for the recovery of penalties and forfeitures under the custom laws of the United States. *In re Keasbey & Mattison Co.*, 160 U. S. 221, 40 L. Ed. 402; *United States v. Mooney*, 116 U. S. 104, 29 L. Ed. 550.

The district court has exclusive jurisdiction of a suit by the United States for the recovery of the penalty provided by § 7 of the customs administrative act of 1890, which provides, in effect, that the importer shall pay, in addition to the duties imposed by law, a sum equal to two per cent. of the total appraised value

enue,<sup>66</sup> contract labor law<sup>67</sup> and the national banking laws.<sup>68</sup> And except where otherwise provided by statute,<sup>69</sup> this jurisdiction is exclusive.<sup>70</sup>

d. *Suits for Seizures*—(1) *Seizures on Navigable Waters*.—See the title ADMIRALTY, vol. 1, pp. 119, 148.

(2) *Seizures on Land or Nonnavigable Waters*.—The district courts of the United States have jurisdiction of all seizures on land and on waters not within the admiralty and maritime jurisdiction,<sup>71</sup> and this jurisdiction is exclusive except where otherwise provided by special statute.<sup>72</sup>

e. *Concurrent Jurisdiction with Circuit Court*.—The district courts are given concurrent jurisdiction with the circuit courts in certain cases by acts of congress.<sup>73</sup> If the district courts are given jurisdiction concurrent with the circuit

of each one per cent. that the appraised value exceeds the value declared in the entry. *Helwig v. United States*, 186 U. S. 605, 610, 47 L. Ed. 614.

66. *Suits under internal revenue laws*.—*Coffey v. United States*, 116 U. S. 427, 433, 29 L. Ed. 681.

67. *Suits for penalties under contract labor law*.—The district courts of the United States have jurisdiction of suits for the recovery of penalties for violations of the contract labor law of February 26, 1885. *Lees v. United States*, 150 U. S. 476, 37 L. Ed. 1150.

68. *Suits against national bank for penalty for taking illegal interest*.—*First Nat. Bank v. Morgan*, 132 U. S. 141, 33 L. Ed. 282.

69. *Exclusive jurisdiction of district courts taken away by special statute*.—*Lees v. United States*, 150 U. S. 476, 478, 37 L. Ed. 1150; *Coffey v. United States*, 116 U. S. 427, 433, 29 L. Ed. 681; *First Nat. Bank v. Morgan*, 132 U. S. 141, 33 L. Ed. 282.

The jurisdiction of the district courts of the United States of suits for penalties incurred under the national banking act for taking usurious interest, is not, since the passage of the acts of 1864 and 1875, exclusive of, but concurrent with, the jurisdiction of such state, county or municipal courts of the county or city in which the bank is located, as has jurisdiction, under the local law, in similar cases. *First Nat. Bank v. Morgan*, 132 U. S. 141, 144, 33 L. Ed. 282.

Suits in rem for forfeitures for violation of internal revenue laws may be brought either in the district or circuit courts. *Coffey v. United States*, 116 U. S. 427, 433, 29 L. Ed. 681.

An action on an embargo bond is not one within the exclusive jurisdiction of the district courts, but may be brought in the circuit court. *Durousseau v. United States*, 6 Cranch 307, 3 L. Ed. 232.

70. *Exclusiveness of jurisdiction of suits for penalties, etc.*—*Lees v. United States*, 150 U. S. 476, 478, 37 L. Ed. 1150; *The Cassius*, 2 Dall. 365, 1 L. Ed. 418; *Evans v. Bollen*, 4 Dall. 342, 1 L. Ed. 859; *In re Keasbey & Mattison Co.*, 160 U. S. 221, 40 L. Ed. 402; *United States v. Mooney*, 113 U. S. 104, 29 L. Ed. 550; *Helwig v. United States*, 188 U. S. 605, 610, 47 L.

Ed. 614; *First Nat. Bank v. Morgan*, 132 U. S. 141, 144, 33 L. Ed. 282.

**Effect of omission of word "exclusive" in state statute.**—"The ninth section of the judiciary act of September 24, 1789, 1 Stat. 73, 78, c. 20, provided as follows: 'The district court shall have exclusive original cognizance \* \* \* of all suits for penalties and forfeitures incurred under the laws of the United States.' While in the Revised Statutes the word 'exclusive' was omitted, the language was not otherwise substantially changed. It is true that in some cases jurisdiction over matters of penalty and forfeiture has been committed to the circuit court, but this was always done by special act, and does not otherwise affect the proposition that the general jurisdiction over actions for penalties and forfeitures has been and is vested in the district court. Hence, when, as here, a statute imposes a penalty and forfeiture, jurisdiction of an action therefor would vest in the district court, unless it is in express terms placed exclusively elsewhere." *Lees v. United States*, 150 U. S. 476, 478, 37 L. Ed. 1150.

71. *Seizures on land or nonnavigable waters*.—Rev. Stat., § 563; *In re Cooper*, 143 U. S. 472, 498, 36 L. Ed. 232; *United States v. 350 Chests of Tea*, 12 Wheat. 486, 497, 6 L. Ed. 702; *Coffey v. United States*, 116 U. S. 427, 433, 29 L. Ed. 681; *Gelston v. Hoyt*, 3 Wheat. 246, 312, 4 L. Ed. 381; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 390, 12 L. Ed. 465; *Slocum v. Mayberry*, 2 Wheat. 1, 4 L. Ed. 169.

72. *Exclusiveness of jurisdiction*.—*Coffey v. United States*, 116 U. S. 427, 433, 29 L. Ed. 681.

By subd. 8, § 563, jurisdiction is given to the district courts of all seizures on land, and it is enacted that such jurisdiction shall be exclusive, except in the particular cases where jurisdiction of such seizures is given to the circuit courts. *Coffey v. United States*, 116 U. S. 427, 433, 29 L. Ed. 681.

73. *Concurrent jurisdiction with circuit courts*.—*Postmaster-General v. Early*, 12 Wheat. 136, 146, 6 L. Ed. 577, where it was held that the district courts had concurrent jurisdiction with the circuit courts of suits brought by the postmaster gen-

courts, these words are capable of giving jurisdiction to the circuit courts in such cases, although such jurisdiction did not previously exist.<sup>74</sup>

f. *Concurrent Jurisdiction with Court of Claims*.—See post, "Concurrent Jurisdiction of District and Circuit Courts," VII, F, 2, e, (8).

4. **DISTRICT COURT WITH CIRCUIT COURT POWERS**.—Districts are sometimes given the power of circuit courts.<sup>75</sup> When performing the appropriate duty of a district court, a district court is not sitting as a circuit court, because it possesses the powers of a circuit court also.<sup>76</sup>

5. **TRANSFER FROM DISTRICT TO CIRCUIT COURT**—a. *Where Judge Is Interested in Cause*.—The judge of a district court has power to order the record of a suit in which he is interested to be transmitted to the circuit of the United States in another state.<sup>77</sup>

b. *Upon Extension of Circuit Court System*.—Where the circuit court system was extended by act of congress to the state of Wisconsin, in which the district court formerly exercised circuit court powers, cases pending in the district court were transferred to the circuit court,<sup>78</sup> except that the district court was given power to enforce final judgments and decrees already rendered by it.<sup>79</sup>

eral for debts and balances due the general postoffice.

74. *Postmaster-General v. Early*, 12 Wheat. 136, 146, 6 L. Ed. 577.

"What is the meaning and purport of the words 'concurrent with' the circuit courts of the United States? Are they entirely senseless? Are they to be excluded from the clause in which the legislature has inserted them, or are they to be taken into view, and allowed the effect of which they are capable? The words are certainly not senseless. They have a plain and obvious meaning. And it is, we think, a rule, that words which have a meaning, are not to be entirely disregarded in construing a statute. We cannot understand this clause, as if these words were excluded from it. They, perhaps, manifest the opinion of the legislature, that the jurisdiction was in the circuit courts; but ought, we think, to be construed to give it, if it did not previously exist. Any other construction would destroy the effect of those words. The district court cannot take cognizance, concurrent with the circuit courts, unless the circuit courts can take cognizance of the same suits. For one body to do a thing concurrently with another is to act in conjunction with that other; it is equivalent to saving, the one may act together with the other. The phrase may imply that power was previously given to that other; but if, in fact, it had not been given, the words are capable of imparting it." *Postmaster-General v. Early*, 12 Wheat. 136, 147, 6 L. Ed. 577.

75. **District court acting as circuit court**.—*Southwick v. Postmaster-General*, 2 Pet. 442, 7 L. Ed. 479; *Bronson v. La Crosse*, etc., R. Co., 1 Wall. 405, 17 L. Ed. 616; *United States Bank v. Martin*, 5 Pet. 479, 8 L. Ed. 198.

76. *Southwick v. Postmaster-General*, 2 Pet. 442, 7 L. Ed. 479.

77. **Transfer to another circuit**.—*Spencer v. Lapsley*, 20 How. 264, 15 L. Ed. 902.

78. **Transfer from district to circuit court**.—*Milwaukee*, etc., R. Co. v. *Soutter*,

154 U. S., appx., 541, 17 L. Ed. 604; 20 L. Ed. 543; *Bronson v. La Crosse*, etc., R. Co., 1 Wall. 405, 17 L. Ed. 616; *Milwaukee R. Co. v. Soutter*, 5 Wall. 660, 18 L. Ed. 678.

**A foreclosure suit pending in the district court at the passage of the act extending the circuit court system to the state of Wisconsin, was transferred to the jurisdiction of the circuit.** *Milwaukee*, etc., R. Co. v. *Soutter*, 154 U. S., appx., 541, 17 L. Ed. 604; 20 L. Ed. 543.

79. **Power of district court to enforce judgments**.—*Bronson v. La Crosse*, etc., R. Co., 1 Wall. 405, 17 L. Ed. 616; *Milwaukee R. Co. v. Soutter*, 5 Wall. 660, 18 L. Ed. 678.

An act of congress (July 15, 1862) repealed all circuit court powers given to certain district courts of the United States. A subsequent statute (March 3, 1863) enacted, "That in all cases wherein the district court had rendered final judgments or decrees prior to the passage of the act, said district court shall have power to issue writs of execution, or other final process, or to use such other powers and proceedings as may be in accordance with law, to enforce the judgments and decrees aforesaid," anything in said act of July 15th, 1862, to the contrary notwithstanding. Held, that the district court acquired only such powers as might be necessary to insure the execution of any final process that it might issue; that is to say, such powers as might be necessary to regulate and control its officers in the execution of their ministerial duties. *Bronson v. La Crosse*, etc., R. Co., 1 Wall. 405, 17 L. Ed. 616.

The words "judgments and decrees," within the meaning of this act, were such judgments and decrees as disposed of the whole case, so that nothing remained to be done but to issue "final process." *Bronson v. La Crosse*, etc., R. Co., 1 Wall. 405, 17 L. Ed. 616.

Even if the statute in question conferred larger powers, and gave the court more general jurisdiction over its former



**C. Circuit Courts**—1. **DEFINITION AND NATURE.**—Circuit courts of the United States are, as contradistinguished from the district courts, the federal courts of original civil jurisdiction.<sup>80</sup>

2. **WHO MAY HOLD CIRCUIT COURTS**—a. *In General.*—The circuit court may be held by the circuit justice, the circuit judge, or the district judge sitting alone, or by any two of them together.<sup>81</sup>

b. *Attendance of Supreme Justices at Circuit Court.*—It is the duty of the chief justice, and of each justice of the supreme court, to attend at least one term of the circuit court in each district of the circuit to which he is allotted during every period of two years.<sup>82</sup>

3. **TERMS AND SESSIONS.**—Regular terms of the circuit court are those held at the time and place provided by act of congress.<sup>83</sup> Special terms are sessions ordered for the disposal of business, supplementary to regular terms, and to be held at the place fixed by congress for holding regular terms.<sup>84</sup> In an early case it was held that the supreme court would not grant a special court to try a case where the next circuit court was so near that it would not be possible to com-

cases, such court could not, pending an appeal by a party in whose favor it had decreed, exercise them on the application and in favor of such party; the supreme court, however, in order to guard against misconstruction, saying that where a decree had been rendered affecting property in litigation, the court below, being in custody of such property, had full power to adopt proper measures to protect it from waste or loss; and where a railroad was the property, reasonably to apply its revenues for its conservation, but not to appropriate them beyond this, and among litigating parties. *Bronson v. La Crosse, etc., R. Co.*, 1 Wall. 405, 17 L. Ed. 616.

The act of confirming or setting aside a sale made by a commissioner in chancery, involving, as it often does, the exercise of a very delicate judgment and discretion, cannot be regarded as a mere control of the ministerial duties of an officer in the execution of final process. *Milwaukee R. Co. v. Soutter*, 5 Wall. 660, 18 L. Ed. 678.

Hence, under the case of *Bronson v. La Crosse, etc., R. Co.*, 1 Wall. 405, 17 L. Ed. 616, here approved, such an act belonged, under the congressional statutes of July 15th, 1862, and March 3d, 1863 (12 Stat. at Large 576 and 807), to the circuit court of Wisconsin, and not to the district court, even though the sale was made under a decree of foreclosure in the last named court, rendered before the act of July 15th, 1862, and when, therefore, the district court was possessed of full circuit court powers. *Milwaukee R. Co. v. Soutter*, 5 Wall. 660, 18 L. Ed. 678.

80. **Definition and nature of circuit courts.**—*Lees v. United States*, 150 U. S. 476, 479, 37 L. Ed. 1150.

81. **Who may hold circuit court.**—Rev. Stat., § 609; *Pollard v. Dwight*, 4 Cranch 421, 2 L. Ed. 666.

The district judge may alone hold the circuit court, although there be no judge of the supreme court allotted to the circuit. *Pollard v. Dwight*, 4 Cranch 421, 2 L. Ed. 666.

The criminal terms of the circuit court for the southern district of New York may be held by all three of the judges named in § 613 of the Revised Statutes. *In re Classen*, 140 U. S. 200, 266, 35 L. Ed. 409.

82. **Attendance of supreme justices at circuit courts.**—Rev. Stat., § 610; *In re Neagle*, 135 U. S. 1, 34 L. Ed. 55.

"Although this enactment does not require in terms that the justices shall go to their circuits more than once in two years, the effect of it is to compel most of them to do this, because there are so many districts in many of the circuits that it is impossible for the circuit justice to reach them all in one year, and the result of this is that he goes to some of them in one year, and to others in the next year, thus requiring an attendance in the circuit every year." *In re Neagle*, 135 U. S. 1, 55, 34 L. Ed. 55.

83. **Regular terms.**—*American R. Co. v. Castro*, 204 U. S. 453, 51 L. Ed. 564.

84. **Special terms defined.**—*American R. Co. v. Castro*, 204 U. S. 453, 457, 51 L. Ed. 564 (holding this to be the sense in which "special term" is used in § 670 of the Revised Statutes).

The act of April 12, 1900, in relation to the district court of Porto Rico, provided that regular terms should be held at San Juan and at Ponce at certain times therein designated, and that special terms might be held at Mayaguez at such other times, "as said judge may deem expedient." It was held that the terms authorized to be held at Mayaguez were not "special terms" within the meaning of § 670 of the Revised Statutes, which, in effect, prohibits the trial of jury cases at special terms. "What the provision in question plainly meant was that regular terms should be held at Ponce and San Juan at the times fixed by congress in the statute and that the same character or terms might be held at Mayaguez at a time to be specially designated by the district judge." *American R. Co. v. Castro*, 204 U. S. 453, 457, 51 L. Ed. 564.

mence and finish the business before the special court before the convening of the circuit court,<sup>85</sup> and it was said that it was very questionable whether the supreme court could appoint a special circuit court, to be held at a distant period, after the regular stated session of the circuit court.<sup>86</sup>

4. JURISDICTION—*a. Civil Suits at Law and in Equity*—(1) *In General*.—The statute conferring jurisdiction upon the circuit courts only extends their jurisdiction to suits of a civil nature at common law or in equity.<sup>87</sup>

(2) *What Constitutes a "Suit."*—The term suit is a very comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law affords. The modes of proceeding may be various; but, if a right is litigated in a court of justice, the proceeding by which the decision of the court is sought is a suit.<sup>88</sup>

(3) *Suits "of a Civil Nature."*—In order for the circuit courts to have cognizance of a suit at law or in equity, it must be one of a civil nature.<sup>89</sup> A proceeding under statute, in the nature of a quo warranto proceeding,<sup>90</sup> and a proceeding under a statute to obtain sale of mortgaged premises,<sup>91</sup> are suits

85. When special term granted.—United States *v.* Hamilton, 3 Dall. 17, 1 L. Ed. 490.

86. Appointment of special court to be held after regular court.—United States *v.* Hamilton, 3 Dall. 17, 1 L. Ed. 490.

87. Statutory provision.—Act of March 3, 1875, ch. 137, 18 Stat. 470.

"Controversies" defined.—See post, "What Constitutes a Controversy," VII, C, 4, b, (2), (a), dd.

What constitutes a "case" arising under constitution or laws.—See post, "Cases Arising under Constitution, Laws, or Treaties," VII, C, 4, b, (1).

88. What constitutes a "suit."—Weston *v.* Charleston, 2 Pet. 449, 464, 7 L. Ed. 481; Kendall *v.* United States, 12 Pet. 524, 9 L. Ed. 1181; Kohl *v.* United States, 91 U. S. 367, 375, 23 L. Ed. 449; Upshur County *v.* Rich, 135 U. S. 467, 34 L. Ed. 196; Ex parte Milligan, 4 Wall. 2, 112, 18 L. Ed. 281. See the title ACTIONS, vol. I, p. 99, and references there given.

A proceeding in the district court of Alaska by petition to obtain a license for vessels and salmon canneries under the act of March 3, 1899, in which the appellant protests against the payment of licenses, and in which the court enters an order directing the issue of the license and overruling and denying the protest, is not a suit or action in which a final decree or judgment is rendered, from which the petitioner can appeal to the supreme court. Pacific Steam Whaling Co. *v.* United States, 187 U. S. 447, 47 L. Ed. 253; Pacific Coast Steamship Co. *v.* United States, 187 U. S. 454, 47 L. Ed. 256.

A proceeding, not in a court of justice, but carried on by executive officers in the exercise of their proper functions, as in the valuation of property for the just distribution of taxes or assessments, is purely administrative in its character, and cannot, in any just sense, be called a suit; and an appeal in such a case, to a board of assessors or commissioners having no judicial powers, and only authorized to determine questions of quantity, proportion and value, is not a suit; but such an

appeal may become a suit, if made to a court or tribunal having power to determine questions of law and fact, either with or without a jury, and there are parties litigant to contest the case on the one side and the other. Upshur County *v.* Rich, 135 U. S. 467, 477, 34 L. Ed. 196.

Where a proceeding in a state court is merely incidental and auxiliary to an original action there—a graft upon it, and not an independent and separate litigation—it cannot be removed into the federal courts under the act of 2d of March, 1867, authorizing under certain conditions the transfer of "suits" originating in the state courts. Bank *v.* Turnbull & Co., 16 Wall. 190, 21 L. Ed. 296.

Writ of right is a suit.—Green *v.* Litter, 8 Cranch 229, 3 L. Ed. 545, cited in Weston *v.* Charleston, 2 Pet. 449, 464, 7 L. Ed. 481.

What constitutes a "suit" for purposes of appeal or error.—See the title APPEAL AND ERROR, vol. 1, p. 929.

What constitutes a "suit" for purpose of removal.—See the title REMOVAL OF CAUSES.

89. Necessity for suit to be of civil nature.—Act of March 3, 1875, ch. 137, 18 Stat. 470.

Habeas corpus.—See the title HABEAS CORPUS.

Mandamus proceedings.—See the title MANDAMUS.

90. A proceeding in the nature of quo warranto proceedings under the Kansas statutes, is one of a civil nature within the jurisdiction of the circuit court. Ames *v.* Kansas, 111 U. S. 449, 458, 28 L. Ed. 482.

91. Suit to sell mortgaged property.—Under the Louisiana statute a mortgage creditor may obtain an order for seizure and sale of the mortgaged premises without previous notice to the debtor, but the sale cannot take place until the debtor has had notice and opportunity to interpose objection. It has been held that a proceeding under this statute is a civil suit within the jurisdiction of the circuit court of the United States. Fleitas *v.* Richard-

of civil nature, and, as such, are cognizable by the circuit court of the United States. But a cause of admiralty jurisdiction is not a civil suit.<sup>92</sup>

(4) *Suits at Common Law*.—By suits at common law are to be understood suits in which legal rights are to be ascertained and determined, in contradistinction to those where equitable rights alone are recognized, and equitable remedies are administered.<sup>93</sup>

(5) *Suits in Equity*.—By cases in equity are to be understood suits in which relief is sought according to the principles and practice of the equity jurisdiction, as established in English jurisprudence.<sup>94</sup>

(6) *New Statutory Remedies*.—The terms "law" and "equity," as used in the constitution, although intended to mark and fix the distinction between the two systems of jurisprudence as known and practised at the time of its adoption, do not restrict the jurisdiction conferred by it to the very rights and remedies then recognized and employed, but embrace as well not only rights newly created by statutes of the states,<sup>95</sup> as in cases of actions for the loss occasioned to survivors by the death of a person caused by the wrongful act, neglect, or default of another,<sup>96</sup> but new forms of remedies to be administered in the courts of the United States, according to the nature of the case, so as to save to suitors the right of trial by jury in cases in which they are entitled to it, according to the course and analogy of the common law.<sup>97</sup>

(7) *Suits with Respect to Probate of Wills*—(a) *Matters of Pure Probate*.—Matters of pure probate, in the strict sense of the words, are not, however, within the jurisdiction of courts of the United States as the authority to make wills is derived from the state and the requirement of probate is but a regulation to make a will effective.<sup>98</sup>

son (No. 1), 147 U. S. 538, 544, 37 L. Ed. 272.

92. *Admiralty cause not a civil suit*.—*Atkins v. The Disintegrating Co.*, 18 Wall. 272, 21 L. Ed. 841.

93. *Suits at "common law"*.—*Irvine v. Marshall*, 20 How. 558, 565, 15 L. Ed. 994; *Parsons v. Bedford*, 3 Pet. 433, 447, 7 L. Ed. 732; *Robinson v. Campbell*, 3 Wheat. 212, 4 L. Ed. 372.

*Suit to condemn land*.—A proceeding to take land under the power of eminent domain, and determining the compensation to be made for it, is a suit at common law, when initiated in a court. *Kohl v. United States*, 91 U. S. 367, 376, 23 L. Ed. 449; *Boom Co. v. Patterson*, 98 U. S. 403, 406, 25 L. Ed. 206; *Pacific Railroad Removal Cases*, 115 U. S. 1, 18, 29 L. Ed. 319; *Searl v. School District (No. 2)*, 124 U. S. 197, 199, 31 L. Ed. 415; *Metropolitan R. Co. v. District of Columbia*, 195 U. S. 322, 328, 49 L. Ed. 219; *Chappell v. United States*, 160 U. S. 499, 513, 40 L. Ed. 510; *Madisonville Traction Co. v. St. Bernard Min. Co.*, 196 U. S. 239, 247, 49 L. Ed. 462. See, also, *Bellaire v. Baltimore, etc.*, R. Co., 146 U. S. 117, 119, 36 L. Ed. 910; *Upshur County v. Rich*, 135 U. S. 467, 474, 34 L. Ed. 196.

*Suit at "common law" within the provision securing jury trial*.—See the title JURY.

94. *Suits in equity*.—*Irvine v. Marshall*, 20 How. 558, 565, 15 L. Ed. 994; *Robinson v. Campbell*, 3 Wheat. 212, 4 L. Ed. 372; *United States v. Howland*, 4 Wheat. 108, 4 L. Ed. 526. See the title EQUITY.

95. *New statutory remedies*.—*Ellis v.*

*Davis*, 109 U. S. 485, 497, 27 L. Ed. 1006; *Kohl v. United States*, 91 U. S. 367, 375, 23 L. Ed. 449.

When, in the eleventh section of the judiciary act of 1789, jurisdiction of suits of a civil nature at common law or in equity was given to the circuit courts, it was intended to embrace not merely suits which the common law recognized as among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined as distinguished from rights in equity, as well as suits in admiralty. *Kohl v. United States*, 91 U. S. 367, 375, 23 L. Ed. 449.

96. *Actions for death, etc.*—*Ellis v. Davis*, 109 U. S. 485, 497, 27 L. Ed. 1006; *Railway Co. v. Whitton*, 13 Wall. 270, 20 L. Ed. 571; *Dennick v. Railroad Co.*, 103 U. S. 11, 26 L. Ed. 439.

97. *Ellis v. Davis*, 109 U. S. 485, 497, 27 L. Ed. 1006; *Ex parte Boyd*, 105 U. S. 647, 26 L. Ed. 1200; *Boom Co. v. Patterson*, 98 U. S. 403, 25 L. Ed. 206.

98. *Probate jurisdiction*.—*Farrell v. O'Brien*, 199 U. S. 89, 110, 50 L. Ed. 101; *Ellis v. Davis*, 109 U. S. 485, 27 L. Ed. 1006; *Case of Broderick's Will*, 21 Wall. 503, 22 L. Ed. 599; *Fouvergne v. New Orleans*, 18 How. 470, 471, 15 L. Ed. 399; *Byers v. McAuley*, 149 U. S. 608, 619, 37 L. Ed. 867; *Adams v. Preston*, 22 How. 473, 16 L. Ed. 273. See the title WILLS.

The original probate, of course, is mere matter of state regulation, and depends entirely upon the local law; for it is that law which confers the power of making wills, and prescribes the conditions upon which alone they may take effect; and



(b) *Suits to Set Aside Wills*.—Where a state law, statutory or customary, gives to the citizens of a state, in an action or suit inter partes, the right to question at law the probate of a will or to assail probate in a suit in equity, the courts of the United States in administering the rights of citizens of other states or aliens will enforce such remedies.<sup>99</sup>

b. *Grounds of Jurisdiction*.—(1) *Cases Arising under Constitution, Laws or Treaties*.—(a) *In General*.—The constitution of the United States provides that the judicial power of the United States shall extend to all cases in law or equity, arising under the constitution, laws or treaties of the United States. Congress has extended the jurisdiction of the United States courts to all such cases, where the matter in dispute is sufficient to give jurisdiction under the acts of congress.<sup>1</sup> Where a case so arises the federal courts have jurisdiction irrespective of the citizenship of the parties.<sup>2</sup>

as, by the law in almost all the states, no instrument can be effective as a will until proved, no rights in relation to it, capable of being contested between parties, can arise until preliminary probate has been first made. Jurisdiction as to wills, and their probate as such, is neither included in nor excepted out of the grant of judicial power to the courts of the United States. So far as it is ex parte and merely administrative, it is not conferred, and it cannot be exercised by them at all until, in a case at law or in equity, its exercise becomes necessary to settle a controversy of which a court of the United States may take cognizance by reason of the citizenship of the parties. *Ellis v. Davis*, 109 U. S. 485, 497, 27 L. Ed. 1006.

The courts of the United States have no probate jurisdiction, and must receive the sentences of the courts to which the jurisdiction over testamentary matters is committed, as conclusive of the validity and contents of a will. An original bill cannot be sustained upon an allegation that the probate of a will is contrary to law. *Fouvergne v. New Orleans*, 18 How. 470, 471, 15 L. Ed. 399.

The parish court of New Orleans had exclusive jurisdiction over property ceded by insolvents, and the courts of the United States have no jurisdiction over such insolvencies. *Adams v. Preston*, 22 How. 473, 16 L. Ed. 273.

**99. Suit to annul and set aside probate of will.**—*Ellis v. Davis*, 109 U. S. 485, 486, 27 L. Ed. 1006; *Gaines v. Fuentes*, 92 U. S. 10, 18, 23 L. Ed. 524; *Farrell v. O'Brien*, 199 U. S. 89, 110, 50 L. Ed. 101.

A suit to annul a will as a muniment of title, and to restrain the enforcement of a decree admitting it to probate, is, in essential particulars, a suit in equity; and if by the law obtaining in a state, customary or statutory, such a suit can be maintained in one of its courts, whatever designation that court may bear, it may be maintained by original process in the circuit court of the United States, if the parties are citizens of different states. *Gaines v. Fuentes*, 92 U. S. 10, 23 L. Ed. 524.

An action of revindication under the Louisiana law can be brought in the cir-

cuit court of the United States. *Ellis v. Davis*, 109 U. S. 485, 486, 27 L. Ed. 1006.

**1. Cases arising under constitution, laws or treaties.**—Act of Aug. 13, 1888, c. 866, 25 Stat. 433; *Wiley v. Sinkler*, 179 U. S. 58, 64, 45 L. Ed. 84; *Pope v. Louisville*, etc., R. Co., 173 U. S. 573, 576, 43 L. Ed. 814; *Cohens v. Virginia*, 6 Wheat. 264, 405, 5 L. Ed. 257; *Ableman v. Booth*, 21 How. 506, 16 L. Ed. 169; *Gold-Washing*, etc., Co. v. *Keyes*, 96 U. S. 199, 24 L. Ed. 656; *Cummings v. Chicago*, 188 U. S. 410, 425, 47 L. Ed. 525; *Calumet Grain*, etc., Co. v. *Chicago*, 188 U. S. 431, 47 L. Ed. 532; *Railroad Co. v. Mississippi*, 102 U. S. 135, 136, 26 L. Ed. 96; *United States v. Mooney*, 116 U. S. 104, 105, 29 L. Ed. 550; *Ames v. Kansas*, 111 U. S. 449, 463, 28 L. Ed. 482; *Stevenson v. Fain*, 195 U. S. 165, 168, 49 L. Ed. 142; *Gaines v. Fuentes*, 92 U. S. 10, 17, 23 L. Ed. 524; *Ex parte Clarke*, 100 U. S. 399, 408, 25 L. Ed. 715; *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 63, 48 L. Ed. 870; *Marbury v. Madison*, 1 Cranch 137, 174, 2 L. Ed. 60.

"Jurisdiction is given to the courts of the union, in two classes of cases. In the first, their jurisdiction depends on the character of the cause, whoever may be the parties. This class comprehends 'all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.' This clause extends the jurisdiction of the court to all the cases described, without making in its terms any exception whatever, and without any regard to the condition of the party. If there be any exception, it is to be implied, against the express words of the article." *Cohens v. Virginia*, 6 Wheat. 264, 378, 5 L. Ed. 257; *Ableman v. Booth*, 21 How. 506, 16 L. Ed. 169.

**2. Jurisdiction not dependent on citizenship.**—*Pope v. Louisville*, etc., R. Co., 173 U. S. 573, 576, 43 L. Ed. 814; *Cohens v. Virginia*, 6 Wheat. 264, 383, 5 L. Ed. 257; *Ableman v. Booth*, 21 How. 506, 16 L. Ed. 169; *Cummings v. Chicago*, 188 U. S. 410, 425, 47 L. Ed. 525; *Calumet Grain*, etc., Co. v. *Chicago*, 188 U. S. 431, 47 L. Ed. 532.

A case arising under the constitution or

(b) "*Case*" Defined.—A "case in law or equity," within the meaning of the judiciary act, consists of the right of one party as well as the other.<sup>3</sup> The term "cases" in the constitution embraces the claims or contentions of litigants brought before the courts for adjudication by regular proceedings established for the protection or enforcement of rights, or the prevention, redress or punishment of wrongs.<sup>4</sup>

(c) *To What Cases Jurisdiction Extends*—aa. *In General*—"All Cases."—The constitution extends the federal jurisdiction to all cases in law and equity

laws of the United States, is cognizable in the courts of the Union, whoever may be the parties to that case. *Cohens v. Virginia*, 6 Wheat. 264, 383, 5 L. Ed. 257.

3. "*Case*" consists of right of both parties.—*Cohens v. Virginia*, 6 Wheat. 264, 379, 5 L. Ed. 257; *Patton v. Brady*, 184 U. S. 608, 611, 46 L. Ed. 713; *The Mayor v. Cooper*, 6 Wall. 247, 253, 18 L. Ed. 851; *Tennessee v. Davis*, 100 U. S. 257, 264, 25 L. Ed. 648. See, also, the title ACTIONS, vol. 1, p. 98.

"The article does not extend the judicial power to every violation of the constitution which may possibly take place, but to 'a case in law or equity,' in which a right, under such law, is asserted in a court of justice. If the question cannot be brought into a court, then there is no case in law or equity, and no jurisdiction is given by the words of the article. But if, in any controversy depending in a court, the cause should depend on the validity of such a law, that would be a case arising under the constitution, to which the judicial power of the United States would extend." *Cohens v. Virginia*, 6 Wheat. 264, 405, 5 L. Ed. 257.

4. "*Case*" defined.—*Smith v. Adams*, 130 U. S. 167, 173, 32 L. Ed. 895; *La Abra Silver Min. Co. v. United States*, 175 U. S. 423, 456, 44 L. Ed. 223; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 475, 38 L. Ed. 1047; *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 38, 46 L. Ed. 860.

A "case" is a suit in law or equity, instituted according to the regular course of judicial proceedings. *Pacific Steam Whaling Co. v. United States*, 187 U. S. 447, 47 L. Ed. 253.

The judicial department may receive jurisdiction to the full extent of the constitution, laws and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law; it then becomes a case, over which the federal courts have jurisdiction. *Osborn v. United States Bank*, 9 Wheat. 738, 819, 6 L. Ed. 204; *Smith v. Adams*, 130 U. S. 167, 174, 32 L. Ed. 895; *La Abra Silver Min. Co. v. United States*, 175 U. S. 423, 44 L. Ed. 223; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 475, 38 L. Ed. 1047; *Murray v. Hoboken Land, etc., Co.*, 18 How. 272, 284, 15 L. Ed. 372.

To constitute a case a question must assume a legal form, for forensic litigation and discussion. *Kendall v. United States*, 12 Pet. 524, 645, 9 L. Ed. 1181.

Under a treaty with Mexico a mining company of the United States was awarded a certain amount by way of indemnity in consequence of certain acts and omissions of duty upon the part of official representatives of Mexico. The money having been paid by Mexico, and it being ascertained that the claim was probably fraudulent, congress provided that the attorney general might bring a suit in the court of claims against the company to determine its right to the amount or any part of the amount awarded. It was held that the court of claims had jurisdiction; that the proceeding was a case within the meaning of the constitution extending the judiciary power of the United States to all cases in law and equity arising under the constitution and laws of the United States and the treaties made under its authority. *La Abra Silver Min. Co. v. United States*, 175 U. S. 423, 44 L. Ed. 223.

A petition filed under § 12 of the interstate commerce act against a witness duly summoned to testify before the commission, to compel him to testify or to produce books, documents and papers relating to the matter in controversy, makes a case to which the judicial power of the United States extends. *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 38 L. Ed. 1047; *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 38, 46 L. Ed. 860.

"When, in the form prescribed by law, the executive officer, acting in behalf of the United States, brings the Chinese laborer before the judge, in order that he may be heard, and the facts upon which depends his right to remain in the country be decided, a case is duly submitted to the judicial power; for here are all the elements of a civil case—a complainant, a defendant and a judge—actor, reus et judex. 3 Bl. Com. 25; *Osborn v. United States Bank*, 9 Wheat. 738, 819, 6 L. Ed. 204. No formal complaint or pleadings are required, and the want of them does not affect the authority of the judge, or the validity of the statute." *Fong Yue Ting v. United States*, 149 U. S. 698, 715, 729, 37 L. Ed. 905.

What constitutes a "controversy."—See post, "What Constitutes a Controversy," VII, C, 4, b, (2), (a), dd.

arising under the constitution and laws of the United States, and it follows, that those who would withdraw any case of this kind from that jurisdiction must sustain the exemption they claim, on the spirit and true meaning of the constitution, which spirit and true meaning must be so apparent as to overrule the words which its framers have employed.<sup>5</sup>

bb. *Suits by State*.—While the eleventh amendment of the national constitution excludes the judicial power of the United States from suits, in law or equity, commenced or prosecuted against one of the United States by citizens of another state, such power is extended by the constitution to suits commenced or prosecuted by a state against an individual, in which the latter demands nothing from the former, but only seeks the protection of the constitution and laws of the United States against the claim or demand of the state.<sup>6</sup>

cc. *Suits against State*.—Suits against a state are expressly excluded from the jurisdiction of the federal courts, and those courts have no jurisdiction of such suits, even though they arise under the constitution or laws of the United States.<sup>7</sup>

dd. *Criminal Cases*.—The provision of the constitution declaring that the judicial power of the United States extends “to all cases in law and equity arising under the constitution, the laws of the United States, and treaties made or which shall be made under their authority,” embraces alike civil and criminal cases. Both are equally within that power.<sup>8</sup>

ee. *Habeas Corpus*.—See the title HABEAS CORPUS.

ff. *Mandamus*.—See the title MANDAMUS.

(d) *What Are Cases Arising under Constitution and Laws*—aa. *General Rules*.—A case arises under the constitution or laws of the United States

**5. To what cases jurisdiction may be extended.**—“All cases.”—*Cohens v. Virginia*, 6 Wheat. 264, 379, 5 L. Ed. 257; *Ames v. Kansas*, 111 U. S. 449, 471, 28 L. Ed. 482; *Tennessee v. Davis*, 100 U. S. 257, 270, 25 L. Ed. 648. See ALL, vol. 1, p. 257.

Although the judicial power of the United States may be extended by congress to all cases arising under the laws of the United States, the legislature has not thought proper to delegate the exercise of that power to its circuit courts, except in certain specified cases. *McIntire v. Wood*, 7 Cranch 504, 506, 3 L. Ed. 420. See post, “Amount in Controversy,” VII, C, 4, d.

**6. Suits by state against individuals.**—*Railroad Co. v. Mississippi*, 102 U. S. 135, 140, 26 L. Ed. 96; *Ames v. Kansas*, 111 U. S. 449, 28 L. Ed. 482; *Plaquemines, etc., Fruit Co. v. Henderson*, 170 U. S. 511, 42 L. Ed. 1126. See, generally, the title STATES.

But a suit by a state in one of its own courts cannot be removed to a circuit court of the United States under the act of 1875, unless it be a suit arising under the constitution or laws of the United States or treaties made under their authority. *Ames v. Kansas*, 111 U. S. 449, 28 L. Ed. 482; *Germania Ins. Co. v. Wisconsin*, 119 U. S. 473, 30 L. Ed. 461; *People's Ins. Co. v. Wisconsin*, 119 U. S. 477, 30 L. Ed. 462.

**7. Suits against state.**—*Smith v. Reeves*, 178 U. S. 436, 44 L. Ed. 1140; *North Carolina v. Temple*, 134 U. S. 22, 33 L. Ed. 849; *Louisiana v. Jumel*, 107 U. S.

711, 27 L. Ed. 448; *Hagood v. Southern*, 117 U. S. 52, 29 L. Ed. 805; *In re Ayers*, 123 U. S. 443, 31 L. Ed. 216; *Cunningham v. Macon, etc., R. Co.*, 109 U. S. 446, 27 L. Ed. 992; *Hans v. Louisiana*, 134 U. S. 1, 33 L. Ed. 842; *Hollingsworth v. Virginia*, 3 Dall. 378, 1 L. Ed. 644; *United States v. Texas*, 143 U. S. 621, 644, 36 L. Ed. 285. See the title STATES.

In a case where the chief magistrate of a state is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, the state itself may be considered a party in the record. *Governor v. Madrazo*, 1 Pet. 110, 7 L. Ed. 73.

A libel and claim exhibited a demand for money actually in the treasury of the state of Georgia, mixed up with the general funds of the state, and for slaves in the possession of the government; the possession of both of which was acquired by means which it was lawful in the state to exercise. Held, that the courts of the United States had no jurisdiction; the same being taken away by the 11th article of the amendment to the constitution of the United States. *Governor v. Madrazo*, 1 Pet. 110, 7 L. Ed. 73.

**Suits against state railroad commissions** not within the eleventh amendment prohibiting suits against states. *Mississippi Railroad Commission v. Illinois Cent. R. Co.*, 203 U. S. 335, 51 L. Ed. 209; *Prout v. Starr*, 188 U. S. 537, 542, 47 L. Ed. 584.

**8. Criminal cases.**—*Tennessee v. Davis*, 100 U. S. 257, 258, 25 L. Ed. 648.

A case arising under the constitution and laws of the United States may as



whenever its correct decision depends on the construction of either,<sup>9</sup> or, as the rule is sometimes expressed, whenever the rights set up by a party may be defeated by one construction of the federal constitution or laws or sustained by another.<sup>10</sup> Cases growing out of the constitution or legislation of congress,

well arise in a criminal prosecution as in a civil suit. *Tennessee v. Davis*, 100 U. S. 257, 264, 25 L. Ed. 648.

**9. Where correct decision depends on construction of constitution or laws.**—*Cohens v. Virginia*, 6 Wheat. 264, 379, 5 L. Ed. 257; *Kansas Pac. R. Co. v. Atchison*, etc., R. Co., 112 U. S. 414, 416, 28 L. Ed. 794; *United States v. Old Settlers*, 148 U. S. 427, 468, 37 L. Ed. 509; *In re Lennon*, 166 U. S. 548, 553, 41 L. Ed. 1110; *Devine v. Los Angeles*, 202 U. S. 313, 332, 50 L. Ed. 1046; *Carson v. Dunham*, 121 U. S. 421, 30 L. Ed. 992; *Blackburn v. Portland Gold Min. Co.*, 175 U. S. 571, 580, 44 L. Ed. 276; *Northern Pac. R. Co. v. Soderberg*, 188 U. S. 526, 528, 47 L. Ed. 575; *Doolan v. Carr*, 125 U. S. 618, 31 L. Ed. 844; *Cooke v. Avery*, 147 U. S. 375, 37 L. Ed. 209; *Pacific Railroad Removal Cases*, 115 U. S. 1, 29 L. Ed. 319; *Chrystal Springs Land, etc., Co. v. Los Angeles*, 177 U. S. 169, 44 L. Ed. 720; *Railroad Co. v. Mississippi*, 102 U. S. 135, 140, 26 L. Ed. 96; *Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257; *Osborn v. United States Bank*, 9 Wheat. 738, 6 L. Ed. 204; *The Mayor v. Cooper*, 6 Wall. 247, 18 L. Ed. 851; *Gold-Washing, etc., Co. v. Keyes*, 96 U. S. 199, 24 L. Ed. 656; *Tennessee v. Davis*, 100 U. S. 257, 25 L. Ed. 648.

A case arises under that constitution or laws not merely where a party comes into court to demand something conferred upon him by the constitution, a law of the United States, or a treaty, but wherever its correct decision as to the right, privilege, claim, protection, or defense of a party, in whole or in part depends upon the construction of either. It is in the power of congress to give the circuit courts of the United States jurisdiction of such a case, although it may involve other questions of fact or of law. *Tennessee v. Davis*, 100 U. S. 257, 258, 25 L. Ed. 648.

In *New Orleans v. Benjamin*, 153 U. S. 411, 424, 38 L. Ed. 764, it was said: "The judicial power extends to all cases in law and equity arising under the constitution, but these are cases actually and not potentially arising, and jurisdiction cannot be assumed on mere hypothesis. In this class of cases it is necessary to the exercise of original jurisdiction by the circuit court that the cause of action should depend upon the construction and application of the constitution, and it is readily seen that cases in that predicament must be rare. Ordinarily the question of the repugnancy of a state statute to the impairment clause of the constitution is to be passed upon by the state courts in the first instance, the presumption being in all cases that they will do what the constitution and laws of the

United States require. *Chicago, etc., R. Co. v. Wiggins Ferry Co.*, 108 U. S. 18, 27 L. Ed. 636; and if there be ground for complaint of their decision, the remedy is by writ of error under § 709 of the Revised Statutes. Congress gave its construction to that part of the constitution by the twenty-fifth section of the judiciary act of 1789, and has adhered to it in subsequent legislation." *Defiance Water Co. v. Defiance*, 191 U. S. 184, 191, 48 L. Ed. 140.

A case arises under the law of the United States, when it arises out of the implication of those laws. *Tennessee v. Davis*, 100 U. S. 257, 264, 25 L. Ed. 648.

**"Suits involving the constitution or laws of the United States are not suits arising under the constitution or laws where they do not turn on a controversy between the parties in regard to the operation of the constitution or laws, on the facts. *Provident Sav. Society v. Ford*, 114 U. S. 635, 29 L. Ed. 261; *Metcalf v. Watertown*, 128 U. S. 586, 32 L. Ed. 543; *Colorado Cent. Consol. Min. Co. v. Turk*, 105 U. S. 138, 37 L. Ed. 1030; *St. Joseph, etc., R. Co. v. Steele*, 167 U. S. 659, 42 L. Ed. 315; *Pratt v. Paris Gas Light, etc., Co.*, 168 U. S. 255, 42 L. Ed. 458; *Western Union Tel. Co. v. Ann Arbor R. Co.*, 178 U. S. 239, 44 L. Ed. 1052; *Gableman v. Peoria, etc., R. Co.*, 179 U. S. 335, 45 L. Ed. 220." *Bankers' Mut. Casualty Co. v. Minneapolis, etc., R. Co.*, 192 U. S. 371, 384, 48 L. Ed. 484.**

**"A case in admiralty does not, in fact, arise under the constitution or laws of the United States. These cases are as old as navigation itself; and the law, admiralty and maritime, as it has existed for ages, is applied by our courts to the cases as they arise." *American Ins. Co. v. Canter*, 1 Pet. 511, 544, 7 L. Ed. 243.**

**Where writ of error would lie to state court.**—A case does not necessarily arise under the constitution or laws of the United States every time a writ of error would lie to the judgment of the state court. *Bradley v. Lightcap* (No. 3), 195 U. S. 25, 49 L. Ed. 78.

**10. Where rights involved may be sustained or defeated by construction of constitution and laws.**—*Kansas Pac. R. Co. v. Atchison, etc., R. Co.*, 112 U. S. 414, 28 L. Ed. 794; *Osborn v. United States Bank*, 9 Wheat. 738, 6 L. Ed. 204; *Blackburn v. Portland Gold Min. Co.*, 175 U. S. 571, 580, 44 L. Ed. 276; *Starr v. New York*, 115 U. S. 248, 29 L. Ed. 388; *Carson v. Dunham*, 121 U. S. 421, 427, 30 L. Ed. 992; *Tennessee v. Union, etc., Bank*, 152 U. S. 454, 460, 38 L. Ed. 511; *Northern Pac. R. Co. v. Soderberg*, 188 U. S. 526, 528, 47 L. Ed. 575; *Doolan v. Carr*, 125 U. S. 618, 31 L. Ed. 844; *Cooke v.*

whether they constitute the right or privilege, or claim or protection, or defense of the party, in whole or in part, by whom they are asserted, arise under the constitution or laws, within the meaning of the constitutional provision providing for the jurisdiction of the federal courts.<sup>11</sup> Cases arising under the constitution, as contradistinguished from those arising under the law of the United States, are such as arise from the powers conferred, or privileges granted, or rights claimed, or protection secured, or prohibitions contained in the constitution itself, independent of any particular statutory enactment.<sup>12</sup>

*bb. Necessity for Federal Question to Be Real and Substantial.*—In order for a suit to be justiciable in the federal courts, as one arising under the constitution or laws of the United States, it must be one which really and substantially involves a dispute or controversy as to the construction of the constitution or some law or treaty of the United States.<sup>13</sup> The mere averment of a question

Avery, 147 U. S. 375, 37 L. Ed. 209; *Patton v. Brady*, 184 U. S. 608, 611, 46 L. Ed. 713; *Cohens v. Virginia*, 6 Wheat. 264, 379, 5 L. Ed. 257; *Osborn v. United States Bank*, 9 Wheat. 738, 824, 6 L. Ed. 204; *The Mayor v. Cooper*, 6 Wall. 247, 252, 18 L. Ed. 851; *Gold-Washing, etc., Co. v. Keyes*, 96 U. S. 199, 201, 24 L. Ed. 656; *Tennessee v. Davis*, 100 U. S. 257, 264, 25 L. Ed. 648; *Railroad Co. v. Mississippi*, 102 U. S. 135, 140, 26 L. Ed. 96; *Ames v. Kansas*, 111 U. S. 449, 462, 28 L. Ed. 482; *Kansas Pac. R. Co. v. Atchison, etc., R. Co.*, 112 U. S. 414, 416, 28 L. Ed. 794; *Provident Sav. Society v. Ford*, 114 U. S. 635, 641, 29 L. Ed. 261; *Pacific Railroad Removal Cases*, 115 U. S. 1, 11, 29 L. Ed. 319; *Germania Ins. Co. v. Wisconsin*, 119 U. S. 473, 475, 30 L. Ed. 461; *People's Ins. Co. v. Wisconsin*, 119 U. S. 477, 30 L. Ed. 462.

If the case made by the plaintiff be one which depends upon the proper construction of an act of congress, with the contingency of being sustained by one construction and defeated by another, it is one arising under the laws of the United States. *Northern Pac. R. Co. v. Soderberg*, 188 U. S. 526, 528, 47 L. Ed. 575; *Doolan v. Carr*, 125 U. S. 618, 31 L. Ed. 844; *Cooke v. Avery*, 147 U. S. 375, 37 L. Ed. 209.

**11. Cases growing out of constitution and laws.**—In *re Lennon*, 166 U. S. 548, 553, 41 L. Ed. 1110; *Starin v. New York*, 115 U. S. 248, 29 L. Ed. 388; *Kansas Pac. R. Co. v. Atchison, etc., R. Co.*, 112 U. S. 414, 28 L. Ed. 794; *Ames v. Kansas*, 111 U. S. 449, 28 L. Ed. 482; *Railroad Co. v. Mississippi*, 102 U. S. 135, 26 L. Ed. 96; *Tennessee v. Davis*, 100 U. S. 257, 25 L. Ed. 648; *Cooke v. Avery*, 147 U. S. 375, 384, 37 L. Ed. 209; *Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257; *Osborn v. United States Bank*, 9 Wheat. 738, 6 L. Ed. 204; *The Mayor v. Cooper*, 6 Wall. 247, 18 L. Ed. 851; *Gold-Washing, etc., Co. v. Keyes*, 96 U. S. 199, 24 L. Ed. 656; *In re Neagle*, 135 U. S. 1, 34 L. Ed. 55; *Bock v. Perkins*, 139 U. S. 628, 630, 35 L. Ed. 314; *The City of Panama*, 101 U. S. 453, 460, 25 L. Ed. 1061.

The suit must be one in which some title, right, privilege, or immunity on

which the recovery depends will be defeated by one construction of the constitution, or a law or treaty of the United States, or sustained by a contrary construction. *Tennessee v. Union, etc., Bank*, 152 U. S. 454, 460, 38 L. Ed. 511; *Carson v. Dunham*, 121 U. S. 421, 427, 30 L. Ed. 992; *Germania Ins. Co. v. Wisconsin*, 119 U. S. 473, 475, 30 L. Ed. 461; *Starin v. New York*, 115 U. S. 248, 257, 29 L. Ed. 388; *Cooke v. Avery*, 147 U. S. 375, 384, 37 L. Ed. 209; *Osborn v. United States Bank*, 9 Wheat. 738, 6 L. Ed. 204.

**12. Cases arising under constitution.**—*The City of Panama*, 101 U. S. 453, 460, 25 L. Ed. 1061.

"That a case arises under the constitution of the United States when the right of either party depends on the validity of an act of congress, is clear." *Patton v. Brady*, 184 U. S. 608, 611, 46 L. Ed. 713.

**13. Necessity for real and substantial controversy.**—*Western Union Tel. Co. v. Ann Arbor R. Co.*, 178 U. S. 239, 243, 44 L. Ed. 1052; *Gold-Washing, etc., Co. v. Keyes*, 96 U. S. 199, 24 L. Ed. 656; *Blackburn v. Portland Gold Min. Co.*, 175 U. S. 571, 44 L. Ed. 276; *Gableman v. Peoria, etc., R. Co.*, 179 U. S. 335, 339, 45 L. Ed. 220; *Shoshone Min. Co. v. Rutter*, 177 U. S. 505, 44 L. Ed. 864; *Chicago, etc., R. Co. v. Martin*, 178 U. S. 245, 248, 44 L. Ed. 1055; *American Sugar Refn. Co. v. New Orleans*, 181 U. S. 277, 281, 45 L. Ed. 859; *Lampasas v. Bell*, 180 U. S. 276, 282, 45 L. Ed. 527; *Underground Railroad v. New York City*, 193 U. S. 416, 422, 48 L. Ed. 733; *Defiance Water Co. v. Defiance*, 191 U. S. 184, 48 L. Ed. 140; *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 65, 48 L. Ed. 870; *Newburyport Water Co. v. Newburyport*, 193 U. S. 561, 48 L. Ed. 799; *Pacific Electric R. Co. v. Los Angeles*, 194 U. S. 112, 48 L. Ed. 896; *St. Joseph, etc., R. Co. v. Steele*, 167 U. S. 659, 42 L. Ed. 315; *New Orleans v. Benjamin*, 153 U. S. 411, 424, 38 L. Ed. 764; *Starin v. New York*, 115 U. S. 248, 29 L. Ed. 388; *Shreveport v. Cole*, 129 U. S. 36, 32 L. Ed. 589; *Currie v. United States*, 129 U. S. 44, 32 L. Ed. 592; *Sloan v. United States*, 193 U. S. 614, 620, 48 L. Ed. 814; *Bankers Mut. Casualty Co. v.*

arising under the constitution or laws of the United States is not sufficient to give jurisdiction to the federal courts, where the question sought to be presented is so wanting in merits as to be frivolous or without any support whatever in reason.<sup>14</sup>

cc. *Necessity for All Questions to Be of Federal Nature.*—Where a question involved in a case arises under the constitution and laws of the United States, it is no objection to the jurisdiction of the federal courts that other questions are involved which are not of a federal character.<sup>15</sup>

Minneapolis, etc., R. Co., 192 U. S. 371, 384, 48 L. Ed. 484; *Tennessee v. Union, etc., Bank*, 152 U. S. 454, 38 L. Ed. 511; *Arbuckle v. Blackburn*, 191 U. S. 405, 48 L. Ed. 239; *Spencer v. Duplan Silk Co.*, 191 U. S. 526, 530, 48 L. Ed. 287; *Montana Catholic Missions v. Missoula County*, 200 U. S. 118, 126, 50 L. Ed. 398; *American R. Co. v. Castro*, 204 U. S. 453, 455, 51 L. Ed. 564; *Chrystal Springs Land, etc., Co. v. Los Angeles*, 177 U. S. 169, 44 L. Ed. 720; *Farrell v. O'Brien*, 199 U. S. 89, 50 L. Ed. 101; *Empire State Min., etc., Co. v. Hanley*, 198 U. S. 292, 298, 49 L. Ed. 1056; *Devine v. Los Angeles*, 202 U. S. 313, 332, 50 L. Ed. 1046.

When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the constitution or laws of the United States upon the determination of which the result depends, then it is not a suit arising under the constitution or laws of the United States. *Western Union Tel. Co. v. Ann Arbor R. Co.*, 178 U. S. 239, 243, 44 L. Ed. 1052; *Blackburn v. Portland Gold Min. Co.*, 175 U. S. 571, 44 L. Ed. 276; *Lampasas v. Bell*, 180 U. S. 276, 282, 45 L. Ed. 527; *Arbuckle v. Blackburn*, 191 U. S. 405, 413, 48 L. Ed. 239; *Defiance Water Co. v. Defiance*, 191 U. S. 184, 48 L. Ed. 140; *Sloan v. United States*, 193 U. S. 614, 620, 48 L. Ed. 814; *Gableman v. Peoria, etc., R. Co.*, 179 U. S. 335, 339, 45 L. Ed. 220; *New Orleans v. Benjamin*, 153 U. S. 411, 424, 38 L. Ed. 764; *Shreveport v. Cole*, 129 U. S. 36, 32 L. Ed. 589; *Starin v. New York*, 115 U. S. 248, 29 L. Ed. 388; *Gold-Washing, etc., Co. v. Keyes*, 96 U. S. 199, 24 L. Ed. 656.

"It is settled that jurisdiction does not arise simply because an averment is made as to the existence of a constitutional question, if it plainly appears that such averment is not real and substantial, but is without color of merit. *Underground Railroad v. New York City*, 193 U. S. 416, 48 L. Ed. 733; *Arbuckle v. Blackburn*, 191 U. S. 405, 48 L. Ed. 239; *Owensboro v. Owensboro Waterworks Co.*, 191 U. S. 358, 48 L. Ed. 217; *Defiance Water Co. v. Defiance*, 191 U. S. 184, 48 L. Ed. 140; *Swafford v. Templeton*, 185 U. S. 487, 46 L. Ed. 1005; *McCain v. Des Moines*, 174 U. S. 168, 43 L. Ed. 936." *Newburyport Water Co. v. Newburyport*, 193 U. S. 561, 576, 48 L. Ed. 799; *Gloucester Water Supply Co. v. Gloucester*, 193 U. S. 580, 48 L. Ed. 801.

14. *Frivolous questions.*—*Farrell v. O'Brien*, 199 U. S. 89, 50 L. Ed. 101;

*Fayerweather v. Ritch*, 195 U. S. 276, 49 L. Ed. 193; *Newburyport Water Co. v. Newburyport*, 193 U. S. 561, 48 L. Ed. 799; *American R. Co. v. Castro*, 204 U. S. 453, 455, 51 L. Ed. 564; *New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 336, 46 L. Ed. 936; *Hanford v. Davies*, 163 U. S. 273, 279, 41 L. Ed. 157.

Where the jurisdiction of the circuit court is not invoked solely upon the ground of alienage of complainants and the citizenship of respondents, but also on the ground of the deprivation of property without due process of law, in violation of the constitution of the United States, it was held that the mere averment of the constitutional question was not sufficient, where the question sought to be presented was so wanting in merit as to cause it to be frivolous or without any support whatever in reason. *Farrell v. O'Brien*, 199 U. S. 89, 50 L. Ed. 101, citing *Fayerweather v. Ritch*, 195 U. S. 276, 49 L. Ed. 193.

15. *Necessity for all questions involved to be of federal nature.*—*The Mayor v. Cooper*, 6 Wall. 247, 252, 18 L. Ed. 851; *Moore v. McGuire*, 205 U. S. 214, 51 L. Ed. 776; *Southern Pac. R. Co. v. California*, 118 U. S. 109, 30 L. Ed. 103; *Railroad Co. v. Mississippi*, 102 U. S. 135, 141, 26 L. Ed. 96; *Osborn v. United States Bank*, 9 Wheat. 738, 823, 6 L. Ed. 204; *Tennessee v. Davis*, 100 U. S. 257, 264, 25 L. Ed. 648.

"It is not sufficient to exclude the judicial power of the United States from a particular case, that it involves questions which do not at all depend on the constitution or laws of the United States; but when a question to which the judicial power of the union is extended by the constitution forms an ingredient of the original cause, it is within the power of congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it." *Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257; *Osborn v. United States Bank*, 9 Wheat. 738, 6 L. Ed. 204; *The Mayor v. Cooper*, 6 Wall. 247, 18 L. Ed. 851; *Gold-Washing, etc., Co. v. Keyes*, 96 U. S. 199, 24 L. Ed. 656; *Tennessee v. Davis*, 100 U. S. 257, 25 L. Ed. 648; *Railroad Co. v. Mississippi*, 102 U. S. 135, 141, 26 L. Ed. 96.

When a question to which the judicial power of the union is extended by the constitution, forms an ingredient of the original cause, it is in the power of congress to give the circuit courts jurisdic-



(c) *Suits Arising under Constitutional Provisions*—aa. *Impairment of Obligation of Contracts*—(aa) *In General*.—Where the jurisdiction of the United States courts is invoked upon the ground that a state law impairs the obligation of a contract, all that is necessary to establish the jurisdiction is to show that the plaintiff had, or claimed in good faith to have, a contract, which the state or its agencies have attempted to impair.<sup>16</sup>

(bb) *Municipal Franchises or Contracts*.—As a general rule the circuit court has jurisdiction of a suit by a corporation which claims that its franchises or charter rights have been impaired by subsequent legislative action of a municipal corporation.<sup>17</sup> But the circuit court has no jurisdiction in such case where the

tion of that cause, although other questions of fact or of law may be involved in it. *Osborn v. United States Bank*, 9 Wheat. 738, 823, 6 L. Ed. 204.

**16. Impairment of obligation of contracts.**—*City R. Co. v. Citizens' St. R. Co.*, 166 U. S. 557, 41 L. Ed. 1114; *Pacific Electric R. Co. v. Los Angeles*, 194 U. S. 112, 117, 48 L. Ed. 896; *Illinois Cent. R. Co. v. Adams*, 180 U. S. 28, 45 L. Ed. 410; *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 65, 46 L. Ed. 808; *Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453, 50 L. Ed. 1102; *New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79, 35 L. Ed. 943; *Holt v. Indiana Mfg. Co.*, 176 U. S. 68, 72, 44 L. Ed. 374; *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 50 L. Ed. 353; *Mercantile Trust, etc., Co. v. Columbus*, 203 U. S. 311, 320, 51 L. Ed. 198; *Dawson v. Columbia, etc., Trust Co.*, 197 U. S. 178, 182, 49 L. Ed. 713. See, also, *Vicksburg v. Vicksburg Waterworks Co.*, 206 U. S. 496, 51 L. Ed. 1155.

If state legislation impairs the obligation of a contract, remedies are found in the first section of the act of August 13, 1888, 25 Stat. 433, c. 866, giving to the circuit courts jurisdiction of all cases arising under the constitution and laws of the United States. *Holt v. Indiana Mfg. Co.*, 176 U. S. 68, 72, 44 L. Ed. 374.

Where no rights created by the constitution are asserted, and the facts set up by complainants are, as matter of law, wholly inadequate to show possession of contract rights as between them, or either of them, and the state, then no dispute or controversy arises in respect of an unconstitutional invasion of such rights, and the United States circuit court is without jurisdiction. *Underground Railroad v. New York City*, 193 U. S. 416, 423, 48 L. Ed. 733.

**Construction of railroad or other public use on route mapped out by another.**—A railroad corporation which has filed maps and plats of its proposed route, but has not obtained the consent of the property owners, or of the court, in lieu thereof, as required by statute, cannot maintain a suit in the federal courts to enjoin another company from constructing a road over the same route, under authority of an act of the legislature, on the ground that the act of legislature impairs the obligation of its contract. Under-

ground *Railroad v. New York City*, 193 U. S. 416, 48 L. Ed. 733.

The mere filing of a route map under a railroad law, by a company whose charter is subject to repeal, does not give the company such a right as would be impaired by a subsequent state law appropriating the property for other uses, so as to give the United States courts jurisdiction of a suit on the ground that the subsequent act of the state legislature impairs the obligation of the railroad company's contract. *Adirondack R. Co. v. New York State*, 176 U. S. 335, 347, 44 L. Ed. 492.

**Threatened impairment by perpetuating injunction.**—It is no ground for federal jurisdiction that a state court has issued a temporary injunction, which, it is alleged, if made perpetual, will impair the obligation of the plaintiff's contract. *Defiance Water Co. v. Defiance*, 191 U. S. 184, 193, 48 L. Ed. 140.

**Jurisdiction where subsequent state law not applicable to prior contracts.**—Where the highest court of a state has held that a provision of its constitution does not apply to contracts previously entered into, the United States courts have no jurisdiction of a suit brought on such a contract between citizens of the same state, the only ground of federal jurisdiction set up being that the constitution of the state impairs the obligation of the contract sued on. *Shreveport v. Cole*, 129 U. S. 36, 32 L. Ed. 589; *Currie v. United States*, 129 U. S. 44, 32 L. Ed. 592.

**17. Impairment of charter rights by municipal action.**—*Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 65, 46 L. Ed. 808; *Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453, 50 L. Ed. 1102; *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 50 L. Ed. 353; *City R. Co. v. Citizens' St. R. Co.*, 166 U. S. 557, 41 L. Ed. 1114; *Pacific Electric R. Co. v. Los Angeles*, 194 U. S. 112, 117, 48 L. Ed. 896; *Illinois Cent. R. Co. v. Adams*, 180 U. S. 28, 45 L. Ed. 410; *Deposit Bank v. Frankfort*, 191 U. S. 499, 520, 48 L. Ed. 276; *Cleveland v. Cleveland City R. Co.*, 194 U. S. 517, 48 L. Ed. 1102; *Cleveland v. Cleveland Electric R. Co.*, 194 U. S. 538, 48 L. Ed. 1105.

"We know of no case in which it has been held that an ordinance, alleged to impair a prior contract with a gas or

charter or franchise in question was subject to repeal and the legislation of the municipal corporation, claimed to be an impairment, is authorized by stat-

water company, did not create a case under the constitution and laws of the United States." *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 9, 43 L. Ed. 341.

**Street railway franchise or contracts.**—A street railway company had franchises for the use of streets of a city for street railway purposes for the period of thirty years, which was subsequently extended for a period of seven years, and the franchises and property of the road sold to another company. The city, acting upon the idea that the franchise would expire at the termination of the original grant of thirty years, entered into a contract with another company, to take effect at that time, giving them the right to lay and operate a railway upon the same streets. It was held that a bill in equity to enjoin the latter company from interrupting or disturbing the former in the construction, operation and maintenance of its street car system, and for the establishment of complainant's rights, and quieting of its titles in that connection was properly brought in the United States circuit court, being one arising under the constitution of the United States. *City R. Co. v. Citizens' St. R. Co.*, 166 U. S. 557, 41 L. Ed. 1114.

Where a street railway company claims that an ordinance of a municipal corporation reducing the rate of fare upon its road is in conflict with previous ordinances of the city, which created a contract in favor of the street railway company, giving it a right to charge rates greater than those fixed by the subsequent ordinance, the United States circuit court has jurisdiction. *Cleveland v. Cleveland City R. Co.*, 194 U. S. 517, 48 L. Ed. 1102; *Cleveland v. Cleveland Electric R. Co.*, 194 U. S. 538, 48 L. Ed. 1105.

A municipal corporation which has passed an ordinance reducing the rate of fare upon a street railway, which the companies claimed to be an impairment of the contract vested in them by virtue of a previous ordinance, cannot assail the subsequent ordinance, upon the ground that they had no power to pass it, and thus defeat the jurisdiction of the circuit court of the United States. *Cleveland v. Cleveland City R. Co.*, 194 U. S. 517, 48 L. Ed. 1102; *Cleveland v. Cleveland Electric R. Co.*, 194 U. S. 538, 48 L. Ed. 1105.

**Gas or water franchise.**—A grant of a right to supply gas or water to a municipality and its inhabitants through pipes and mains laid in the streets, upon condition of the performance of its service by the grantee, is the grant of a franchise vested in the state, in consideration of the performance of a public service, and after performance by the grantee, is a contract protected by the constitution of the United States against state legislation to impair it, and where it is alleged that a municipal

corporation has subsequently passed an ordinance the effect of which is to impair its obligation, the federal courts have jurisdiction. *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 9, 43 L. Ed. 341.

In accordance with statutory provisions, a city entered into a contract with a firm for the erection of waterworks to supply the inhabitants with water, the contract providing that the company should have the exclusive right to furnish water to the inhabitants for a period of thirty years. Subsequently the city was authorized to purchase or erect waterworks of its own and proceeded to take action to that end. The company with whom they had previously made the contract for the water supply sought to enjoin them from further proceedings, upon the ground that the obligation of their contract with the city was impaired by the subsequent legislation and proceedings taken thereunder. It was held that the circuit court of the United States had jurisdiction, the case being one arising under the constitution and laws of the United States. *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 65, 46 L. Ed. 808.

A suit in equity in the circuit court of the United States brought by a waterworks company against a city claiming the exclusive right under a contract with the city for the construction and maintenance of the waterworks and for supplying the city with water for a period of thirty years, and in which it is alleged that such contract would be destroyed if subjected to the competition of a system of waterworks to be erected by the city itself, which was in contemplation under authority of an act authorizing the city to issue bonds for that purpose, and in which suit it is alleged that a resolution has been passed authorizing and providing for notice to the complainant that liability is denied under the contract for the use of their waterworks, hydrants, etc., presents a federal question under the contract clause of the constitution and within the jurisdiction of the circuit court. *Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453, 50 L. Ed. 1102.

The claim of exclusive privilege to supply water to a city which it is alleged constitutes a contract which will be impaired by the erection by the city of waterworks of its own, presents a case under the constitution and laws of the United States of which the circuit court has original jurisdiction. *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 50 L. Ed. 353.

Where a water company claimed an exclusive contract with a municipal corporation for furnishing the city with a supply of water, and the council of the city in allowing a bill of the water company for water furnished inserted a clause in



ute,<sup>18</sup> or where the action of the municipal corporation, which is claimed to impair the obligation of contracts, amounts to nothing more than a refusal of the municipality to perform its contract,<sup>19</sup> or where the ordinance claimed to be an impairment was not passed under supposed legislative authority.<sup>20</sup> A bond holder

the resolution or ordinance that the allowance should not be "construed or taken to be any acknowledgment of any contract between them and the said city for said water rentals," and the water company filed a bill in equity against the city praying that an account might be taken of the amount due it from the city and that the city be decreed to allow and pay the same; that the city be enjoined from appropriating and diverting the moneys of the water fund to the payment of any other indebtedness than that due the complainant; and that the council and the city be perpetually enjoined from denying the existence of or abrogating the contract, the circuit court had no jurisdiction, the ordinance not amounting to an impairment of the contract. *Defiance Water Co. v. Defiance*, 191 U. S. 184, 48 L. Ed. 140.

**18. Charter subject to repeal.**—*Newburyport Water Co. v. Newburyport*, 193 U. S. 561, 48 L. Ed. 799; *Gloucester Water Supply Co. v. Gloucester*, 193 U. S. 580, 48 L. Ed. 801; *Farmers' Loan, etc., Co. v. Sioux Falls*, 199 U. S. 601, 50 L. Ed. 328; *Owensboro v. Owensboro Waterworks Co.*, 191 U. S. 358, 48 L. Ed. 217.

The charter of a waterworks company was subject to repeal by legislative act. The legislature passed an act empowering the city, which had previously been supplied with water by the company, to erect its own waterworks and provided therein that the city might acquire by agreement with the waterworks company its plant, and by a subsequent act provided that the city should accept the offer of sale of the plant to the city provided it was made within a certain time, and the sale was made in accordance with the statutes. The waterworks company brought a suit in equity for restoration of its property, for damages for its detention, and for full compensation, the ground of federal jurisdiction set up being that they had been deprived of their property without due process of law and that the obligation of their contract had been impaired. It was held that the federal courts were without jurisdiction, as their charter was subject to repeal at the will of the legislature. *Newburyport Water Co. v. Newburyport*, 193 U. S. 561, 48 L. Ed. 799; *Gloucester Water Supply Co. v. Gloucester*, 193 U. S. 580, 48 L. Ed. 801, reaffirmed in *Farmers' Loan, etc., Co. v. Sioux Falls*, 199 U. S. 601, 50 L. Ed. 328.

**19. Refusal of municipal corporation to perform contract.**—*Dawson v. Columbia, etc., Trust Co.*, 197 U. S. 178, 182, 49 L. Ed. 713; *Newburyport Water Co. v. Newburyport*, 193 U. S. 561, 48 L. Ed. 799.

Something more than a mere refusal of a municipal corporation to perform its

contract is necessary to make a law impairing the obligation of contracts or otherwise to give rise to a suit under the constitution of the United States. *Dawson v. Columbia, etc., Trust Co.*, 197 U. S. 178, 182, 49 L. Ed. 713; *Newburyport Water Co. v. Newburyport*, 193 U. S. 561, 48 L. Ed. 799.

Mere statements of intention on the part of one of the parties to a contract not to be bound by its obligations does not amount to an impairment thereof. The mere denial by a municipal corporation contained in an ordinance to that effect is not legislation impairing the obligation of the contract. *Mercantile Trust, etc., Co. v. Columbus*, 202 U. S. 311, 321, 51 L. Ed. 198, citing *St. Paul Gas Light Co. v. St. Paul*, 181 U. S. 142, 45 L. Ed. 788.

"The attempt by an afterthought to give jurisdiction by setting up constitutional rights must fail also. The bill presents a naked case of breach of contract. The first step of the city was to repudiate the contract and to refuse to pay. Whatever it may have done subsequently, its wrong, if, contrary to the decision of the supreme court of the state, there was a wrong, was complete then. The repudiation and refusal were kept up until the bill was filed and the other acts were subsequent, subordinate to and in aid of them. The mere fact that the city was a municipal corporation does not give to its refusal the character of a law impairing the obligation of contracts or deprive a citizen of property without due process of law." *Dawson v. Columbia, etc., Trust Co.*, 197 U. S. 178, 181, 49 L. Ed. 713; *St. Paul Gas Light Co. v. St. Paul*, 181 U. S. 142, 45 L. Ed. 788.

**20. Ordinance not passed under supposed authority.**—*Hamilton Gas Light, etc., Co. v. Hamilton City*, 146 U. S. 258, 266, 36 L. Ed. 963.

"A municipal ordinance, not passed under supposed legislative authority, cannot be regarded as a law of the state within the meaning of the constitutional prohibition against state laws impairing the obligations of contracts. *Murray v. Charleston*, 96 U. S. 432, 24 L. Ed. 769; *Williams v. Bruffy*, 96 U. S. 176, 24 L. Ed. 716; *Lehigh Water Co. v. Easton*, 121 U. S. 388, 30 L. Ed. 1059; *New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co.*, 125 U. S. 18, 31 L. Ed. 607. A suit to prevent the enforcement of such an ordinance would not, therefore, be one arising under the constitution of the United States." *Hamilton Gas Light, etc., Co. v. Hamilton City*, 146 U. S. 258, 266, 36 L. Ed. 963.

A municipal corporation grounded its



of a public service corporation may sue in the federal courts to enjoin subsequent action of a municipality, which he claims impairs the obligation of a contract of the city with the corporation whose bonds he holds.<sup>21</sup>

(cc) *Exemptions from Taxation*.—One claiming an exemption from taxation by legislative authority and setting up an impairment thereof, by subsequent state legislation, may sue in federal courts.<sup>22</sup>

bb. *Denial of Due Process of Law*.—The jurisdiction of the circuit court may be invoked upon the ground that state law deprives a person of his property without due process of law.<sup>23</sup> In order for the federal courts to have jurisdic-

rights to enact an ordinance and to maintain and erect gas works of its own, upon the state municipal code providing that the city council of any city or village should have power, whenever it was deemed expedient and for the public good, to erect gasworks at the expense of the corporation, or to purchase gasworks already erected therein; which section the plaintiff contended, if construed as conferring the authority claimed, impaired the obligation of its contract previously made with the state and the city. Held, that the circuit court had jurisdiction. *Hamilton Gas Light, etc., Co. v. Hamilton City*, 146 U. S. 258, 266, 36 L. Ed. 963.

**21. Right of bondholder of corporation to sue in federal courts.**—*Mercantile Trust, etc., Co. v. Columbus*, 203 U. S. 311, 51 L. Ed. 198.

A waterworks company had the exclusive contract to supply water to a municipal corporation. The city under the authority of an act of the legislature passed an ordinance for the construction of works of its own. The bondholders of the original waterworks company, the value of whose securities would have been reduced by the proposed action on the part of the city, filed a bill in the United States circuit court to obtain an injunction restraining the city from the construction of waterworks. It was held that the circuit court had jurisdiction, the case being one arising under the contract clause of the federal constitution. *Mercantile Trust, etc., Co. v. Columbus*, 203 U. S. 311, 51 L. Ed. 198.

**22. Exemptions from taxation.**—*Illinois Cent. R. Co. v. Adams*, 180 U. S. 28, 45 L. Ed. 410.

Where a bill alleges that its charter contains a contract exempting it from taxation, which contract has been ratified by the state constitution, and that subsequent legislation of the state, if permitted to stand, would impair that contract, the federal courts have jurisdiction. *Illinois Cent. R. Co. v. Adams*, 180 U. S. 28, 45 L. Ed. 410.

**23. Denial of due process of law.**—*Barney v. New York City*, 193 U. S. 430, 437, 48 L. Ed. 737; *Huntington v. New York City*, 193 U. S. 441, 48 L. Ed. 741; *Farrell v. O'Brien*, 199 U. S. 89, 50 L. Ed. 101; *Arbuckle v. Blackburn*, 191 U. S. 403, 414, 48 L. Ed. 239; *Hanford v. Davies*, 163 U. S. 273, 279, 41 L. Ed. 157; *Owens-*

*boro Waterworks Co. v. Owensboro*, 200 U. S. 38, 46, 50 L. Ed. 361; *Pacific Electric R. Co. v. Los Angeles*, 194 U. S. 112, 118, 48 L. Ed. 896; *Holt v. Indiana Mfg. Co.*, 176 U. S. 68, 72, 44 L. Ed. 374; *Brown v. Grant*, 116 U. S. 207, 211, 29 L. Ed. 598.

**Suit to set aside probate of will.**—The federal courts have no jurisdiction of a suit to set aside the probate of a will by a state court simply upon the ground that the hearing as to the probate was had without the notice required by the state statute. *Farrell v. O'Brien*, 199 U. S. 89, 50 L. Ed. 101.

Where the jurisdiction of the federal court to set aside the probate of a nuncupative will by the state court is invoked upon the ground that the state court permitted it to take effect as to the real estate contrary to the laws and practice of the state in this respect, and thus deprived the owners thereof of their property without due process of law, the jurisdiction cannot be maintained upon this ground where it appears that this averment is wholly subordinate to the termination of the existence of the alleged nuncupative will and the validity of the probate thereof, a question over which the circuit court could not have jurisdiction. *Farrell v. O'Brien*, 199 U. S. 89, 50 L. Ed. 101.

**Diversion of funds by municipal corporation.**—The diversion, or the intended diversion, by a municipal corporation, of certain funds which under legislative sanction it had collected from taxpayers for a specific public object, which funds were not applied to the object for which they were raised, and which failure of duty on the part of the corporation so to apply them may ultimately cause increased taxation if the full amount originally intended to be applied to the particular object named by the legislature is to be collected, does not present a case under the constitution of the United States. *Owensboro Waterworks Co. v. Owensboro*, 200 U. S. 38, 44, 50 L. Ed. 361.

**Establishment of waterworks by city under authority of statute.**—The charter of a waterworks company was subject to repeal by legislative act. The legislature passed an act empowering the city, which had previously been supplied with water by the company, to erect its own waterworks and provided therein that the city might acquire by agreement with the waterworks company its plant, and by a

tion, the act claimed to deprive the plaintiff of his property without due process must be done under state authority.<sup>24</sup>

cc. *Denial of Equal Protection of Laws.*—The federal courts have jurisdiction of a suit really and substantially involving a controversy as to the denial of equal protection of laws.<sup>25</sup> But the court will not take jurisdiction on this ground, where the alleged denial of equal protection of laws is not the result of any fixed scheme for that purpose, but results from a mistake of judgment on the part of the state officers enforcing or administering the state law.<sup>26</sup>

dd. *Denial of Full Faith and Credit to Acts, Records, etc., of State.*—The clause of the federal constitution providing that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, only prescribes a rule by which courts, state and federal, are to be guided when a question arises in the progress of a pending suit as to the faith and credit to be given by the court to the public acts, records and judicial proceedings of a state other than that in which the court is sitting, and even if it be assumed that the word "acts" includes "statutes," the clause has nothing to do with the conduct of individuals or corporations, and a case does not arise under the constitution or laws of the United States merely because the rule which it prescribes is invoked.<sup>27</sup>

ee. *Deprivation of Civil Rights—Racial Discrimination.*—As to jurisdiction of suits for the deprivation of civil rights in general, see the title CIVIL RIGHTS, vol. 3, pp. 821, 824. As to jurisdiction of federal courts of an indictment against in-

subsequent act provided that the city should accept the offer of sale of the plant to the city provided it was made within a certain time, and the sale was made in accordance with the statutes. The waterworks company brought a suit in equity for restoration of its property, for damages for its detention, and for full compensation, the ground of federal jurisdiction set up being that they had been deprived of their property without due process of law. It was held that the federal courts were without jurisdiction, as their charter was subject to repeal at the will of the legislature. *Newburyport Water Co. v. Newburyport*, 193 U. S. 561, 48 L. Ed. 799; *Gloucester Water Supply Co. v. Gloucester*, 193 U. S. 580, 48 L. Ed. 801, reaffirmed in *Farmers' Loan, etc., Co. v. Sioux Falls*, 199 U. S. 601, 50 L. Ed. 328.

**24. Act must be done under state authority.**—*Barney v. New York City*, 193 U. S. 430, 437, 48 L. Ed. 737; *Huntington v. New York City*, 193 U. S. 441, 48 L. Ed. 741; *Arbuckle v. Blackburn*, 191 U. S. 405, 414, 48 L. Ed. 239.

Where the jurisdiction of the circuit court was invoked upon the ground that by a tunnel construction sought to be enjoined, complainant was deprived of his property without due process of law, in violation of the fourteenth amendment, it was held that the fourteenth amendment prohibits deprivation by a state, and as the bill alleged that what was done was without authority and illegal, and proceeded on the theory that the construction of the tunnel was not only not authorized, but was forbidden by the legislation, and hence was not action by the state of New York within the intent and meaning of the fourteenth amendment, the cir-

cuit court was right in dismissing it for want of jurisdiction. *Barney v. New York City*, 193 U. S. 430, 437, 48 L. Ed. 737; *Huntington v. New York City*, 193 U. S. 441, 48 L. Ed. 741.

**25. Denial of equal protection of laws.**—*Holt v. Indiana Mfg. Co.*, 176 U. S. 68, 72, 44 L. Ed. 374; *Coulter v. Louisville, etc., R. Co.*, 196 U. S. 599, 49 L. Ed. 615. See, generally, the titles CIVIL RIGHTS, vol. 3, p. 814; CONSTITUTIONAL LAW, ante, p. 1.

**26. Mistake by officers applying state law.**—*Coulter v. Louisville, etc., R. Co.*, 196 U. S. 599, 49 L. Ed. 615.

A constitution of a state required all property to be assessed uniformly. A bill alleged that the assessors uniformly assessed the tangible property in the state below its cash value, but that the assessment upon the plaintiff's franchise to be a railroad corporation was alleged to have been assessed upon its full value, and the plaintiff thus deprived of the equal protection of the laws. There was evidence to show that the assessment of the tax upon tangible property was according to its full value. It was held that if there was any inequality in the assessment of the tax, it was not sufficient to give the circuit court jurisdiction unless it was done in pursuance of a scheme, and that mistake of judgment on the part of the officers making the assessment was not of itself sufficient to sustain the jurisdiction. *Coulter v. Louisiana, etc., R. Co.*, 196 U. S. 599, 49 L. Ed. 615.

**27. Denial of full faith and credit to acts, records, etc., of state.**—*Minnesota v. Northern Securities Co.*, 194 U. S. 48, 72, 48 L. Ed. 870. See, generally, the title CONSTITUTIONAL LAW, ante, p. 1.

dividuals charging them with a conspiracy to prevent negroes from making and carrying out contracts, see the title *CIVIL RIGHTS*, vol. 3, p. 818. As to exclusion of negroes as witnesses as giving jurisdiction to federal courts of case as one "affecting" civil rights, see the title *CIVIL RIGHTS*, vol. 3, p. 833.

(f) *Suits Arising under Federal Laws*—aa. *Abandoned and Captured Property Act*.—The circuit court of the United States has no jurisdiction under the act of March 12th, 1863, commonly known as the abandoned and captured property act, where both parties are citizens of the same state.<sup>28</sup>

bb. *Antitrust Laws*.—An allegation in a complaint that the combination and consolidation between two railway companies and their control of their affairs and operations by a holding corporation are in violation of the anti-trust act of congress of July 2, 1890, confers jurisdiction to determine whether the case is of the class of which the court may properly take cognizance for purposes of a final decree on the merits.<sup>29</sup>

cc. *Bankruptcy Laws*.—See the title *BANKRUPTCY*, vol. 2, pp. 823, 828.

dd. *Confiscation Act*.—The circuit court has jurisdiction, under the act of August 6, 1861, "to confiscate property for insurrectionary purposes" of proceedings for the condemnation of real estate or property on land.<sup>30</sup>

ee. *Copyright Laws*.—The federal courts have jurisdiction of suits arising under the copyright laws of the United States, regardless of the citizenship of the parties.<sup>31</sup> But a suit, between citizens of the state, to recover for breach of a contract to assign the defendant's interest in a copyright to the plaintiff, is not one arising under the copyright laws.<sup>32</sup>

ff. *Interstate Commerce Act*.—A suit to compel a railroad to afford reasonable facilities for the interchange of traffic, as required by the interstate commerce act,<sup>33</sup> or to enjoin the enforcement of an order of a state railroad commis-

**28. Abandoned and captured property act.**—*Mail Co. v. Flanders*, 12 Wall. 130, 20 L. Ed. 249. See, generally, the title *ABANDONED AND CAPTURED PROPERTY*, vol. 1, p. 1.

**29. Antitrust laws.**—*Minnesota v. Northern Securities Co.*, 194 U. S. 48, 65, 48 L. Ed. 870. (In this case the suit was dismissed, because not really and substantially involving a claim under the constitution and laws of the United States.)

**30. Confiscation acts.**—*Union Ins. Co. v. United States*, 6 Wall. 759, 18 L. Ed. 879; *United States v. Bales of Cotton*, 154 U. S., appx., 556, 18 L. Ed. 889.

**31. Suits arising under copyright laws.**—*Rev. Stat.*, § 629; *Spencer v. Duplan Silk Co.*, 191 U. S. 526, 528, 48 L. Ed. 287; *Press Pub. Co. v. Monroe*, 164 U. S. 105, 41 L. Ed. 367; *Excelsior Wooden Pipe Co. v. Pacific Bridge Co.*, 185 U. S. 282, 285, 46 L. Ed. 910; *Wade v. Lawder*, 165 U. S. 624, 41 L. Ed. 851; *In re Hohorst*, 150 U. S. 653, 661, 37 L. Ed. 1211; *Burrow-Giles Lithographia Co. v. Sarony*, 111 U. S. 53, 28 L. Ed. 349; *Little v. Hall*, 18 How. 165, 15 L. Ed. 328; *Brady v. Daly*, 175 U. S. 148, 44 L. Ed. 109. See, generally, the title *COPYRIGHT*, ante, p. 602.

An action for infringement of a copyright is cognizable in the United States circuit court. It is not a suit for a penalty or forfeiture, of which the district court has exclusive jurisdiction. *Brady v. Daly*, 175 U. S. 148, 44 L. Ed. 109.

**32. Suit for breach of contract as to assignment of copyright.**—*Little v. Hall*, 18 How. 165, 171, 15 L. Ed. 328.

On the 27th of December, 1847, C. was appointed state reporter under a statute of the state of New York, which office he held until the 27th of December, 1851. During his term of office, viz, in 1850, he, in conjunction with the comptroller and secretary of the state, acting under the authority of a statute, made an agreement with certain persons, that for five years to come they should have the publication of the decisions of the court of appeals, and the exclusive benefit of the copyright. At the expiration of C's term, viz, on the 27th of December, 1851, he had in his possession sundry manuscript notes, and the decisions made at the ensuing January term were also placed in his hands to be reported. Out of these materials he made a volume, and sold it upon his own private account. In a suit by the assignees against C., it was held that the federal courts had no jurisdiction, the parties being citizens of the same state. *Little v. Hall*, 18 How. 165, 15 L. Ed. 328.

**33. Suit to compel interchange of traffic.**—*In re Lennon*, 166 U. S. 548, 553, 41 L. Ed. 1110.

A suit brought solely to enforce a compliance with the provisions of the interstate commerce act, and to compel the defendants to comply with such act, by offering proper and reasonable facilities for the interchange of traffic with complainant, and enjoining them from re-



sion which interferes with interstate commerce,<sup>34</sup> arises under the constitution and laws of the United States, and may be brought in the United States circuit court upon that ground.

gg. *Patent Laws*—(aa) *In General*.—The United States circuit courts have original jurisdiction of all suits at law or in equity arising under the patent laws of the United States.<sup>25</sup>

(bb) *"Case" Distinguished from "Question."*—There is a clear distinction between a case and a question arising under the patent laws. The former arises when the plaintiff in his opening pleading—be it a bill, complaint or declaration—sets up a right under the patent laws as ground for a recovery. Of such the state courts have no jurisdiction. The latter may appear in the plea or answer or in the testimony. The determination of such question is not beyond the competency of the state tribunals.<sup>36</sup>

(cc) *What Cases Arise under Patent Laws*—aaa. *In General*.—To constitute a cause one arising under the patent right laws of the United States in any proper sense of the term, the plaintiff must set up some right, title or interest under the patent laws, or at least make it appear that some right or privilege will be defeated by one construction, or sustained by the opposite construction of these laws.<sup>37</sup>

bbb. *Suits for Infringement*.—The circuit courts of the United States have

fusing to receive from complainant, for transportation over their lines, any cars which might be tendered them is one arising under the constitution and laws of the United States. In re Lennon, 166 U. S. 548, 553, 41 L. Ed. 1110.

**34. Suit to enjoin action of state railroad commission.**—Mississippi Railroad Commission v. Illinois Cent. R. Co., 203 U. S. 335, 51 L. Ed. 209.

A suit to enjoin the enforcement of an order of a state railroad commission requiring trains to make certain stops, it being alleged that the state statutes, requiring the stoppage of trains, violates the commerce clause of the federal constitution, is one arising under the constitution and laws of the United States. Mississippi Railroad Commission v. Illinois Cent. R. Co., 203 U. S. 335, 51 L. Ed. 209.

If a bill in equity shows on its face that the relief sought would be inconsistent with the power to regulate commerce, or with regulations established by congress, or with the fourteenth amendment, it only demonstrates that the bill cannot be maintained at all, and not that the cause of action arose under the constitution or laws of the United States. Arkansas v. Kansas, etc., Coal Co., 183 U. S. 185, 190, 46 L. Ed. 144.

**35. Suits arising under patent laws.**—Rev. Stat., § 629; Shoshone Min. Co. v. Rutter, 177 U. S. 505, 506, 44 L. Ed. 864; Osborn v. United States Bank, 9 Wheat. 738, 826, 6 L. Ed. 204; Evans v. Eaton, 3 Wheat. 454, 4 L. Ed. 433; Excelsior Wooden Pipe Co. v. Pacific Bridge Co., 185 U. S. 282, 285, 46 L. Ed. 910; Press Pub. Co. v. Monroe, 164 U. S. 105, 110, 41 L. Ed. 367; Spencer v. Duplan Silk Co., 191 U. S. 526, 528, 48 L. Ed. 287; Cochrane v. Deener, 94 U. S. 780, 783, 24 L. Ed. 139.

**Equity jurisdiction.**—The circuit courts

were first invested with equity jurisdiction in patent cases by the act of February 15, 1819, which declared that these courts should have "original cognizance, as well in equity as at law, of all actions, suits, controversies, and cases arising under any law of the United States, granting or confirming to authors or inventors the exclusive right to their respective writings, inventions, and discoveries; and upon any bill in equity, filed by any party aggrieved in any such cases, should have authority to grant injunctions, according to the course and principles of courts of equity," etc. This law was substantially re-enacted in the seventeenth section of the patent law of July 4, 1836, and the fifty-fifth section of that of July 8, 1870, special powers to assess damages in equity cases being also conferred by the latter act. Cochrane v. Deener, 94 U. S. 780, 782, 24 L. Ed. 139. See post, "Suits for Infringement," VII, C, 4, b, (1), (f), gg (cc), bbb.

Where the state court has jurisdiction both of the parties and the subject matter as set forth in the declaration, it cannot be ousted of such jurisdiction by the fact that, incidentally to one of these defenses, the defendant claimed the invalidity of a certain patent. To hold that it has no right to introduce evidence upon this subject is to do it a wrong and deny it a remedy. Pratt v. Paris Gas Light, etc., Co., 168 U. S. 255, 259, 42 L. Ed. 458.

**26. "Case" and "question" distinguished.**—Pratt v. Paris Gas Light, etc., Co., 168 U. S. 255, 259, 42 L. Ed. 458; Excelsior Wooden Pipe Co. v. Pacific Bridge Co., 185 U. S. 282, 286, 46 L. Ed. 910.

**37. What cases arise under patent laws**—**In general.**—Pratt v. Paris Gas Light, etc., Co., 168 U. S. 255, 42 L. Ed. 458, citing Excelsior Wooden Pipe Co. v. Pacific Bridge Co., 185 U. S. 282, 286, 46 L. Ed. 910.

exclusive jurisdiction of action or suits for the infringement of patents,<sup>38</sup> including suits in equity as well as actions at law.<sup>39</sup> The rule applies as well to actions by an assignee of the patent as to actions by the patentee himself,<sup>40</sup> and

**38. Suits for infringement.**—United States *v.* Palmer, 128 U. S. 262, 32 L. Ed. 442; In re Hohorst, 150 U. S. 653, 661, 37 L. Ed. 1211; In re Keasbey & Mattison Co., 160 U. S. 221, 40 L. Ed. 402; White *v.* Rankin, 144 U. S. 628, 635, 36 L. Ed. 569; Excelsior Wooden Pipe Co. *v.* Pacific Bridge Co., 185 U. S. 282, 287, 46 L. Ed. 910; Littlefield *v.* Perry, 21 Wall. 205, 377, 22 L. Ed. 577; Cochrane *v.* Deener, 94 U. S. 780, 782, 24 L. Ed. 139; Chaffee *v.* Hayward, 20 How. 208, 215, 15 L. Ed. 804; Osborn *v.* United States Bank, 9 Wheat. 738, 826, 6 L. Ed. 204; Campbell *v.* Haverhill, 155 U. S. 610, 620, 39 L. Ed. 280; Marsh *v.* Seymour, 97 U. S. 348, 349, 24 L. Ed. 963; Evans *v.* Eaton, 3 Wheat. 454, 458, 4 L. Ed. 433.

In a suit for an infringement of a patent for an invention, the jurisdiction of the national courts over which depends upon the subject matter, and not upon the parties; and, by statutes in force at the time of the passage of the acts of 1887 and 1888, the courts of the nation had original jurisdiction "exclusive of the courts of the several states," "of all cases arising under the patent right of copyright laws of the United States," without regard to the amount or value in dispute. In re Hohorst, 150 U. S. 653, 661, 37 L. Ed. 1211.

The jurisdiction is clear on the face of the bill where there is no suggestion in the bill that there was ever any contract or agreement, or attempt to make one, between the plaintiff and the defendant or that either the plaintiff or the defendants claim anything under any contract. An averment in the bill that the defendants have made, used and sold machines containing the patented inventions without the license of the plaintiff and without any right so to do, cannot be regarded as raising any question on any alleged license or contract. White *v.* Rankin, 144 U. S. 628, 36 L. Ed. 569.

In Evans *v.* Eaton, 3 Wheat. 454, 4 L. Ed. 433, it was held that the act for the relief of Oliver Evans was engrafted on the general patent law, so as to give him a right to sue in the circuit court for an infringement of his patent rights, although the defendant was a citizen of the same state with himself.

**39. Suits in equity.**—Cochrane *v.* Deener, 94 U. S. 780, 782, 24 L. Ed. 139; Chaffee *v.* Hayward, 20 How. 208, 215, 15 L. Ed. 804; Campbell *v.* Haverhill, 155 U. S. 610, 620, 39 L. Ed. 280; White *v.* Rankin, 144 U. S. 628, 36 L. Ed. 569.

Before the act of 1819 was passed, the circuit courts had cognizance of actions at law brought to recover damages for the infringement of patents, but not of suits in equity in relation thereto, unless the

parties happened to be citizens of different states. Under that act and the subsequent acts in which it became incorporated, bills in equity for injunction, discovery and account have constantly been sustained, frequently without any previous action at law. Cochrane *v.* Deener, 94 U. S. 780, 782, 24 L. Ed. 139.

An act of congress conferring jurisdiction on the circuit courts of the United States in suits by inventors against those who infringe their letters patent, includes all cases, both at law and in equity, arising under the patent laws, without regard to citizenship of the parties or the amount in controversy. Chaffee *v.* Hayward, 20 How. 208, 215, 15 L. Ed. 804.

**40. Actions by assignee.**—Marsh *v.* Seymour, 97 U. S. 348, 349, 24 L. Ed. 963; Littlefield *v.* Perry, 21 Wall. 205, 206, 22 L. Ed. 577.

Where an instrument, duly recorded in the patent office, contains in unmis- takable language an absolute conveyance by a patentee of his patent and inventions described and all improvements thereon, within and throughout certain states, and an agreement by the assignee to pay a royalty on all patented articles sold, with a clause of forfeiture in case of nonpay- ment, or neglect, after due notice to make and sell the patented articles to the extent of a reasonable demand therefor, the gran- tee will not, by an agreement supple- mentary to such assignment and of even date but not recorded, be reduced into a mere licensee as respects a right to sue in the federal courts, for infringement within the assigned territory, by the fact that in the supplementary agreement the parties declare that nothing in the grant shall give the assignee the right to apply the principle of the invention to one special purpose "the same being intended to be reserved" by the patentee. And this is so, although the supplementary and un- recorded agreement be referred to in the recorded one. The reservation will be regarded as the grant back of a mere license from the assignee to the patentee. Such grantee, or one claiming under him, may accordingly, as assignee under the patent acts, sue in the federal courts to prevent an infringement upon his right. Littlefield *v.* Perry, 21 Wall. 205, 22 L. Ed. 577.

Even though this were not so, and he not technically an assignee, such a gran- tee may, under the patent act, which pro- vides "that all actions, suits, controversies, and cases arising under any law of the United States granting or confirming to inventors the exclusive right to their in- ventions or discoveries shall be, originally cognizable, as well in equity as at law, in the circuit courts, etc.," maintain a suit in

when the bill is an ordinary one for an infringement and the answer puts in issue the title of the plaintiff to sue, the jurisdiction is not ousted by the mere allegation that the license has been revoked, and the court is at liberty to go on and determine that fact.<sup>41</sup>

ccc. *Suits to Enforce or Set Aside Contract as to Patent*.—A suit on a contract of which a patent is the subject matter, either to enforce such contract, or to annul it, arises on the contract, or out of the contract, and not under the patent laws.<sup>42</sup> The federal courts have no right, irrespective of citizenship, to entertain suits for the amount of an agreed license,<sup>43</sup> or for the specific perform-

his own name in the federal court against the patentee, alleged to infringe. He has the exclusive right to the use of the patent for certain purposes within a defined territory, and so holds a right under the patent. Alleging infringement, a construction of the patent is involved; this raises a question "under" the "law." That such a suit may involve the construction of a contract as well as of the patent, will not oust the court of its jurisdiction. If the patent is involved it carries with it the whole case. *Littlefield v. Perry*, 21 Wall. 205, 206, 22 L. Ed. 577.

It seems that where the patentee himself is infringing the rights of his own licensee, and the licensee (not being able to sue the patentee in the usual way in which a licensee sues an infringer, i. e., in the patentee's name) is remediless so far as the federal courts are concerned, unless he can sue in his own name—he may so sue in equity, which regards substance and not form. The cases of strangers and the patentee himself distinguished in the category of infringement. *Littlefield v. Perry*, 21 Wall. 205, 206, 22 L. Ed. 577.

41. *Effect of allegation in answer as to revocation of license*.—*White v. Rankin*, 144 U. S. 628, 36 L. Ed. 569; *Excelsior Wooden Pipe Co. v. Pacific Bridge Co.*, 185 U. S. 282, 295, 46 L. Ed. 910; *Littlefield v. Perry*, 21 Wall. 205, 22 L. Ed. 577.

42. *Suit to enforce or annul contract as to patent or patent rights*.—*Wade v. Lawder*, 165 U. S. 624, 627, 41 L. Ed. 851; *Dale Tile Mfg. Co. v. Hyatt*, 125 U. S. 46, 31 L. Ed. 683; *Marsh v. Nichols*, 140 U. S. 344, 35 L. Ed. 413; *Hartell v. Tilghman*, 99 U. S. 547, 25 L. Ed. 357; *Albright v. Teas*, 106 U. S. 613, 27 L. Ed. 295; *White v. Rankin*, 144 U. S. 628, 638, 36 L. Ed. 569; *Excelsior Wooden Pipe Co. v. Pacific Bridge Co.*, 185 U. S. 282, 285, 46 L. Ed. 910.

"Thus in *Brown v. Shannon*, 20 How. 55, 15 L. Ed. 826, it was decided that a bill in equity in the circuit court of the United States by the owner of letters patent to enforce a contract for the use of the patent, and in *Wilson v. Sandford*, 10 How. 99, 13 L. Ed. 344, to set aside such a contract because the defendant had not complied with its terms, was not within the acts of congress by which an appeal to this court was allowable in cases arising under the patent laws, without regard to the value of the matter in con-

troversy." *Marsh v. Nichols*, 140 U. S. 344, 355, 35 L. Ed. 413.

43. *Recovery of royalty or amount agreed to be paid for license*.—*Pratt v. Paris Gas Light, etc., Co.*, 168 U. S. 255, 260, 42 L. Ed. 458; *Albright v. Teas*, 106 U. S. 613, 27 L. Ed. 295; *Excelsior Wooden Pipe Co. v. Pacific Bridge Co.*, 185 U. S. 282, 285, 46 L. Ed. 910; *White v. Rankin*, 144 U. S. 628, 638, 36 L. Ed. 569; *Dale Tile Mfg. Co. v. Hyatt*, 125 U. S. 46, 31 L. Ed. 683.

An action upon an agreement in writing, by which, in consideration of a license from the patentee to make and sell the invention, the licensee acknowledges the validity of the patent, stipulates that the patentee may obtain the reissue thereof, and promises to pay certain royalties so long as the patent shall not have been adjudged invalid, is not a case arising under the patent laws of the United States, and is within the jurisdiction of the state courts. *Dale Tile Mfg. Co. v. Hyatt*, 125 U. S. 46, 31 L. Ed. 683; *Marsh v. Nichols*, 140 U. S. 344, 355, 35 L. Ed. 413.

A suit between citizens of the same state cannot be sustained in the circuit court as arising under the patent laws of the United States, where the defendant admits the validity and his use of the plaintiff's letters patent, and a subsisting contract is shown governing the rights of the parties in the use of the invention. *Hartell v. Tilghman*, 99 U. S. 547, 25 L. Ed. 357; *White v. Rankin*, 144 U. S. 628, 636, 36 L. Ed. 569.

A suit brought by the plaintiff for moneys alleged to be due under a contract whereby certain letters patent granted to him were transferred to the defendant is clearly a bill to recover royalties, involving no question under the patent laws. *Albright v. Teas*, 106 U. S. 613, 27 L. Ed. 295; *Excelsior Wooden Pipe Co. v. Pacific Bridge Co.*, 185 U. S. 282, 285, 46 L. Ed. 910.

In an action by patentees in a state court upon the common counts to recover of the defendant the stipulated price for manufacturing and setting up an apparatus for the manufacture of water gas, defendant pleaded that the plaintiff had agreed to save it harmless against any suit which might be brought against it for infringement, and to defend such suits at their own expense, and averred, among other things, that the patents were void and an infringement upon prior patents;



ance of a contract for the sale or use of a patent,<sup>44</sup> and such suits not only may but must be brought in the state courts.

ddd. *Suit to Enjoin Tax on Patent*.—A complaint setting up that an assessment of taxes by a state is illegal because, in effect, levied on patents or patent rights, and praying for an injunction against the collection of such taxes does not involve the construction, or the validity, or the infringement of the patents or any other question under the patent laws, and is not a suit "arising under the patent laws," and the circuit court has no jurisdiction on that ground.<sup>45</sup>

eee. *Suits by United States to Set Aside Patent*.—A suit by the United States to annul a patent on the ground of fraud arises under the laws and constitution of the United States, and is, within the language, both of the constitution and of the statute conferring jurisdiction on the circuit courts.<sup>46</sup>

hh. *Postal Laws*.—A suit by the postmaster general of the United States is one arising under the laws of the United States and of which the federal courts have jurisdiction without regard to the citizenship of the parties.<sup>47</sup> But an action by a private party against a railroad company, engaged in carrying the mail, for the loss of mail matter, does not arise under the laws of the United States.<sup>48</sup>

ii. *Revenue Laws*—(aa) *What Are "Revenue Laws."*—The term "revenue law," when used in connection with the jurisdiction of the courts of the United States, means a law imposing duties on imports or tonnage, or a law providing in terms for revenue; that is to say, a law which is directly traceable to the power granted to congress by § 8, art. 1, of the constitution, "to lay and collect taxes, duties, imposts, and excises."<sup>49</sup>

(bb) *Suits under Import or Tonnage Laws*—aaa. *Former Rule*.—Prior to the act of 1833 the federal courts had no jurisdiction of suits arising under the import or tonnage laws of the United States upon this ground alone, but only where the parties were citizens of different states.<sup>50</sup> Jurisdiction of the circuit

that defendant had not kept plaintiffs harmless against such suits, but had refused to defend a certain suit brought against it, and that the defendant had rightfully rescinded the contract. It was held that the action was not one arising under the patent laws of the United States. *Pratt v. Paris Gas Light, etc., Co.*, 168 U. S. 255, 42 L. Ed. 458.

44. *Specific performance of contract*.—*Marsh v. Nichols*, 140 U. S. 344, 35 L. Ed. 413; *Pratt v. Paris Gas Light, etc., Co.*, 168 U. S. 255, 260, 42 L. Ed. 458; *Brown v. Shannon*, 20 How. 55, 15 L. Ed. 826.

A suit to compel the specific performance of a contract for the sale by the inventor of a patent or an interest therein, is not one arising under the laws of the United States, and where the parties are citizens of the same state the federal courts have no jurisdiction. *Marsh v. Nichols*, 140 U. S. 344, 35 L. Ed. 413.

45. *Suit to enjoin state tax on patent or patent rights*.—*Holt v. Indiana Mfg. Co.*, 176 U. S. 68, 71, 44 L. Ed. 374. See, also, *Indiana Mfg. Co. v. Kochne*, 188 U. S. 681, 690, 47 L. Ed. 651.

46. *Action to set aside patent for fraud*.—*United States v. American Bell Telephone Co.*, 128 U. S. 315, 32 L. Ed. 450; *United States v. American Bell Telephone Co.*, 159 U. S. 548, 40 L. Ed. 253; *United States v. American Bell Telephone Co.*, 167 U. S. 224, 268, 42 L. Ed. 144.

47. *Suit by postmaster general*.—*Osborn v. United States Bank*, 9 Wheat. 738, 6 L. Ed. 204, Rev. Stat. 629, c. 4.

*Action on bond of deputy postmaster*.—See post, "Suits on Bonds of United States Officers," VII, C, 4, b, (1), (m).

48. *Action by sender of mail against mail carrier*.—*Bankers Mut. Casualty Co. v. Minneapolis, etc., R. Co.*, 192 U. S. 371, 48 L. Ed. 484.

An action against a railroad company for the loss of a registered letter deposited in the United States mail and lost by the railroad company while engaged in performing its contract with the United States of carrying the mail, is not cognizable in the United States courts upon the ground that it is a suit arising under the laws of the United States, where the plaintiff relies on principles of general law applicable to negligence, and does not assert a right which might be defeated or sustained by one or another construction of the constitution or of any laws of the United States. *Bankers Mut. Casualty Co. v. Minneapolis, etc., R. Co.*, 192 U. S. 371, 48 L. Ed. 484.

49. *What are revenue laws*.—*United States v. Hill*, 123 U. S. 681, 686, 31 L. Ed. 275; *United States v. Jahn*, 155 U. S. 109, 112, 39 L. Ed. 87.

50. *Prior to act of 1833*.—*Insurance Co. v. Ritchie*, 5 Wall. 541, 542, 18 L. Ed. 540.

Prior to the act of 1833 no original action by a citizen of any state against a citizen of the same state could be maintained in a national court, at law, or in equity, for injuries arising from the illegal

courts was extended by the act of March 2, 1833, to all cases in law or equity arising under the revenue laws where other provisions had not been previously made by law.<sup>51</sup>

bbb. *Present Rule*—(aaa) *In General*.—Under the present statute, the federal courts, as a general rule, have jurisdiction of suits at law or in equity arising under any act providing for revenue for imports or tonnage.<sup>52</sup>

(bbb) *Suits for Recovery Back of Duties*—aaaa. *In General*.—The circuit court of the United States has no jurisdiction to entertain a suit against the collector of customs to recover back duties exacted, where the goods were assessed according to law, and no request for reappraisement made.<sup>53</sup>

bbbb. *Duties Assessed on Nonimportable Goods*.—Actions against the collector to recover back duties assessed upon nonimportable property are within the jurisdiction of the circuit court.<sup>54</sup>

exaction of duties by collectors of revenue. Redress of such injuries could be obtained only in the state courts, and the revisory jurisdiction of this court could be invoked only under the twenty fifth section of the judiciary act. *Insurance Co. v. Ritchie*, 5 Wall. 541, 542, 18 L. Ed. 540.

A suit at common law may be instituted in the district or circuit courts in the name of the United States, founded upon their legal right to recover the possession of goods upon which they have a lien for duties, or to recover damages for the illegal taking or detaining the same. *United States v. 350 Chests of Tea*, 12 Wheat. 486, 6 L. Ed. 702.

51. *Under act of 1833*.—*Philadelphia v. Collector*, 5 Wall. 720, 728, 18 L. Ed. 614. See, also, *Ex parte Smith*, 94 U. S. 455, 456, 24 L. Ed. 165; *Insurance Co. v. Ritchie*, 5 Wall. 541, 542, 18 L. Ed. 540.

The act of 1833 made the right of action to depend not altogether, as previously, upon the character of the parties as citizens or aliens, but also on the nature of the controversy, without regard to citizenship or a lienage. Under that act citizens of the same state might sue each other for causes arising under the revenue laws. A citizen injured by the proceedings of a collector might have an action against him for the injury, though a citizen of the same state with himself. And the third section of the same act gave the right to collectors or others who might be sued in any state court, on account of any act done under the revenue laws, to remove the action by a proper proceeding into a national court. *Insurance Co. v. Ritchie*, 5 Wall. 541, 543, 18 L. Ed. 540.

52. *Suits under import or tonnage laws*—*In general*.—Rev. Stat., § 629, c. 4. *Dooley v. United States*, 182 U. S. 222, 223, 45 L. Ed. 1074; *De Lima v. Bidwell*, 182 U. S. 1, 45 L. Ed. 1041; *United States v. Hill*, 123 U. S. 681, 687, 31 L. Ed. 275.

"By Rev. Stat., § 629, subdivision 4, the circuit courts are vested with jurisdiction 'of all suits at law or equity arising under any act providing for a revenue from imports or tonnage,' irrespective of the amount involved. This section should be construed in connection with § 643, which provides for the removal from state courts

to circuit courts of the United States of suits against revenue officers 'on account of any act done under color of his office, or of such revenue law, or on account of any right, title or authority claimed by such officer or other person under any such law.' Both these sections are taken from the act of March 2, 1833, c. 57, § 4 Stat. 632, commonly known as the Force Bill, and are evidently intended to include all actions against customs officers acting under color of their office." *Downes v. Bidwell*, 182 U. S. 244, 248, 45 L. Ed. 1088.

**Section 629 not repealed by act of 1888.**—Clause 4, § 629, of the Revised Statutes, was not repealed by the jurisdictional act of 1875, or the subsequent act of August 13, 1888, since these acts were "not intended to interfere with the prior statutes conferring jurisdiction upon the circuit or district courts in special cases, and over particular subjects." *Downes v. Bidwell*, 182 U. S. 244, 248, 45 L. Ed. 1088.

53. *Action against collector of customs*.—*Schoenfeld v. Hendricks*, 152 U. S. 691, 38 L. Ed. 601.

"It was decided by this court in *Arnson v. Murphy*, 109 U. S. 238, 27 L. Ed. 920, that the common-law right of action against a collector to recover duties illegally collected was taken away by act of congress, and a statutory remedy given, which was exclusive. *Arnson v. Murphy*, 115 U. S. 579, 29 L. Ed. 491; *Cheatham v. United States*, 92 U. S. 85, 23 L. Ed. 561. While the common-law right was outstanding, the collector withheld, as an indemnity, the sum in dispute, but congress provided that he must pay into the treasury all moneys received officially, and that the secretary of the treasury should refund erroneous and illegal exactions. A suit to recover back an excess of duty necessarily could only be maintained as affirmatively specified in the statute." Rev. Stat., §§ 2931-3013. *Schoenfeld v. Hendricks*, 152 U. S. 691, 693, 38 L. Ed. 601.

54. *Action to recover back duties paid on nonimportable property*.—*Dowes v. Bidwell*, 182 U. S. 244, 248, 45 L. Ed. 1088; *De Lima v. Bidwell*, 182 U. S. 1, 45 L. Ed. 1041; *Dooley v. United States*, 182 U. S. 222, 223, 45 L. Ed. 1074.

ccc. *Suits to Review Decision of Board of Appraisers*.—Under the act of June 10, 1890, the circuit court has no jurisdiction to entertain an appeal by importers from a decision of the board of general appraisers as to the dutiable value of imported merchandise,<sup>55</sup> though it may entertain jurisdiction of an appeal from the board of general appraisers assessing a charge for gauging goods imported and withdrawn from the warehouse for export.<sup>56</sup>

(ddd) *Suits for Penalties and Forfeitures*.—Suits for penalties and forfeitures arising under acts providing for revenue from imports or tonnage are not within the jurisdiction of the federal courts upon this ground alone.<sup>57</sup>

(cc) *Suits under Internal Revenue Laws*.—The jurisdiction of the circuit courts in suits arising under internal revenue laws has been the subject of frequent legislation by congress,<sup>58</sup> but, at present, it is well settled that their ju-

55. *Appeal from decision of board of appraisers as to dutiable value*.—*Passavant v. United States*, 148 U. S. 214, 37 L. Ed. 426; *Schoenfeld v. Hendricks*, 152 U. S. 691, 694, 38 L. Ed. 601.

Under the customs administrative act of June 10, 1890, 26 Stat. c. 407, p. 131, the circuit courts of the United States have no jurisdiction to entertain an appeal by importers from a decision of the board of general appraisers, as to the dutiable value of imported merchandise; in other words, the circuit courts of the United States have, under the provisions of said act no authority or jurisdiction, on the application of dissatisfied importers, to review and reverse a decision of a board of general appraisers, ascertaining and fixing the dutiable value of imported goods, when such board has acted in pursuance of law, and without fraud, or other misconduct from which bad faith could be implied. *Passavant v. United States*, 148 U. S. 214, 37 L. Ed. 426.

"We held in *Passavant v. United States*, 148 U. S. 214, 37 L. Ed. 426, that the act of June 10, 1890, conferred no jurisdiction upon circuit courts of the United States, on the application of dissatisfied importers, to review and reverse a decision of a board of general appraisers ascertaining and fixing the dutiable value of imported goods, when such board has acted in pursuance of law, and without fraud or other misconduct from which bad faith could be implied; but it does not result from that conclusion that in such cases the collector is still subject to suit." *Schoenfeld v. Hendricks*, 152 U. S. 691, 694, 38 L. Ed. 601.

But it has been held that the circuit court of the United States for the southern district of New York has jurisdiction to review the decision of the board of general appraisers reversing the action of the collector of the port of New York in estimating the value and converting paper florins into the currency of the United States on importations of merchandise, the invoices of which were expressed in paper florins of Austria Hungary, from which country the importations were made. *United States v. Klingenberg*, 153 U. S. 93, 38 L. Ed. 647.

56. *Propriety of charge for gauging goods withdrawn from warehouse*.—*United States v. Jahn*, 155 U. S. 109, 39 L. Ed. 87.

57. *Suits for penalties and forfeitures*.—Rev. Stat., § 629, c. 4. *Coffey v. United States*, 116 U. S. 427, 433, 29 L. Ed. 681.

By subdivision 4, § 629, jurisdiction is denied to the circuit courts of suits for penalties and forfeitures arising under any act providing for revenue from imports and tonnage. *Coffey v. United States*, 116 U. S. 427, 433, 29 L. Ed. 681; *Coffey v. United States*, 116 U. S. 436, 29 L. Ed. 684.

58. *Former rules as to jurisdiction of suits under internal revenue laws*.—The act of 1833 gave jurisdiction to the circuit courts of the United States of suits under the internal revenue acts against collectors and others without regard to citizenship. *Mason v. Rollins*, 13 Wall. 602, 20 L. Ed. 527; *Williams v. Reynolds*, 131 U. S., appx. cxi, 21 L. Ed. 112; *Hornthall v. The Collector*, 9 Wall. 560, 19 L. Ed. 560; *Insurance Co. v. Ritchie*, 5 Wall. 541, 18 L. Ed. 540.

All cases in law or equity arising under the revenue laws were declared to be cognizable in the circuit courts by the act of the 2d of March, 1833, unless where it appeared that other provisions for the trial of the same had previously been made by law. *Williams v. Reynolds*, 131 U. S., appx. cxi, 21 L. Ed. 112.

Under act of June 30, 1864, the jurisdiction of the circuit courts in original suits between citizens of the same state in internal revenue cases was continued or made clear. *Insurance Co. v. Ritchie*, 5 Wall. 541, 18 L. Ed. 540; *Williams v. Reynolds*, 131 U. S., appx. cxi, 21 L. Ed. 112.

Doubts were entertained whether cases arising under laws subsequently passed, to levy and collect internal revenue taxes, were included in the act of 1833, as no such acts were in force at the time that act was passed, and to remove all such doubts upon the subject, congress, on the 30th of June, 1864, enacted that the provisions of that act "shall be taken and deemed as extending to and embracing all cases arising under the laws for the collection of internal duties, stamp duties, licenses or taxes, which have been or may



risdiction extends to all cases arising under those laws,<sup>59</sup> including actions or suits for penalties and forfeitures incurred thereunder,<sup>60</sup> as well as to suits to recover back taxes illegally collected under color of those laws.<sup>61</sup>

be hereafter enacted." *Williams v. Reynolds*, 131 U. S., appx. cxi, 21 L. Ed. 112.

The effect of this enactment was to confer upon the circuit courts original jurisdiction in all cases, whether in law or equity, arising under the laws passed to levy and collect internal revenue taxes. *Williams v. Reynolds*, 131 U. S., appx. cxi, 21 L. Ed. 112.

By the act of July 13, 1866, "to reduce internal taxation, and to amend an act to provide internal revenue," etc., the jurisdiction of the circuit courts in original suits between citizens of the same state, in internal revenue cases, was taken away. *Insurance Co. v. Ritchie*, 5 Wall. 541, 18 L. Ed. 540; *Williams v. Reynolds*, 131 U. S., appx. cxi, 21 L. Ed. 112; *Hornthall v. The Collector*, 9 Wall. 560, 19 L. Ed. 560; *The Assessors v. Osbornes*, 9 Wall. 567, 19 L. Ed. 748; *Mason v. Rollins*, 13 Wall. 602, 20 L. Ed. 527; *The Collector v. Hubbard*, 12 Wall. 1, 20 L. Ed. 272.

"Congress, on the 13th of July, 1866, repealed the section of the act conferring such jurisdiction, and also enacted that the original act conferring such jurisdiction in certain revenue cases, entitled 'An act to provide for the collection of duties on imports,' shall not be so construed as to apply to cases arising under an act entitled 'an act to provide internal revenue to support the government,' or any act in addition thereto or in amendment thereof, nor to any case in which the validity or interpretation of said act or acts shall be in issue. 4 Stat. 632; 14 Stat. 172, §§ 67, 68; *Hornthall v. The Collector*, 9 Wall. 560, 19 L. Ed. 560; *Insurance Co. v. Ritchie*, 5 Wall. 541, 18 L. Ed. 540." *Williams v. Reynolds*, 131 U. S., appx. cxi, 21 L. Ed. 112.

Since the passage of the last-named act, and the repeal of the 50th section of the prior act, the circuit courts have no jurisdiction of cases arising under the internal revenue laws, to recover back duties illegally assessed and paid under protest, unless the plaintiff and defendant in such suit are citizens of different states. Such action, if the parties are citizens of different states, may be commenced in the circuit court; but if they are citizens of the same state, the suit must be commenced in the state court and be prosecuted there, unless it is removed into the circuit court for the same district, in pursuance of some one of the acts of congress passed for that purpose. *The Assessors v. Osbornes*, 9 Wall. 567, 19 L. Ed. 748; *Philadelphia v. Collector*, 5 Wall. 720, 18 L. Ed. 614; *Williams v. Reynolds*, 131 U. S., appx. cxi, 21 L. Ed. 112.

**59. Present rule as to jurisdiction of suits under internal revenue laws.**—Rev. Stat., § 629, c. 4; *Spreckles Sugar Ref.*

*Co. v. McClain*, 192 U. S. 397, 407, 48 L. Ed. 496; *Coffey v. United States*, 116 U. S. 427, 433, 29 L. Ed. 681; *Patton v. Brady*, 184 U. S. 608, 46 L. Ed. 713; *United States v. Hill*, 123 U. S. 681, 687, 31 L. Ed. 275.

A suit in which it is alleged that the law under which the defendant proceeded in collecting internal revenue taxes is repugnant to the constitution of the United States arises both under the constitution and laws of the United States. *Spreckles Sugar Ref. Co. v. McClain*, 192 U. S. 397, 407, 48 L. Ed. 496.

**The provision of § 629 of the Revised Statutes** conferring jurisdiction upon the circuit courts of suits arising under statutes providing for internal revenue was not superseded by the judiciary act of 1887-8. *Spreckles Sugar Ref. Co. v. McClain*, 192 U. S. 397, 407, 48 L. Ed. 496.

"By § 629 of the Revised Statutes, subd. 4, original jurisdiction is given to the circuit courts 'of all causes arising under any law providing internal revenue.' In title xxxv of the Revised Statutes concerning 'Internal Revenue,' § 3213 provides that 'all suits for fines, penalties and forfeitures, where not otherwise provided for, shall be brought in the name of the United States, in any proper form of action, or by any appropriate form of proceeding, qui tam or otherwise, before any circuit or district court of the United States, for the district within which said fine, penalty or forfeiture may have been incurred, or before any other court of competent jurisdiction.'" *Coffey v. United States*, 116 U. S. 427, 432, 20 L. Ed. 681.

**60. Suits for penalties and forfeitures.**—*Coffey v. United States*, 116 U. S. 427, 433, 29 L. Ed. 681. See post, "Suits for Penalties and Forfeitures," VII, B, 3, c.

Although, in practice, suits in rem for forfeitures for violations of the internal revenue laws are more frequently brought in the district courts, yet cases are to be found of such suits originally brought in the circuit courts, where jurisdiction was not questioned. *Coffey v. United States*, 116 U. S. 427, 433, 29 L. Ed. 681.

The circuit court was held to have jurisdiction of a suit in rem for forfeiture of property seized on land for violation of the internal revenue laws. *Coffey v. United States*, 116 U. S. 427, 29 L. Ed. 681.

**61. An action against the collector of internal revenue to recover back taxes** paid under an act of congress claimed to be unconstitutional, is one arising under the laws of the United States and within the jurisdiction of the circuit court. *Patton v. Brady*, 184 U. S. 608, 46 L. Ed. 713.

(dd) *Suits under State Revenue Laws.*—Where a suit is brought by the state to recover taxes and penalties imposed by its own revenue laws, the jurisdiction belongs to its own tribunals, except so far as congress, in order to secure the supremacy of the national constitution and laws, has provided for a removal into the courts of the United States.<sup>62</sup>

jj. *Trademark Laws.*—The courts of the United States have cognizance of an action or suit in equity between citizens of the same state, in respect to trademarks, where the trademark in controversy is duly registered and is used on goods intended to be transported to a foreign country or in lawful commercial intercourse with an Indian tribe.<sup>63</sup> But the federal courts have no jurisdiction of a suit for relief on the ground that the defendant is defrauding the public by palming off his goods on them as the goods of the plaintiff, where the mark of the plaintiff was not, and could not have been registered as a trademark,<sup>64</sup> and in a suit between citizens of the same state for the infringement of a duly registered trademark, the plaintiff must allege and prove that the trademark was intended to be used on goods to be transported to a foreign country, or in commerce with the Indian tribes.<sup>65</sup>

kk. *Act Admitting State into Union.*—A suit in which the construction of an act of congress admitting a state into the Union is involved is one arising under the laws of the United States, and may be brought in the circuit court, although other questions are also involved in the case which, of themselves, are not sufficient to give the federal courts jurisdiction.<sup>66</sup>

ll. *Act as to Places within Exclusive Jurisdiction of United States.*—A suit under an act of congress in relation to the District of Columbia, or other places

**62. Suits under state revenue laws.**—*Postal Tel. Cable Co. v. Alabama*, 155 U. S. 482, 487, 39 L. Ed. 231.

**63. Suits in regard to registered trademarks.**—*Warner v. Searle, etc., Co.*, 191 U. S. 195, 205, 48 L. Ed. 145; *In re Keasbey & Mattison Co.*, 160 U. S. 221, 40 L. Ed. 402; *Ryder v. Holt*, 128 U. S. 525, 32 L. Ed. 529; *Elgin Nat. Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 665, 677, 45 L. Ed. 365; *Leschen Rope Co. v. Broderick, etc., Rope Co.*, 201 U. S. 166, 172, 50 L. Ed. 710.

**Amount in controversy.**—See post, "Amount in Controversy," VII, C, 4, d.

**United States and state courts have concurrent jurisdiction in suits for the infringement of trademarks.** *In re Keasbey & Mattison Co.*, 160 U. S. 221, 40 L. Ed. 402.

**64. Suits for fraudulent use of mark, not valid as trademark.**—"Nor can we assume jurisdiction of this case as one wherein the defendant had made use of plaintiff's device for the purpose of defrauding the plaintiff and palming off its goods upon the public as of the plaintiff's manufacture. Our jurisdiction depends solely upon the question whether plaintiff has a registered trademark valid under the act of congress, and, for the reasons above given, we think it has not." *Leschen Rope Co. v. Broderick, etc., Rope Co.*, 201 U. S. 166, 172, 50 L. Ed. 710.

Where the absolute right to a geographical name as a trademark belongs to the plaintiff, the circuit court has jurisdiction under the statute to award relief for infringement; but where it is not a lawfully registered trademark, jurisdiction cannot

be maintained. *Elgin Nat. Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 665, 677, 45 L. Ed. 365.

**65. Trademark must be used on goods for export or for sale to Indian tribes.**—*Warner v. Searle, etc., Co.*, 191 U. S. 195, 205, 48 L. Ed. 145; *Ryder v. Holt*, 128 U. S. 525, 32 L. Ed. 529.

Where the evidence in the record did not show that the defendant used the name of its preparation on merchandise intended to be transported, and the sales proved were sales in the city of Chicago and Northern District of Illinois, and there was nothing to indicate that the preparation was intended to be used in foreign or Indian trade, it was held that even if it were assumed that there could be a trademark in the use of the word "Pancropepsine," which would be invaded by the use of the word "Pancro-Pepsin," the circuit court could not, by virtue of the act, enjoin such use because it was not used in the commerce to which the act related. *Warner v. Searle, etc., Co.*, 191 U. S. 195, 206, 48 L. Ed. 145.

**66. Act admitting state into union.**—*Moore v. McGuire*, 205 U. S. 214, 51 L. Ed. 776.

A bill to quiet and remove a cloud upon a title to land upon an island in the Mississippi river, in which the construction of the act of congress admitting the state of Mississippi into the union and defining its boundaries is involved, is one arising under the laws of the United States and within the jurisdiction of the circuit court of the United States. *Moore v. McGuire*, 205 U. S. 214, 219, 51 L. Ed. 776.

over which the United States has exclusive jurisdiction, is one arising under the laws of the United States.<sup>67</sup>

(g) *Suits by or against National Banks*—aa. *Rule Prior to Act of 1882*.—Prior to July 12, 1882, suits might be brought by or against national banks, in the circuit courts of the United States in the districts where the banks were located. In other words, the mere fact that one of the parties to a controversy was a national bank was sufficient to give jurisdiction to the federal courts.<sup>68</sup>

bb. *Rule under Act of 1882*.—By the act of July 12, 1882, it was provided that "the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States, which do or might do banking business where such national banking associations may be doing business when such suit may be begun." Under this act nothing in the way of jurisdiction could be

**67. Act of congress as to places within exclusive jurisdiction of United States.**—*Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257.

**68. Prior to 1882.**—*Whittemore v. Amoskeag Nat. Bank*, 134 U. S. 527, 33 L. Ed. 1002; *Kennedy v. Gibson*, 8 Wall. 498, 19 L. Ed. 476; *Bank v. Pahquioque Bank*, 14 Wall. 383, 20 L. Ed. 840; *Casey v. Adams*, 102 U. S. 66, 26 L. Ed. 52; *Continental Nat. Bank v. Buford*, 191 U. S. 119, 123, 48 L. Ed. 119; *Petri v. Commercial Nat. Bank*, 142 U. S. 644, 35 L. Ed. 1144; *Pacific Nat. Bank v. Mixter*, 124 U. S. 721, 31 L. Ed. 567; *Fortier v. New Orleans Nat. Bank*, 112 U. S. 439, 28 L. Ed. 764; *County of Wilson v. National Bank*, 103 U. S. 770, 26 L. Ed. 488; *Van Reed v. People's Nat. Bank*, 198 U. S. 554, 560, 49 L. Ed. 1161.

Section 629, U. S. Rev. Stat., gives the circuit courts jurisdiction of suits brought by or against a national bank, without regard to the citizenship of the parties. *County of Wilson v. National Bank*, 103 U. S. 770, 776, 26 L. Ed. 488; *Kennedy v. Gibson*, 8 Wall. 498, 19 L. Ed. 476.

**Suits by bank under act of 1863.**—Suits may be brought under § 57 of the act, by any association, as well as against it; though the word "by" be omitted in the text of the section. Reading the section by the light of another section of a prior act, on the same general subject, the omission is to be regarded as an accidental one. *Kennedy v. Gibson*, 8 Wall. 498, 19 L. Ed. 476.

"The 59th section of the act of February 25th, 1863, provides that all suits by or against such associations may be brought in the proper courts of the United States or of the state. The 57th section of the act of 1864 relates to the same subject, and revises and enlarges the provisions of the 59th section of the preceding act. In the latter, the word 'by' in respect to such suits is dropped. The omission was doubtless accidental. It is not to be supposed that congress intended to exclude the associations from suing in the courts where they can be sued." *Kennedy v. Gibson*, 8 Wall. 498, 506, 19 L. Ed. 476.

**Suit by president of bank on behalf of bank.**—Where a bill is brought in the federal court by a person in the capacity of president of a national bank and throughout the case both parties treat it as one by the bank, and not by the president in person, the defendant cannot object on appeal that the federal courts are without jurisdiction, upon the ground that the suit is one by the president in person and that he and the defendant are both citizens of the same state. *Fortier v. New Orleans Nat. Bank*, 112 U. S. 439, 28 L. Ed. 764.

**Suit by bank on behalf of stockholders to enjoin tax on shares.**—A suit by a national bank, on behalf of its stockholders, to enjoin an illegal tax on its shares, may be maintained in the United States circuit court. *Cummings v. National Bank*, 101 U. S. 153, 155, 25 L. Ed. 903; *Hills v. Exchange Bank*, 105 U. S. 319, 26 L. Ed. 1052.

**Concurrent jurisdiction of state courts.**—"The law as it stood previous to the act of July 12, 1882, 22 Stat. 163, c. 290, § 4, gave the proper state federal courts concurrent jurisdiction in all ordinary suits against national banks." *Pacific Nat. Bank v. Mixter*, 124 U. S. 721, 727, 31 L. Ed. 567.

There is nowhere in the banking act any evidence of an intention on the part of congress to exempt banks from the ordinary rules of law affecting the locality of actions founded on local things. *Casey v. Adams*, 102 U. S. 66, 67, 26 L. Ed. 52.

A national banking association may be sued in any state, county, or municipal court in the county or city where such association is located, having jurisdiction in similar cases. *Bank v. Pahquioque Bank*, 14 Wall. 383, 20 L. Ed. 840.

In the case of *Bank v. Pahquioque Bank*, 14 Wall. 383, 20 L. Ed. 840, it was decided that suit might be brought in a state court against a national bank, although it had made default in paying its circulating notes, and a receiver of a bank had been appointed by the comptroller of the currency. *Calhoun v. Lanaux*, 127 U. S. 634, 639, 32 L. Ed. 297.



claimed by a national bank because of the source of its incorporation but a national bank was placed in the same situation in this respect as a bank not organized under the laws of the United States.<sup>69</sup> The jurisdiction of federal courts of suits by or against national banks in cases where the parties were citizens of different states,<sup>70</sup> or where the suit arose under the constitution, laws or treaties of the United States,<sup>71</sup> was not defeated.

cc. *Rule under Act of 1887*—(aa) *In General*.—The judiciary act of March 3, 1887, as corrected by the act of August 13, 1888, c. 866, provided "that all national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located; and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same states. The provisions of this section shall not be held to effect the jurisdiction of the courts of the United States in cases commenced by the

69. *Under act of July 12, 1832*.—Whittemore *v. Amoskeag Nat. Bank*, 134 U. S. 527, 33 L. Ed. 1002; *Auten v. United States Nat. Bank*, 174 U. S. 125, 140, 43 L. Ed. 920; *International Trust Co. v. Weeks*, 203 U. S. 364, 51 L. Ed. 224; *Wyman v. Wallace*, 201 U. S. 230, 50 L. Ed. 738; *Frenzer v. Wallace*, 201 U. S. 244, 50 L. Ed. 742; *Poppleton v. Wallace*, 201 U. S. 245, 50 L. Ed. 743; *Guthrie v. Harkness*, 199 U. S. 148, 157, 50 L. Ed. 130; *Leather Manufacturers' Bank v. Cooper*, 120 U. S. 778, 30 L. Ed. 816; *Ex parte Jones*, 164 U. S. 691, 41 L. Ed. 601; *Petri v. Commercial Nat. Bank*, 142 U. S. 644, 35 L. Ed. 1144; *Watkins v. American Nat. Bank*, 199 U. S. 599, 50 L. Ed. 327; *Continental Nat. Bank v. Buford*, 191 U. S. 119, 48 L. Ed. 119; *Van Reed v. People's Nat. Bank*, 198 U. S. 554, 560, 49 L. Ed. 1161; *First Nat. Bank v. Morgan*, 132 U. S. 141, 33 L. Ed. 282.

"The act of 1882 provided in clear and unmistakable terms that the courts of the United States should not have jurisdiction of such suits thereafter brought, save in a few classes of cases, unless they would have jurisdiction under like circumstances of suits by or against a state bank doing business in the same state with the national bank. The provision is not that no such suit shall be brought by or against such a national bank in a federal court, but that a federal court shall not have jurisdiction. This clearly implies that such a suit can neither be brought nor removed there, for jurisdiction of such suits has been taken away, unless a similar suit could be entertained by the same court by or against a state bank in like situation with the national bank." *Leather Manufacturers' Bank v. Cooper*, 120 U. S. 778, 781, 30 L. Ed. 816.

The act of July, 1882, does not apply to suits brought before its enactment. *First Nat. Bank v. Morgan*, 132 U. S. 141, 33 L. Ed. 282.

Of an action by a stockholder of a national bank against the bank and its officers in a circuit court for a certain district, where all the parties were citizens of the district, and the bank was located

therein; the circuit court for that district had no jurisdiction, there being no grounds therefor under §§ 5209, 5239, Rev. Stat. *Whittemore v. Amoskeag Nat. Bank*, 134 U. S. 527, 529, 33 L. Ed. 1002.

70. *Jurisdiction of federal courts on ground of diversity of citizenship*.—*Petri v. Commercial Nat. Bank*, 142 U. S. 644, 35 L. Ed. 1144; *Leather Manufacturers' Bank v. Cooper*, 120 U. S. 778, 30 L. Ed. 816.

"A national bank located in one state may bring suit against a citizen of another state in the circuit court of the United States for the district wherein the defendant resides, by reason alone of diverse citizenship." *Petri v. Commercial Nat. Bank*, 142 U. S. 644, 647, 35 L. Ed. 1144.

So far as the mere source of its incorporation rendered suits to which a national bank might be a party, cognizable by the circuit courts, that was taken away, by the proviso to the 4th section of the act of congress of July 12, 1882, c. 290, but the jurisdiction which those courts might exercise in such suits when arising between citizens of different states or under the constitution or laws of the United States, except in that respect, remained unchanged. *Petri v. Commercial Nat. Bank*, 142 U. S. 644, 649, 35 L. Ed. 1144.

"No reason is perceived why it should be held that congress intended that national banks should not resort to federal tribunals as other corporations and individual citizens might." *Petri v. Commercial Nat. Bank*, 142 U. S. 644, 650, 651, 35 L. Ed. 1144.

71. *Suits arising under laws of United States*.—*Petri v. Commercial Nat. Bank*, 142 U. S. 644, 35 L. Ed. 1144; *Continental Nat. Bank v. Buford*, 191 U. S. 119, 123, 48 L. Ed. 119.

*Action against receiver of national bank*.—Thus an action against a receiver of a national bank appointed by the comptroller of the currency is an action against an officer of the United States, and is one arising under the laws of the United States and within the jurisdiction of the federal courts. *Auten v. United States Nat. Bank*, 174 U. S. 125, 140, 43 L. Ed. 920.

United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank.<sup>72</sup>

(bb) *Action to Wind Up Affairs of Bank*.—The federal jurisdiction of actions on suits for winding up the affairs of national banks is saved by the act of March 13, 1887.<sup>73</sup> Under this clause, an action under § 2 of the act of June 30, 1876, to enforce individual liability of shareholders in a national bank which has gone into voluntary liquidation in the manner provided in § 5220 of the Revised Statutes,<sup>74</sup> or an action on a contract for rent alleged to be due under the terms of a lease to a national bank, brought by the agent of the shareholders of the bank to whom the comptroller of the currency has released its assets,<sup>75</sup> is cognizable in the federal courts.

dd. *Suits for Forfeiture of Charter*.—The United States courts have exclusive jurisdiction to declare a forfeiture of the charter of a national bank as the result of wrongs committed by the directors.<sup>76</sup>

(h) *Suits by or against Bank of United States*.—In the absence of any express statute or charter provision authorizing the bank of the United States to sue or be sued in the federal courts, it was held that the federal court had no jurisdiction of a suit in which the bank was a party unless it was shown that the parties were citizens of different states.<sup>77</sup> It was competent, however, for congress to confer upon the United States bank by its charter authority to sue and be sued in the federal courts, in pursuance of the constitutional provision extend-

**72. Under act of March 3, 1887.**—Continental Nat. Bank v. Buford, 191 U. S. 119, 123, 48 L. Ed. 119; International Trust Co. v. Weeks, 203 U. S. 364, 51 L. Ed. 224.

National banks are subject by statute to suit in state courts. 25 Stat. 433; Guthrie v. Harkness, 199 U. S. 148, 50 L. Ed. 130.

"The necessary effect of the legislation (of 1882, 1887, 1888) was to make national banks, for purposes of suing and being sued in the circuit courts of the United States, citizens of the states in which they were respectively located, and to withdraw from them the right to invoke the jurisdiction of the circuit courts of the United States simply upon the ground that they were created by and exercised their powers under acts of congress. No other purpose can be imputed to congress than to effect that result. Of course, notwithstanding the acts of 1882 and 1888, there remained to a national bank, independently of its federal origin, and as a citizen of the state in which it was located, the right to invoke the original jurisdiction of the circuit courts in any suit involving the required amount, and which, by reason of its subject matter, and not by reason simply of the federal origin of the bank, was a suit arising under the constitution or laws of the United States. Petri v. Commercial Nat. Bank, 142 U. S. 644, 648, 35 L. Ed. 1144." Continental Nat. Bank v. Buford, 191 U. S. 119, 123, 124, 48 L. Ed. 119, reaffirmed in Kimbell v. Chicago, etc., Press Brick Co., 194 U. S. 631, 48 L. Ed. 1158; Warder v. Loomis, 197 U. S. 619, 49 L. Ed. 909; Russell v. Russell, 200 U. S. 613, 614, 50 L. Ed. 620.

**73. Actions to wind up national bank.**—Continental Nat. Bank v. Buford, 191 U. S. 119, 123, 48 L. Ed. 119; International

Trust Co. v. Weeks, 203 U. S. 364, 51 L. Ed. 224; Wyman v. Wallace, 201 U. S. 230, 50 L. Ed. 738; Poppleton v. Wallace, 201 U. S. 245, 50 L. Ed. 743.

**74. Action to enforce liability of stockholders.**—Wyman v. Wallace, 201 U. S. 230, 50 L. Ed. 738; Frenzer v. Wallace, 201 U. S. 244, 50 L. Ed. 742; Poppleton v. Wallace, 201 U. S. 245, 50 L. Ed. 743.

**75. Action for money due bank on lease.**—International Trust Co. v. Weeks, 203 U. S. 364, 51 L. Ed. 224, citing In re Chetwood, 165 U. S. 443, 41 L. Ed. 782.

**76. Suit for forfeiture of charter.**—Yates v. Jones Nat. Bank, 206 U. S. 158, 180, 51 L. Ed. 1002.

**77. Absence of statutory provision giving jurisdiction to federal courts.**—United States Bank v. Deveaux, 5 Cranch 61, 3 L. Ed. 38; Claflin v. Houseman, 93 U. S. 130, 135, 23 L. Ed. 833; United States Bank v. Martin, 5 Pet. 479, 8 L. Ed. 198.

The first bank of the United States, chartered in 1791, had capacity given it "to sue and be sued \* \* \* in courts of record, or any other place whatsoever," but it was held, in United States Bank v. Deveaux, 5 Cranch 61, 3 L. Ed. 38, that this did not authorize the bank to sue in the courts of the United States, without showing proper citizenship of the parties in different states. The bank was obliged to sue in the state courts. Claflin v. Houseman, 93 U. S. 130, 135, 23 L. Ed. 833.

The district court of the United States for the state of Alabama has not jurisdiction of suits instituted by the bank of the United States; this jurisdiction is not given in the act of congress establishing that court, nor is it conferred by the act incorporating the bank of the United States. United States Bank v. Martin, 5 Pet. 479, 8 L. Ed. 198.

ing the judicial power to cases arising under the laws of the United States,<sup>78</sup> and this power was expressly conferred by its charter upon the second bank of the United States.<sup>79</sup>

(i) *Suits with Respect to Land Grants or Patents*—aa. *Title Derived from Patent or Act of Congress*—(aa) *Assertion of Title under Patent*.—The mere assertion of title to land under and by virtue of a patent granted by the United States, presents no question which, of itself, confers jurisdiction on a circuit court of the United States.<sup>80</sup>

**78. Power of congress to confer federal jurisdiction.**—*Osborn v. United States Bank*, 9 Wheat. 738, 6 L. Ed. 204.

This provision in the charter is warranted by the third article of the constitution, which declares, that "the judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." *Osborn v. United States Bank*, 9 Wheat. 738, 6 L. Ed. 204.

**79. Suits by or against bank of the United States.**—*Osborn v. United States Bank*, 9 Wheat. 738, 6 L. Ed. 204; *Claffin v. Houseman*, 93 U. S. 130, 135, 23 L. Ed. 833; *United States Bank v. Planters' Bank*, 9 Wheat. 904, 6 L. Ed. 244.

The second bank of the United States had express capacity to "sue and be sued in all state courts having competent jurisdiction, and in any circuit court of the United States." In the case of *Osborn v. United States Bank*, 9 Wheat. 738, 815, 6 L. Ed. 204, it was objected that congress had not authority to enable the bank to sue in the federal courts merely because of its being created by an act of congress. But the court held otherwise, and sustained its right to sue therein. No question was made of its right to sue in the state courts. *Claffin v. Houseman*, 93 U. S. 130, 135, 23 L. Ed. 833; *Osborn v. United States Bank*, 9 Wheat. 738, 6 L. Ed. 204.

The circuit courts of the United States have jurisdiction of suits brought by the bank of the United States against another bank, incorporated under a law of a state, and of which the state itself is a stockholder, together with private individuals, who are citizens of the same state with some of the stockholders of the bank of the United States. *United States Bank v. Planters' Bank*, 9 Wheat. 904, 6 L. Ed. 244.

The circuit courts of the United States have jurisdiction of a bill brought by the bank of the United States, for the purpose of protecting the bank in the exercise of its franchises, which are threatened to be invaded under the unconstitutional laws of a state; and as the state itself cannot, according to the 11th amendment of the constitution, be made a party defendant to the suit, it may be maintained against the officers and agent of the state, who are intrusted with the execution of such laws. *Osborn v. United States Bank*, 9 Wheat. 738, 739, 6 L. Ed. 204.

The Bank of the United States may sue

in the circuit courts as indorsee or bearer of a promissory note, although the original payee or indorser could not sue in the same courts, being a citizen of the same state with the defendants. *United States Bank v. Planters' Bank*, 9 Wheat. 904, 6 L. Ed. 244.

**Jurisdiction dependent on charter, not on judiciary act.**—"The bank does not sue in virtue of any right conferred by the judiciary act, but in virtue of the right conferred by its charter. It does not sue, because the defendant is a citizen of a different state from any of its members, but because its charter confers upon it the right of suing its debtors in a circuit court of the United States. If the bank could not sue a person who was a citizen of the same state without any one of its members, in the circuit court, this disability would defeat the power. There is, probably, not a commercial state in the Union, some of whose citizens are not members of the bank of the United States. There is, consequently, scarcely a debt due to the bank, for which a suit could be maintained in a federal court, did the jurisdiction of the court depend on citizenship. A general power to sue in any circuit court of the United States, expressed in terms obviously intended to comprehend every case, would thus be construed to comprehend no case. Such construction cannot be the correct one." *United States Bank v. Planters' Bank*, 9 Wheat. 904, 909, 6 L. Ed. 244.

**80. Assertion of title under United States land patent.**—*Florida Cent, etc., R. Co. v. Bell*, 176 U. S. 321, 44 L. Ed. 486; *Bonin v. Gulf Co.*, 198 U. S. 115, 117, 49 L. Ed. 970; *Blackburn v. Portland Gold Min. Co.*, 175 U. S. 571, 44 L. Ed. 276.

"The assertion of title under a patent from the United States, presents no question, which, of itself, confers jurisdiction. *Florida Cent, etc., R. Co. v. Bell*, 176 U. S. 321, 44 L. Ed. 486. No dispute or controversy as to the effect or construction of the constitution, or of any law, or treaty of the United States, on which the result depended, appeared by the record to have been really and substantially involved, so that it could be successfully contended that jurisdiction was invoked on the ground that the suit arose under constitution, law, or treaty." *Bonin v. Gulf Co.*, 198 U. S. 115, 117, 49 L. Ed. 970.

**A claim for accretion on land patented** by the United States is not one under the laws of the United States, where accretion formed since the patent issued. *Joy v. St. Louis*, 201 U. S. 332, 342, 50 L. Ed. 776.



(bb) *Assertion of Title under Act of Congress.*—The mere fact that the title of the plaintiff is derived from an act of congress does not confer jurisdiction upon the federal courts.<sup>81</sup>

(cc) *Title Not Directly Dependent on Act of Congress.*—And so where the plaintiff does not claim directly under a law of the United States, but his rights depend on an ordinance made in pursuance of such law,<sup>82</sup> or on a Mexican land grant,<sup>83</sup> the case does not arise under the laws of the United States.

bb. *Suits Involving Construction or Validity of Act of Congress.*—(aa) *Acts Granting Lands.*—A suit involving the construction of an act of congress granting public lands is within the jurisdiction of the United States courts, and one arising under the laws of the United States.<sup>84</sup>

(bb) *Suits between Rival Claimants under Laws of United States.*—A suit between rival claimants of land under different acts of congress, is one arising under the laws of the United States, and the United States circuit court has jurisdiction without regard to the citizenship of the parties.<sup>85</sup>

**81. Assertion of title under act of congress.**—*Joy v. St. Louis*, 201 U. S. 332, 341, 50 L. Ed. 776; *Blackburn v. Portland Gold Min. Co.*, 175 U. S. 571, 44 L. Ed. 276; *Shoshone Min. Co. v. Rutter*, 177 U. S. 505, 44 L. Ed. 864; *De Lamar's, etc., Min. Co. v. Nesbitt*, 177 U. S. 523, 44 L. Ed. 872.

"It was said in *Blackburn v. Portland Gold Min. Co.*, 175 U. S. 571, 44 L. Ed. 276, that 'this court has frequently been vainly asked to hold that controversies in respect to land, one of the parties to which had derived his title directly under an act of congress, for that reason alone presented a federal question.' The same principle was held in *Shoshone Min. Co. v. Rutter*, 177 U. S. 505, 44 L. Ed. 864, and also in *De Lamar's, etc., Min. Co. v. Nesbitt*, 177 U. S. 523, 44 L. Ed. 872." *Joy v. St. Louis*, 201 U. S. 332, 341, 50 L. Ed. 776.

"A suit to enforce a right which takes its origin in the laws of the United States is not necessarily one arising under the constitution or laws of the United States, within the meaning of the jurisdiction clauses, for if it did every action to establish title to real estate (at least in the newer states) would be such a one, as all titles in whose state come from the United States or by virtue of its laws." *Shoshone Min. Co. v. Rutter*, 177 U. S. 505, 507, 44 L. Ed. 864.

Congress might doubtless provide that any controversy of a judicial nature arising in or growing out of the disposal of the public lands should be litigated only in the courts of the United States. *Shoshone Min. Co. v. Rutter*, 177 U. S. 505, 506, 44 L. Ed. 864.

**82. Claim under ordinance made in pursuance of act of congress.**—*Hoadley v. San Francisco*, 94 U. S. 4, 24 L. Ed. 34.

An action to quiet title to certain of the public lands of the city of San Francisco granted to that city by the act of congress of July 1, 1864, the plaintiff claiming as one of the beneficiaries under the grant by operation of city ordinances of the city of San Francisco, is not a case arising under the laws of the United States. *Hoadley v. San Francisco*, 94 U. S. 4, 24 L. Ed. 34.

**83. Claim dependent on Mexican land grant.**—*Robinson v. Anderson*, 121 U. S. 522, 523, 30 L. Ed. 1021.

Where according to the plaintiff's own showing in his complaint, his rights all depend on the boundaries of a grant by the Mexican government, and confirmed and patented to the grantee's representatives by the United States under the act of March 3, 1851, c. 41, 9 Stat. 631, "to ascertain and settle the private land claims in the state of California," primarily these boundaries depend on the description of the land granted as found in the patent issued under the decree of confirmation, and it nowhere appearing that either the constitution or any law or treaty of the United States is involved, the federal courts have no jurisdiction. *Robinson v. Anderson*, 121 U. S. 522, 523, 30 L. Ed. 1021.

**84. Suits involving construction of land grant acts.**—*Northern Pac. R. Co. v. Soderberg*, 188 U. S. 526, 528, 47 L. Ed. 575.

Where it appears that the plaintiff's title rests upon a property interpretation of the land grant act of 1864 as to the exception of nonmineral lands, the federal courts have jurisdiction wholly independent of citizenship, under that clause of § 1 of the act of 1888, 25 Stat. 433, clothing the circuit court with jurisdiction of all civil suits involving over \$2,000, "and arising under the constitution or laws of the United States." *Northern Pac. R. Co. v. Soderberg*, 188 U. S. 526, 528, 47 L. Ed. 575.

**85. Suits between rival claimants under laws of United States.**—*Kansas Pac. R. Co. v. Atchison, etc., R. Co.*, 112 U. S. 414, 28 L. Ed. 794; *Spokane Falls, etc., R. Co. v. Ziegler*, 167 U. S. 65, 72, 42 L. Ed. 79.

A case of a contest between a settler claiming title under the laws of the United States and a railroad company claiming a right under an act of congress is one of which the United States circuit court has jurisdiction. *Spokane Falls, etc., R. Co. v. Ziegler*, 167 U. S. 65, 72, 42 L. Ed. 79.

An action between two corporations with respect to land which both of them claim title to under different acts of congress is one arising under the laws of the

cc. *Suits Involving Validity of Patent*.—Where a controversy turns upon the validity of a patent from the United States under which the plaintiff claims title, and which is denied by the defendants, it is within the jurisdiction of the United States circuit court as one arising under the laws of the United States.<sup>86</sup>

dd. *Suits to Try Adverse Mining Claims*.—A suit for contesting the claim to a patent for any land claimed and located for valuable deposits, as authorized by § 2326 of the Revised Statutes, by making an affidavit before a court of competent jurisdiction for the purpose of determining the right of possession, is not one arising under the laws of the United States so as to be cognizable by the federal courts without regard to the citizenship of the parties.<sup>87</sup>

(j) *Suits by or against Federal Corporations*.—A suit by or against a corporation created by the authority of an act of congress, is one arising under the laws of the United States, of which the United States circuit courts have jurisdiction, irrespective of the citizenship of the parties.<sup>88</sup> The federal courts have

United States. *Kansas Pac. R. Co. v. Atchison, etc., R. Co.*, 112 U. S. 414, 28 L. Ed. 794.

"We think that the plaintiff's statement did disclose a cause of action arising under the laws of the United States and cognizable by the circuit court. In his complaint the plaintiff alleged that, on May 1, 1889, he was in possession, as a preemptor under the laws of the United States, of a tract of land containing about eighty acres, and on said date had made all the improvements and had lived on the land a sufficient length of time, and had done all other acts necessary to entitle him to a patent to the same from the United States; that the defendant company, being a corporation of the territory of Washington, on said date entered upon and seized a strip of said land fifty feet in width, and appropriated it for railroad purposes without the consent of the plaintiff, and without having compensated him therefor; and that the entry upon and seizure by the defendant of the land was under and pursuant to the laws of the territory of Washington authorizing railroad companies to appropriate land for right of way for railroad tracks." *Spokane Falls, etc., R. Co. v. Ziegler*, 167 U. S. 65, 72, 42 L. Ed. 79.

**86. Suits involving validity of United States land patents.**—*Doolan v. Carr*, 125 U. S. 618, 620, 31 L. Ed. 844.

**87. Suits to try adverse mining claims.**—*Blackburn v. Portland Gold Min. Co.*, 175 U. S. 571, 44 L. Ed. 276; *Shoshone Min. Co. v. Rutter*, 177 U. S. 505, 44 L. Ed. 864; *Mountain View Min. & Mill. Co. v. McFadden*, 180 U. S. 533, 534, 45 L. Ed. 656; *De Lamar's etc., Min. Co. v. Nesbitt*, 177 U. S. 523, 527, 44 L. Ed. 872; *Butte City Water Co. v. Baker*, 196 U. S. 119, 124, 49 L. Ed. 409.

A controversy between rival claimants to land located for valuable deposits under §§ 2325 and 2326 of the Revised Statutes may be properly determined by a state court. *Blackburn v. Portland Gold Min. Co.*, 175 U. S. 571, 44 L. Ed. 276.

The act leaves open to suitors all courts competent to determine the right of

possession. A party may proceed in a state court if he chooses, or if the amount in controversy is sufficient and the parties are citizens of different states he may sue in the federal courts. *Blackburn v. Portland Gold Min. Co.*, 175 U. S. 571, 44 L. Ed. 276.

"In *Shoshone Min. Co. v. Rutter*, 177 U. S. 505, 44 L. Ed. 864, it was held that a suit brought in support of an adverse claim was not one of which a federal court necessarily had jurisdiction, because, as said: 'In a given case the right of possession may not involve any question under the constitution or laws of the United States, but simply a determination of local rules and customs, or state statutes, or even only a mere matter of fact.'" *Butte City Water Co. v. Baker*, 196 U. S. 119, 124, 49 L. Ed. 409.

Inasmuch, therefore, as the "adverse suit" to determine the right of possession may not involve any question as to the construction or effect of the constitution or laws of the United States, but may present simply a question of fact as to the time of the discovery of mineral, the location of the claim on the ground, or a determination of the meaning and effect of certain local rules and customs prescribed by the miners of the district, or the effect of state statutes, it would seem to follow that it is not one which necessarily arises under the constitution and laws of the United States. *Shoshone Min. Co. v. Rutter*, 177 U. S. 505, 509, 44 L. Ed. 864.

Although these suits may sometimes so present questions arising under the constitution or laws of the United States that the federal courts will have jurisdiction, yet the mere fact that a suit is an adverse suit authorized by the statutes of congress is not in and of itself sufficient to vest jurisdiction in the federal courts. *Shoshone Min. Co. v. Rutter*, 177 U. S. 505, 513, 44 L. Ed. 864.

**88. Suits by or against federal corporations.**—*Roberts v. Northern Pac. R. Co.*, 158 U. S. 1, 22, 39 L. Ed. 873; *Osborn v. United States Bank*, 9 Wheat. 738, 823, 6 L. Ed. 204; *Texas & Pac. R. Co. v. Johnson*, 151 U. S. 81, 98, 38 L. Ed. 81;

jurisdiction in such cases although the averments set out to establish the wrong

Pacific Railroad Removal Cases, 115 U. S. 1, 29 L. Ed. 319; Washington, etc., R. Co. v. Coeur D'Alene R., etc., Co., 160 U. S. 77, 93, 40 L. Ed. 346; Texas & Pac. R. Co. v. Cody, 166 U. S. 606, 609, 41 L. Ed. 1132; Ames v. Kansas, 111 U. S. 449, 462, 28 L. Ed. 482; Northern Pac. R. Co. v. Amato, 144 U. S. 465, 471, 36 L. Ed. 506; Southern Kansas R. Co. v. Briscoe, 144 U. S. 133, 135, 36 L. Ed. 377; Swafford v. Templeton, 185 U. S. 487, 494, 46 L. Ed. 1005; Butler v. National Home for Soldiers, 144 U. S. 64, 66, 36 L. Ed. 346.

A suit by or against a corporation of the United States is a suit arising under the laws of the United States, and, on jurisdiction thus attaching in the federal courts, the judicial power is extended to the whole case. "The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not only itself the mere creature of a law, but all its actions and all its rights are dependent on the same law." *Osborn v. United States Bank*, 9 Wheat. 738, 823, 6 L. Ed. 204, quoted in *Roberts v. Northern Pac. R. Co.*, 158 U. S. 1, 22, 39 L. Ed. 873.

As all the faculties and capacities possessed by federal corporations are derived from their acts of incorporation by congress, all their doings arise out of those laws, and, therefore, suits by and against them are "suits arising under the laws of the United States." *Pacific Railroad Removal Cases*, 115 U. S. 1, 29 L. Ed. 319; *Texas & Pac. R. Co. v. Cody*, 166 U. S. 606, 609, 41 L. Ed. 1132.

**Controversies with railroad deriving its authority and powers from act of congress.**—A railroad corporation which acquired all its rights in the matter of the construction and operation of its road within the Indian Territory under and by virtue of a law of the United States, enacted by congress in the exercise of its power over the territories, controversies arising by reason of the exercise of its powers therein are necessarily controversies arising under the laws of the United States, and this being so, it was competent for congress to give the enumerated courts jurisdiction over not only controversies immediately relating to or growing out of the construction of the road, but over all controversies between the nations and tribes or the inhabitants thereof, through whose territory the railroad might be constructed, and the company. *Southern Kansas R.*

*Co. v. Briscoe*, 144 U. S. 133, 135, 36 L. Ed. 377.

The act of March 3, 1873 (17 Stat. 509), is a valid and constitutional exercise of legislative power. Congress, by requiring the attorney general to bring a suit in equity in the name of the United States in any circuit court against the Union Pacific Railroad Company and others, intended, not to change the substantial rights of the parties to the suit, but to provide a specific mode of procedure, which, by removing certain restrictions on the jurisdiction, process, and pleading which are in other cases imposed, would give a larger scope to the action of the court, and a more commercial and efficient remedy than before existed. *United States v. Union Pac. R. Co.*, 98 U. S. 569, 25 L. Ed. 143.

The matters in regard to which the statute authorizes a suit to be brought are very largely those arising under the act which chartered the Union Pacific Railroad Company, conferred on it certain rights and benefits, and imposed on it certain obligations. It is in reference to these rights and obligations that the suit is to be brought. It is also to be brought by the United States, which is, therefore, necessarily the party complainant. Whether, therefore, this suit is authorized by the statute or not, it is very clear that the general subject on which congress legislated is within the judicial power as defined by the constitution. *United States v. Union Pac. R. Co.*, 98 U. S. 569, 602, 25 L. Ed. 143.

**Action for forfeiture of charter of railroad consolidated under act of congress.**—Where a corporation of a state has been consolidated by an act of congress, the proceeding by the state in the nature of a quo warranto for the forfeiture of the franchises of the consolidated company, and also against the management of the consolidated company for usurpation of the powers of the domestic corporation, is one arising under the laws of the United States, and within the jurisdiction of the circuit court of the United States. *Ames v. Kansas*, 111 U. S. 449, 28 L. Ed. 482.

A proceeding by civil action under the Kansas statute in the nature of a quo warranto for the abandonment, relinquishment and surrender of the powers of a domestic corporation which has been consolidated with another corporation under an act of congress, and against the officers of the consolidated corporation for usurping the powers of the domestic corporation, is a civil action, and since it arises under the laws of the United States may be brought in the federal courts. *Ames v. Kansas*, 111 U. S. 449, 28 L. Ed. 482.

"That the validity of the consolidation, so far as the state is concerned, rests



complained of or the defense interposed are unsubstantial in character.<sup>89</sup>

(k) *Suits by or against Federal Receivers.*—While the bare fact that the appointment of a receiver for a state corporation was by a federal court does not make all actions against him cases arising under the constitution or laws of the United States, where he was appointed under the general equity powers of courts of chancery, and not under any provision of that constitution or of those laws, and his liability depends on general law, and his defense does not rest on any act of congress,<sup>90</sup> it has been held that where a receiver of a railroad which was incorporated by act of congress became such by reason of, and derived his authority from, and operated the road in obedience to, the orders of the circuit court in the exercise of its judicial powers, federal jurisdiction existed because the suit was one arising under the constitution and laws of the United States.<sup>91</sup>

alone on the authority conferred for that purpose by the acts of congress is not denied. If the acts of congress confer the authority, the consolidation is valid; if not, it is invalid. Clearly, therefore, the cases arise under these acts of congress, for, to use the language of Chief Justice Marshall in *Osborn v. United States Bank*, 9 Wheat. 738, 825, 6 L. Ed. 204, an act of congress 'is the first ingredient in the case—is its origin—is that from which every other part arises.' The right set up by the company, and by the directors as well, will be defeated by one construction of these acts and sustained by the opposite construction. When this is so, it has never been doubted that a case is presented which arises under the laws of the United States." *Ames v. Kansas*, 111 U. S. 449, 462, 28 L. Ed. 482.

**Right of removal.**—Corporations of the United States created by and organized under acts of congress are entitled as such to remove into the circuit courts of the United States suits brought against them in the state courts, on the ground that such suits are suits "arising under the laws of the United States." *Pacific Railroad Removal Cases*, 115 U. S. 1, 18, 29 L. Ed. 319; *Roberts v. Northern Pac. R. Co.*, 158 U. S. 1, 22, 39 L. Ed. 873. See, generally, the title REMOVAL OF CAUSES.

**Suits by or against Bank of United States.**—See post, "Suits by or against Bank of United States," VII, C, 4, b, (1), (h).

**Suits by or against national banks.**—See post, "Suits by or against National Banks," VII, C, 4, l, (1), (g).

**89. Jurisdiction not dependent upon merits of case.**—*Swafford v. Templeton*, 185 U. S. 487, 494, 46 L. Ed. 1005.

"It may not be doubted that if an action be brought in a circuit court of the United States by such a corporation, there would be jurisdiction to entertain it, although the averments set out to establish the wrong complained of or the defense interposed were unsubstantial in character. The distinction is also well illustrated by the case of *Huntington v. Laidley*, 176 U. S. 468, 44 L. Ed. 630, where, finding that jurisdiction obtained in a circuit court, this court held that it

was error to dismiss the action for want of jurisdiction because it was deemed that the record established that the cause of action asserted was not well founded." *Swafford v. Templeton*, 185 U. S. 487, 494, 46 L. Ed. 1005.

**90. Appointment by federal court not sufficient to give jurisdiction.**—*Gableman v. Peoria, etc., R. Co.*, 179 U. S. 335, 340, 45 L. Ed. 220. But see *Rouse v. Hornsby*, 161 U. S. 588, 590, 40 L. Ed. 817.

But in *Rouse v. Hornsby*, 161 U. S. 558, 590, 40 L. Ed. 817, it was said: "If, as is said, the intervenor, the railroad company and the receivers were all citizens of Kansas, and this had been an action at law and not a petition of intervention in the equity suit, the jurisdiction of the circuit court would nevertheless have been maintainable on the ground that it was one arising under the constitution and laws of the United States in that the receivers were appointed by the circuit court and derived their powers from and discharged their duties subject to those orders, and the right to sue them as such, without leave of the court which appointed them, was conferred by § 3 of the act of March 3, 1887, c. 373, 24 Stat. 552. *Texas, etc., R. Co. v. Cox*, 145 U. S. 593, 36 L. Ed. 829; *Tennessee v. Union, etc., Bank*, 152 U. S. 454, 38 L. Ed. 511."

**91. Federal receiver of federal corporation.**—*Texas, etc., R. Co. v. Cox*, 145 U. S. 593, 603, 36 L. Ed. 829; *Rouse v. Hornsby*, 161 U. S. 588, 590, 40 L. Ed. 817 (in this case the corporation was not one created by act of congress, but the rule of the text was nevertheless said to be applicable to it).

The circuit court has jurisdiction to punish for contempt a state constable who seizes, without warrant, liquor in the possession of a receiver of a railroad appointed by the federal court, which is held awaiting delivery to consignee. In *re Swan*, 150 U. S. 637, 37 L. Ed. 1207.

Where a receiver appointed by the circuit court voluntarily brings a suit in that court, he cannot, after the court has passed on the matter in controversy, be heard to object to the power of that court to render judgment therein. *Baggs v. Martin*, 179 U. S. 206, 208, 44 L. Ed. 155.

(1) *Suits with Respect to Federal Judgment*—aa. *Action to Enforce Judgment*.—An action or suit to enforce a judgment or order of the federal court is not one arising under the laws of the United States, and where the parties are citizens of the same state, federal courts have no jurisdiction.<sup>92</sup>

bb. *Suit to Construe Judgment*.—Where a bill in equity is necessary to have a construction of the orders, decrees, and acts made or done by a federal court, the bill is properly filed in such federal court as distinguished from any state court; and it may be entertained in such federal court, even though parties who are interested in having the construction made would not, from want of proper citizenship, be entitled to proceed by original bill of any kind in a court of the United States.<sup>93</sup>

cc. *Action for Real Estate Founded on Judgment*.—Where in an action to try title to real estate, the plaintiff's title is founded on a federal judgment and its validity depends on whether such judgment is a lien, under the act of congress, and rules of the federal courts adopting the state practice as to judgments, the case is one arising under the laws of the United States, and cognizable in the circuit court irrespective of the citizenship of the parties.<sup>94</sup>

(m) *Suits on Bonds of United States Officers*.—Actions to enforce the liabilities of sureties upon the bonds of the United States officers, arise under the laws of the United States and are within the jurisdiction of the United States circuit courts.<sup>95</sup> This rule has been applied to an action on the bond of a United States marshal,<sup>96</sup> to an action on the bond of the clerk of the United States

**92. Action to enforce federal judgment.**—*Metcalf v. Watertown*, 128 U. S. 586, 635, 32 L. Ed. 543; *Provident Sav. Society v. Ford*, 114 U. S. 635, 642, 29 L. Ed. 261.

"What is a judgment, but a security of record showing a debt due from one person to another? It is as much a mere security as a treasury note, or a bond of the United States. If A brings an action against B, trover or otherwise, for the withholding of such securities, it is not therefore a case arising under the laws of the United States, although the whole value of the securities depends upon the fact of their being the obligations of the United States. So if A have title to land by patent of the United States and brings an action against B for trespass or waste, committed by cutting timber, or by mining and carrying away precious ores, or the like, it is not therefore a case arising under the laws of the United States. It is simply the case of an ordinary right of property sought to be enforced. A suit on a judgment is nothing more, unless some question is raised in the case (as might be raised in any of the cases specified), distinctly involving the laws of the United States—such a question, for example, as was ineffectually attempted to be raised by the defendant in this case. If such a question were raised, then it is conceded it would be a case arising under the laws of the United States." *Provident Sav. Society v. Ford*, 114 U. S. 635, 641, 29 L. Ed. 261.

The fact that a suit is brought to recover the amount of a judgment of a court of the United States does not, of itself, make it a suit arising under the laws of the United States, where the plaintiff, without raising by his complaint any distinct question of a federal nature,

and without indicating, by proper averment, how the determination of any question of that character is involved in the case, seeks to enforce an ordinary right of property, by suing upon the judgment merely as a security of record, showing a debt due. *Metcalf v. Watertown*, 128 U. S. 586, 588, 32 L. Ed. 543; *Provident Sav. Society v. Ford*, 114 U. S. 635, 29 L. Ed. 261.

**93. Construction of federal judgment.**—*Minnesota Co. v. St. Paul Co.*, 2 Wall. 609, 17 L. Ed. 886. See post, "Ancillary Jurisdiction," V, C, 4, e.

**94. Action for real estate founded on federal judgment.**—*Cooke v. Avery*, 147 U. S. 375, 37 L. Ed. 209.

**95. Action on bond of United States officers.**—*Sonnenheil v. Christian Moerlein Brewing Co.*, 172 U. S. 401, 405, 43 L. Ed. 492; *Feibelman v. Packard*, 109 U. S. 421, 27 L. Ed. 984; *Backrack v. Norton*, 132 U. S. 337, 33 L. Ed. 377; *Postmaster-General v. Early*, 12 Wheat. 136, 6 L. Ed. 577; *Howard v. United States*, 184 U. S. 676, 46 L. Ed. 754; *Reagan v. Aiken*, 138 U. S. 109, 34 L. Ed. 892; *Bock v. Perkins*, 139 U. S. 628, 35 L. Ed. 314.

**96. Action on bond of United States marshal.**—*Backrack v. Norton*, 132 U. S. 337, 338, 33 L. Ed. 377; *Feibelman v. Packard*, 109 U. S. 421, 27 L. Ed. 984; *Reagan v. Aiken*, 138 U. S. 109, 34 L. Ed. 892; *Bock v. Perkins*, 139 U. S. 628, 35 L. Ed. 314.

An action on a marshal's bond, against him and his sureties, to recover damages for his wrongful taking of the goods of the plaintiff under an attachment issued out of the circuit court of the United States is one arising under the laws of the United States, and is therefore within the jurisdiction of the circuit court without

court,<sup>97</sup> and to an action by the postmaster general on a bond given to him by a deputy postmaster.<sup>98</sup>

(n) *Suits against United States Marshal*.—A suit against a marshal of the United States for acts done in his official capacity is one arising under the laws of the United States.<sup>99</sup> A case, therefore, depending upon the inquiry whether a marshal or his deputy has rightfully executed a lawful precept directed to the former from a court of the United States,<sup>1</sup> such as an action against a marshal to recover the value of a stock of goods wrongfully seized by him under a writ of attachment,<sup>2</sup> is within the jurisdiction of the federal courts. And the joinder of another defendant, jurisdiction over whom is dependent upon diversity of citizenship, deprives the marshal of no right which he otherwise would possess.<sup>3</sup>

any averment of citizenship of the parties. *Backrack v. Norton*, 132 U. S. 337, 338, 33 L. Ed. 377; *Feibelman v. Packard*, 109 U. S. 421, 27 L. Ed. 984.

**97. Action on bond of United States clerk.**—*Howard v. United States*, 184 U. S. 676, 46 L. Ed. 754.

A suit upon the bond of the clerk of the United States court, taken by the circuit court in conformity with the statutes of the United States, depends upon the scope and effect of that bond and the meaning of those statutes and is therefore a suit arising under the laws of the United States. *Howard v. United States*, 184 U. S. 676, 46 L. Ed. 754.

**98. Action on bond of deputy postmaster.**—*Postmaster-General v. Early*, 12 Wheat. 136, 6 L. Ed. 577.

The postmaster general has authority to take such a bond, under the different acts establishing and regulating the post-office department, and particularly under the act of April 30th, 1810, ch. 262, § 29, 42. *Postmaster-General v. Early*, 12 Wheat. 136, 6 L. Ed. 577.

The circuit courts of the Union have jurisdiction, under the constitution, and the acts of April 30th, 1810, ch. 262, § 29, and of March 3d, 1815, ch. 782, § 4, of suits brought in the name of "the postmaster general of the United States," on bonds given to the postmaster general, by a deputy postmaster, conditioned "to pay all moneys that shall come to his hands for the postages of whatever is by law chargeable with postage, to the postmaster general of the United States for the time being, deducting only the commission and allowances made by law for his care, trouble and charges, in managing the said office," etc. *Postmaster-General v. Early*, 12 Wheat. 136, 6 L. Ed. 577.

**99. Suits against marshal for official acts.**—*Sonnentheil v. Christian Moerlein Brewing Co.*, 172 U. S. 401, 405, 43 L. Ed. 492.

"If suits against a bank or railways chartered by congress are suits arising under the laws of the United States, as was held in *Osborn v. United States Bank*, 9 Wheat. 738, 6 L. Ed. 204, and in *Pacific Railroad Removal Cases*, 115 U. S. 1, 29 L. Ed. 319, with even greater reason must

it be considered that a suit against a marshal of the United States for acts done in his official capacity falls within the same category." *Sonnentheil v. Christian Moerlein Brewing Co.*, 172 U. S. 401, 405, 43 L. Ed. 492.

**1. Action depending on whether marshal has properly executed process.**—*Bock v. Perkins*, 139 U. S. 628, 35 L. Ed. 314.

**2. Action for value of goods wrongfully seized by marshal under attachment.**—*Sonnentheil v. Christian Moerlein Brewing Co.*, 172 U. S. 401, 405, 43 L. Ed. 492; *Bock v. Perkins*, 139 U. S. 628, 35 L. Ed. 314; *Buck v. Colbath*, 3 Wall. 334, 18 L. Ed. 257.

An action against a United States marshal for the value of goods seized by him under a writ of attachment, and alleged to have been wrongfully seized, is one arising under the laws of the United States. *Bock v. Perkins*, 139 U. S. 628, 35 L. Ed. 314.

An action by mortgagees to recover the value of goods mortgaged to them which had been seized, sold and appropriated by the defendant, a United States marshal, for other purposes, was held to be removable to the United States courts. *Reagan v. Aiken*, 138 U. S. 109, 34 L. Ed. 892.

**3. Effect of joinder of another party as defendant with marshal.**—*Sonnentheil v. Christian Moerlein Brewing Co.*, 172 U. S. 401, 405, 43 L. Ed. 492.

"The joinder of another defendant, jurisdiction over whom was dependent upon diversity of citizenship, deprived the marshal of no right he otherwise would have possessed. Though there are two defendants, the case was one, and that a case in which the jurisdiction was not dependent entirely upon the opposite parties to the suit being citizens of different states. Had two suits been brought, one of them would undoubtedly have been dependent upon citizenship, and the other a case arising under the laws of the United States. But as the plaintiff chose to join both defendants in a single action, jurisdiction of that action was not wholly dependent upon either consideration." *Sonnentheil v. Christian Moerlein Brewing Co.*, 172 U. S. 401, 405, 43 L. Ed. 492.



(o) *Suits for Refusal to Permit Plaintiff to Vote for Member of Congress.*—An action for damages for wrongful refusal by the defendants to permit the plaintiff to vote at an annual election for a member of the house of representatives, is one arising under the constitution and laws of the United States of which the circuit court of the United States has jurisdiction.<sup>4</sup>

(p) *Suits by Government to Condemn Land.*—A suit by an officer of the United States, properly authorized by act of congress, to condemn land for the purposes of the government, is within the jurisdiction of the circuit court of the United States, as a case arising under the laws of the United States.<sup>5</sup>

(q) *Cases with Respect to Rights of Navigable Waters.*—A suit to enjoin municipal authorities from interfering with the erection of a dock in public navigable waters, the right to construct the dock being based upon the constitution of the United States, acts of congress, and a permit of the secretary of war, may be brought in the circuit court of the United States irrespective of the citizenship of the parties, since it is one arising under the constitution and laws of the United States.<sup>6</sup>

(r) *Cases Arising under Treaties.*—The federal courts have jurisdiction of suits arising under treaties.<sup>7</sup> A case arising from or growing out of a treaty is one involving rights given or protected by a treaty.<sup>8</sup>

**4. Suits for refusal to permit vote for member of congress.**—*Swafford v. Templeton*, 185 U. S. 487, 46 L. Ed. 1005, reaffirmed in *Stuart v. Hauser*, 203 U. S. 585, 51 L. Ed. 328; *Wiley v. Sinkler*, 179 U. S. 58, 45 L. Ed. 84. See, also, *Ex parte Yarbrough*, 110 U. S. 651, 663, 28 L. Ed. 274; *Pope v. Williams*, 193 U. S. 621, 633, 48 L. Ed. 817; *Giles v. Teasley*, 193 U. S. 146, 166, 48 L. Ed. 655.

Where an action is brought against election officers to recover damages for their rejection of the plaintiff's vote for a member of the house of representatives of the United States, and the complaint, by alleging that the plaintiff was at that time, under the constitution and laws of the state of South Carolina, and the constitution and laws of the United States, a duly qualified elector of the state, this shows that the action is brought under the constitution and laws of the United States. *Wiley v. Sinkler*, 179 U. S. 58, 64, 45 L. Ed. 84.

The right to vote for members of the congress of the United States is not derived merely from the constitution and laws of the state in which they are chosen, but has its foundation in the constitution of the United States. *Wiley v. Sinkler*, 179 U. S. 58, 62, 45 L. Ed. 84.

The plaintiff must show that he is in a position to impugn the constitutionality of the statute; and that he was duly registered, or made any application to be registered. *Wiley v. Sinkler*, 179 U. S. 58, 67, 45 L. Ed. 84.

**5. Suits by government to condemn land.**—*Kohl v. United States*, 91 U. S. 367, 23 L. Ed. 449. See, generally, the title EMINENT DOMAIN.

Where congress by one act authorized the secretary of the treasury to purchase in the city of Cincinnati a suitable site for a building for the accommodation of the United States courts and for other

public purposes, and by a subsequent act made an appropriation "for the purchase at private sale, or by condemnation of such site," power was conferred upon him to acquire, in his discretion, the requisite ground by the exercise of the national right of eminent domain; and the proper circuit court of the United States had, under the general grant of jurisdiction made by the act of 1789, jurisdiction of the proceedings brought by the United States to secure the condemnation of the ground. *Kohl v. United States*, 91 U. S. 367, 23 L. Ed. 449.

**6. Rights in navigable waters.**—*Cummings v. Chicago*, 188 U. S. 410, 47 L. Ed. 525; *Calumet Grain, etc., Co. v. Chicago*, 188 U. S. 431, 47 L. Ed. 532, reaffirmed in *Jessup v. Trustees*, 195 U. S. 624, 49 L. Ed. 349.

**7. Suits arising under treaties.**—*Chrysal Springs Land, etc., Co. v. Los Angeles*, 177 U. S. 169, 44 L. Ed. 720; *Devine v. Los Angeles*, 202 U. S. 313, 338, 50 L. Ed. 1046; *Filhiol v. Maurice*, 185 U. S. 108, 46 L. Ed. 827, reaffirmed in *Cuelti v. Rodriguez*, 198 U. S. 581, 582, 49 L. Ed. 1172.

**8. When case arises under treaty.**—*United States v. Old Settlers*, 148 U. S. 427, 37 L. Ed. 509, citing *Owings v. Norwood*, 5 Cranch 344, 348, 3 L. Ed. 120.

A complaint in ejectment alleged that by the 5th amendment to the constitution and by a treaty with France the United States undertook and agreed to maintain the complainant's ancestors and their heirs in their title to the land in controversy, but that in violation of this provision, the defendants ousted the plaintiff and refused to surrender possession to them. It was held that the complaint did not state a cause of action arising under the constitution or laws of the United States or treaties made under their authority, but set out nothing more than a mere wrongful ouster by private persons, remediable

(s) *Cases Arising under or Dependent upon State Laws*—aa. *Suits for Custody of Infants*.—The custody and guardianship by the parent of his child does not arise under the constitution, laws or treaties of the United States and is not dependent on them.<sup>9</sup>

bb. *Relief against Wharfage Charges*.—A suit in equity for relief against exorbitant rates of wharfage established by a municipal corporation which is the proprietor of the wharves and which professes to act under the authority of a state law is not one arising under the constitution or laws of the United States so as to be within the jurisdiction of the circuit courts of the United States although the rates of wharfage are graduated by the size or tonnage of the vessel, and although the constitution of the United States declares that no state shall, without the consent of congress, lay any duty of tonnage.<sup>10</sup>

cc. *Suits Involving Validity of Municipal Organization*.—Where the only question involved in a case is as to the validity of a city organization, the federal courts have no jurisdiction.<sup>11</sup>

dd. *Suits to Recover Back Taxes Paid*.—An action for recovery back of taxes paid, in which is asserted a claim of exemption from taxation, which claim is not based on any provision of the federal constitution or laws, or upon any treaty, does not arise under the constitution or laws of the United States, simply upon the ground that the plaintiff is an institution of purely public charity.<sup>12</sup>

in the ordinary court, and in the proper tribunal. *Filhiol v. Maurice*, 185 U. S. 108, 46 L. Ed. 827, reaffirmed in *Cuelti v. Rodriguez*, 198 U. S. 581, 582, 49 L. Ed. 1172.

Where both parties claimed under Mexican grants, confirmed and patented by the United States in accordance with the provisions of the treaty of Guadalupe Hidalgo, and the controversy was only as to what were the rights thus granted and confirmed, the suit was not one arising under a treaty so as to confer jurisdiction on a federal court, and where the only ground of federal jurisdiction was the allegation that defendant's claim of title was based in part on certain acts of the legislature of the state, which attempted to transfer to it, as alleged, the title held by complainant's grantors at the time of their passage, the court would not retain jurisdiction when an answer was filed by defendant denying the allegations, and disclaiming any title or claim of title not held by it before the passage of the acts. *Chrystal Springs Land, etc., Co. v. Los Angeles*, 177 U. S. 169, 44 L. Ed. 720; *Devine v. Los Angeles*, 202 U. S. 313, 338, 50 L. Ed. 1046.

In *Devine v. Los Angeles*, 202 U. S. 313, 334, 50 L. Ed. 1046, the court said: "We are of opinion that, as a bill to quiet title, the jurisdiction of the circuit court cannot be sustained by reason of the allegations that defendant's adverse claims are based on an erroneous construction of the treaty of Guadalupe Hidalgo, the act of March 3, 1851, and the acts of the legislature of California, and ordinances and charters of the city of Los Angeles, enumerated, as clearly shown hereafter."

9. *Parent and child*.—In *re Burrus*, 136 U. S. 586, 596, 34 L. Ed. 500. See, generally, the title PARENT AND CHILD.

10. *Relief against wharfage charges*.—*Transportation Co. v. Parkersburg*, 107 U. S. 691, 27 L. Ed. 584.

"The gravamen of the bill is really nothing but a complaint against exorbitant rates of wharfage. These rates are established by a municipal body, itself the proprietor of the wharves, and professing to act under the authority of state law. It cannot be supposed that the law authorizes exorbitant charges to be made; but whether the charges exacted are exorbitant or not can only be determined by that law. It is clear, therefore, that the complainant in filing its bill in the United States court on the ground that the wharfage complained of is in violation of the constitution or laws of the United States, has totally misconceived its rights, and the proper means of obtaining redress. Unless it has some other ground for coming into the federal court, it must seek redress in the state courts; and whether the question of reasonableness of wharfage is submitted to the determination of the one forum or the other; it is only determinable by the laws of the state within whose jurisdiction the wharf is situated. Since the parties are all citizens of West Virginia, and since the case cannot be sustained as one 'arising under the constitution or laws of the United States,' there was no error in the decree dismissing the bill of complaint." *Transportation Co. v. Parkersburg*, 107 U. S. 691, 707, 27 L. Ed. 584. See, generally, the title WHARVES.

11. *Municipal corporations*.—*McCain v. Des Moines*, 174 U. S. 168, 177, 43 L. Ed. 936.

12. *Recovery back of taxes, where plaintiff claims exemption*.—*Montana Catholic Missions v. Missoula County*, 200 U. S. 118, 126, 50 L. Ed. 398.

For the purpose of defraying the expenses of conducting the missionary work

ee. *Suits to Enjoin Tax on Bridge Authorized by Congress*.—A suit to enjoin a tax on a bridge constructed under authority of an act of congress, cannot be brought in the federal courts, as one arising under the laws of the United States, where it was not denied that the tax is illegal, but the only objection is as to the method of assessment.<sup>13</sup>

(2) *Suits between Citizens of Different States*—(a) *General Rules*—aa. *Constitutional and Statutory Provisions*.—The constitution extends the judicial power of the United States to "controversies between citizens of different states."<sup>14</sup> The original judiciary act conferred jurisdiction upon the federal courts "in suits between a citizen of the state where the suit is brought, and a citizen of another state."<sup>15</sup> By the act of congress of March 3, 1875, the jurisdiction of the circuit courts was extended to controversies between citizens of different states, the statute using the very words of the constitution and thus avoiding the embarrassments that frequently arose under the earlier act.<sup>16</sup>

among the Indians, a Catholic missionary society, with the consent of the Indians and the acquiescence of the United States government, acquired a band of cattle, which it maintained upon the reservation of the Flathead Indians in the state of Montana. The entire proceeds of this cattle business was used for the benefit of the Indians. A county of the state of Montana levied a tax upon the cattle which, in order to prevent the seizure and sale, the missionary society paid. It was held that a suit to recover back the tax thus paid was not one arising under the constitution or laws of the United States and that the federal courts had no jurisdiction. *Montana Catholic Missions v. Missoula*, 200 U. S. 118, 126m, 50 L. Ed. 398.

The fact that the proceeds of the cattle business is devoted to the benefit of the Indians, does not make them the beneficial owners thereof, nor show that the society is made use of by the United States as a means of carrying out its obligation to the Indians under the constitution and laws of the United States. *Montana Catholic Missions v. Missoula County*, 200 U. S. 118, 50 L. Ed. 398.

"This pleading seems simply to be a claim that the plaintiff is exempt from taxation on the cattle which it owns, because it is an institution of purely public charity, and it would seem from that fact that it was claiming such exemption under some act of the state of Montana, and that its right to recover back these taxes depended upon a statute of that state. There is no provision in the federal constitution, neither is there any federal law, nor any treaty between the United States and the Indians, that is referred to in complaint, and it is not averred therein that the claim of the plaintiff to be exempt from taxation is founded upon any constitutional provision or law or treaty of the United States. It cannot be assumed, from any averment in the complaint, that the alleged right of a private owner of property to be exempt from taxation thereon, because it was devoted to purposes of charity among the Indians, was founded upon any federal ground.

On the contrary, it would seem to be plain that it was based upon some statute of the state wherein the tax was imposed and collected which exempted from state taxation property wholly devoted to charity. The case is, therefore, not one which from the subject matter of the controversy is apparently and in its essence of a federal nature, or one that involved any of the foregoing questions of federal right." *Montana Catholic Missions v. Missoula County*, 200 U. S. 118, 126, 50 L. Ed. 398.

**13. Suit to enjoin tax on bridge authorized by congress.**—*St. Joseph, etc., R. Co. v. Steele*, 167 U. S. 659, 42 L. Ed. 315.

A railroad company was authorized by act of congress to erect a bridge across the Missouri river to be used for carrying the trains of a railroad company and vehicles and passengers paying toll. It was held that a suit by the railroad company to enjoin the assessment and levy of a tax of the county or township authorities of the county in which the bridge was situated wherein it was contended that the bridge was a part of the railroad, and as such only taxable by the state board of railroad assessors, and could not be taxed by the county as a toll bridge for local purposes, was not one within the jurisdiction of the circuit court of the United States, the parties being citizens of the same state. *St. Joseph, etc., R. Co. v. Steele*, 167 U. S. 659, 42 L. Ed. 315.

**14. Constitutional provision.**—Art. 3, § 2; *Ober v. Gallagher*, 93 U. S. 199, 204, 23 L. Ed. 829.

A citizen of one state has the constitutional right to sue a citizen of another state in the courts of the United States, instead of resorting to a state tribunal. *Payne v. Hook*, 7 Wall. 425, 429, 19 L. Ed. 260; *Cohens v. Virginia*, 6 Wheat. 264, 378, 5 L. Ed. 257.

**15. Original judiciary act.**—*Ober v. Gallagher*, 93 U. S. 199, 204, 23 L. Ed. 829; *Cohens v. Virginia*, 6 Wheat. 264, 378, 5 L. Ed. 257; *Hornthall v. The Collector*, 9 Wall. 560, 19 L. Ed. 560; *Gaines v. Fuentes*, 92 U. S. 10, 18, 23 L. Ed. 524; *Brown v. Keene*, 8 Pet. 112, 8 L. Ed. 885.

**16. Present statute.**—*Ober v. Gallagher*, 93 U. S. 199, 204, 23 L. Ed. 829; *Hotel Co.*



bb. *Reason for Federal Jurisdiction*.—The object of the provisions of the constitution and statutes of the United States, in conferring upon the circuit courts of the United States jurisdiction of controversies between citizens of different states of the Union, or between citizens of one of the states and aliens, was to secure a tribunal presumed to be more impartial than a court of the state in which one of the litigants resides.<sup>17</sup>

cc. *Power of Congress to Extend Jurisdiction*.—As the constitution imposes no limitation upon the class of cases involving controversies between citizens of different states, to which the judicial power of the United States may be extended, congress may provide for bringing, at the option of either of the parties, all such controversies within the jurisdiction of the federal judiciary.<sup>18</sup>

dd. *What Constitutes a Controversy*.—A controversy between citizens is involved in a suit whenever any property or claim of the parties, capable of pecuniary estimation, is the subject of litigation and is presented by the pleadings for judicial determination.<sup>19</sup> By the term "controversies" is intended the claims

*v. Wade*, 97 U. S. 13, 16, 24 L. Ed. 917; *Sweeney v. Carter Oil Co.*, 199 U. S. 252, 256, 50 L. Ed. 178; *Illinois Cent. R. Co. v. Adams*, 180 U. S. 28, 34, 45 L. Ed. 410; *Kinney v. Columbia Sav., etc., Ass'n*, 191 U. S. 78, 80, 48 L. Ed. 103; *Texas & Pac. R. Co. v. Cody*, 166 U. S. 606, 609, 41 L. Ed. 1132; *Mitchell v. Harmony*, 13 How. 115, 14 L. Ed. 75; *Ex parte Clarke*, 100 U. S. 399, 408, 25 L. Ed. 715; *McArthur v. Scott*, 113 U. S. 340, 342, 28 L. Ed. 1015; *Smith v. McKay*, 161 U. S. 355, 359, 40 L. Ed. 731; *Waite v. Santa Cruz*, 184 U. S. 302, 325, 46 L. Ed. 552; *Warner v. Searle, etc., Co.*, 191 U. S. 195, 205, 48 L. Ed. 145; *Thomas v. Board of Trustees*, 195 U. S. 207, 210, 49 L. Ed. 160; *Anderson v. Watt*, 138 U. S. 694, 707, 34 L. Ed. 1078.

Where diverse citizenship exists, and the statutory amount is in controversy, the courts of the United States have jurisdiction. *Warner v. Searle, etc., Co.*, 191 U. S. 195, 205, 48 L. Ed. 145.

The judicial power of the United States and the original jurisdiction of the circuit courts, whatever may be ordained by state legislation, extends to suits in which there is a controversy between citizens of different states. *Madisonville Traction Co. v. St. Bernard Min. Co.*, 196 U. S. 239, 255, 49 L. Ed. 462; *Interior Construction, etc., Co. v. Gibney*, 160 U. S. 217, 219, 40 L. Ed. 401.

Where the jurisdiction of the courts of the United States depends upon the citizenship of the parties, it has reference to the parties as persons. *Amory v. Amory*, 95 U. S. 186, 187, 24 L. Ed. 428.

In *Sweeney v. Carter Oil Co.*, 199 U. S. 252, 256, 50 L. Ed. 178, it was said: "We do not feel warranted in construing the words 'controversy between citizens of different states' to mean 'controversy between citizens of the same state and citizens of another state,' and unless that is done this judgment must be reversed."

17. *Reason for federal jurisdiction*.—*Barrow Steamship Co. v. Kane*, 170 U. S. 100, 111, 42 L. Ed. 964; *Removal Cases*, 100 U. S. 457, 480, 25 L. Ed. 593; *Pease v. Peck*, 18 How. 595, 15 L. Ed. 518.

The theory upon which jurisdiction is conferred on the courts of the United States, in controversies between citizens of different states, has its foundation in the supposition that, possibly the state tribunal might not be impartial between their own citizens and foreigners. *Pease v. Peck*, 18 How. 595, 599, 15 L. Ed. 518.

The object of extending the judicial power to controversies between citizens of different states was, to establish a common and impartial tribunal, equally related to both parties, for the purpose of deciding between them. *Removal Cases*, 100 U. S. 457, 480, 25 L. Ed. 593.

18. *Power of congress to extend jurisdiction*.—*Gaines v. Fuentes*, 92 U. S. 10, 18, 23 L. Ed. 524; *Ellis v. Davis*, 109 U. S. 485, 498, 27 L. Ed. 1006.

In cases where the judicial power of the United States can be applied only because they involve controversies between citizens of different states, it rests with congress to determine at what time and upon what conditions the power may be invoked—whether originally in the federal court, or after suit brought in the state court; and, in the latter case, at what stage of the proceedings—whether before issue or trial by removal to a federal court, or after judgment upon appeal or writ of error. *Gaines v. Fuentes*, 92 U. S. 10, 23 L. Ed. 524.

19. *What constitutes a controversy*.—*Gaines v. Fuentes*, 92 U. S. 10, 20, 23 L. Ed. 524; *Boom Co. v. Patterson*, 98 U. S. 403, 407, 25 L. Ed. 206; *Madisonville Traction Co. v. St. Bernard Min. Co.*, 196 U. S. 239, 255, 49 L. Ed. 462; *Illinois Cent. R. Co. v. Adams*, 180 U. S. 28, 45 L. Ed. 410; *Searl v. School District (No. 2)*, 124 U. S. 197, 199, 31 L. Ed. 415. See, also, the titles *ACTIONS*, vol. 1, p. 101; *REMOVAL OF CAUSES*.

The term "controversies" as here used refers to such only as are of a civil as distinguished from those of a criminal nature. *Ex parte Clarke*, 100 U. S. 399, 408, 25 L. Ed. 715.

The use of the word "controversies" as in contradistinction to the word "cases,"

or contentions of litigants brought before the courts for adjudication by regular proceedings established for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim or contention of a party takes such a form that the judicial power is capable of acting upon it, then it has become a case or controversy.<sup>20</sup>

ee. *Jurisdiction as Affected by Character of Suit.*—**General Rule.**—As a general rule, the circuit courts have jurisdiction of all suits of a civil nature in common law or equity, where the parties are citizens of different states, irrespective of the nature of the controversy or relief sought.<sup>21</sup>

and the omission of the word "all" in respect of controversies, left it to congress to define the controversies over which the courts it was empowered to ordain and establish might exercise jurisdiction, and the manner in which it was to be done. *Stevenson v. Fain*, 195 U. S. 165, 167, 49 L. Ed. 142; *Ex parte Wisner*, 203 U. S. 449, 459, 51 L. Ed. 264.

A direct civil proceeding, expressly authorized by an act of congress, in the name of the interstate commerce commission, and under the direction of the attorney general of the United States against a witness so refusing to testify, before the commission, to compel him to give evidence, is a controversy of which cognizance could be taken by any court established by congress to receive the judicial power of the United States. *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 470, 38 L. Ed. 1047; *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 38, 46 L. Ed. 860.

20. *Smith v. Adams*, 130 U. S. 167, 173, 32 L. Ed. 895; *La Abra Silver Min. Co. v. United States*, 175 U. S. 423, 456, 44 L. Ed. 223; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 38 L. Ed. 1047; *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 38, 46 L. Ed. 860.

"**Cases arising under constitution and laws,**" see ante, "**Cases Arising under Constitution, Laws, or Treaties,**" VII, C, 4, b, (1).

"**Suits at law and in equity.**"—See post, "**Civil Suits at Law and in Equity,**" VII, C, 4, a.

21. **Jurisdiction as affected by nature of suit or action.**—*Pope v. Louisville, etc., R. Co.*, 173 U. S. 573, 576, 43 L. Ed. 814; *Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257; *Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401; *Madisonville Traction Co. v. St. Bernard Min. Co.*, 196 U. S. 239, 252, 49 L. Ed. 462.

Rights conferred by state laws may, in a proper case, as where there is diverse citizenship, be enforced in the federal courts. *Ex parte McNiel*, 13 Wall. 236, 243, 20 L. Ed. 624; *Railway Co. v. Whitton*, 13 Wall. 270, 286, 20 L. Ed. 571.

In the exercise of that power a circuit court of the United States, sitting within the limits of a state and having jurisdiction of the parties, is, for every practical purpose, a court of that state. Its function, under such circumstances, is to enforce the rights of parties according to the

law of the state, taking care, always, as the state courts must take care, not to infringe any right secured by the constitution and the laws of the United States. *Madisonville Traction Co. v. St. Bernard Min. Co.*, 196 U. S. 239, 255, 49 L. Ed. 462.

Diversity of citizenship confers jurisdiction, irrespective of the cause of action. *Pope v. Louisville, etc., R. Co.*, 173 U. S. 573, 576, 43 L. Ed. 814.

"It may be laid down as a general proposition that, wherever a citizen of a state can go into the courts of a state to defend his property against the illegal act of its officers, a citizen of another state may invoke the jurisdiction of the federal courts to maintain a like defense. A state cannot tie up a citizen of another state, having property rights within its territory invaded by authorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the state to protect property rights, a citizen of another state may invoke the jurisdiction of the federal courts. *Cowles v. Mercer County*, 7 Wall. 118, 19 L. Ed. 86; *Lincoln County v. Luning*, 133 U. S. 529, 33 L. Ed. 766; *Chicot County v. Sherwood*, 148 U. S. 529, 37 L. Ed. 546." *Reagan v. Farmers' Loan, etc., Co.*, 154 U. S. 362, 391, 38 L. Ed. 1014.

A nonresident complainant can ask no greater relief in the courts of the United States than he could obtain were he to resort to the state courts. If, in the latter courts, equity would afford no relief, neither will it in the former. *Ewing v. St. Louis*, 5 Wall. 413, 18 L. Ed. 657.

"It was certainly intended to give to suitors, having a right to sue in the circuit court, remedies coextensive with that right; these remedies would not be so, if any proceedings, under an act of state legislation, to which the plaintiff was not a party, exempting a person of such state from suit, could be pleaded to abate a suit in the circuit court." *Suydam v. Broadnax*, 14 Pet. 67, 10 L. Ed. 357.

**Equity jurisdiction.**—As to equity jurisdiction of federal courts, see the title EQUITY.

**A suit to remove cloud from title** may be brought in the federal courts between citizens of different states. *Clark v. Smith*, 13 Pet. 195, 10 L. Ed. 123; *Dick v. Foraker*, 155 U. S. 404, 410, 39 L. Ed. 201.

The state of Kentucky has an undoubted power to regulate and protect individual

ff. *Motive as Affecting Jurisdiction*.—When a citizen of one state has a cause of action against a citizen of another state which he may prosecute lawfully in a federal court, and when the suit is free from fraud or collusion, his motive in preferring a federal tribunal is immaterial.<sup>22</sup>

gg. *Right to Decide All Issues Involved*.—When a federal court acquires jurisdiction of a controversy by reason of the diverse citizenship of the parties, then it may dispose of all the issues in the case, determining the rights of parties under the same rules or principles that control when the case is in the state court.<sup>23</sup>

(b) *Who Are "Citizens of Different States"*—aa. *Who Are Citizens*—(aa) *In General*.—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside.<sup>24</sup>

(bb) *Residence Distinguished from Citizenship*.—Residence and citizenship are wholly different things within the meaning of the constitution and laws defining and regulating the jurisdiction of the circuit courts of the United States, and a mere averment of residence in a particular state is not an averment of citizenship for the purpose of jurisdiction.<sup>25</sup> This rule is unaffected by

rights to her soil, and to declare what shall form a cloud on titles; and having so declared, the courts of the United States, by removing such cloud, are only applying an old practice to a new equity created by the legislature, having its origin in the peculiar condition of the country. The unappropriated lands of the state of Kentucky have been opened to entry and grant, at a very cheap rate, which policy has let in abuses; the clouds upon old titles, by the issuance of new patents for the same lands, were the consequence; and the citizens of other states are entitled to come into the courts of the United States, to have their rights secured to them by the statute of Kentucky of 1796. *Clark v. Smith*, 13 Pet. 195, 10 L. Ed. 123.

**Suits to set aside fraudulent sales of infant's land.**—Suit in equity to set aside fraudulent sale of infant's lands made by guardian under authority of the probate court of the state, the parties being citizens of different states, may be brought in the United States circuit court. *Arrow-smith v. Gleason*, 129 U. S. 86, 32 L. Ed. 630.

**Suit to enforce lien for street assessments.**—The statutes of Ohio give to the local authorities of cities and incorporated villages power to make various improvements in streets, etc., and to assess the proportionate expense thereof upon the lots fronting thereon, which is declared to be a lien upon the property. The city council of Toledo directed certain improvements to be made, and contracted with two persons (one of whom purchased the right of the other) to do the work, and authorized them to collect the amount due upon the assessments. The contractor who executed the work, and who was a citizen of another state, filed a bill upon the equity side of the circuit court to enforce this lien. The court had jurisdiction of the case. *Fitch v. Creighton*, 24 How. 159, 16 L. Ed. 596.

**Suits for divorce or alimony.**—The federal courts have no jurisdiction of suits for divorce and alimony, either as an original proceeding in chancery, or as incident to a divorce a vinculo, or to one for bed and board. *Barber v. Barber*, 21 How. 582, 16 L. Ed. 226. See, generally, the title DIVORCE AND ALIMONY.

**22. Motive as affecting jurisdiction.**—*Chicago v. Mills*, 204 U. S. 321, 330, 51 L. Ed. 504; *Blair v. Chicago*, 201 U. S. 400, 50 L. Ed. 801; *Smithers v. Smith*, 204 U. S. 632, 644, 51 L. Ed. 656.

**23. Right to decide all issues involved.**—*Owensboro Waterworks Co. v. Owensboro*, 200 U. S. 38, 46, 50 L. Ed. 361.

**24. Who are citizens—In general.**—*Railroad Co. v. Koontz*, 104 U. S. 5, 12, 26 L. Ed. 643. See, generally, the title CITIZENSHIP, vol. 3, p. 788.

**25. "Residence" distinguished from "citizenship."**—*Brown v. Keene*, 8 Pet. 112, 116, 8 L. Ed. 885; *Bingham v. Cabot*, 3 Dall. 382, 1 L. Ed. 646; *Abercrombie v. Dupuis*, 1 Cranch 343, 2 L. Ed. 129; *Robertson v. Cease*, 97 U. S. 646, 648, 24 L. Ed. 1057; *Parker v. Overman*, 18 How. 137, 15 L. Ed. 318; *Steigleder v. McQuesten*, 198 U. S. 141, 143, 49 L. Ed. 986; *Everhart v. Huntsville College*, 120 U. S. 223, 30 L. Ed. 623; *Turner v. Bank*, 4 Dall. 8, 1 L. Ed. 718; *Shaw v. Quincy Min. Co.*, 145 U. S. 444, 447, 36 L. Ed. 768; *Grace v. American Cent. Ins. Co.*, 109 U. S. 278, 27 L. Ed. 932; *Timmons v. Elyton Land Co.*, 139 U. S. 378, 35 L. Ed. 195; *Denny v. Pironi*, 141 U. S. 121, 35 L. Ed. 657; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 205, 36 L. Ed. 943; *Sun Printing, etc., Ass'n v. Edwards*, 194 U. S. 377, 382, 48 L. Ed. 1027; *Mexican Cent. R. Co. v. Duthie*, 189 U. S. 76, 47 L. Ed. 715; *Horne v. Hammond Co.*, 155 U. S. 393, 39 L. Ed. 197; *Union Mut. Life Ins. Co. v. Kirchoff*, 169 U. S. 103, 111, 42 L. Ed. 677; *Continental Ins. Co. v. Rhoads*, 119 U. S. 237, 30 L. Ed. 380; *Menard v. Goggan*, 121 U. S.



the provisions of the fourteenth amendment declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof," are citizens of the United States, and of the state wherein they reside.<sup>26</sup>

(cc) *States as Citizens*.—A state is not a citizen, and, under the judiciary acts of the United States, it is well settled that a suit between a state and a citizen or a corporation of another state is not between citizens of different states; and that the circuit court of the United States has no jurisdiction of it, unless it arises under the constitution, laws or treaties of the United States.<sup>27</sup>

(dd) *Slaves as Citizens*.—It was held that a free negro of the African race, whose ancestors were brought to this country and sold as slaves, was not a citizen of a state in which he resided within the meaning of the constitution of the United States extending the judicial power of suits between citizens of different states.<sup>28</sup>

bb. *What Are States within Constitution*—(aa) *District of Columbia*.—A citizen of the District of Columbia cannot be a party to a suit in the federal courts, where the sole ground upon which the jurisdiction of those courts is invoked is that of diversity of citizenship.<sup>29</sup>

253, 30 L. Ed. 914; *Anderson v. Watt*, 138 U. S. 694, 702, 34 L. Ed. 1078; *Galveston, etc., Co. v. Gonzales*, 151 U. S. 496, 38 L. Ed. 248. See, also, the title CITIZENSHIP, vol. 3, p. 795.

In *Steigleder v. McQuestion*, 198 U. S. 141, 143, 49 L. Ed. 986, it was held that the evidence warranted the conclusion that the plaintiff was, for many years prior to the commencement of the action, a citizen of Massachusetts, and her residence in the state of Washington, at and before the suit was brought, not being shown to be otherwise than temporary without any fixed purpose to abandon citizenship in Massachusetts, it sufficiently appeared from the record that she was, when the suit was brought, a citizen of Massachusetts.

In *Reynolds v. Adden*, 136 U. S. 348, 36 L. Ed. 360, the plaintiff had become the surety of an assignee in bankruptcy in the state of Massachusetts, and in those proceedings he described himself as residing in that state. It was held that he might have been a temporary resident of Massachusetts and yet a citizen of another state, and hence there could be no estoppel to show that he was a citizen of a state other than Massachusetts.

The facts that the party and his wife were residents of Louisiana for more than two years before the commencement of the suit; that he was absent only once, on a visit to a watering place, that he resided the greater part of the time on a plantation which he claimed as his own; that he constructed upon it a more secure and comfortable dwelling house; that he observed to a witness that he considered himself a resident—are sufficient to justify the circuit court of Louisiana in exercising jurisdiction in a suit brought against that party by a citizen of Missouri. *Shelton v. Tiffin*, 6 How. 163, 12 L. Ed. 387.

26. *Rule unaffected by fourteenth amendment*.—*Shaw v. Quincy Min. Co.*, 145 U.

S. 444, 447, 36 L. Ed. 768; *Robertson v. Cease*, 97 U. S. 646, 24 L. Ed. 1057.

27. *States*.—*Postal Tel. Cable Co. v. Alabama*, 155 U. S. 482, 487, 39 L. Ed. 231; *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 63, 48 L. Ed. 870; *Arkansas v. Kansas, etc., Coal Co.*, 183 U. S. 185, 188, 46 L. Ed. 144; *Stone v. South Carolina*, 117 U. S. 430, 29 L. Ed. 962; *Germania Ins. Co. v. Wisconsin*, 119 U. 473, 30 L. Ed. 461; *Ames v. Kansas*, 111 U. S. 449, 28 L. Ed. 482.

28. *Slaves*.—*Scott v. Sandford*, 19 How. 393, 405, 15 L. Ed. 691. See the title SLAVERY AND INVOLUNTARY SERVITUDE.

When the constitution was adopted, slaves were not regarded in any of the states as members of the community which constituted the state, and were not numbered among its "people or citizens." Consequently, the special rights and immunities guaranteed to citizens do not apply to them. And not being "citizens" within the meaning of the constitution, they are not entitled to sue in that character in a court of the United States, and the circuit court has not jurisdiction in such a suit. *Scott v. Sandford*, 19 How. 393, 15 L. Ed. 691.

29. *Citizens of District of Columbia*.—*Barney v. Baltimore*, 6 Wall. 280, 18 L. Ed. 825; *Hepburn v. Ellzey*, 2 Cranch 445, 2 L. Ed. 332; *Greeley v. Lowe*, 155 U. S. 58, 75, 39 L. Ed. 69; *Hooe v. Jamieson*, 166 U. S. 395, 397, 41 L. Ed. 1049; *Hooe v. Werner*, 166 U. S. 399, 41 L. Ed. 1051; *Cameron v. Hodges*, 127 U. S. 322, 32 L. Ed. 132; *Scott v. Jones*, 5 How. 343, 377, 12 L. Ed. 181; *Downes v. Bidwell*, 182 U. S. 244, 259, 45 L. Ed. 1088; *Railroad Co. v. Harris*, 12 Wall. 65, 86, 20 L. Ed. 354. See, also, *Florida Cent., etc., R. Co. v. Bell*, 176 U. S. 321, 333, 44 L. Ed. 486; *Geofroy v. Riggs*, 133 U. S. 258, 269, 33 L. Ed. 642.

If one or more of the plaintiffs is a citizen of the District of Columbia, and another a citizen of a state, and the suit is

(bb) *Territories*.—A citizen of a territory cannot sue a citizen of a state in the courts of the United States, as the constitution only extends the judicial power, in cases dependent upon diversity of citizenship, to suits between citizens of different states.<sup>20</sup>

cc. *Estoppel to Show Real Citizenship*.—The fact that a person has described himself in a bond executed as surety of an assignee in insolvency as a resident of a state other than the one of which he really is a citizen, does not estop him to show his true citizenship nor defeat his right to sue a citizen of another state in the federal courts.<sup>21</sup>

dd. *Evidence of Citizenship*.—See the titles *ALIENS*, vol. 1, p. 244; *CITIZENSHIP*, vol. 3, p. 788.

(c) *Citizenship of Real Parties in Interest as Controlling*—aa. *General Rule*.—Where the jurisdiction of the circuit court is invoked on the ground of diversity of citizenship of the parties, the citizenship of the real parties in interest is taken into account.<sup>32</sup>

bb. *Citizenship of Formal Parties Immaterial*—(aa) *In General*.—The fact that one who is a mere formal party is a citizen of the same state with the plaintiff or defendant does not defeat the jurisdiction.<sup>33</sup>

brought against the citizen of another state, the federal courts have no jurisdiction. *Hooe v. Jamieson*, 166 U. S. 395, 41 L. Ed. 1049; *Hooe v. Werner*, 166 U. S. 399, 41 L. Ed. 1051.

30. *Citizens of territories*.—Southern Kansas R. Co. *v. Briscoe*, 144 U. S. 133, 136, 36 L. Ed. 377; *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379, 381, 28 L. Ed. 462; *New Orelans v. Winter*, 1 Wheat. 91, 4 L. Ed. 44; *Cameron v. Hodges*, 127 U. S. 322, 32 L. Ed. 132; *Barney v. Baltimore*, 6 Wall. 280, 287, 18 L. Ed. 825; *Scott v. Jones*, 5 How. 343, 377, 12 L. Ed. 181; *Koenigsberger v. Richmond Silver Min. Co.*, 158 U. S. 41, 47, 39 L. Ed. 889. See, also, *Florida Cent., etc., R. Co. v. Bell*, 176 U. S. 321, 333, 44 L. Ed. 486.

A citizen of a territory cannot sue in a federal court by joining with himself a citizen of another state. *New Orleans v. Winter*, 1 Wheat. 91, 4 L. Ed. 44. See, also, *Alabama Great Southern R. Co. v. Thompson*, 200 U. S. 206, 219, 50 L. Ed. 441.

In *Sere v. Pitot*, 6 Cranch 332, 3 L. Ed. 240, it was held that the citizens of the territory of Orleans might sue and be sued in the district court of that territory, in the same cases in which a citizen of Kentucky might sue and be sued in the court of Kentucky.

31. *Estoppel to show real citizenship*.—*Reynolds v. Adden*, 136 U. S. 348, 36 L. Ed. 360 (the court said that the defendant might have been a temporary resident of one state and yet a citizen of another).

32. *Citizenship of real parties considered*.—*New Orleans v. Gaines*, 138 U. S. 595, 607, 34 L. Ed. 1102; *Stewart v. Baltimore, etc., R. Co.*, 168 U. S. 445, 449, 42 L. Ed. 537.

If the legal right to sue be in the plaintiff, and the citizenship, as between him and the defendant, gives jurisdiction, the court will not inquire into the residence of those who may have an equitable interest

in the claim. *Bonnafee v. Williams*, 3 How. 574, 11 L. Ed. 732.

The circuit court of the United States has jurisdiction where a promissory note is made by a citizen of one state payable to another citizen of the same state or bearer, and the party bringing the suit is a citizen of a different state; although upon the face of the note it was expressed to be for the use of persons residing in the state in which the maker and payee lived. *Bonnafee v. Williams*, 3 How. 574, 11 L. Ed. 732.

*Right to give judgment against parties within jurisdiction*.—See the titles *JUDGMENTS AND DECREES*; *JURISDICTION*.

33. *Disregard of citizenship of formal parties*.—*Wormley v. Wormley*, 8 Wheat. 421, 451, 5 L. Ed. 651; *Bacon v. Rives*, 106 U. S. 99, 104, 27 L. Ed. 69; *Wilson v. Oswego Township*, 151 U. S. 56, 38 L. Ed. 70; *Massachusetts, etc., Construction Co. v. Cane Creek Tp.*, 155 U. S. 283, 39 L. Ed. 152; *Barney v. Baltimore*, 6 Wall. 280, 18 L. Ed. 825; *Walden v. Skinner*, 101 U. S. 577, 25 L. Ed. 963; *Bonnafee v. Williams*, 3 How. 574, 11 L. Ed. 732; *Huff v. Hutchinson*, 14 How. 586, 14 L. Ed. 553; *Florida v. Anderson*, 91 U. S. 667, 676, 23 L. Ed. 290; *Vattier v. Hinde*, 7 Pet. 252, 8 L. Ed. 675; *Carneal v. Banks*, 10 Wheat. 181, 6 L. Ed. 298; *Blackburn v. Portland Gold Min. Co.*, 175 U. S. 571, 44 L. Ed. 276; *Coal Co. v. Blatchford*, 11 Wall. 172, 177, 20 L. Ed. 179; *Indiana v. Glover*, 155 U. S. 513, 39 L. Ed. 243; *Gaither v. Farmers, etc., Bank*, 1 Pet. 37, 42, 7 L. Ed. 43; *Browne v. Strode*, 5 Cranch 303, 3 L. Ed. 108; *Maryland v. Baldwin*, 112 U. S. 490, 491, 28 L. Ed. 822; *McNutt v. Bland*, 2 How. 1, 9, 11 L. Ed. 159; *Howard v. United States*, 184 U. S. 676, 680, 46 L. Ed. 746; *Wood v. Davis*, 18 How. 467, 15 L. Ed. 460; *New Orleans v. Gaines*, 138 U. S. 595, 607, 34 L. Ed. 1102; *Case of the Sewing Machine*

(bb) *Who Are Formal Parties.*—The general question as to who are formal, necessary or indispensable parties is treated in another title.<sup>34</sup> For the purposes of federal jurisdiction, one who occupies substantially the position of a garnishee is a formal party only.<sup>35</sup> And in an action in the name of a state,<sup>36</sup> state officers,<sup>37</sup>

Companies, 18 Wall. 553, 586, 21 L. Ed. 914; Knapp v. Railroad Co., 20 Wall. 117, 123, 22 L. Ed. 328.

The courts of the United States have jurisdiction in a case between citizens of the same state, if the plaintiffs are only nominal plaintiffs, for the use of an alien. Browne v. Strode, 5 Cranch 303, 3 L. Ed. 108.

The joinder of improper parties, as, citizens of the same state, etc., will not affect the jurisdiction of the circuit courts in equity, as between the parties who are properly before the court, if a decree may be pronounced as between the parties who are not citizens of the same state. Carneal v. Banks, 10 Wheat. 181, 6 L. Ed. 298.

The court will not suffer its jurisdiction to be ousted, by the mere joinder or non-joinder of formal parties; but will rather proceed without them, and decide upon the merits of the case between the parties, who have the real interests before it, whenever it can be done, without prejudice to the rights of others. Wormley v. Wormley, 8 Wheat. 421, 451, 5 L. Ed. 651.

When objection is taken to the jurisdiction of the circuit court of the United States by reason of the citizenship of some of the parties to a suit, the question is whether to a decree authorized by the case presented they are indispensable parties. If their interests are severable from those of other parties, and a decree without prejudice to their rights can be made, the jurisdiction of the court should be retained and the suit dismissed as to them. Horn v. Lockart, 17 Wall. 570, 21 L. Ed. 657.

Where McR., a citizen of Kentucky, brought a suit in equity, in the circuit court of Kentucky, against C. C., stated to be a citizen of Virginia, and E. J. and S. E., without any designation of citizenship; all the defendants appeared and answered; and a decree was pronounced for the plaintiff; it was held, that if a joint interest vested in C. C. and the other defendants, the court had no jurisdiction over the cause; but that if a distinct interest vested in C. C., so that substantial justice (so far as he was concerned) could be done, without affecting the other defendants, the jurisdiction of the court might be exercised as to him alone. Cameron v. McRoberts, 3 Wheat. 591, 4 L. Ed. 467.

**34. Who are formal, necessary or indispensable parties.**—See the title PARTIES.

**35. Persons occupying position of garnishee.**—Bacon v. Rives, 106 U. S. 99, 104, 27 L. Ed. 69.

**36. Suits by state.**—McNutt v. Bland, 2 How. 1, 11 L. Ed. 159; Indiana v. Glover, 155 U. S. 513, 39 L. Ed. 243 (a suit in name of state on bond of municipal officer).

A statute of Mississippi in force in 1844 required sheriffs to execute bonds to the governor of the state for the faithful performance of their duties, which could be prosecuted by any party aggrieved, until the whole penalty was recovered. An action was brought in the circuit court of the United States for the district of Mississippi in the name of the governor for the use of citizens of New York against defendants who were citizens of Mississippi, and on demurrer it was held that the circuit court had jurisdiction. McNutt v. Bland, 2 How. 1, 9, 11 L. Ed. 159; Maryland v. Baldwin, 112 U. S. 490, 492, 28 L. Ed. 822.

By the law of Maryland the bond of an administrator is taken to the state, but is held for the security of persons interested in the estate of the deceased. The name of the state is used from necessity when a suit on the bond is prosecuted for the benefit of a person thus interested, and, in such cases, the real controversy is between him and the obligors on the bond. If the residence of these parties be in different states, the circuit court of the United States has jurisdiction. Maryland v. Baldwin, 112 U. S. 490, 491, 28 L. Ed. 822.

**37. Suits by state officers.**—Where the real and only controversy is between citizens of different states, or an alien or a citizen, and the plaintiff is by some positive law compelled to use the name of a public officer who has not, or ever had any interest in or control over it, the courts of the United States will not consider any others as parties to the suit, than the persons between whom the litigation before them exists. Coal Co. v. Blatchford, 11 Wall. 172, 177, 20 L. Ed. 179; Browne v. Strode, 5 Cranch 303, 3 L. Ed. 108.

"It has frequently been decided in the circuit courts, where the jurisdiction depended on the citizenship of the parties, that such jurisdiction is not ousted, where there has been occasion to make a formal party of a sheriff or other public officer by reason of his having a writ of execution, or being named as obligee in an official bond sued for the benefit of private parties, provided that the real parties to the litigation have the requisite citizenship. Thus an administration bond given to the surrogate or to the governor of a state may be sued in his name in the circuit court of the United States, though not having the requisite citizenship, if the



the United States,<sup>38</sup> or United States officers<sup>39</sup> for the benefit of a third person, the jurisdiction is dependent on the question whether the defendant and the person for whose benefit the suit is brought are citizens of different states. Instances of parties who have been held to be real and not formal parties are given in the notes.<sup>40</sup>

party for whose benefit the suit is prosecuted has the requisite citizenship. These authorities apply equally to the case of the marshal who was named in the bill, but against whom no relief was sought. Several of the cases are reviewed in the recent case of the *Coal Co. v. Blatchford*, 11 Wall. 172, 20 L. Ed. 179, and a further discussion of the subject at this time is unnecessary." *Florida v. Anderson*, 91 U. S. 667, 676, 23 L. Ed. 290.

In *Browne v. Strode*, 5 Cranch 303, 3 L. Ed. 108, the action was on a bond given by an executor for the faithful execution of his testator's will, in conformity with the statute of Virginia, which required all such bonds to be made payable to the justices of the peace of the county where administration was granted, but allowed suits to be brought upon them at the instance of any party aggrieved. The object of the action was to recover of the defendant, a citizen of Virginia, a debt due by the testator to a British subject, and was brought in the name of the justices of the peace of the county, who were also citizens of that state. It was held that the circuit court had jurisdiction. *Coal Co. v. Blatchford*, 11 Wall. 172, 176, 20 L. Ed. 179.

**38. Suits by United States.**—*Howard v. United States*, 184 U. S. 676, 680, 46 L. Ed. 746.

Where the opposite parties are a citizen of Maine, for whose benefit the suit was brought, and the sureties on the bond of a clerk of a United States court who are all citizens of Missouri, and the United States is the nominal, while the citizen of Maine is the real, plaintiff, the citizenship of the latter is to be regarded in any inquiry as to jurisdiction. *Howard v. United States*, 184 U. S. 676, 680, 46 L. Ed. 746.

**39. Suits by United States officers.**—Where the marshal of the district of Wisconsin attached property at the suit of creditors in New York, and then gave it up upon the execution of a bond to himself, for the use of those creditors, it was within the jurisdiction of the district court of the United States for Wisconsin, to entertain a suit by the marshal, suing upon the bond for the New York creditors, against the claimants in Wisconsin, although both parties resided in the same state. The name of the marshal was merely formal; the real plaintiffs were averred to be citizens of New York. *Huff v. Hutchinson*, 14 How. 586, 14 L. Ed. 553.

**40. Parties held not to be formal parties.**—In a case of a stakeholder, or the holder of a deed as an escrow, where a trust has been created by the parties,

which is sought to be enforced by one of them, the trustee may be a proper party, as he has a duty to perform, and which the court may enforce, if improperly neglected or refused. *Wood v. Davis*, 18 How. 467, 15 L. Ed. 460; *Wilson v. Oswego Township*, 151 U. S. 56, 64, 38 L. Ed. 70; *Massachusetts, etc., Construction Co. v. Cane Creek Tp.*, 155 U. S. 283, 285, 39 L. Ed. 152.

Part owners or tenants in common in real estate of which partition is asked in equity have an interest in the subject matter of the suit, and in the relief sought, so intimately connected with that of their cotenants, that if these cannot be subjected to the jurisdiction of the court, the bill will be dismissed. The act of February 28th, 1839, has no application to suits where the parties stand in this position, but has reference, among others, to suits at law against joint obligors in contract, verbal or written. *Barney v. Baltimore*, 6 Wall. 280, 18 L. Ed. 825.

A vendor sold an estate in Louisiana for a large sum of money, and received payment, from time to time, for nearly one-half of the amount. Afterwards, he agreed to take back the property, upon the payment of an additional sum of money, which was secured to him by the promissory notes of six individuals, four of whom lived in Louisiana, and two in Mississippi. Becoming dissatisfied with this arrangement, the vendor filed a bill in the circuit court of the United States for Louisiana, against the two citizens of Mississippi, to set aside the agreement as having been improperly procured, and to restore him to his rights under the original sale. All the six persons with whom the second arrangement was made were indorsers upon the notes originally given by the vendee for the purchase money, under the sale. The four parties to the compromise, who resided in Louisiana, not being suable in the circuit court of that state, and their presence, as defendants, being necessary, the court could not rescind the contract as to two, and allow it to stand as to the other four. Consequently, it could not pass a decree, as prayed. *Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158.

The Michigan Central Railroad Company, established in Michigan, made an agreement with the New Albany and Salem Railroad Co., established in Indiana, that the former would build and work a road in Indiana, under the charter of the latter. Another company, also established in Indiana, called the Northern Indiana Railroad Company, claiming an exclusive right to that part of Indiana, filed a bill in

cc. *Arrangement of Parties According to Interest.*—The court may take jurisdiction without regard to the position the parties occupied in the pleadings as plaintiffs or defendants. For the purposes of jurisdiction, it may ascertain the real matter in dispute, and arrange the parties on one side or the other of that dispute. If in such arrangement it appears that those on one side were all citizens of different states from those on the other, jurisdiction may be entertained and the cause proceeded with.<sup>41</sup>

the circuit court of the United States, for the district of Michigan, against the Michigan company, praying an injunction to prevent the construction of the road under the above agreement. It was held that the rights of the New Albany Company are seriously involved in the controversy, and they are not made parties to the suit. The act of congress, providing for the nonjoinder of parties who are not inhabitants of the district, does not apply to such a case. *Northern Indiana R. Co. v. Michigan Cent. R. Co.*, 15 How. 233, 14 L. Ed. 674.

**Suit for another's use.**—An action was brought by foreign attachment, in the court of common pleas of Warren county, Pennsylvania, in the name of a citizen of Pennsylvania, for the use of The Lumberman's Bank, at Warren, Pennsylvania, against a citizen of New York; the suit was on a note given by the defendant to the plaintiff, to be paid "in the office notes of the Lumberman's Bank at Warren;" some of the stockholders of the Lumberman's Bank at Warren were citizens of the state of New York. The defendant appeared to the action, by counsel, and having given bond with surety to the court of common pleas, removed the cause to the circuit court of the United States for the western district of Pennsylvania; a motion was made in the circuit court having no jurisdiction of the cause, on the ground, that the real party in the suit was the Lumberman's Bank, at Warren, an aggregate corporation, some of the stockholders of the bank being citizens of the state of New York. It was held, that the circuit court had jurisdiction of the case. *Irvine v. Lowry*, 14 Pet. 293, 10 L. Ed. 462.

**Person claiming patent in suit to try adverse mining claim.**—In a suit in support of an adverse mining claim, against two defendants, one of whom has applied for the patent, but who, before making such application, has sold his interest in the claim to the other, the vendor of the claim is a necessary party, and where he is a citizen of the same state as the plaintiff, the circuit court has no jurisdiction, although the other defendant is a citizen of a different state. *Blackburn v. Portland Gold Min. Co.*, 175 U. S. 571, 44 L. Ed. 276.

**41. Arrangement of parties according to interest.**—*Pacific Railroad v. Ketchum*, 101 U. S. 289, 298, 25 L. Ed. 932; *Removal*

*Cases*, 100 U. S. 457, 25 L. Ed. 593; *Evers v. Watson*, 156 U. S. 527, 532, 39 L. Ed. 520; *Dawson v. Columbia, etc., Trust Co.*, 197 U. S. 178, 180, 49 L. Ed. 713; *Blacklock v. Small*, 127 U. S. 96, 32 L. Ed. 70; *Merchants' Cotton Press, etc., Co. v. Insurance Co.*, 151 U. S. 368, 385, 38 L. Ed. 195; *Carey v. Houston, etc., R. Co.*, 161 U. S. 115, 132, 40 L. Ed. 638; *Harter v. Kernochan*, 103 U. S. 562, 566, 26 L. Ed. 411; *Brown v. Trousdale*, 138 U. S. 389, 395, 34 L. Ed. 987; *Wilson v. Oswego Township*, 151 U. S. 56, 63, 38 L. Ed. 70; *Blake v. McKim*, 103 U. S. 336, 26 L. Ed. 563; *Barney v. Latham*, 103 U. S. 205, 211, 26 L. Ed. 514.

The above cases were mostly cases of removal from state courts, but the principle seems to apply equally to cases originally brought in the United States courts and in *Carey v. Houston, etc., R. Co.*, 161 U. S. 115, 132, 40 L. Ed. 638, a case originally brought in the court, the court said: "These cases were consolidated by the order of May 26, 1886, the parties being arranged for the purposes of jurisdiction on the one side or the other of the matters in dispute, as indicated in *Pacific Railroad v. Ketchum*, 101 U. S. 289, 25 L. Ed. 932, and, unless that order is to be disregarded, the question whether either case lacked an indispensable party, became immaterial."

"The power of the court under the act of 1875, thus to rearrange the parties, and to place them on different sides of the matter in dispute according to the actual facts, has been recognized by this court in several cases. *Removal Cases*, 100 U. S. 457, 25 L. Ed. 593; *Pacific Railroad v. Ketchum*, 101 U. S. 289, 25 L. Ed. 932; *Harter v. Kernochan*, 103 U. S. 562, 26 L. Ed. 411." *Evers v. Watson*, 156 U. S. 527, 532, 39 L. Ed. 520.

In *Dawson v. Columbia, etc., Trust Co.*, 197 U. S. 178, 180, 49 L. Ed. 713, the court said: "We are of opinion that the bill should have been dismissed for want of jurisdiction. The waterworks company is admitted to have been a necessary party, and it, like the defendant city, was a Georgia corporation. It was made a defendant, but the court will look beyond the pleadings and arrange the parties according to their sides in the dispute. When that is done it is obvious that the waterworks company is on the plaintiff's side, and was made a defendant solely for the purpose of reopening in the United States court a controversy which had been decided against it in the courts of the state.

(d) *Plurality of Plaintiffs or Defendants.*—The suit must be wholly between citizens of different states, and if there is a plurality of plaintiffs or defendants, all the parties on one side of the controversy must be citizens of different states from all those on the other side.<sup>42</sup> But if none of the plaintiffs are citizens of

There was a pretense of asking relief against it, as we have stated, but no foundation for the prayer was laid in the allegations of the bill. On the contrary, it appears from these allegations that the waterworks company insisted on its contract with the city, and did everything in its power to carry the contract out. It also recognized the plaintiff's right to receive the rentals and yielded to its demand. No difference or collision of interest or action is alleged or even suggested."

A suit by two or more citizens of one state against two or more citizens of another, which is for the substantial benefit of one of the defendants, who by answer ranges himself on the side of the plaintiff as against the other defendant, and joins in the prayer of the bill, cannot be maintained in the federal court. *Blacklock v. Small*, 127 U. S. 96, 32 L. Ed. 70, citing *Ayres v. Wiswall*, 112 U. S. 187, 23 L. Ed. 693; *Thayer v. Life Ass'n*, 112 U. S. 717, 28 L. Ed. 864; *Central R. Co. v. Mills*, 113 U. S. 249, 28 L. Ed. 949; *Louisville, etc., R. Co. v. Ide*, 114 U. S. 52, 29 L. Ed. 63.

Bonds issued by a corporation in Nebraska, secured by a mortgage on its lands there situate, were held by citizens of another state, who, on default of the corporation to pay the interest represented by the coupons, applied to the trustee named to take possession of the lands, pursuant to the mortgage, and bring a foreclosure suit. On his refusal, they filed their bill September 24, 1873, in the circuit court, against him, the corporation, and the other bond and coupon holders, all citizens of Nebraska, who refused to join in bringing suit. Held, that the complainants had the right to file their bill, and that the court below had jurisdiction, although some of the respondents were joined as such solely on the ground that they had refused to unite with the complainants in the prosecution of a suit to compel the trustee to foreclose the mortgage. *Hotel Co. v. Wade*, 97 U. S. 13, 24 L. Ed. 917.

**42. Plurality of plaintiffs or defendants.**—*Central R. Co. v. Mills*, 113 U. S. 249, 257, 28 L. Ed. 949; *Peper v. Fordyce*, 119 U. S. 469, 471, 30 L. Ed. 435; *Ayres v. Wiswall*, 112 U. S. 187, 23 L. Ed. 693; *Strawbridge v. Curtiss*, 3 Cranch 267, 2 L. Ed. 435; *Peninsular Iron Co. v. Stone*, 121 U. S. 631, 632, 30 L. Ed. 1020; *Raphael v. Trask*, 194 U. S. 272, 277, 48 L. Ed. 973; *Coal Co. v. Blatchford*, 11 Wall. 172, 20 L. Ed. 179; *Sweeney v. Carter Oil Co.*, 199 U. S. 252, 257, 50 L. Ed. 178; *Smith v. Lyon*, 133 U. S. 315, 33 L. Ed. 635; *New Orleans v. Winter*, 1 Wheat. 91, 4 L. Ed.

44; *Case of the Sewing Machine Companies*, 18 Wall. 553, 21 L. Ed. 914; *McCormick Harvesting Machine Co. v. Walther*, 134 U. S. 41, 33 L. Ed. 833; *Hanrick v. Hanrick*, 153 U. S. 192, 195, 38 L. Ed. 685; *Barney v. Latham*, 103 U. S. 205, 26 L. Ed. 514; *Florida Cent., etc., R. Co. v. Bell*, 176 U. S. 321, 325, 44 L. Ed. 486; *Anderson v. Watt*, 138 U. S. 694, 702, 34 L. Ed. 1078; *Timmons v. Elyton Land Co.*, 139 U. S. 378, 35 L. Ed. 195; *Ober v. Gallagher*, 93 U. S. 199, 204, 23 L. Ed. 829; *Hooe v. Jamieson*, 166 U. S. 395, 41 L. Ed. 1049; *Hooe v. Werner*, 166 U. S. 399, 41 L. Ed. 1051; *Commercial, etc., Bank v. Slocumb, etc., Co.*, 14 Pet. 60, 10 L. Ed. 354; *Cochran v. Montgomery County*, 199 U. S. 260, 273, 50 L. Ed. 182; *Hotel Co. v. Wade*, 97 U. S. 13, 24 L. Ed. 917; *Blake v. McKim*, 103 U. S. 336, 338, 26 L. Ed. 563; *Removal Cases*, 100 U. S. 457, 25 L. Ed. 593; *Hyde v. Ruble*, 104 U. S. 407, 26 L. Ed. 823; *Shelton v. Tiffin*, 6 How. 163, 164, 12 L. Ed. 387.

In other words, if there are several plaintiffs, the intention of the act is that each plaintiff must be competent to sue, and if there are several codefendants, each defendant must be liable to be sued, or the jurisdiction cannot be entertained. *Sweeney v. Carter Oil Co.*, 199 U. S. 252, 257, 50 L. Ed. 178; *Smith v. Lyon*, 133 U. S. 315, 33 L. Ed. 635; *New Orleans v. Winter*, 1 Wheat. 91, 4 L. Ed. 44; *Coal Co. v. Blatchford*, 11 Wall. 172, 20 L. Ed. 179; *Case of the Sewing Machine Companies*, 18 Wall. 553, 21 L. Ed. 914; *Peninsular Iron Co. v. Stone*, 121 U. S. 631, 30 L. Ed. 1020.

"Each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts. That is, that where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts." *Strawbridge v. Curtiss*, 3 Cranch 267, 2 L. Ed. 435; *Smith v. Lyon*, 133 U. S. 315, 33 L. Ed. 635; *Sweeney v. Carter Oil Co.*, 199 U. S. 252, 257, 50 L. Ed. 178.

If an indispensable party is a citizen of the same state with the plaintiff, federal courts have no jurisdiction. *Ober v. Gallagher*, 93 U. S. 199, 204, 23 L. Ed. 829.

Under the acts of 1887, 1888, the circuit court has no jurisdiction if there are two plaintiffs to the action who are citizens of and residents in different states and the defendant is a citizen of and resident in a third state and the action is brought in the state in which one of the plaintiffs resides. *Smith v. Lyon*, 133 U. S. 315, 33 L. Ed. 635.

A suit to which citizens of Ohio are parties on one side and a citizen of Ohio



the same state with any of the defendants, the court has jurisdiction, although the plaintiffs or the defendants, or some of them, as between themselves, are citizens of different states.<sup>43</sup>

(e) *At What Time Diversity Must Exist*—aa. *At Commencement of Suit*.—Where the jurisdiction of the federal courts is invoked upon the ground of diversity of citizenship, their jurisdiction is dependent upon the citizenship of the parties at the time of the commencement of the suit.<sup>44</sup>

bb. *Effect of Change of Citizenship*—(aa) *As Divesting Jurisdiction*.—If the jurisdiction of the circuit court is once attached because of diversity of citizenship of the parties, it is not divested by a change of citizenship.<sup>45</sup>

a party on the other, with interests so conflicting that the relief prayed cannot be had without keeping them on opposite sides of the matter in dispute, is not within the jurisdiction of the circuit court. *Peninsular Iron Co. v. Stone*, 121 U. S. 631, 633, 30 L. Ed. 1020.

The Merchants' Bank of South Carolina, at Cheraw, suspended specie payments November 13, 1860, and never thereafter resumed. Its charter contains a provision that, "in case of the failure of the said bank, each stockholder, copartnership, or body politic, having a share or shares in the said bank at the time of such failure, or who shall have been interested therein at any time within twelve months previous to such failure, shall be liable and held bound individually for any sum not exceeding twice the amount of his, her, or their share or shares." To enforce this provision, A., December 2, 1870, filed, for himself and other noteholders a bill in the circuit court against the receiver of the bank its cashier, five of its directors, and some sixty others, as stockholders, alleging among other matters, that he was a citizen of Virginia, but making no averment touching the citizenship of the other noteholders or of the defendants. Such citizenship does not appear by the record, and the bank was not made a party. Held, that the citizenship of the parties is not sufficiently shown to give the court below jurisdiction. *Godfrey v. Terry*, 97 U. S. 171, 24 L. Ed. 944.

In an action of ejectment to recover possession of a tract of land in the state of Florida, the plaintiffs were eight in number, three of whom were alleged to be citizens of the state of Texas, and there was no allegation as to the citizenship of the other five. The defendant was alleged to be a corporation organized and existing under the laws of Florida. It was held that upon the face of the declaration, the jurisdiction of the circuit court would have failed, at least as to five of the plaintiffs, if that jurisdiction depended solely on the citizenship of the parties. *Florida Cent., etc., R. Co. v. Bell*, 176 U. S. 321, 325, 44 L. Ed. 486.

A citizen of a territory cannot sue in the federal court by joining with himself a citizen of another state. *New Orleans v. Winter*, 1 Wheat. 91, 4 L. Ed. 44. See, also, *Alabama Great Southern R. Co. v. Thompson*, 200 U. S. 206, 219, 50 L. Ed. 441.

If one or more of the plaintiffs is a citizen of the District of Columbia, and another a citizen of a state, and the suit is brought against the citizen of another state, the federal courts have no jurisdiction. *Hooe v. Jamieson*, 166 U. S. 395, 41 L. Ed. 1049; *Hooe v. Werner*, 166 U. S. 399, 41 L. Ed. 1051.

The act of congress, of February 28, 1839, entitled "an act in amendment of the acts respecting the judicial system of the United States," did not contemplate a change in the jurisdiction of the courts of the United States, as regards the character of the parties, as prescribed by the judiciary act of 1789, as that act has been expounded by the supreme court of the United States; which is, that each of the plaintiffs must be capable of suing, and each of the defendants capable of being sued. *Commercial, etc., Bank v. Slocomb, etc., Co.*, 14 Pet. 60, 10 L. Ed. 354.

43. *Triangular citizenship*.—*Sweeney v. Carter Oil Co.*, 199 U. S. 252, 254, 50 L. Ed. 178.

The circuit court has jurisdiction in a controversy between citizens of different states, where plaintiffs are citizens of different states as between themselves; and defendant is a citizen of a different state from either of them, the suit being brought where the defendant resides. *Sweeney v. Carter Oil Co.*, 199 U. S. 252, 254, 50 L. Ed. 178.

44. *At what time diversity of citizenship exists*.—*Louisville, etc., R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 566, 43 L. Ed. 1081; *Morgan v. Morgan*, 2 Wheat. 290, 4 L. Ed. 242; *Clarke v. Mathewson*, 12 Pet. 164, 9 L. Ed. 1041; *Koenigsberger v. Richmond Silver Min. Co.*, 158 U. S. 41, 39 L. Ed. 889; *Florida v. Georgia*, 17 How. 478, 508, 15 L. Ed. 181; *Dunn v. Clarke*, 8 Pet. 1, 8 L. Ed. 845; *Chicago v. Mills*, 204 U. S. 321, 328, 51 L. Ed. 504; *Kirby v. American Soda Fountain Co.*, 194 U. S. 141, 48 L. Ed. 911; *Morris v. Gilmer*, 129 U. S. 315, 328, 32 L. Ed. 690; *Kanouse v. Martin*, 15 How. 198, 14 L. Ed. 660; *Anderson v. Watt*, 138 U. S. 694, 34 L. Ed. 1078; *Stevens v. Nichols*, 130 U. S. 230, 231, 32 L. Ed. 914; *Vattier v. Hinde*, 7 Pet. 252, 260, 8 L. Ed. 675; *Conolly v. Taylor*, 2 Pet. 556, 7 L. Ed. 518; *Mullen v. Torrance*, 9 Wheat. 537, 6 L. Ed. 154.

45. *Change of citizenship as divesting jurisdiction*.—*Mullen v. Torrance*, 9 Wheat.

(bb) *As Perfecting Jurisdiction*.—And, on the other hand, if the citizenship of the parties at the time of the commencement of the suit was not such as to warrant the assumption of jurisdiction, the fact that it becomes so pending suit does not confer jurisdiction as to the suit already pending.<sup>46</sup>

(f) *Change of Parties Pending Suit*.—The jurisdiction of the circuit court depends on the citizenship of the original parties to the suit,<sup>47</sup> and a subsequent change of parties cannot divest jurisdiction which has once attached.<sup>48</sup>

537, 6 L. Ed. 154; *Vattier v. Hinde*, 7 Pet. 252, 261, 8 L. Ed. 675; *Dunn v. Clarke*, 8 Pet. 1, 8 L. Ed. 845; *Florida v. Georgia*, 17 How. 478, 508, 15 L. Ed. 181; *Morgan v. Morgan*, 2 Wheat. 290, 297, 4 L. Ed. 242; *Clarke v. Mathewson*, 12 Pet. 164, 9 L. Ed. 1041; *Kanouse v. Martin*, 15 How. 198, 14 L. Ed. 660; *Kirby v. American Soda Fountain Co.*, 194 U. S. 141, 146, 48 L. Ed. 911; *Koenigsberger v. Richmond Silver Min. Co.*, 158 U. S. 41, 39 L. Ed. 889; *Louisville, etc., R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 566, 43 L. Ed. 1081.

"When the jurisdiction of the circuit court, by reason of the character of the parties, has once attached, it is not divested by one of the parties losing the character which entitled him to sue, or subjected him to be sued in the circuit court, or by his death and administration being granted to a citizen who would not have been competent to sue." *Florida v. Georgia*, 17 How. 478, 508, 15 L. Ed. 181.

The jurisdiction of the circuit court having once vested, between citizens of different states, cannot be divested by a change of domicile of one of the parties, and his removal into the same state with the adverse party, *pendente lite*. *Morgan v. Morgan*, 2 Wheat. 290, 4 L. Ed. 242; *Kanouse v. Martin*, 15 How. 198, 14 L. Ed. 660; *Clarke v. Mathewson*, 12 Pet. 164, 9 L. Ed. 1041; *Kirby v. American Soda Fountain Co.*, 194 U. S. 141, 146, 48 L. Ed. 911.

"In the case of *Clarke v. Mathewson*, 12 Pet. 164, 9 L. Ed. 1041, it was held that a bill of revivor was but a continuation of the original suit, and that the jurisdiction having once attached was complete, and continued to enable the court to adjudicate on that subject matter." *Florida v. Georgia*, 17 How. 478, 518, 15 L. Ed. 181.

**46. Diversity accruing pending suit.**—*Vattier v. Hinde*, 7 Pet. 252, 260, 8 L. Ed. 675; *Mullen v. Torrance*, 9 Wheat. 537, 6 L. Ed. 154. See, also, *Anderson v. Watt*, 138 U. S. 694, 34 L. Ed. 1078.

In *Mullen v. Torrance*, 9 Wheat. 537, 6 L. Ed. 154, a plea to the jurisdiction averred that the plaintiff and defendant were both citizens of the state of Mississippi. On demurrer, this plea was held bad, because the jurisdiction of the court depended on the state of the parties at the institution of the suit, and not at the time of the plea pleaded. *Vattier v. Hinde*, 7 Pet. 252, 261, 8 L. Ed. 675.

**47. Change of parties cannot affect jurisdiction.**—*Hardenbergh v. Ray*, 151 U. S. 112, 118, 38 L. Ed. 93; *Phelps v. Oaks*, 117 U. S. 236, 29 L. Ed. 888; *Stewart v. Dunham*, 115 U. S. 61, 29 L. Ed. 329.

**48. Change of parties cannot divest jurisdiction.**—*Hardenbergh v. Ray*, 151 U. S. 112, 118, 38 L. Ed. 93; *Phelps v. Oaks*, 117 U. S. 236, 29 L. Ed. 888; *Stewart v. Dunham*, 115 U. S. 61, 29 L. Ed. 329.

**Letting in landlord to defend ejectment.**—Where the jurisdiction of the court has completely attached against the tenant in possession, the substitution of the landlord as a defendant for such tenant will in no way affect or defeat the jurisdiction of the court. *Hardenbergh v. Ray*, 151 U. S. 112, 118, 38 L. Ed. 93.

The jurisdiction of the circuit court of the United States of an action of ejectment between citizens of different states, is not defeated by the admission of the landlord of the defendant as a party defendant, according to the state practice in such cases, though the landlord is a citizen of a different state from that of either the plaintiff or defendant. *Phelps v. Oaks*, 117 U. S. 236, 29 L. Ed. 888.

**A creditor's suit in equity** was removed from the state court to the United States court and that court proceeded to decree after admitting other parties as co-complainants. The appellants alleged that as the case then stood, the court was without jurisdiction, as the controversy did not appear to be wholly between citizens of different states. It was held that the introduction, afterwards, of these parties as co-complainants did not oust the jurisdiction of the court, already lawfully acquired, as between the original parties. The right of the court to proceed to decree between the original and new parties did not depend upon difference of citizenship. The court said that "the bill having been filed by the original complainants on behalf of themselves and all other creditors choosing to come in and share the expenses of the litigation, the court, in exercising jurisdiction between the parties, could incidentally decree in favor of all other creditors coming in under the bill." *Stewart v. Dunham*, 115 U. S. 61, 29 L. Ed. 329.

"Such a proceeding would be ancillary to the jurisdiction acquired between the original parties, and it would be merely a matter of form whether the new parties should come in as co-complainants, or before a master, under a decree order-

(g) *Change of Domicile or Citizenship before Suit*—aa. *Real and Bona Fide Change*—(aa) *In General*.—A person who makes a bona fide change of his domicile with the intention of taking up his residence in another state, may invoke the jurisdiction of the federal courts in suits by or against citizens of the state of his original domicile.<sup>49</sup>

(bb) *Change for Purpose of Giving Federal Courts Jurisdiction*.—Indeed, the right of a party to sue in the federal courts is not defeated by the fact that his change of domicile was made for the express purpose of giving jurisdiction to the federal courts of suits between himself and a citizen of the state of his former domicile.<sup>50</sup>

bb. *Fraudulent or Fictitious Change*—(aa) *By Natural Persons*.—But if a party does not really mean to change his domicile permanently, the fact that he takes up his residence in another state does not confer jurisdiction upon the federal courts of suits by or against residents of the state of his former domicile.<sup>51</sup>

ing a reference to prove the claims of all persons entitled to the benefit of the decree. If the latter course had been adopted, no question of jurisdiction could have arisen. The adoption of the alternative is, in substance, the same thing." *Stewart v. Dunham*, 115 U. S. 61, 29 L. Ed. 329.

49. *Real and bona fide change of domicile*.—*Morris v. Gilmer*, 129 U. S. 315, 328, 32 L. Ed. 690; *Robertson v. Carson*, 19 Wall. 94, 106, 22 L. Ed. 178; *Knox v. Greenleaf*, 4 Dall. 360, 1 L. Ed. 866; *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 44 L. Ed. 423; *South Dakota v. North Carolina*, 192 U. S. 286, 311, 48 L. Ed. 448; *Manhattan Life Ins. Co. v. Broughton*, 109 U. S. 121, 27 L. Ed. 878; *Jones v. League*, 18 How. 76, 15 L. Ed. 263; *Ex parte Schollenberger*, 96 U. S. 369, 377, 24 L. Ed. 853; *Chicago, etc., R. Co. v. Ohle*, 117 U. S. 123, 29 L. Ed. 837; *Shelton v. Tiffin*, 6 How. 163, 12 L. Ed. 387; *Cheever v. Wilson*, 9 Wall. 108, 19 L. Ed. 604. See, generally, the titles DOMICILE; CITIZENSHIP, vol. 3, p. 788.

The intention and the act must concur in order to effect such a change of domicile as constitutes a change of citizenship. *Morris v. Gilmer*, 129 U. S. 315, 328, 32 L. Ed. 690.

The change of citizenship from one state to another must be made with a bona fide intention of becoming a citizen of the state to which the party removes. *Jones v. League*, 18 How. 76, 15 L. Ed. 263; *Chicago, etc., R. Co. v. Ohle*, 117 U. S. 123, 29 L. Ed. 837.

On a change of domicile from one state to another, citizenship may depend upon the intention of the individual. But this intention may be shown more satisfactorily by acts than declarations. An exercise of the right of suffrage is conclusive upon the subject; but acquiring a right of suffrage, accompanied by acts which show a permanent location, unexplained, may be sufficient. *Shelton v. Tiffin*, 6 How. 163, 12 L. Ed. 387.

Where a citizen of one state removes to another state, and there purchases real estate, pays his taxes and resides there for about four years, he must be regarded

as a citizen of the latter state, subject to the jurisdiction of a federal court, even though during this time, during a temporary absence, he acquired and exercised municipal rights in another and third state. *Knox v. Greenleaf*, 4 Dall. 360, 1 L. Ed. 866.

50. *Change in order to give federal courts jurisdiction*.—*Robertson v. Carson*, 19 Wall. 94, 106, 22 L. Ed. 178; *Ex parte Schollenberger*, 96 U. S. 369, 377, 24 L. Ed. 853; *Morris v. Gilmer*, 129 U. S. 315, 328, 32 L. Ed. 690; *Manhattan Life Ins. Co. v. Broughton*, 109 U. S. 121, 125, 27 L. Ed. 878; *Jones v. League*, 18 How. 76, 81, 15 L. Ed. 263; *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 190, 191, 192, 44 L. Ed. 423; *South Dakota v. North Carolina*, 192 U. S. 286, 311, 48 L. Ed. 448; *Cheever v. Wilson*, 9 Wall. 108, 123, 19 L. Ed. 604.

51. *Fraudulent or fictitious change*.—*Morris v. Gilmer*, 129 U. S. 315, 328, 32 L. Ed. 690; *Jones v. League*, 18 How. 76, 15 L. Ed. 263; *Lake County Comm'rs v. Dudley*, 173 U. S. 243, 254, 43 L. Ed. 684.

"There must be an actual, not pretended, change of domicile; in other words, the removal must be a real one, *animo manendi*, and not merely ostensible." *Morris v. Gilmer*, 129 U. S. 315, 328, 32 L. Ed. 690.

"If the removal be for the purpose of committing a fraud upon the law, and to enable the party to avail himself of the jurisdiction of the federal courts, and that fact be made out by his acts, the court must pronounce that his removal was not with a bona fide intention of changing his domicile, however frequent and public his declarations to the contrary may have been." *Morris v. Gilmer*, 129 U. S. 315, 328, 32 L. Ed. 690.

Where the plaintiff went to Tennessee without any present intention to remain there permanently or for an indefinite time, but with a present intention to return to Alabama as soon as he could do so without defeating the jurisdiction of the federal court to determine his new suit, and was a mere sojourner in the former state when the suit was brought, and returned to Alabama almost immediately after giving his deposition, it was



(bb) *Fraudulent Incorporation*.—Upon a like principle, where a corporation of one state incorporates itself in another state for the fraudulent purpose of giving the federal courts jurisdiction of suits, over which they otherwise would not have jurisdiction, the federal courts will refuse to give effect to their fraudulent purpose, and will not take jurisdiction.<sup>52</sup>

(h) *Suits by or against Artificial Bodies*—aa. *Corporations*—(aa) *General Rules as to Suits by or against Corporations*—aaa. *Former Rule*.—The acts conferring jurisdiction on the federal courts in suits between citizens of different states do not mention corporations, and for half a century after the passage of the first act, corporations were allowed to sue and be sued in the federal courts only when all the members of the corporation were citizens of the state which created the corporation, and the suit was by or against a citizen of another state.<sup>53</sup> In other words it was held that a corporation could not be a citizen, and

held that the court had no jurisdiction. *Morris v. Gilmer*, 129 U. S. 315, 328, 32 L. Ed. 690.

It was not a bona fide change of domicile where the plaintiff only made a short absence, and it appeared from the deed under which he claimed that he was in fact prosecuting the suit for the benefit of his grantor (who could not sue), receiving a portion of the land recovered as an equivalent for paying one-third of the costs and superintending the prosecution of the suit. In such a case, the federal court has no jurisdiction. *Jones v. League*, 18 How. 76, 15 L. Ed. 263.

**52. Fraudulent incorporation in another state.**—*Lehigh Min. & Mfg. Co. v. Kelly*, 160 U. S. 327, 40 L. Ed. 444; *Riverdale Cotton Mills v. Alabama, etc., Mfg. Co.*, 198 U. S. 188, 199, 49 L. Ed. 1008.

A Virginia corporation claimed title to lands in that commonwealth which were in the possession of certain individuals, citizens of Virginia. The stockholders of the Virginia corporation organized themselves into a corporation under the laws of Pennsylvania in order that the Pennsylvania corporation, after receiving a conveyance from the Virginia corporation, could bring suit in the circuit court of the United States sitting in Virginia, against the citizens in that commonwealth who held possession of the lands. The contemplated conveyance was made, but no consideration actually passed or was intended to be passed for the transfer. The supreme court held that within the meaning of the act of 1875 the case was a collusive one and should have been dismissed as a fraud on the jurisdiction of the United States court. *Lehigh Min. & Mfg. Co. v. Kelly*, 160 U. S. 327, 40 L. Ed. 444.

**53. Early rule as to jurisdiction of suits by or against corporations.**—*Shaw v. Quincy Min. Co.*, 145 U. S. 444, 451, 36 L. Ed. 768; *United States Bank v. Deveaux*, 5 Cranch 61, 3 L. Ed. 38; *Hope Ins. Co. v. Boardman*, 5 Cranch 57, 3 L. Ed. 36; *Sullivan v. Fulton Steamboat Co.*, 6 Wheat. 450, 5 L. Ed. 302; *Breithaupt v. Bank*, 1 Pet. 238, 7 L. Ed. 127; *Commercial, etc., Bank v. Slocomb, etc., Co.*, 14 Pet. 60, 10 L. Ed. 354; *Barrow Steamship*

*Co. v. Kane*, 170 U. S. 100, 107, 42 L. Ed. 964; *Bank v. Earle*, 13 Pet. 519, 10\* L. Ed. 274; *Irvine v. Lowry*, 14 Pet. 293, 10 L. Ed. 462; *Cowles v. Mercer County*, 7 Wall. 118, 121, 19 L. Ed. 86.

"The jurisdiction of the circuit courts over suits between a citizen of one state and a corporation of another state was at first maintained upon the theory that the persons composing the corporation were suing or being sued in its name, and upon the presumption of fact that all those persons were citizens of the state by which the corporation had been created; but that this presumption might be rebutted, by plea and proof, and the jurisdiction thereby defeated. *United States Bank v. Deveaux*, 5 Cranch 61, 3 L. Ed. 38; *Hope Ins. Co. v. Boardman*, 5 Cranch 57, 3 L. Ed. 36; *Commercial, etc., Bank v. Slocomb, etc., Co.*, 14 Pet. 60, 10 L. Ed. 354." *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 106, 42 L. Ed. 964.

A corporation aggregate, composed of citizens of one state, may sue a citizen of another state, in the circuit court of the United States. *United States Bank v. Deveaux*, 5 Cranch 61, 3 L. Ed. 38.

The artificial being, a corporation aggregate, is not, as such, a citizen of the United States; yet the courts of the United States will look beyond the mere corporate character, to the individuals of whom it is composed; and if they were citizens of a different state from the party sued, they are competent to sue in the courts of the United States; but all the corporators must be citizens of a different state from the party sued. The same principle applies to the individuals composing a corporation aggregate, when standing in the attitude of defendants, which does when they are in that of plaintiffs. *Commercial, etc., Bank v. Slocomb, etc., Co.*, 14 Pet. 60, 10 L. Ed. 354.

An action was brought in the circuit court of Mississippi, against the Commercial and Railroad Bank of Vicksburg, Mississippi, by parties who were citizens of the state of Louisiana; the defendants pleaded in abatement, by attorney, that they were an aggregate corporation, and that two of the stockholders were citizens of Louisiana; the affidavit to the plea was

could only litigate in the courts of the United States in consequence of the character of the individuals who composed the body corporate.<sup>54</sup>

*bbb. Present Rule.*—The rule that the jurisdiction of the federal courts in suits by or against corporations was dependent upon the citizenship of the incorporators, was overruled in 1844.<sup>55</sup> Since then it has never been doubted that a corporation created by and doing business in a state is to be considered as a citizen of the state, as much as a natural person, so far as the jurisdiction of the federal courts, upon the ground of diversity of citizenship, is concerned;<sup>56</sup>

sworn to by the cashier of the bank, before the "deputy clerk;" it was not entitled as of any term of the court; the plaintiffs demurred to the plea. Held, that the appearance of the defendants in the circuit court, by attorney, was proper; and that if any exceptions existed to this form of the plea, they should have been urged to the receiving of it, when it was offered, and were not causes of demurrer; also, that the circuit court of Mississippi had no jurisdiction of the case. *Commercial, etc., Bank v. Slocomb, etc., Co.*, 14 Pet. 60, 10 L. Ed. 354.

54. *Hope Ins. Co. v. Boardman*, 5 Cranch 57, 3 L. Ed. 36.

55. *Former rule changed in 1844.*—*Louisville, etc., R. Co. v. Letson*, 2 How. 497, 11 L. Ed. 353; *Cowles v. Mercer County*, 7 Wall. 118, 121, 19 L. Ed. 86.

56. *Corporation a citizen of state creating it.*—*Louisville, etc., R. Co. v. Letson*, 2 How. 497, 11 L. Ed. 353; *Cowles v. Mercer County*, 7 Wall. 118, 121, 19 L. Ed. 86; *St. Louis, etc., R. Co. v. James*, 161 U. S. 546, 562, 40 L. Ed. 802; *Empire Coal, etc., Co. v. Empire, etc., Min. Co.*, 150 U. S. 159, 163, 37 L. Ed. 1037; *Muller v. Dows*, 94 U. S. 444, 24 L. Ed. 207; *Nashua, etc., R. Corp. v. Boston, etc., R. Corp.*, 136 U. S. 356, 381, 34 L. Ed. 363; *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449, 44 L. Ed. 842; *Loeb v. Columbia Township Trustees*, 179 U. S. 472, 485, 45 L. Ed. 280; *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 106, 42 L. Ed. 964; *Railroad Co. v. Koontz*, 104 U. S. 5, 26 L. Ed. 643; *Chapman v. Barney*, 129 U. S. 677, 682, 32 L. Ed. 800; *Guthrie v. Harkness*, 199 U. S. 148, 50 L. Ed. 130; *Wells Co. v. Gastonia Cotton Mfg. Co.*, 198 U. S. 177, 49 L. Ed. 1003; *Boom Co. v. Patterson*, 98 U. S. 403, 407, 25 L. Ed. 206; *Marshall v. Baltimore, etc., R. Co.*, 16 How. 314, 14 L. Ed. 953; *Dodge v. Woolsey*, 18 How. 331, 364, 15 L. Ed. 401; *Lafayette Ins. Co. v. French*, 18 How. 404, 405, 15 L. Ed. 451; *Philadelphia, etc., R. Co. v. Quigley*, 21 How. 202, 214, 16 L. Ed. 73; *Ohio, etc., R. Co. v. Wheeler*, 1 Black 286, 296, 17 L. Ed. 130; *Railroad Co. v. Harris*, 12 Wall. 65, 82, 20 L. Ed. 354; *Covington Drawbridge Co. v. Shepherd*, 20 How. 227, 231, 15 L. Ed. 896; *Covington Drawbridge Co. v. Shepherd*, 21 How. 112, 16 L. Ed. 38; *Insurance Co. v. Ritchie*, 5 Wall. 541, 542, 18 L. Ed. 540; *Paul v. Virginia*, 8 Wall. 168, 178, 19 L. Ed. 357; *Pennsylvania v. Quicksilver Co.*, 10 Wall. 553, 556, 19 L. Ed. 998; *Case of*

*the Sewing Machine Companies*, 18 Wall. 553, 575; 21 L. Ed. 914; *Steamship Co. v. Tugman*, 106 U. S. 118, 121, 27 L. Ed. 87; *Doctor v. Harrington*, 196 U. S. 579, 49 L. Ed. 606; *Kansas, Pac. R. Co. v. Atchison, etc., R. Co.*, 112 U. S. 414, 28 L. Ed. 794; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 205, 36 L. Ed. 943; *Shaw v. Quincy Min. Co.*, 145 U. S. 444, 446, 36 L. Ed. 768; *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222; *Canada Southern R. Co. v. Gebhard*, 109 U. S. 527, 27 L. Ed. 1020; *Memphis, etc., R. Co. v. Alabama*, 107 U. S. 581, 27 L. Ed. 518; *Railway Co. v. Whitton*, 13 Wall. 270, 20 L. Ed. 571; *Insurance Co. v. Francis*, 11 Wall. 210, 20 L. Ed. 77; *Express Co. v. Kountze Bros.*, 8 Wall. 342, 343, 19 L. Ed. 457; *Ex parte Schollenberger*, 96 U. S. 369, 24 L. Ed. 853; *Mexican Cent. R. Co. v. Eckman*, 187 U. S. 429, 433, 47 L. Ed. 245; *Sun Printing, etc., Ass'n v. Edwards*, 194 U. S. 377, 381, 48 L. Ed. 1027; *Southern R. Co. v. Allison*, 190 U. S. 326, 332, 47 L. Ed. 1078; *Thomas v. Board of Trustees*, 195 U. S. 207, 217, 49 L. Ed. 160; *Madisonville Traction Co. v. St. Bernard Min. Co.*, 196 U. S. 239, 256, 49 L. Ed. 462; *Insurance Co. v. Morse*, 20 Wall. 445, 453, 22 L. Ed. 365; *Barron v. Burnside*, 121 U. S. 186, 198, 30 L. Ed. 915; *Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. 518, 14 L. Ed. 249; *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 287, 32 L. Ed. 239; *St. Joseph, etc., R. Co. v. Steele*, 167 U. S. 659, 42 L. Ed. 315; *Galveston, etc., R. Co. v. Gonzales*, 151 U. S. 496, 38 L. Ed. 248; *Blake v. McClung*, 172 U. S. 239, 259, 43 L. Ed. 432; *In re Hohorst*, 150 U. S. 653, 662, 37 L. Ed. 1211; *Goodlett v. Louisville, etc., Railroad*, 122 U. S. 391, 30 L. Ed. 1230; *Baltimore, etc., R. Co. v. Baugh*, 149 U. S. 368, 400, 37 L. Ed. 772; *United States v. Northwestern Express, etc., Co.*, 164 U. S. 686, 689, 41 L. Ed. 599; *Rundle v. Delaware, etc., Canal Co.*, 14 How. 80, 100, 14 L. Ed. 335; *Northern Indiana R. Co. v. Michigan Cent. R. Co.*, 15 How. 233, 249, 14 L. Ed. 674; *Martin v. Baltimore, etc., R. Co.*, 151 U. S. 673, 677, 38 L. Ed. 311; *In re Keasbey & Mattison Co.*, 160 U. S. 221, 228, 40 L. Ed. 402.

"The words 'citizens' and 'aliens,' in these provisions of the constitution and of the judiciary act, have always been held by this court to include corporations." *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 106, 42 L. Ed. 964.

The constant tendency of judicial decisions in modern times has been in the

and there is a conclusive presumption of law that the persons composing the corporation are citizens of the state to whose laws the corporate body owes its existence.<sup>57</sup>

direction of putting corporations upon the same footing as natural persons in regard to the jurisdiction of suits by or against them. *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 106, 42 L. Ed. 964.

A corporation may for the purposes of suit be said to be born where by law it is created and organized, and to reside where, by or under the authority of its charter, its principal office is. *Railroad Co. v. Koonitz*, 104 U. S. 5, 12, 26 L. Ed. 643.

In *Muller v. Dows*, 94 U. S. 444, 24 L. Ed. 207, it was held that a corporation itself can be a citizen of no state in the sense in which the word "citizen" is used in the constitution of the United States.

A citizen of one state can sue a corporation which has been created by another state in the federal courts, although the state itself may be a member of the corporation. *Louisville, etc., R. Co. v. Letson*, 2 How. 497, 11 L. Ed. 353.

A suit involving a controversy between corporate citizens of different states, is one of which the circuit court of the United States can take original cognizance, under the judiciary act. *Madisonville Traction Co. v. St. Bernard Min. Co.*, 196 U. S. 239, 256, 49 L. Ed. 462.

A citizen of Virginia may sue the Baltimore and Ohio Railroad Company in the circuit court of the United States for Maryland, and an averment that the defendants are a body corporate, created by the legislature of Maryland, is sufficient to give the court jurisdiction. *Marshall v. Baltimore, etc., R. Co.*, 16 How. 314, 14 L. Ed. 953.

**Territorial corporation becomes citizen of state on its admission as a state.**—*Kansas Pac. R. Co. v. Atchison, etc., R. Co.*, 112 U. S. 414, 28 L. Ed. 794.

**57. Presumption as to citizenship of stockholders.**—*St. Louis, etc., R. Co. v. James*, 161 U. S. 545, 562, 40 L. Ed. 802; *Muller v. Dows*, 94 U. S. 444, 24 L. Ed. 207; *Louisville, etc., R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 565, 43 L. Ed. 1081; *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 106, 42 L. Ed. 964; *Steamship Co. v. Tugman*, 106 U. S. 118, 121, 27 L. Ed. 87; *Ohio, etc., R. Co. v. Wheeler*, 1 Black 286, 296, 17 L. Ed. 150; *Louisville, etc., R. Co. v. Letson*, 2 How. 497, 11 L. Ed. 353; *Doctor v. Harrington*, 196 U. S. 579, 49 L. Ed. 606; *Shaw v. Quincy Min. Co.*, 145 U. S. 444, 451, 36 L. Ed. 768; *Memphis, etc., R. Co. v. Alabama*, 107 U. S. 581, 27 L. Ed. 518; *Sun Printing, etc., Ass'n v. Edwards*, 194 U. S. 377, 381, 48 L. Ed. 1027; *Southern R. Co. v. Allison*, 190 U. S. 326, 332, 47 L. Ed. 1078; *Thomas v. Board of Trustees*, 195 U. S. 207, 210, 49 L. Ed. 160; *Blake v. McClung*, 172 U. S. 239, 259, 43 L. Ed. 432; *Baltimore, etc.,*

*R. Co. v. Baugh*, 149 U. S. 368, 400, 37 L. Ed. 772; *United States v. Northwestern Express, etc., Co.*, 164 U. S. 686, 689, 41 L. Ed. 599.

Where a corporation is created by the laws of a state, the legal presumption is, that its members are citizens of the state in which alone the corporate body has a legal existence; and a suit by or against a corporation, in its corporate name, must be presumed to be a suit by or against citizens of the state which created the corporate body; and no averment or evidence to the contrary is admissible, for the purpose of withdrawing the suit from the jurisdiction of a court of the United States. *Louisville, etc., R. Co. v. Letson*, 2 How. 497, 11 L. Ed. 353; *Ohio, etc., R. Co. v. Wheeler*, 1 Black 286, 17 L. Ed. 150; *Steamship Co. v. Tugman*, 106 U. S. 118, 120, 27 L. Ed. 87.

"There is an indisputable legal presumption that a state corporation, when sued or suing in a circuit court of the United States, is composed of citizens of the state which created it, and hence such a corporation is itself deemed to come within that provision of the constitution of the United States which confers jurisdiction upon the federal courts in 'controversies between citizens of different states.'" *Louisville, etc., R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 565, 43 L. Ed. 1081; *St. Louis, etc., R. Co. v. James*, 161 U. S. 545, 40 L. Ed. 802; *Wells Co. v. Gastonia Cotton Mfg. Co.*, 198 U. S. 177, 49 L. Ed. 1003.

"That doctrine began, as we have seen, in the assumption that state corporations were composed of citizens of the state which created them; but such assumption was one of fact, and was the subject of allegation and traverse, and thus the jurisdiction of the federal courts might be defeated. Then, after a long contest in this court, it was settled that the presumption of citizenship is one of law, not to be defeated by allegation or evidence to the contrary." *St. Louis, etc., R. Co. v. James*, 161 U. S. 545, 563, 40 L. Ed. 802.

"The presumption that a corporation is composed of citizens of the state which created it accompanies such corporation when it does business in another state, and it may sue or be sued in the federal courts in such other state as a citizen of the state of its original creation." *Louisville, etc., R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 565, 43 L. Ed. 1081; *St. Louis, etc., R. Co. v. James*, 161 U. S. 545, 40 L. Ed. 802; *Steamship Co. v. Tugman*, 106 U. S. 118, 121, 27 L. Ed. 87.

**Presumption does not defeat stockholders' suit against corporation.**—*Doctor v. Harrington*, 196 U. S. 579, 49 L. Ed. 606.

As to stockholders' suits in federal



(bb) *Necessity for Corporation to Be Duly Organized, etc.*—In order for an artificial body to be sued in the federal courts as a corporation by a citizen of a different state than that from which such body is alleged to derive its powers, on the ground of diverse citizenship of the parties, the body must be, in fact, a corporation.<sup>58</sup> As a general rule, the federal courts will accept the decision of the highest court of the state that a particular body is or is not a corporation under the state laws.<sup>59</sup>

(cc) *Corporations Created by One State and Doing Business in Another*—*aaa. In General.*—A corporation created by the laws of one state and doing business in another is, for the purposes of federal jurisdiction, to be deemed a citizen of the state of its creation only.<sup>60</sup> Thus a corporation created by the laws of one state and doing business in another may be sued in the federal courts of either state by a citizen of the state in which it is engaged in business.<sup>61</sup> On the

courts on ground of diverse citizenship, see the title STOCK AND STOCK-HOLDERS.

**58. Necessity for body sued as corporation to be such.**—*Thomas v. Board of Trustees*, 195 U. S. 207, 217, 49 L. Ed. 160; *Wells Co. v. Gastonia Cotton Mfg. Co.*, 198 U. S. 177, 49 L. Ed. 1003.

A corporate charter was issued by the state of Mississippi under its general corporation laws. One clause of the charter provided that the incorporators "are hereby created a body politic and corporate \* \* \* shall be allowed to sue and be sued, contract and be contracted with," etc. Another clause provided that "as soon as \$10,000 of stock is subscribed and paid for, said corporation shall have power to commence business." No stock was subscribed or paid for and the question was whether the company had ever become a corporation so as to have a right to sue in the federal courts, on the ground of diversity of citizenship. It was held that the company became a corporation when its charter was issued and that it was not a condition precedent that the capital stock should be subscribed and paid for and that therefore it might sue a citizen of a different state in the federal courts. *Wells Co. v. Gastonia Cotton Mfg. Co.*, 198 U. S. 177, 49 L. Ed. 1003.

In *Thomas v. Board of Trustees*, 195 U. S. 207, 217, 49 L. Ed. 160, it was held that the board of trustees of the Ohio State University, which under the state law had power to sue and be sued, and against which a judgment was valid, was nevertheless not a corporation, and was not, therefore, subject to suit in the federal courts by a citizen of a state other than Ohio, without showing the citizenship of the individual members of the board to be such as to sustain the jurisdiction.

**59. Federal court will accept decision of state court as to what is corporation.**—*Thomas v. Board of Trustees*, 195 U. S. 207, 217, 49 L. Ed. 160.

**60. Corporation created by one state and doing business in another.**—*Empire Coal, etc., Co. v. Empire, etc., Min. Co.*, 150 U. S. 159, 163, 37 L. Ed. 1037; *Insurance Co. v. Francis*, 11 Wall. 210, 20 L.

Ed. 77; *Railway Co. v. Whitton*, 13 Wall. 270, 20 L. Ed. 571; *Shaw v. Quincy Min. Co.*, 145 U. S. 444, 450, 36 L. Ed. 768; *Martin v. Baltimore, etc., R. Co.*, 151 U. S. 673, 38 L. Ed. 311; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 205, 36 L. Ed. 943; *McCormick Harvesting Machine Co. v. Walther*, 134 U. S. 41, 33 L. Ed. 833; *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 295, 30 L. Ed. 83; *Goodlett v. Louisville, etc., Railroad*, 122 U. S. 391, 30 L. Ed. 1230; *Railroad Co. v. Harris*, 12 Wall. 65, 20 L. Ed. 354.

"A corporation of one state, owning property and doing business in another state by permission of the latter, does not thereby become a citizen of this state also." *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 295, 30 L. Ed. 83.

Where a corporation is created by the laws of a state, it is, in suits brought in a federal court in that state, to be considered as a citizen of such state whatever its status or citizenship may be elsewhere by the legislation of other states. *Railway Co. v. Whitton*, 13 Wall. 270, 20 L. Ed. 571.

"A corporation," said Chief Justice Waite, "created by and organized under the laws of a particular state, and having its principal office there, is, under the constitution and laws for the purpose of suing and being sued, a citizen of that state."

By doing business away from their legal residence, they do not change their citizenship, but simply extend the field of their operations. They reside at home, but do business abroad. *Railroad Co. v. Koontz*, 104 U. S. 5, 26 L. Ed. 643; *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357; *Railroad Co. v. Harris*, 12 Wall. 65, 20 L. Ed. 354; *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222; *Canada Southern R. Co. v. Gebhard*, 109 U. S. 527, 27 L. Ed. 1020." *Shaw v. Quincy Min. Co.*, 145 U. S. 444, 450, 36 L. Ed. 768.

**61. Suit against foreign corporation by citizens of state where it is doing business.**—*Southern Pac. Co. v. Denton*, 146 U. S. 202, 205, 36 L. Ed. 943 (the first headnote in this case, contrary to the rule stated in the text, is incorrect); *Martin v. Baltimore, etc., R. Co.*, 151 U. S. 673, 38 L. Ed. 311; *McCormick Harvesting Ma-*

other hand such a corporation cannot be sued in the federal courts by a citizen of the state by which it was created, although it has a place of business in another state.<sup>62</sup>

bbb. *Leasing Rights of Domestic Corporation.*—A foreign corporation, by taking from a domestic corporation, with the unconditional assent of the state creating the latter, a lease of a railroad which can only be operated by the use in the latter state of the corporate franchises of the lessor, does not make itself a corporation of the latter state, or part with any of the rights it had under the constitution and laws of the United States as a corporation of the former state.<sup>63</sup>

ccc. *Corporation Domesticated by Filing Articles, etc.*—The fact that a corporation created under the laws of one state has become domesticated, or has become in form a domestic corporation, under the laws of another state in compliance with the legislation thereof, by filing a copy of its charter and by-laws with the state, or by complying with any other of the state laws as to domestication, does not make it a corporation of the second state, and for the purposes of federal jurisdiction it is to be taken to be a citizen of the state which originally created it.<sup>64</sup> The mere grant of powers or privileges by one state to an existing cor-

chine Co. *v.* Walthers, 134 U. S. 41, 33 L. Ed. 833.

In *Southern Pac. Co. v. Denton*, 146 U. S. 202, 205, 36 L. Ed. 943, the plaintiff was a citizen of Texas residing in the eastern district thereof, and the defendant a Kentucky corporation doing business in the western district of Texas. It was held that while it could not be sued in the western district of Texas, it might be sued either in the eastern district of Texas or in the state of Kentucky.

In *McCormick Harvesting Machine Co. v. Walthers*, 134 U. S. 41, 33 L. Ed. 833, a citizen and resident of Nebraska sued an Illinois corporation, which was doing business in Nebraska, in the United States circuit court for Nebraska. It was held that suit was properly brought.

A railroad corporation in one state and doing business in another under a license issued by the state for that purpose may be sued in the federal courts of that state by one of its citizens, or if sued in the state courts, under such circumstances, the case may be removed by it to the federal courts. *Martin v. Baltimore, etc., R. Co.*, 151 U. S. 673, 38 L. Ed. 311.

**62. Suit by citizen against domestic corporation doing business in another state.**—*Empire Coal, etc., Co. v. Empire, etc., Min. Co.*, 150 U. S. 159, 163, 37 L. Ed. 1037.

Where two corporations are created by the same state, neither of them can maintain an action against the other in a circuit court of the United States, whether held in that state or in any other state, even if the defendant had a place of business in the latter. *Empire Coal, etc., Co. v. Empire, etc., Min. Co.*, 150 U. S. 159, 163, 37 L. Ed. 1037.

**63. Foreign corporation leasing rights of domestic corporation.**—*Railroad Co. v. Koontz*, 104 U. S. 5, 13, 26 L. Ed. 643.

**64. Corporation domesticated by filing articles.**—*Southern R. Co. v. Allison*, 190 U. S. 326, 47 L. Ed. 1078; *St. Louis, etc., R. Co. v. James*, 161 U. S. 545, 562, 40 L.

Ed. 802; *Louisville, etc., R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 563, 43 L. Ed. 1081; *St. Joseph, etc., R. Co. v. Steele*, 167 U. S. 659, 42 L. Ed. 315; *Martin v. Baltimore, etc., R. Co.*, 151 U. S. 673, 38 L. Ed. 311; *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 296, 30 L. Ed. 83; *Railroad Co. v. Harris*, 12 Wall. 65, 20 L. Ed. 354, *Goodlett v. Louisville, etc., Railroad*, 122 U. S. 391, 30 L. Ed. 1230.

A statute of North Carolina provides in substance that a railroad incorporated under the laws of any state which desires to own property or carry on business in that state may become a domestic corporation by filing in the office of the secretary of state a copy of its charter, etc. A railroad company organized under the laws of Virginia complied with the requirements of the above statute. It was held, nevertheless, that federal courts in North Carolina had jurisdiction of a suit against it by a citizen of North Carolina. *Southern R. Co. v. Allison*, 190 U. S. 326, 47 L. Ed. 1078.

The Arkansas act of 1889, provides that every railroad corporation of any other state which has leased or purchased a road in that state must within sixty days of the passage of the act file a certified copy of its articles of incorporation or charter with the secretary of the state and that it shall then become a corporation of Arkansas. A railroad company incorporated under the laws of Missouri purchased the road of an Arkansas company and filed a copy of its articles of incorporation with the secretary of state as directed by the statute. It was held that whatever was the effect of such legislation, in the way of subjecting the company to the local laws, it did not create an Arkansas corporation in such a sense as to make it a citizen of Arkansas within the meaning of the federal constitution so as to subject it as such to a suit in the federal courts by a citizen of the state of its

poration of another state, does not make the corporation a citizen of the former state so as to defeat the jurisdiction of the federal courts in suits by or against its citizens.<sup>65</sup>

*ddd. Actual Reincorporation under Laws of Second State—(aaa) In General.*—If a corporation originally incorporated in one state has been actually created and reincorporated in another state, out of natural persons, whose citizenship may be imputed to the corporation itself, it seems that it is then to be deemed a citizen of that state, and that in such case it may even be sued in the federal courts of the latter state by a citizen of the state of its original incorporation.<sup>66</sup>

origin. *St. Louis, etc., R. Co. v. James*, 161 U. S. 545, 565, 40 L. Ed. 802.

Where the plaintiff was first created a corporation of the state of Indiana, it was held that even if it was afterwards created a corporation of the state of Kentucky also, it was and remained, for the purposes of the jurisdiction of the courts of the United States, a citizen of Indiana, the state by which it was originally created. It could neither have brought suit as a corporation of both states against a corporation or other citizen of either state, nor could it have sued or been sued as a corporation of Kentucky, in any court of the United States. *Louisville, etc., R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 563, 43 L. Ed. 1081.

A railroad company was chartered by a special act of the Illinois legislature to build a road within the state, and by an act of the legislature of Indiana was permitted to extend its road into that state. The corporation was sold out under foreclosure, and was reorganized under an act of the Illinois legislature into a new corporation which succeeded to the rights of the original company. The reorganizers filed in the office of the secretary of state of Indiana a certificate of the organization of the new company with the name of the directors. There was no evidence of an agreement of the company to accept of or act under the attempt at organization under the Indiana laws; they held no election for directors of the Indiana corporation, if one existed and did not recognize the existence of an Indiana corporation of the same name. It was held that the company was a citizen of the state of Illinois alone, and might maintain a suit in the circuit court of Indiana against a citizen of Indiana and citizens of other states than Illinois. *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 30 L. Ed. 83.

In *Southern R. Co. v. Allison*, 190 U. S. 326, 338, 47 L. Ed. 1078, the court thought that there was a plain and fundamental difference between the case of *St. Louis, etc., R. Co. v. James*, 161 U. S. 545, 562, 40 L. Ed. 802, and *Memphis, etc., R. Co. v. Alabama*, 107 U. S. 581, 27 L. Ed. 518, but it went on and said that in any event the former case was decisive of the question.

While a railroad company, owning and operating a line running through several

states, may receive and exercise powers granted by each, and may, for many purposes, be regarded as a corporation of each, such legislation does not avail to make the same corporation a citizen of every state it passes through, within the meaning of the jurisdiction clause of the constitution of the United States. *St. Joseph, etc., R. Co. v. Steele*, 167 U. S. 659, 663, 42 L. Ed. 315.

**65. Grant of powers by one state to corporation of another state.**—*Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 296, 30 L. Ed. 83; *Railroad Co. v. Harris*, 12 Wall. 65, 20 L. Ed. 354; *Goodlett v. Louisville, etc., Railroad*, 122 U. S. 391, 30 L. Ed. 1230.

In *Goodlett v. Louisville, etc., Railroad*, 122 U. S. 391, 30 L. Ed. 1230, it was held that the act of the legislature of Tennessee giving legislative sanction to the Louisville and Nashville Railroad, a corporation under the laws of Kentucky, to exert its corporate powers in the state of Tennessee, did not create a new corporation.

**66. Actual new incorporation.**—*St. Louis, etc., R. Co. v. James*, 161 U. S. 545, 565, 40 L. Ed. 802; *Louisville, etc., R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 43 L. Ed. 1081; *Southern R. Co. v. Allison*, 190 U. S. 326, 338, 47 L. Ed. 1078; *Memphis, etc., R. Co. v. Alabama*, 107 U. S. 581, 27 L. Ed. 518; *Martin v. Baltimore, etc., R. Co.*, 151 U. S. 673, 677, 38 L. Ed. 311; *Riverdale Cotton Mills v. Alabama, etc., Mfg. Co.*, 198 U. S. 188, 199, 49 L. Ed. 1008.

"To make such a company a corporation of another state the language used must imply creation or adoption in such form as to confer the power usually exercised over corporations by the state, or by the legislature, and such allegiance as a state corporation owes to its creator. The mere grant of privileges or powers to it as an existing corporation, without more, does not do this, and does not make it a citizen of the state conferring such powers." *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 296, 30 L. Ed. 83. See, generally, the title CORPORATIONS.

A corporation endued with the capacities and faculties it possesses by the co-operating legislation of two states, cannot have one and the same legal being in both states. Neither state could confer



(bbb) *Joinder of the Two Corporations as Parties.*—The federal courts have no jurisdiction, on the ground of diverse citizenship of a suit in which a corporation created under the laws of two states, sues, or is sued by, a citizen of one of the states creating it, as a corporation of both states; that is where both corporations are plaintiffs or defendants, and the other party is a citizen of the state of one of the corporations.<sup>67</sup>

eee. *Consolidation of Corporations of Different States.*—Corporations created by two or more states, though joined in their interests, in the operation of their roads, in the issue of their stock, and in the division of their profits, so as practically to be a single corporation, do not lose their identity; and each one has its existence and its standing in the federal courts only by virtue of the legislation of the state by which it is created. The union of name, of officers, of business and of property does not change their distinctive character as separate corporations.<sup>68</sup>

fff. *Suits by Stockholders on Behalf of Corporation.*—The subject of suits in federal courts by stockholders on behalf of the corporation, on the ground of

on it a corporate existence in the other, nor add to or diminish the powers to be there exercised. *Ohio, etc., R. Co. v. Wheeler*, 1 Black 286, 17 L. Ed. 130.

A citizen of Illinois may sue in a federal court of Wisconsin a corporation organized under both the laws of Wisconsin and Illinois. *Railway Co. v. Whitton*, 13 Wall. 270, 283, 20 L. Ed. 571, where it is said that this doctrine is supported by *Ohio, etc., R. Co. v. Wheeler*, 1 Black 286, 17 L. Ed. 130.

A Tennessee railroad corporation was made a corporation of Alabama in the following manner: The company was required to open books in that state for the subscription of stock in the capital of the corporation so as to afford the citizens thereof an opportunity to take stock to a certain amount. The Alabama act also provided that the company should at the first meeting of the stockholders designate a time when and a place or places where for the convenience of the citizens of the state who might be stockholders, an election for directors should be held, notice of which was to be given in the newspapers; and elections for directors were required to be held at the same time both in Alabama and Tennessee. It was held that by reason of the peculiar language used in the act there was a separate original Alabama corporation which was not subject to suit in the federal courts by a citizen of Alabama. *Memphis, etc., R. Co. v. Alabama*, 107 U. S. 581, 27 L. Ed. 518, explained in *Southern R. Co. v. Allison*, 190 U. S. 326, 337, 47 L. Ed. 1078.

**Acceptance of charter by corporation.**—"In a case where the corporation already exists, even if adopted by the law of another state and invested with full corporate powers, it does not thereby become such new corporation of another state, until it does some act which signifies its acceptance of this legislation and its purpose to be governed by it." *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 296, 30 L. Ed. 83.

**67. Joinder of the two corporations as parties.**—*Ohio, etc., R. Co. v. Wheeler*, 1 Black 286, 17 L. Ed. 130; *St. Joseph, etc., R. Co. v. Steele*, 167 U. S. 659, 663, 42 L. Ed. 315.

The two corporations deriving their powers from distinct sovereignties, and exercising them within distinct limits, cannot unite as plaintiffs in a suit in a court of the United States against a citizen of either of the states which chartered them. *Ohio, etc., R. Co. v. Wheeler*, 1 Black 286, 17 L. Ed. 130; *St. Joseph, etc., R. Co. v. Steele*, 167 U. S. 659, 663, 42 L. Ed. 315.

**68. Consolidation of corporations of different states.**—*Nashua, etc., R. Corp. v. Boston, etc., R. Corp.*, 136 U. S. 356, 382, 34 L. Ed. 363. See, also, *Muller v. Dows*, 94 U. S. 444, 24 L. Ed. 207.

However closely two corporations of different states may unite their interests, and though even the stockholders of the one may become the stockholders of the other and their business be conducted by the same directors, the separate identity of each, as a corporation of the state by which it was created, and as a citizen of that state, is not thereby lost. *Nashua, etc., R. Corp. v. Boston, etc., R. Corp.*, 136 U. S. 356, 375, 34 L. Ed. 363.

The union or consolidation of a corporation created by the laws of New Hampshire, with another corporation of the same name organized under the laws of Massachusetts, does not extinguish or modify its character as a citizen of New Hampshire, or give it any such additional citizenship in Massachusetts as to defeat its right to go into the circuit of the United States in that district. *Nashua, etc., R. Corp. v. Boston, etc., R. Corp.*, 136 U. S. 356, 381, 34 L. Ed. 363.

And a corporation created by the laws of Iowa, although consolidated with another of the same name in Missouri, under the authority of a statute of each state, is, nevertheless, in Iowa, a corporation existing there under the laws of that state alone. *Muller v. Dows*, 94 U. S. 444, 24 L. Ed. 207.

diverse citizenship of the parties, and the operation and effect of the 94th equity rule of practice of the United States courts, in such cases, is treated in another title.<sup>69</sup>

bb. *Municipal Corporations*.—A municipal corporation created under the laws of a state with power to sue and be sued and to incur obligations is to be deemed a citizen of that state for purposes of suit by or against it in the courts of the United States.<sup>70</sup>

cc. *Counties and County Boards*.—A county,<sup>71</sup> or county board of supervisors,<sup>72</sup> may sue, or be sued by, citizens of a different state from that by which it was created, in the federal courts.

dd. *National Banks*.—See post, "Suits by or against National Banks," VII, C, 4, b, (1), (g).

ee. *Associations*.—Neither a voluntary association of persons, nor an association into a body politic, created by law, is a citizen of a state within the meaning of the constitution or statutes conferring jurisdiction on the United States courts in suits between citizens of different states.<sup>73</sup>

ff. *Joint-Stock Companies*.—A joint company organized under the laws of a state is not a citizen of the state within the meaning of the constitution or statutes relating to the jurisdiction of the federal courts, unless it is in fact a corporation.<sup>74</sup>

**69. Suits by stockholder on behalf of corporation.**—See the title STOCK AND STOCKHOLDERS.

**70. Municipal corporations.**—*Loeb v. Columbia Township Trustees*, 179 U. S. 472, 485, 45 L. Ed. 280; *Cowles v. Mercer County*, 7 Wall. 118, 19 L. Ed. 86.

**71. Counties.**—*Cowles v. Mercer County*, 7 Wall. 118, 121, 19 L. Ed. 86, approved in *Lincoln County v. Luning*, 133 U. S. 529, 531, 33 L. Ed. 766.

Because a county is an integral part of the state does not, under the eleventh amendment of the federal constitution exempt it from being sued in the federal circuit court. *Lincoln County v. Luning*, 133 U. S. 529, 530, 32 L. Ed. 766. See the titles CONSTITUTIONAL LAW, ante, p. 1; STATE.

**72. Board of supervisors of county.**—*Cowles v. Mercer County*, 7 Wall. 118, 121, 19 L. Ed. 86.

"In *Cowles v. Mercer County*, 7 Wall. 118, 122, 19 L. Ed. 86, this court said: 'It is enough for this case that we find the board of supervisors (of the county) to be a corporation authorized to contract for the county. The power to contract with citizens of other states implies liability to suit by citizens of other states, and no statute limitation of suability can defeat a jurisdiction given by the constitution.'" *Loeb v. Columbia Township Trustees*, 179 U. S. 472, 485, 45 L. Ed. 280, citing *Lincoln County v. Luning*, 133 U. S. 529, 33 L. Ed. 766.

**73. Associations.**—*Lafayette Ins. Co. v. French*, 18 How. 404, 405, 15 L. Ed. 451; *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449, 44 L. Ed. 842.

"The rule that for purposes of jurisdiction and within the meaning of the clause of the constitution extending the judicial powers of the United States to controversies between citizens of different states, a corporation was to be deemed a citizen

of the state creating it, has been so long recognized and applied that it is not now to be questioned. No such rule, however, has been applied to partnership associations although such associations may have some of the characteristics of a corporation. When the question relates to the jurisdiction of a circuit court of the United States as resting on the diverse citizenship of the parties, we must look in the case of a suit by or against a partnership association to the citizenship of the several persons composing such association." *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449, 456, 44 L. Ed. 842.

"In *Lafayette Ins. Co. v. French*, 18 How. 404, 405, 15 L. Ed. 451, which was an action brought by citizens of Ohio in the circuit court of the United States for the district of Indiana, the declaration described the defendant as the 'Lafayette Insurance Company, a citizen of the state of Indiana.' This court said: 'This averment is not sufficient to show jurisdiction. It does not appear from it that the Lafayette Insurance Company is a corporation; or if it be such, by the law of what state it was created. The averment that the company is a citizen of the state of Indiana can have no sensible meaning attached to it. This court does not hold that either a voluntary association of persons, or an association into a body politic, created by law, is a citizen of a state within the meaning of the constitution. And, therefore, if the defective averment in the declaration had not been otherwise supplied, the suit must have been dismissed.'" *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449, 454, 44 L. Ed. 842.

**74. Joint-stock companies.**—*Chapman v. Barney*, 129 U. S. 677, 32 L. Ed. 800; *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449, 454, 44 L. Ed. 842; *Thomas v. Board of Trustees*, 195 U. S. 207, 212, 49 L. Ed. 160.

gg. *Partnerships*.—The fact that a partnership is engaged in business in a state other than that of the plaintiff, is not sufficient to give the federal courts jurisdiction of a suit against it, where one or more members of the firm are citizens of the same state with the plaintiff.<sup>75</sup>

hh. *Unincorporated Boards*.—An unincorporated board of trustees of a state university which, under the state laws, has power to sue and be sued as a collective body, and against which a judgment is binding, may be sued in the federal courts by citizens of another state, providing the individual members of the board are citizens of the state from which the board derives its powers.<sup>76</sup>

(i) *Suits by or against Persons Acting in Representative Capacity*—aa. *In General*.—In suits by or against persons acting in a representative capacity, the representatives stand upon their own citizenship without regard to the citizenship of the persons whom they represent.<sup>77</sup>

bb. *Executors and Administrators*.—Suits can be maintained in the circuit court by executors or administrators if they are citizens of a different state from the party sued, on the ground that they are the real parties in interest, and succeed to all the rights of the testator or intestate by operation of law. And it makes no difference that the testator or intestate was a citizen of the same state with the defendants, and could not, if alive, have sued in the federal courts; nor is the status of the parties affected by the fact that the creditors and legatees of the decedent are citizens of the same state with the defendants.<sup>78</sup> Nor is the right of an administrator to sue or be sued in the federal courts affected by the fact that at the time of his appointment he was a citizen of the same state as the other party to the suit, where he is a citizen of a different state at the time when the suit is brought.<sup>79</sup> But the general rule has no application where the executor is merely a formal party.<sup>80</sup>

**75. Actions against partners.**—Raphael v. Trask, 194 U. S. 272, 48 L. Ed. 973; Great Southern Fire Proof Hotel Co. v. Jones, 177 U. S. 449, 458, 44 L. Ed. 842; Thomas v. Board of Trustees, 195 U. S. 207, 212, 49 L. Ed. 160.

**76. Unincorporated board having power to sue and be sued.**—Thomas v. Board of Trustees, 195 U. S. 207, 217, 49 L. Ed. 160 (where it was held that it was not necessary to bring the individual members of the board before the court as defendants).

**77. Suits by or against persons acting in representative capacity.**—Mexican Cent. R. Co. v. Eckman, 187 U. S. 429, 434, 47 L. Ed. 245; New Orleans v. Gaines, 138 U. S. 595, 34 L. Ed. 1102.

"Representatives may stand upon their own citizenship in the federal courts irrespective of the citizenship of the persons whom they represent—such as executors, administrators, guardians, trustees, receivers, etc." Mexican Cent. R. Co. v. Eckman, 187 U. S. 429, 434, 47 L. Ed. 245; New Orleans v. Gaines, 138 U. S. 595, 34 L. Ed. 1102.

**78. Executors and administrators.**—Coal Co. v. Blatchford, 11 Wall. 172, 20 L. Ed. 179; New Orleans v. Gaines, 138 U. S. 595, 34 L. Ed. 1102; Rice v. Houston, 13 Wall. 66, 67, 20 L. Ed. 484; Chappedelaine v. Dechenaux, 4 Cranch 306, 2 L. Ed. 629; Browne v. Strode, 5 Cranch 303, 3 L. Ed. 108; Childress v. Emory, 8 Wheat. 642, 669, 5 L. Ed. 705; McNutt v. Bland, 2 How. 1, 15, 11 L. Ed. 159; Green v. Creighton, 23 How. 90, 16 L. Ed. 419; Continental Ins. Co. v. Rhoads, 119 U.

S. 237, 30 L. Ed. 380; Sere v. Pitot, 6 Cranch 332, 336, 3 L. Ed. 240; Amory v. Amory, 95 U. S. 186, 24 L. Ed. 428. See, also, Knapp v. Railroad Co., 20 Wall. 117, 22 L. Ed. 328.

If the executors and administrators suing for the benefit of their decedent are personally qualified by their citizenship to bring suit in the courts of the United States, the jurisdiction is not defeated by the fact that the parties whom they represent may be disqualified; and if they are not personally qualified by their citizenship, the courts of the United States will not entertain jurisdiction, although the parties they represent may be qualified. Coal Co. v. Blatchford, 11 Wall. 172, 20 L. Ed. 179.

**79. Removal of administrator after appointment.**—Rice v. Houston, 13 Wall. 66, 20 L. Ed. 484.

A citizen of one state getting letters of administration on the estate of a decedent there, its citizen also, and afterwards removing to another state, and becoming a citizen of it, may sue in the circuit court of the first state, there being nothing in the laws of that state forbidding an administrator to remove from the state. Rice v. Houston, 13 Wall. 66, 20 L. Ed. 484.

**80. Executor merely a formal party.**—The jurisdiction of the circuit court is not defeated by the fact that with the principal defendant are joined, as nominal parties the executors of a deceased trustee, citizens of the same state as the complainant, to perform the ministerial act



cc. *Guardians*.—Where an action is brought in the federal courts by a guardian on behalf of his ward, the citizenship of the guardian, and not that of the ward, determines the jurisdiction.<sup>81</sup>

dd. *Trustees*.—In suits by or against persons acting as trustees for others, the jurisdiction of the federal courts upon the ground of diversity of citizenship of the parties is dependent upon the citizenship of the trustee rather than that of the beneficiary.<sup>82</sup>

ee. *Persons Taking by Subrogation*.—Persons subrogated to the rights of others by the rules of equity stand upon their own citizenship in the federal courts, irrespective of that of the persons to whose rights they are subrogated.<sup>83</sup>

(j) *Suits by or against Husband and Wife*.—Since a husband and wife cannot be citizens of different states so long as the marriage relation continues, a suit for divorce will not lie in the federal courts on the ground that the parties are citizens of different states.<sup>84</sup>

(k) *Suits by Purchasers or Transferees*—aa. *Real and Bona Fide Transfers or Conveyances*—(aa) *Conveyances of Real Estate*.—It is well settled that a bona fide purchaser of real estate may bring a suit with respect thereto in the federal court against a citizen of a different state, although his vendor could not have brought such a suit,<sup>85</sup> and this is true irrespective of the motive which

of conveying title, in case the power to do so is vested in them by the laws of the state. *Walden v. Skinner*, 101 U. S. 577, 25 L. Ed. 963.

81. *Guardians*.—*Mexican Cent. R. Co. v. Eckman*, 187 U. S. 429, 434, 47 L. Ed. 245; *New Orleans v. Gaines*, 138 U. S. 595, 34 L. Ed. 1102. See, generally, the title GUARDIAN AND WARD.

If in the state of the forum the general guardian has the right to bring suit in his own name as such guardian, and does so, he is to be treated as the party plaintiff so far as federal jurisdiction is concerned, even though suit might have been instituted in the name of the ward by guardian ad litem or next friend. *Mexican Cent. R. Co. v. Eckman*, 187 U. S. 429, 434, 47 L. Ed. 245.

82. *Trustee*.—*New Orleans v. Gaines*, 138 U. S. 595, 34 L. Ed. 1102; *Dodge v. Tulleys*, 144 U. S. 451, 456, 36 L. Ed. 501; *Manhattan Life Ins. Co. v. Broughton*, 109 U. S. 121, 125, 27 L. Ed. 878; *Thayer v. Life Ass'n*, 112 U. S. 717, 28 L. Ed. 864; *Coal Co. v. Blatchford*, 11 Wall. 172, 20 L. Ed. 179; *Knapp v. Railroad Co.*, 20 Wall. 117, 22 L. Ed. 328.

The fact that the beneficiary in a trust deed may be a citizen of the same state as the grantor, would not, if the trustee is a citizen of a different state, defeat the jurisdiction of the federal court of a suit to enforce the trust deed. *Dodge v. Tulleys*, 144 U. S. 451, 456, 36 L. Ed. 501.

The payee named in a policy of life insurance was a citizen of New Jersey, and the life insurance company was a citizen of New York. A, a citizen of New Jersey was appointed by a court as the trustee for the payee in the place of B, who was formerly the trustee, and who was a citizen of New York. It was held that the circuit court of New York had jurisdiction of a suit by A against the company, and that the circumstance that one object

in having A appointed was to enable suit to be brought in the United States courts was not sufficient to require or justify the construction that he was improperly or collusively made a party for the purpose of creating a case cognizable by the federal courts. *Manhattan Life Ins. Co. v. Broughton*, 109 U. S. 121, 125, 27 L. Ed. 878.

Citizens of West Virginia conveyed to a trustee certain real estate to secure the payment of several notes executed by them to a life insurance company, a corporation under the laws of Missouri. Subsequently the life insurance company was dissolved by a decree of the court of the state of Missouri and its assets placed in the hands of the superintendent of the insurance department of the state. Upon the trustee's proceeding to advertise the property for sale, a bill was filed by the grantors to enjoin the sale, the insurance company, the superintendent of insurance of the state of Missouri, and the trustee being made parties defendant. It was held that as the object of the suit was to prevent the trustee from selling the property under the power given by the trustee, and the relief asked could not have been granted without his being before the court, and as it was not averred that he was a citizen of a different state from that of the grantors, the federal courts had no jurisdiction. *Thayer v. Life Ass'n*, 112 U. S. 717, 28 L. Ed. 864.

83. *Persons taking by subrogation*.—*New Orleans v. Gaines*, 138 U. S. 595, 606, 34 L. Ed. 1102.

84. *Husband and wife*.—*De La Rama v. De La Rama*, 201 U. S. 303, 50 L. Ed. 765. See the title DIVORCE AND ALIMONY.

85. *Suit by vendee of real estate*.—*Dickerman v. Northern Trust Co.*, 176 U. S. 181, 191, 44 L. Ed. 423; *Jones v. League*, 18 How. 76, 81, 15 L. Ed. 263; *Smith v. Kernochen*, 7 How. 198, 12 L. Ed. 660;

actuated the parties in making the conveyance.<sup>86</sup>

(bb) *Transfer of Notes and Mortgages*.—The transfer of negotiable notes and mortgages for a valuable consideration, which terminates the interest of the transferor, although made for the purpose of permitting the transferee to sue in the federal courts, does not defeat the jurisdiction, where the transaction was in fact a bona fide sale.<sup>87</sup>

(cc) *Transfer of Judgments*.—If the transfer of a judgment is absolute and the judgment creditors actually part with all their interest for good consideration, the mere fact that one of the motives of the purchase may have been to enable the purchaser to bring suit in the United States court, does not defeat the jurisdiction.<sup>88</sup>

bb. *Colorable Transfers or Conveyances*.—It is well settled that a mere colorable conveyance of property, for the purpose of vesting title in a nonresident and enabling him to bring suit in a federal court, will not confer jurisdiction.<sup>89</sup> This rule has been applied to colorable conveyances or transfers of real

McDonald v. Smalley, 1 Pet. 620, 7 L. Ed. 287; Lehigh Min. & Mfg. Co. v. Kelly, 160 U. S. 327, 336, 40 L. Ed. 444; Barney v. Baltimore, 6 Wall. 280, 18 L. Ed. 825; Crawford v. Neal, 144 U. S. 585, 36 L. Ed. 552; South Dakota v. North Carolina, 192 U. S. 286, 311, 48 L. Ed. 448.

It cannot be alleged that a citizen of one state, having title to lands in another state, is disabled from suing for those lands in the courts of the United States, by the fact that he derives his title from a citizen of the state in which the lands lie. McDonald v. Smalley, 1 Pet. 620, 7 L. Ed. 287.

The conveyance must be made bona fide, so that the prosecution of the suit shall not be for the benefit of the grantor. Jones v. League, 18 How. 76, 81, 15 L. Ed. 263.

**86. Motive of making conveyance immaterial.**—Dickerman v. Northern Trust Co., 176 U. S. 181, 191, 44 L. Ed. 423; Jones v. League, 18 How. 76, 81, 15 L. Ed. 263; Smith v. Kernochen, 7 How. 198, 12 L. Ed. 660; McDonald v. Smalley, 1 Pet. 620, 7 L. Ed. 287; Lehigh Min. & Mfg. Co. v. Kelly, 160 U. S. 327, 336, 40 L. Ed. 444; Barney v. Baltimore, 6 Wall. 280, 18 L. Ed. 825; Crawford v. Neal, 144 U. S. 585, 36 L. Ed. 552; South Dakota v. North Carolina, 192 U. S. 286, 311, 48 L. Ed. 448.

"If the conveyance appear to be a real transaction, the court will not, in deciding upon the question of jurisdiction, inquire into the motives which actuated the parties in making the conveyance. McDonald v. Smalley, 1 Pet. 620, 7 L. Ed. 287; Smith v. Kernochen, 7 How. 198, 12 L. Ed. 660; Barney v. Baltimore, 6 Wall. 280, 18 L. Ed. 825; Farmington v. Pillsbury, 114 U. S. 138, 29 L. Ed. 114; Crawford v. Neal, 144 U. S. 585, 36 L. Ed. 552." Dickerman v. Northern Trust Co., 176 U. S. 181, 191, 44 L. Ed. 423.

M., a citizen of Ohio, apprehensive of his title to lands in that state could not be maintained in the state court, and being indebted to the plaintiff, a citizen of Alabama, to the amount of \$1,110, offered to sell and convey to him the land, in

payment of the debt, stating in the letter by which the offer was made, that the title would most probably be maintained in the courts of the state; the property was estimated at more than the debt, but in consequence of the difficulties attending the title, he was willing to convey it for the debt, which was done; the plaintiff in error, after the land was conveyed to him, gave his bond to make a quitclaim title to the land, on condition of receiving \$1,100. Held, that the title acquired by the purchase, gave jurisdiction to the court of the United States. McDonald v. Smalley, 1 Pet. 620, 7 L. Ed. 287.

**87. Suits by transferee of notes and mortgages.**—Cross v. Allen, 141 U. S. 528, 533, 35 L. Ed. 843.

The fact that such a transfer was made with the purpose of creating an ownership which would cut off anticipated defenses is not of itself enough to defeat the jurisdiction of the federal courts. The purpose of the transfer must have been to create federal jurisdiction in a case not otherwise cognizable in the federal courts. Lanier v. Nash, 121 U. S. 404, 410, 30 L. Ed. 947.

**88. Suit by transferee of judgment.**—Crawford v. Neal, 144 U. S. 585, 593, 36 L. Ed. 552.

**89. Colorable transfers or conveyances in general.**—Dickerman v. Northern Trust Co., 176 U. S. 181, 191, 44 L. Ed. 423; Provident Sav., etc., Society v. Ford, 114 U. S. 635, 641, 29 L. Ed. 261; South Dakota v. North Carolina, 192 U. S. 286, 311, 48 L. Ed. 448.

"Where an assignment of a cause of action is colorably made for the purpose of giving jurisdiction to the United States court, § 5 of the act of congress of March 3, 1875, relating to removals, has now given to the circuit court power to dismiss or remand the cause at any time when the fact is made to appear. And by analogy to this law, it may, perhaps, be a good defense to an action in a state court, to show that a colorable assignment has been made to deprive the United States court of jurisdiction; but, as before said, it would be a defense to the

property,<sup>90</sup> negotiable paper, such as notes, bills and coupon bonds,<sup>91</sup> and

action, and not a ground of removing that cause into the federal court." *Provident Sav., etc., Society v. Ford*, 114 U. S. 635, 641, 29 L. Ed. 261.

**90. Real estate.**—*Dickerman v. Northern Trust Co.*, 176 U. S. 181, 191, 44 L. Ed. 423; *Farmington v. Pillsbury*, 114 U. S. 138, 143, 29 L. Ed. 114; *Smith v. Kernochen*, 7 How. 198, 12 L. Ed. 660; *Jones v. League*, 18 How. 76, 15 L. Ed. 263; *Maxfield v. Levy*, 4 Dall. 330, 1 L. Ed. 854; *Barney v. Baltimore*, 6 Wall. 280, 18 L. Ed. 825; *South Dakota v. North Carolina*, 192 U. S. 286, 311, 48 L. Ed. 448; *Lake County Comm'rs v. Dudley*, 173 U. S. 243, 251, 43 L. Ed. 684; *Cashman v. Amador, etc., Canal Co.*, 118 U. S. 58, 30 L. Ed. 72; *Lehigh Min. & Mfg. Co. v. Kelly*, 160 U. S. 327, 335, 40 L. Ed. 444; *Little v. Giles*, 118 U. S. 596, 30 L. Ed. 269.

A colorable and collusive conveyance made without consideration for the purpose of giving jurisdiction to the United States circuit court, is not sufficient to sustain the jurisdiction. *Maxwell v. Levy*, 2 Dall. 381, 1 L. Ed. 424; *Maxfield v. Levy*, 4 Dall. 330, 1 L. Ed. 854; *Lehigh Min. & Mfg. Co. v. Kelly*, 160 U. S. 327, 335, 40 L. Ed. 444; *Little v. Giles*, 118 U. S. 596, 30 L. Ed. 269.

A, an alien residing in California, whose land it was claimed was injured by debris thrown on it in the working of certain mines, entered into an agreement with a county of that state by which it was agreed that A should bring suit in the United States circuit court to enjoin the further working of the mines in a manner thus detrimental alike to the interests of A and the county. The county agreed to pay all expenses of the litigation and A agreed not to compromise or settle the suit without the consent of the county. The agreement recited that the suit was brought by A in order that the circuit court might have jurisdiction. It was held that it was a case in which the parties were collusively made for the purpose of creating a case cognizable in the federal courts, as the real and substantial parties to it were the county and the mining company, both corporations created under the laws of California. *Cashman v. Amador, etc., Canal Co.*, 118 U. S. 58, 30 L. Ed. 72.

A bill in equity for the partition of real estate and for an account of rents and profits, was filed in the circuit court of the United States for the district of Maryland, by a citizen of Delaware, owning a share in the estate, against citizens of Maryland, owning other shares therein, and to whom the owners of the remaining shares, being citizens of the District of Columbia, and not of any state, and therefore not authorized to sue in the circuit court of the United States, had conveyed their shares without consideration, under an agreement to reconvey upon request, and for the sole purpose

of giving jurisdiction to the federal courts. The bill was dismissed, because the grantors were necessary parties to the suit, and because their conveyance, not transferring their real interests to the other parties, was a fraud upon the court. *Barney v. Baltimore*, 6 Wall. 280, 18 L. Ed. 825.

Several citizens of Nebraska, purchased from the heirs of a decedent all of their interest in certain lands of the decedent, which his wife had conveyed away, as her own, but which, it was claimed had reverted to the heirs, under a clause of the will providing therefor in the event of the widow's marrying again. These citizens of Nebraska then conveyed to a citizen of Iowa their interest in the said lands, for no actual consideration paid and for the purpose, as the evidence showed, to give the federal courts jurisdiction of a suit to try the title. It was held that the federal court was without jurisdiction, as the parties were collusively made. *Little v. Giles*, 118 U. S. 596, 607, 30 L. Ed. 269.

**91. Negotiable instruments.**—*Manufacturing Co. v. Bradley*, 105 U. S. 175, 180, 26 L. Ed. 1034; *Bernards Township v. Stebbins*, 109 U. S. 341, 355, 27 L. Ed. 956; *Farmington v. Pillsbury*, 114 U. S. 138, 29 L. Ed. 114; *Williams v. Nottawa*, 104 U. S. 209, 26 L. Ed. 719; *Hartog v. Memory*, 116 U. S. 588, 591, 29 L. Ed. 725; *South Dakota v. North Carolina*, 192 U. S. 286, 311, 48 L. Ed. 448; *Lake County Comm'rs v. Dudley*, 173 U. S. 243, 251, 43 L. Ed. 684; *Waite v. Santa Cruz*, 184 U. S. 302, 325, 46 L. Ed. 552; *Metcalf v. Watertown*, 128 U. S. 586, 32 L. Ed. 543.

The holders of promissory notes or of foreign or domestic bills of exchange, who are citizens of a state in which the decisions of the courts have been adverse to their interests, cannot by collusive transfers to citizens of other states create a case apparently cognizable in the courts of the United States, and have it prosecuted by their assignees in those tribunals for their benefit, in the hope of securing an adjudication in that jurisdiction more favorable to their interests. The courts of the United States were not created under the constitution for any such purpose. *Farmington v. Pillsbury*, 114 U. S. 138, 145, 29 L. Ed. 114.

Where coupons payable to bearer made by a corporation were transferred to a person without his knowledge and without his request, and only that he might represent the interests of the real owners, and he never requested the execution of a pretended bill of sale, nor heard of it being made until more than nine years after it was signed, and, notwithstanding the evasive character of his answers to questions, it was clear that his transferrers were the only real parties in interest and that his name was used for their benefit, it was held that the transfer was collusive and simulated for



judgments.<sup>92</sup>

(1) *Suits by Assignees*—aa. *Statutory Provisions Restricting Jurisdiction*.—Ever since the passage of the original judiciary act, there has existed a statute which restricted the rights of assignees to sue in the federal courts, upon the ground of diversity of citizenship of the parties, to cases where their assignors could have sued in a like manner, subject to certain exceptions. The act of 1789 excepted foreign bills of exchange;<sup>93</sup> the act of 1875 excepted bills of exchange and promissory notes negotiable by the law merchant;<sup>94</sup> while the act of 1888 made the same exception as to foreign bills of exchange as that contained in the original judiciary act but limited the jurisdiction even more than that act did, by a provision restricting the jurisdiction to the federal courts in suits by holders of paper payable to bearer to cases where such paper was made by a corporation.<sup>95</sup>

the purpose of committing a fraud upon the jurisdiction of the circuit court. *Lake County Comm'rs v. Dudley*, 173 U. S. 243, 254, 43 L. Ed. 684.

Bonds to which coupons were attached were bought as early as 1871 or 1872 by citizens of the state of Maine, who held and owned the bonds themselves when suit was brought. Their purchases were made while a suit was pending in the courts of the state to test the validity of the bonds. On the 27th of August, 1878, the highest court of the state decided in effect that the bonds were inoperative and void, for want of constitutional power in the village corporation to issue them. Almost two years after this decision these coupons, to the amount of \$7,922, were collected from various holders of bonds, all residents of the village of Farmington and citizens of Maine, and transferred, separate from the bonds, to the plaintiff, a citizen of Massachusetts, under an arrangement by which the plaintiff gave to the agent of the holders of the coupons his nonnegotiable promissory note for \$500, payable in two years from date, with interest, and agreed, "as a further consideration for said coupons," that if he succeeded in collecting the full amount thereof he would pay the agent, as soon as the money was got from the corporation, fifty per cent. of the net amount collected above the \$500. It was held that the federal court was without jurisdiction. *Farmington v. Pillsbury*, 114 U. S. 138, 145, 29 L. Ed. 114.

"The decision in *Williams v. Nottawa*, 104 U. S. 209, 26 L. Ed. 719, establishes that the circuit court of the United States cannot, since the act of 1875, entertain a suit upon municipal bonds payable to bearer, the real owners of which have transferred them to the plaintiffs of record for the sole purpose of suing thereon in the courts of the United States for the benefit of such owners, who could not have sued there in their own names, either by reason of their being citizens of the same state as the defendant, or by reason of the insufficient value of their claims. The principle of that decision is equally applicable to suits in equity to assert equitable rights under such bonds."

*Bernards Township v. Stebbins*, 109 U. S. 341, 355, 27 L. Ed. 956.

**Transfer for collection.**—That the plaintiff was invested with the legal title to the bonds and coupons simply for purposes of collection does not, it seems, defeat the jurisdiction of the federal courts, where the object of the transfer was not to make a case cognizable in the federal courts which otherwise would not have been triable there. *Waite v. Santa Cruz*, 184 U. S. 302, 325, 46 L. Ed. 552.

**92. Judgments.**—*Crawford v. Neal*, 144 U. S. 585, 593, 36 L. Ed. 552.

**93. Act of 1789.**—*Turner v. Bank*, 4 Dall. 8, 1 L. Ed. 718; *McNutt v. Bland*, 2 How. 1, 15, 11 L. Ed. 159; *Smith v. Railroad Co.*, 99 U. S. 398, 25 L. Ed. 437; *Coffee v. The Planters' Bank*, 13 How. 183, 187, 14 L. Ed. 105; *Dromgoole v. Farmers', etc., Bank*, 2 How. 241, 243, 11 L. Ed. 252; *Gibson v. Chew*, 16 Pet. 315, 10 L. Ed. 977; *Deshler v. Dodge*, 16 How. 622, 14 L. Ed. 1084; *Ober v. Gallagher*, 93 U. S. 199, 205, 23 L. Ed. 829; *Sere v. Pitot*, 6 Cranch 332, 3 L. Ed. 240; *Maxfield v. Levy*, 4 Dall. 330, 1 L. Ed. 854; *Williams v. Nottawa*, 104 U. S. 209, 210, 26 L. Ed. 719; *Walker v. Powers*, 104 U. S. 245, 248, 26 L. Ed. 729; *Thompson v. Perrine*, 106 U. S. 589, 591, 27 L. Ed. 298; *Chickaming v. Carpenter*, 106 U. S. 663, 666, 27 L. Ed. 307; *New York Guaranty Co. v. Memphis Water Co.*, 107 U. S. 205, 27 L. Ed. 484; *Corbin v. Black Hawk County*, 105 U. S. 659, 664, 26 L. Ed. 1136; *Claffin v. Commonwealth Ins. Co.*, 110 U. S. 81, 90, 28 L. Ed. 76; *Manhattan Life Ins. Co. v. Broughton*, 109 U. S. 121, 125, 27 L. Ed. 878.

**94. Act of 1875.**—*Thompson v. Perrine*, 106 U. S. 589, 591, 27 L. Ed. 298; *Chickaming v. Carpenter*, 106 U. S. 663, 666, 27 L. Ed. 307; *King Bridge Co. v. Otoe County*, 120 U. S. 225, 226, 30 L. Ed. 623.

**95. Act of 1888.**—*Waite v. Santa Cruz*, 184 U. S. 302, 324, 46 L. Ed. 552; *Lake County Comm'rs v. Dudley*, 173 U. S. 243, 43 L. Ed. 684; *New Orleans v. Quinlan*, 173 U. S. 191, 192, 43 L. Ed. 664; *North American Transp., etc., Co. v. Morrison*, 178 U. S. 262, 44 L. Ed. 1061; *Loeb v. Columbia Township Trustees*, 179 U. S. 472, 485, 45 L. Ed. 280; *Benjamin v.*

bb. *Object of Restriction*.—The purpose of the restriction as to suits by assignees was to prevent the making of assignments of choses in action for the purpose of giving jurisdiction to the federal court.<sup>96</sup>

cc. *Validity of Restriction*.—Courts created by statute can have no jurisdiction but such as the statute confers, and although the third article of the constitution of the United States says that the judicial power shall extend to controversies between citizens of different states, the act of congress restraining the circuit courts from taking cognizance of any suit to recover the contents of a chose in action brought by an assignee, when the original holder could not have maintained the suit, is not unconstitutional.<sup>97</sup>

dd. *Construction and Operation of Restrictive Statute*—(aa) *Applicable Both to Suits in Equity and Actions at Law*.—The provision restricting the jurisdiction of federal courts in suits by assignees to cases where the assignor could have sued in those courts, applies to bills in equity as well as to actions at law.<sup>98</sup>

(bb) *Who Are Assignees*—aaa. *"Assignee" Defined*.—The term "assignee" is the statute covers not merely persons to whom is technically transferred the contract in controversy, but any one who, by virtue of any transfer to him, can claim its beneficial interest.<sup>99</sup>

bbb. *General Assignee of Insolvent*.—A general assignee of the effects of an insolvent cannot sue in the federal courts, if his assignor could not have sued in those courts.<sup>1</sup>

ccc. *Purchaser at Judicial Sale*.—The purchaser of choses in action at a judicial sale made by authority of the probate court, is an assignee within the meaning of the statute.<sup>2</sup>

ddd. *Persons Taking by Subrogation*.—Persons subrogated to the rights of others by the rules of equity are not assignees within the meaning of the statute.<sup>3</sup>

New Orleans, 169 U. S. 161, 163, 42 L. Ed. 700; Kolze v. Hoadley, 200 U. S. 76, 84, 50 L. Ed. 377; Blacklock v. Small, 127 U. S. 96, 32 L. Ed. 70; Holmes v. Goldsmith, 147 U. S. 150, 37 L. Ed. 118; Glass v. Concordia Parish Police Jury, 176 U. S. 207, 209, 44 L. Ed. 436; Emsheimer v. New Orleans, 186 U. S. 33, 43, 46 L. Ed. 1042; Blair v. Chicago, 201 U. S. 400, 447, 50 L. Ed. 801; Mississippi Mills v. Cohn, 150 U. S. 202, 37 L. Ed. 1052; Ambler v. Eppinger, 137 U. S. 480, 34 L. Ed. 765; Metcalf v. Watertown, 128 U. S. 586, 32 L. Ed. 543; Brock v. Northwestern Fuel Co., 130 U. S. 341, 32 L. Ed. 905; Delaware County Comm'rs v. Diebold Safe, etc., Co., 133 U. S. 473, 33 L. Ed. 674; Parker v. Ormsby, 141 U. S. 81, 84, 35 L. Ed. 654; Shoecraft v. Bloxham, 124 U. S. 730, 31 L. Ed. 574; Mexican Nat. R. Co. v. Davidson, 157 U. S. 201, 204, 39 L. Ed. 672.

96. *Object of statute*.—Holmes v. Goldsmith, 147 U. S. 150, 160, 37 L. Ed. 118; Bushnell v. Kennedy, 9 Wall. 387, 393, 19 L. Ed. 736; Emsheimer v. New Orleans, 186 U. S. 33, 43, 46 L. Ed. 1042.

"It was obvious that numerous suits, by assignees, under assignments made for the express purpose of giving jurisdiction, would be brought in those courts if the right of assignees to sue was left unrestricted. It was to prevent that evil and to keep the jurisdiction of the national courts within just limits that the restriction was put into the act." Bushnell v. Kennedy, 9 Wall. 387, 393, 19 L. Ed. 736.

97. *Validity of statute*.—Holmes v. Goldsmith, 147 U. S. 150, 157, 37 L. Ed. 118; Sheldon v. Sill, 8 How. 441, 12 L. Ed. 1147; Turner v. Bank, 4 Dall. 8, 10, 1 L. Ed. 718; McIntire v. Wood, 7 Cranch 504, 506, 3 L. Ed. 420; Kendall v. United States, 12 Pet. 524, 616, 9 L. Ed. 1181; Cary v. Curtis, 3 How. 236, 245, 11 L. Ed. 570.

98. *Statute applies to suits in equity and actions at law*.—Bernards Township v. Stebbins, 109 U. S. 341, 353, 27 L. Ed. 956, citing Sheldon v. Sill, 8 How. 441, 12 L. Ed. 1147; Corbin v. Black Hawk County, 105 U. S. 659, 26 L. Ed. 1136.

99. *Assignee defined*.—Plant Investment Co. v. Jacksonville, etc., R. Co., 152 U. S. 71, 77, 38 L. Ed. 358. See, also, American Colortype Co. v. Continental Colortype Co., 188 U. S. 104, 47 L. Ed. 404.

1. *Assignee of insolvent*.—Sere v. Pitot, 6 Cranch 332, 3 L. Ed. 240. See, also, Corbin v. Black Hawk County, 105 U. S. 659, 666, 26 L. Ed. 1136; Glass v. Concordia Parish Police Jury, 176 U. S. 207, 209, 44 L. Ed. 436. But see Bushnell v. Kennedy, 9 Wall. 387, 393, 19 L. Ed. 736.

2. *Purchaser at judicial sale*.—Glass v. Concordia Parish Police Jury, 176 U. S. 207, 208, 44 L. Ed. 436.

3. *Persons entitled to chose in action by subrogation*.—New Orleans v. Gaines, 138 U. S. 595, 606, 34 L. Ed. 1102.

eee. *Executors and Administrators*.—The executors or administrators of a decedent may stand upon their own citizenship in the federal courts irrespective of the citizenship of the parties whom they represent, and may sue a citizen of a different state on a claim in favor of the estate in the federal courts, although the defendant is a citizen of the state of which the decedent was a citizen at the time of his death.<sup>4</sup>

fff. *Effect Where Nominal Assignee Is in Fact Payee*.—Where the nominal assignee or indorsee of commercial paper is in fact the payee, he may sue thereon in the United States courts, notwithstanding the disability of the nominal payee.<sup>5</sup> Thus where notes are made payable to a person as a matter of form merely, but really for the benefit of another person,<sup>6</sup> or where notes are made for the accommodation of a person,<sup>7</sup> the person advancing the money on them is

4. **Executors and administrators.**—*Childress v. Emory*, 8 Wheat. 642, 5 L. Ed. 705; *Chappedelaine v. Dechenaux*, 4 Cranch 306, 2 L. Ed. 629; *New Orleans v. Gaines*, 138 U. S. 595, 606, 34 L. Ed. 1102; *McNutt v. Bland*, 2 How. 1, 14, 11 L. Ed. 159; *Sere v. Pitot*, 6 Cranch 332, 336, 3 L. Ed. 240; *Florida v. Georgia*, 17 How. 478, 498, 15 L. Ed. 181; *Coal Co. v. Blatchford*, 11 Wall. 172, 175, 20 L. Ed. 179; *Holmes v. Goldsmith*, 147 U. S. 150, 161, 37 L. Ed. 118; *Bushnell v. Kennedy*, 9 Wall. 387, 391, 19 L. Ed. 736.

The courts of the United States have jurisdiction of suits by or against executors and administrators, if they are citizens of different states, etc., although their testators or intestates might not have been entitled to sue, or liable to be sued in those courts. *Childress v. Emory*, 8 Wheat. 642, 5 L. Ed. 705.

"The parties, executors, are, in the writ and declaration, averred to the citizens of different states; but it is not alleged, that their testators were citizens of different states; and the case has, therefore, been supposed to be affected by the 11th section of the judiciary act of 1789, c. 20. But that section has never been construed to apply to executors and administrators. They are the real parties in interest before the court, and succeed to all the rights of their testators, by operation of law, and no other persons are the representatives of the personalty, capable of suing and being sued. They are contradistinguished, therefore, from assignees, who claim by act of the parties. The point expressly adjudged in *Chappedelaine v. Dechenaux*, 4 Cranch 306, 2 L. Ed. 629, and, indeed, has not been seriously pressed on the present occasion." *Childress v. Emory*, 8 Wheat. 642, 668, 5 L. Ed. 705.

"They are contradistinguished, therefore, from assignees who claim by the act of the parties, and may sue in the federal courts in cases where the decedent could not." *McNutt v. Bland*, 2 How. 1, 14, 11 L. Ed. 159.

Where an assignment is by will, the restriction is not applicable to the representative of the decedent. *Holmes v. Goldsmith*, 147 U. S. 150, 161, 37 L. Ed. 118; *Bushnell v. Kennedy*, 9 Wall. 387, 19

L. Ed. 736; *Chappedelaine v. Dechenaux*, 4 Cranch 306, 308, 2 L. Ed. 629.

5. **Action by nominal indorsee who is in fact the payee.**—*Blair v. Chicago*, 201 U. S. 400, 50 L. Ed. 801; *Holmes v. Goldsmith*, 147 U. S. 150, 37 L. Ed. 118; *McMicken v. Webb*, 11 Pet. 25, 9 L. Ed. 618.

6. **Paper payable to person as matter of form, but for another's benefit.**—*Blair v. Chicago*, 201 U. S. 400, 50 L. Ed. 801; *McMicken v. Webb*, 11 Pet. 25, 9 L. Ed. 618.

An Illinois corporation executed a negotiable note to its treasurer, who transferred it to a citizen of another state, for money furnished directly to the Illinois corporation. It was held that notes made in this form payable to the treasurer, and indorsed before delivery by him, were notes of the Illinois corporation, that the indorsee was not in fact the assignee of the paper, and that the federal courts had jurisdiction. *Blair v. Chicago*, 201 U. S. 400, 50 L. Ed. 801.

A and B were in partnership as merchants in Louisiana, and at the dissolution of the firm B agreed to purchase one-half of the stock from A, and, after the dissolution of the firm, he and three other citizens of Louisiana executed a promissory note in payment of the same, payable to A and B. B had no interest in the note at all, as the payee thereof. In an action on the note in the United States courts by A, who was a citizen of the state of Ohio, it was contended that the court was without jurisdiction because B was in fact an assignor of the note and A an assignee within the meaning of the judiciary act. It was held that B. never had any interest in the note as payee and that the court therefore had jurisdiction. *McMicken v. Webb*, 11 Pet. 25, 9 L. Ed. 618.

7. **Paper made for accommodation of payee.**—*Holmes v. Goldsmith*, 147 U. S. 150, 37 L. Ed. 118.

A note was made by citizens of Oregon for the accommodation of another citizen of the same state, who indorsed it to the plaintiffs, citizens of the state of New York. In an action in the United States courts by the indorsee against the makers, it was contended that the plaintiffs could maintain their action against the makers



not, as to the makers, to be regarded as an assignee or indorsee, and where he and the makers are citizens of different states he may sue thereon in the federal courts, although the nominal payee is a citizen of the same state as the maker.

(cc) *To What Suits or Actions Restriction Applicable*—aaa. *Suits to Recover "Contents of Note or Chose in Action"*—(aaa) *"Contents" Defined*.—"The contents of any promissory note or other chose in action" were designed to embrace the rights the instrument conferred which were capable of enforcement by suit.<sup>8</sup>

(bbb) *"Chose in Action" Defined*.—The term "chose in action" is one of comprehensive import, and includes the infinite variety of contracts, covenants, and promises, which confer on one party a right to recover a personal chattel or a sum of money from another, by action.<sup>9</sup>

bbb. *Actions on Bills and Notes*—(aaa) *Actions by Assignee against Maker*—aaaa. *Under Act of 1789*.—Under the judiciary act of 1789, the circuit court of the United States had no jurisdiction of a suit on an inland bill of exchange or promissory note brought by the assignee against the principal debtor, unless it appeared that it could have been maintained in that court in the name of the original payee,<sup>10</sup> and under this act the indorsee of a negotiable promissory

by proving that the nominal indorser was not in reality such; that the note was made by the makers for his accommodation and as his sureties; that he was in legal effect the maker of the note; that he received the proceeds of the loan effected through the note and had no right of action against the nominal makers of the note; and hence that he could not be regarded as an assignor of a right of action against the makers within the true meaning of the judiciary act. It was held that the court had jurisdiction. *Holmes v. Goldsmith*, 147 U. S. 150, 37 L. Ed. 118.

The true meaning of the restriction is not disturbed by permitting parties to show that, notwithstanding the terms of the note, the payee was really a maker or original promisor and did not by his indorsement assign or transfer any right of action held by him against the accommodation makers. *Holmes v. Goldsmith*, 147 U. S. 150, 37 L. Ed. 118.

8. *What are suits to recover contents of note or chose in action*.—*Shoecraft v. Bloxham*, 124 U. S. 730, 31 L. Ed. 574; *Plant Investment Co. v. Jacksonville, etc., R. Co.*, 152 U. S. 71, 76, 38 L. Ed. 358; *New Orleans v. Benjamin*, 153 U. S. 411, 433, 38 L. Ed. 764; *Corbin v. Black Hawk County*, 105 U. S. 659, 26 L. Ed. 1136; *Kolze v. Hoadley*, 200 U. S. 76, 83, 50 L. Ed. 377.

A suit to recover the contents of a promissory note or other chose in action is a suit to recover the amount due upon such note, or the amount claimed to be due upon an account, personal contract, or other chose in action. *Sere v. Pitor*, 6 Cranch 332, 3 L. Ed. 240; *Deshler v. Dodge*, 16 How. 622, 14 L. Ed. 1084; *Bushnell v. Kennedy*, 9 Wall. 387, 19 L. Ed. 736; *Shoecraft v. Bloxham*, 124 U. S. 730, 31 L. Ed. 574; *Kolze v. Hoadley*, 200 U. S. 76, 82, 50 L. Ed. 377.

"As remarked by Mr. Justice Blatchford in *Corbin v. Black Hawk County*,

105 U. S. 659, 665, 26 L. Ed. 1136, 'the contents of a contract, as a chose in action, in the sense of § 629, are the rights created by it in favor of a party in whose behalf stipulations are made in it which he has a right to enforce in a suit founded on the contract; and a suit to enforce such stipulations is a suit to recover such contents.'" *New Orleans v. Benjamin*, 153 U. S. 411, 433, 38 L. Ed. 764.

9. *Chose in action defined*.—*Sheldon v. Sill*, 8 How. 441, 12 L. Ed. 1147; *Deshler v. Dodge*, 16 How. 622, 631, 14 L. Ed. 1084; *Mexican Nat. R. Co. v. Davidson*, 157 U. S. 201, 205, 39 L. Ed. 672.

"It is true, a deed or title for land does not come within this description. And it is true, also, that a mortgagee may avail himself of his legal title to recover in ejectment, in a court of law. Yet, even there, he is considered as having but a chattel interest, while the mortgagor is treated as the true owner." *Sheldon v. Sill*, 8 How. 441, 449, 12 L. Ed. 1147.

10. *Suits on inland bills and promissory notes*.—*Sheldon v. Sill*, 8 How. 441, 12 L. Ed. 1147; *Ober v. Gallagher*, 93 U. S. 199, 205, 23 L. Ed. 829; *Tredway v. Sanger*, 107 U. S. 323, 325, 27 L. Ed. 582; *Farmington v. Pillsbury*, 114 U. S. 138, 142, 29 L. Ed. 114; *Parker v. Ormsby*, 141 U. S. 81, 84, 35 L. Ed. 654; *Turner v. Bank*, 4 Dall. 8, 1 L. Ed. 718; *Montalet v. Murray*, 4 Cranch 46, 2 L. Ed. 545; *Gibson v. Chew*, 16 Pet. 315, 10 L. Ed. 977; *Coffee v. The Planners' Bank*, 13 How. 183, 14 L. Ed. 105; *Morgan v. Gay*, 19 Wall. 81, 22 L. Ed. 100; *Keary v. Farmers', etc., Bank*, 16 Pet. 88, 89, 10 L. Ed. 897; *Evans v. Gee*, 11 Pet. 80, 83, 9 L. Ed. 639; *United States Bank v. Moss*, 6 How. 31, 12 L. Ed. 331. \*

Under the act of 1789, the jurisdiction of the courts of the United States, in suits by assignees of choses in action, was confined within narrow limits, and there was comparatively little danger of col-

note, secured to the payee by a mortgage, could not sue in the courts of the United States to foreclose the mortgage, unless the mortgagee could.<sup>11</sup> But foreign bills of exchange were expressly excepted from the operation of the statute.<sup>12</sup>

bbbb. *Under Act of 1875*—(aaaa) *In General*.—By the act of March 3, 1875, ch. 137, § 1, 18 Stat. 470, § 11 of the act of 1789 was changed so as to provide that the circuit and district courts should not have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange.<sup>13</sup>

(bbbb) *Instruments Included within Exception*.—Checks,<sup>14</sup> or negotiable promissory notes,<sup>15</sup> even though overdue,<sup>16</sup> municipal bonds in the ordinary form,<sup>17</sup>

clusion to create a case of that character cognizable by those courts, because, if the owner of the claim could sue in his own name, there would ordinarily be no motive for transferring it to another to bring the action. In that act promissory notes and inland bills of exchange, the form of negotiable securities most used in the transaction of ordinary business by citizens of the United States, were included in the prohibition of suits by assignees. *Farmington v. Pillsbury*, 114 U. S. 138, 142, 29 L. Ed. 114.

"It was settled by many decisions, under the act of 1789, that a circuit court of the United States had no jurisdiction of a suit brought against the maker by the assignee of a promissory note payable to order, unless it appeared, affirmatively, that it could have been maintained in that court in the name of the original payee. *Turner v. Bank*, 4 Dall. 8, 1 L. Ed. 718; *Montalet v. Murray*, 4 Cranch 46, 2 L. Ed. 545; *Gibson v. Chew*, 16 Pet. 315, 10 L. Ed. 977; *Coffee v. The Planters' Bank*, 13 How. 183, 14 L. Ed. 105; *Morgan v. Gay*, 19 Wall. 81, 22 L. Ed. 100." *Parker v. Ormsby*, 141 U. S. 81, 84, 35 L. Ed. 654.

**Where state statute permits joint action against maker and indorser.**—Where a state statute allows a joint suit to be brought against the maker and payee of a promissory note by the indorsee, an action of this kind cannot be maintained in the courts of the United States, although the plaintiff resides in another state, provided the maker and payee of the note both reside in Mississippi. *Dromgoole v. Farmers', etc., Bank*, 2 How. 241, 11 L. Ed. 252.

**11. Action to foreclose mortgage securing note.**—*Sheldon v. Sill*, 8 How. 441, 12 L. Ed. 1147. See, also, *Ober v. Gallagher*, 93 U. S. 199, 205, 23 L. Ed. 829.

**12. Foreign bills of exchange.**—*Buckner v. Finley*, 2 Pet. 586, 7 L. Ed. 528; *Plant Investment Co. v. Jacksonville, etc., R. Co.*, 152 U. S. 71, 38 L. Ed. 358; *Tredway v. Sanger*, 107 U. S. 323, 325, 27 L. Ed. 582; *Farmington v. Pillsbury*, 114 U. S. 138, 141, 29 L. Ed. 114.

As to what constitutes a foreign bill of exchange, see the title **BILLS, NOTES AND CHECKS**, vol. 3, p. 257.

**13. Exception as to bills and notes by act of 1875.**—*Farmington v. Pillsbury*, 114 U. S. 138, 141, 29 L. Ed. 114; *King Bridge Co. v. Otoe County*, 120 U. S. 225, 227, 30 L. Ed. 623; *Manufacturing Co. v. Bradley*, 105 U. S. 175, 180, 26 L. Ed. 1034; *Bull v. Bank*, 123 U. S. 105, 31 L. Ed. 97; *Cross v. Allen*, 141 U. S. 528, 533, 35 L. Ed. 843; *Tredway v. Sanger*, 107 U. S. 323, 324, 27 L. Ed. 582; *Mersman v. Werges*, 112 U. S. 139, 28 L. Ed. 641; *Williams v. Nottawa*, 104 U. S. 209, 26 L. Ed. 719; *Dodge v. Tulleys*, 144 U. S. 451, 456, 36 L. Ed. 501; *Ackley School District v. Hall*, 113 U. S. 135, 28 L. Ed. 954; *Superior City v. Ripley*, 138 U. S. 93, 34 L. Ed. 914.

**14. Checks.**—*Bull v. Bank*, 123 U. S. 105, 31 L. Ed. 97.

A check for \$500 in current funds is a bill of exchange within the meaning of the act of March 3, 1875, prescribing the jurisdiction of circuit courts of the United States. *Bull v. Bank*, 123 U. S. 105, 31 L. Ed. 97. See the title **BILLS, NOTES AND CHECKS**, vol. 3, p. 257.

**15. Negotiable promissory note.**—*Mersman v. Werges*, 112 U. S. 139, 143, 28 L. Ed. 641.

A suit between citizens of different states, founded on a negotiable promissory note, the indorsement of which to the plaintiff carried with it as an incident, in equity, a mortgage made to secure its payment, is within the jurisdiction of the circuit court, under the act of March 3, 1875, ch. 137, although the payee and mortgagee could not have maintained a suit in that court. *Mersman v. Werges*, 112 U. S. 139, 143, 28 L. Ed. 641.

**16. Overdue note.**—*Cross v. Allen*, 141 U. S. 528, 533, 35 L. Ed. 843, citing *Ackley School District v. Hall*, 113 U. S. 135, 28 L. Ed. 954; *New Providence v. Halsey*, 117 U. S. 336, 29 L. Ed. 904.

As to negotiability of overdue paper, see the title **BILLS, NOTES AND CHECKS**, vol. 3, p. 257.

**17. Municipal bonds.**—A municipal bond in the ordinary form is "a promissory note negotiable by the law merchant," within the meaning of that term in the act of March 3, 1875, 18 Stat. 470, ch. 137, § 1, which allows a suit on instruments of that class to be brought in

and an indorsement on the back of a note which contains no negotiable words, directing payment to bearer,<sup>18</sup> were held to be within the exception of the act of 1875.

(cccc) *Necessity for Holder to Take by Indorsement*.—But in order for the holder of a negotiable note to be entitled to sue under the act of 1875 he must have become the holder by indorsement, and not by assignment merely.<sup>19</sup>

(dddd) *Foreclosure of Mortgage Securing Note*.—If a promissory note, negotiable by the law merchant, is made by a citizen of one state to a citizen of the same state, and secured by a mortgage from the maker to the payee, an indorsee of the note can, since the act of March 3, 1875, c. 137, sue in the courts of the United States to foreclose the mortgage, and obtain a sale of the mortgaged property.<sup>20</sup>

cccc. *Under Act of 1888*.—Under the act of August 13, 1888, assignees are prohibited from suing in the United States courts upon the ground of diversity of citizenship, in cases where the assignors could not have maintained such an action, in all cases except actions on foreign bills of exchange and on instruments made by a corporation which are payable to bearer.<sup>21</sup>

dddd. *Paper Payable to Bearer*—(aaaa) *Prior to Act of 1888*.—Prior to the act of Aug. 13, 1888, paper payable to bearer, or to a certain person or bearer, could be sued on in the United States courts by a holder whose citizenship was of a different state of that of the defendant, although his transferrer and the defendant are citizens of the same state, as, in such cases, the holder was not considered an "assignee" thereof, but was the holder in virtue of an original and direct promise moving from the maker to the bearer.<sup>22</sup> Corporate

the courts of the United States by an assignee, notwithstanding a suit could not have been prosecuted in such court if no assignment had been made. *New Providence v. Halsey*, 117 U. S. 336, 338, 29 L. Ed. 904; *Ackley School District v. Hall*, 113 U. S. 135, 28 L. Ed. 954.

18. *Nonnegotiable instrument indorsed to bearer*.—In *Manufacturing Co. v. Bradley*, 105 U. S. 175, 26 L. Ed. 1034, a corporation agreed to pay on a certain date to A, a sum of money, at a specified rate of interest; and, by an indorsement on the paper after it matured, further agreed, in consideration of forbearance to a date named, to pay at a higher rate of interest, to bearer. It was held that the indorsement was a new contract, upon sufficient consideration, and negotiable within the meaning of the law merchant, and that B, the legal holder of the paper, was not precluded from suing thereon in the circuit court, by the fact that A was a citizen of the same state as the corporation. *Superior City v. Ripley*, 138 U. S. 93, 97, 34 L. Ed. 914.

19. *Holder must have taken by indorsement and not by assignment*.—*King Bridge Co. v. Otoe County*, 120 U. S. 225, 227, 30 L. Ed. 623.

One of two county warrants was payable to a certain person, and the other to him or order, but the latter was not indorsed by him in blank or to the order of the plaintiff. Held, that upon any view of the statute, the plaintiff, as the holder or owner of the warrants, could not maintain a suit in the circuit court below, unless the payee could have sued in that court, had he not sold the warrants, and that as it did not appear that he could

have maintained the suit, and there was no averment as to his citizenship, and it not otherwise appearing from the record, the supreme court would presume on writ of error, that the circuit court was without jurisdiction. *King Bridge Co. v. Otoe County*, 120 U. S. 225, 227, 30 L. Ed. 623.

20. *Action to foreclose mortgage securing note*.—*Tredway v. Sanger*, 107 U. S. 323, 324, 27 L. Ed. 582, distinguishing *Sheldon v. Sill*, 8 How. 441, 12 L. Ed. 1147.

21. *Effect of act of 1888*.—*Holmes v. Goldsmith*, 147 U. S. 150, 37 L. Ed. 118; *Blair v. Chicago*, 201 U. S. 400, 50 L. Ed. 801; *Parker v. Ormsby*, 141 U. S. 81, 84, 35 L. Ed. 654.

The act of 1888 further restricted the jurisdiction of the circuit courts by including in the prohibitory clause the case of promissory notes payable to bearer. *Holmes v. Goldsmith*, 147 U. S. 150, 161, 37 L. Ed. 118.

The act of 1887, in respect to suits to recover the contents of promissory notes or other choses in action, differs from the act of 1789 only in the particular that the act of 1887 excludes, under certain circumstances, from the cognizance of the circuit and district courts of the United States suits in favor "of any subsequent holder, if such instrument be payable to bearer and be not made by any corporation." *Parker v. Ormsby*, 141 U. S. 81, 84, 35 L. Ed. 654.

22. *Paper payable to bearer—Rule prior to 1888*.—*Waite v. Sante Cruz*, 184 U. S. 302, 324, 46 L. Ed. 552; *Thompson v. Perrine*, 106 U. S. 589, 27 L. Ed. 298; *Holmes v. Goldsmith*, 147 U. S. 150, 161, 37 L. Ed. 118; *Bank v.*



bonds payable in blank were held to be equivalent to bonds payable to bearer in this respect.<sup>23</sup>

(bbbb) *Under Act of 1888.*—Under the judiciary act of August 13, 1888 (25 Stat. 433), the holder of an instrument payable to bearer cannot maintain a suit in the circuit court of the United States upon the ground of diversity of

Wister, 2 Pet. 318, 7 L. Ed. 437; *Chanute City v. Trader*, 132 U. S. 210, 33 L. Ed. 345; *Bushnell v. Kennedy*, 9 Wall. 387, 391, 19 L. Ed. 736; *Smith v. Clapp*, 15 Pet. 125, 10 L. Ed. 684; *Thomson v. Lee County*, 3 Wall. 327, 18 L. Ed. 177; *Lexington v. Butler*, 14 Wall. 282, 20 L. Ed. 809; *Chickaming v. Carpenter*, 106 U. S. 663, 666, 27 L. Ed. 307; *Bonnafee v. Williams*, 3 How. 574, 11 L. Ed. 732; *Ambler v. Eppinger*, 137 U. S. 480, 482, 34 L. Ed. 765; *Parker v. Ormsby*, 141 U. S. 81, 85, 35 L. Ed. 654; *Dodge v. Tulleys*, 144 U. S. 451, 456, 36 L. Ed. 501.

A note payable to bearer is payable to anybody, and is not affected by the disabilities (to sue) of the nominal payee. *Bank v. Wister*, 2 Pet. 318, 7 L. Ed. 437; *Thompson v. Perrine*, 106 U. S. 589, 593, 27 L. Ed. 298; *Thomson v. Lee County*, 3 Wall. 327, 18 L. Ed. 177; *Bushnell v. Kennedy*, 9 Wall. 387, 19 L. Ed. 736; *Lexington v. Butler*, 14 Wall. 282, 20 L. Ed. 809; *Holmes v. Goldsmith*, 147 U. S. 150, 160, 37 L. Ed. 118.

A note payable to bearer, is often said to be assignable by delivery; but in correct language there is no assignment in the case. It passes by mere delivery; and the holder never makes any title by or through any assignment, but claims merely as bearer. The note is an original promise by the maker to pay any person who shall become the bearer; it is, therefore, payable to any person who successively holds the note bona fide, not by virtue of any assignment of the promise, but by an original and direct promise, moving from the maker to the bearer. *Thompson v. Perrine*, 106 U. S. 589, 593, 27 L. Ed. 298.

By the statutes of Alabama, promissory notes may be assigned by indorsement; and the assignee may maintain an action in his own name on such notes; by the act of 1833, the same rights are given to the holder of notes given to a certain person or bearer, to a fictitious person, or to bearer only; and the assignment of such notes by delivery only, authorizes a suit by the holder in his own name. The holder of a note payable to A. B. or bearer, may, to avail himself of these provisions of the law, call himself an assignee of the note from A. B.; but the holder of such a note payable to the bearer, is not an assignee, within the provisions of the judiciary act of 1789. *Smith v. Clapp*, 15 Pet. 125, 10 L. Ed. 684.

Suits upon bills or notes payable to a particular individual or to bearer may be maintained by the holder, without any allegation of citizenship of the original payee. *Bushnell v. Kennedy*, 9 Wall. 387,

391, 19 L. Ed. 736; *Bank v. Wister*, 2 Pet. 318, 7 L. Ed. 437.

**Municipal bonds and coupons payable to bearer** could be sued on by the assignee or holder, if he is a citizen of a different state from that of the corporation, although his transferrer was not competent to sue, being a citizen of the same state as the corporation. *Chickaming v. Carpenter*, 106 U. S. 663, 666, 27 L. Ed. 307; *Bank v. Wister*, 2 Pet. 318, 7 L. Ed. 437; *Lexington v. Butler*, 14 Wall. 282, 20 L. Ed. 809.

The holder of municipal coupons payable to the holder thereof, was not an assignee within the meaning of the act of 1875, and was entitled to sue without reference to the citizenship of any previous holder. *Thompson v. Perrine*, 106 U. S. 589, 593, 27 L. Ed. 298.

**The act of March 3, 1875**, was certainly not a limitation on the judiciary act of Sept. 24, 1789, and an assignee of a note payable to bearer was at least entitled to the same rights, as to suing in the federal courts, under that act as under the act of 1879. *Chickaming v. Carpenter*, 106 U. S. 663, 666, 27 L. Ed. 307.

**Note payable to bearer but for use of person residing in state of maker.**—The circuit court of the United States has jurisdiction where a promissory note is made by a citizen of one state payable to another citizen of the same state or bearer, and the party bringing the suit is a citizen of a different state; although upon the face of the note it was expressed to be for the use of persons residing in the state in which the maker and payee lived. *Bonnafee v. Williams*, 3 How. 574, 11 L. Ed. 732.

**Where bonds are transferred for purpose of collusively creating case cognizable in federal courts.**—See post, "Parties Collusively Made or Joined," VII, C, 4, b, (2), (m).

**23. Corporate bonds payable in blank.**—Bonds issued by a railroad company in Massachusetts, payable in blank, no payee being inserted, and issued to a citizen of Massachusetts, which had passed through several intervening holders, could be filled up by a citizen of New Hampshire, payable to himself or order, and then suit could be maintained upon them in the circuit court of the United States for Massachusetts. The eleventh section of the judiciary act does not apply to such a case. The usage and practice of railroad companies, and of the capitalists and business men of the country, and decisions of courts, have made this class of securities negotiable instruments. *White v. Vermont, etc., R. Co.*, 21 How. 575, 16 L. Ed. 221.

citizenship of himself and the defendant unless his transfer could have maintained the suit, except in cases where the instrument is made by "any corporation."<sup>24</sup> The words "any corporation" include municipal corporations, and municipal bonds, coupons or certificates payable to bearer may be sued on in the circuit court of the United States by the holder thereof, although the person from whom he derived title was a citizen of the same state with the municipal corporation.<sup>25</sup>

(bbb) *Action by Indorsee against Indorser.*—The indorsee of a bill may sue his immediate indorser in the circuit court of the United States if the parties are citizens of different states, even though the maker and payee are citizens of the state, as the indorsee does not claim through an assignment, but by virtue of a new contract between him and the indorser.<sup>26</sup> But where the suit is brought

**24. Effect of act of 1888.**—*Waite v. Santa Cruz*, 184 U. S. 302, 324, 46 L. Ed. 552; *Loeb v. Columbia Township Trustees*, 179 U. S. 472, 486, 45 L. Ed. 280; *Holmes v. Goldsmith*, 147 U. S. 150, 161, 37 L. Ed. 118; *Andes v. Ely*, 158 U. S. 312, 325, 39 L. Ed. 996; *Emsheimer v. New Orleans*, 186 U. S. 33, 43, 46 L. Ed. 1042; *New Orleans v. Quinlan*, 173 U. S. 191, 192, 43 L. Ed. 664; *Lake County Comm'rs v. Dudley*, 173 U. S. 243, 250, 43 L. Ed. 684; *Ambler v. Eppinger*, 137 U. S. 480, 482, 34 L. Ed. 765.

In *Lake County Comm'rs v. Dudley*, 173 U. S. 243, 250, 43 L. Ed. 684, the court said: "Without stopping to consider the full scope and effect of the above provision in the act of 1888, it is only necessary to say that the instruments sued on being payable to bearer and having been made by a corporation are expressly excepted by the statute from the general rule prescribed that an assignee or subsequent holder of a promissory note or chose in action could not sue in a circuit or district court of the United States unless his assignor or transferrer could have sued in such court. It is immaterial to inquire what were the reasons that induced congress to make such an exception. Suffice it to say that the statute is clear and explicit, and its mandate must be respected."

**25. Paper payable to bearer made by municipal corporation.**—*Loeb v. Columbia Township Trustees*, 179 U. S. 472, 45 L. Ed. 280; *Waite v. Santa Cruz*, 184 U. S. 302, 325, 46 L. Ed. 552; *Andes v. Ely*, 158 U. S. 312, 325, 39 L. Ed. 996; *New Orleans v. Quinlan*, 173 U. S. 191, 43 L. Ed. 664.

"We perceive nothing in that act indicating any purpose of congress to exclude from the jurisdiction of the circuit courts of the United States suits by or against municipal corporations having authority by the laws creating them to sue or to incur liabilities in their corporate name. It must therefore be taken that the words any corporation in the act of 1888 include municipal as well as private corporations." *Loeb v. Columbia Township Trustees*, 179 U. S. 472, 486, 45 L. Ed. 280.

In Ohio, a township is a corporation

and suable on account of any liabilities incurred by it, and the holder of paper made by such a township payable to bearer may sue thereon in the United States courts where he and the defendant are citizens of different states, although his transferrer was a citizen of Ohio. *Loeb v. Columbia Township Trustees*, 179 U. S. 472, 486, 45 L. Ed. 280.

In New York, a town is a corporation, so far as respects the making of contract, the right to sue and liability to be sued, and is within the exception of the statute. *Andes v. Ely*, 158 U. S. 312, 325, 39 L. Ed. 996.

In an action brought in the circuit court of the United States for the eastern district of Louisiana by a citizen of the state of New York, against the city of New Orleans, to recover on a number of certificates owned by her, made by the city, and payable to bearer, defendant excepted to the jurisdiction because the petition contained no averment that the suit could have been maintained "by the assignors of the claims or certificates sued upon." The circuit court overruled the exception, and the cause subsequently went to judgment. Judgment affirmed. *New Orleans v. Quinlan*, 173 U. S. 191, 43 L. Ed. 664.

In an action on bonds and coupons made by the city and payable to bearer, the coupons need not disclose the citizenship of any previous holder of the bonds where it shows a diversity of citizenship as between the holder of the legal title to the bonds and coupons and the defendant city. *Waite v. Santa Cruz*, 184 U. S. 302, 325, 46 L. Ed. 552.

**26. Action by indorsee against immediate indorser.**—*Parker v. Ormsby*, 141 U. S. 81, 85, 35 L. Ed. 654; *Mullen v. Torrance*, 9 Wheat. 537, 6 L. Ed. 154; *Young v. Bryan*, 6 Wheat. 146, 148, 5 L. Ed. 228; *Kolze v. Hoadley*, 200 U. S. 76, 83, 50 L. Ed. 377; *Manufacturing Co. v. Bradley*, 105 U. S. 175, 26 L. Ed. 1034; *Coffee v. The Planters' Bank*, 13 How. 183, 14 L. Ed. 105; *United States Bank v. Moss*, 6 How. 31, 12 L. Ed. 331; *Superior City v. Ripley*, 138 U. S. 93, 34 L. Ed. 914; *Keary v. Farmers', etc., Bank*, 16 Pet. 88, 89, 10 L. Ed. 897; *Dromgoole v. Farmers', etc., Bank*, 21 How. 241, 243, 11 L.

against a remote indorser, and the plaintiff, in his declaration, traces his title through an intermediate indorser, he must show that this intermediate indorser could have sustained his action in the circuit court.<sup>27</sup> Suits between indorsers to enforce agreements as to liability with respect to their indorsements is in no way dependent on the citizenship of the other parties to the paper.<sup>28</sup>

(ccc) *Action by Payee against Acceptor*.—The acceptance of a bill of exchange is a new contract, and the payee may sue the acceptor in the federal courts, if the parties are citizens of different states, notwithstanding the fact that the drawer of the bill is a resident of the same state as the acceptor.<sup>29</sup>

ccc. *Action on Judgment*—(aaa) *In General*.—The assignee of a judgment founded on contract cannot maintain a suit thereon in a court of the United States upon the ground of diversity of citizenship unless such a suit might have been prosecuted there if an assignment had not been made.<sup>30</sup>

(bbb) *Judgment Recovered by Assignee*.—Where a note given between parties who are citizens of the same state is assigned to a citizen of another, who recovers judgment thereon, the note is merged in the judgment, and the judgment creditor may sue the debtor in the federal courts.<sup>31</sup>

ddd. *Suits for Specific Performance*.—A suit to compel the specific performance of a contract, is one to recover the contents of the contract, and cannot be brought in the federal courts upon the ground of diversity of citizenship of the parties, by an assignee thereof, unless the party in whose favor the contract was made could have sued the defendant in the federal courts.<sup>32</sup>

Ed. 252; *Evans v. Gee*, 11 Pet. 80, 83, 9 L. Ed. 639.

In such case the original contract may be considered to ascertain the amount of the damages. *Kolze v. Hoadley*, 200 U. S. 76, 83, 50 L. Ed. 377.

**27. Action by indorsee against remote indorser**.—*Mullen v. Torrance*, 9 Wheat. 537, 6 L. Ed. 154. See, also, *Coffee v. The Planters' Bank*, 13 How. 183, 14 L. Ed. 105.

**28. Suits by indorser to enforce agreement as to liability**.—*Phillips v. Preston*, 5 How. 278, 12 L. Ed. 152.

In a suit by the first indorser of promissory notes against a second indorser, upon an alleged contract that the second indorser would bear half the loss which might accrue from their nonpayment by the drawer, it is not a sufficient objection to the jurisdiction of the court that the second indorsee and defendant were citizens of the same state. Such an objection would be well founded if the suit had been upon the notes. But not where the suit is brought upon a collateral contract. *Phillips v. Preston*, 5 How. 278, 12 L. Ed. 152.

**29. Action by payee against acceptor**.—*Superior City v. Ripley*, 138 U. S. 93, 97, 34 L. Ed. 914.

"Ever since the case of *Young v. Bryan*, 6 Wheat. 146, 5 L. Ed. 228, it has been the settled law of this court that the circuit court has jurisdiction of a suit, brought by the indorsee of a promissory note against his immediate indorser, whether a suit would lie against the maker or not, upon the ground as stated by Chief Justice Marshall, 'that the indorsee does not claim through an assignment. It is a new contract entered into by the indorser and indorsee.' This

case was approved in *Mullen v. Torrance*, 9 Wheat. 537, 6 L. Ed. 154; *Evans v. Gee*, 11 Pet. 80, 9 L. Ed. 639, and *Coffee v. The Planters' Bank*, 13 How. 183, 14 L. Ed. 105. It needs no argument to show that the same rule would apply as between the acceptor and the payee; and if the latter be a nonresident of the state, he may bring suit directly against the acceptor, notwithstanding the drawer of the paper is a resident of the same state as the acceptor, for the same reason that the acceptance creates a new contract, to which the drawer is not a party." *Superior City v. Ripley*, 138 U. S. 93, 97, 34 L. Ed. 914.

**30. Action on judgment founded on contract**.—*Walker v. Powers*, 104 U. S. 245, 26 L. Ed. 729; *Metcalf v. Watertown*, 128 U. S. 586, 587, 32 L. Ed. 543; *New Orleans v. Benjamin*, 153 U. S. 411, 434, 38 L. Ed. 764; *Mississippi Mills v. Cohn*, 150 U. S. 202, 37 L. Ed. 1052.

A suit founded on an original judgment on a contract against a city, is one "founded on contract" within the meaning of the act. *Metcalf v. Watertown*, 128 U. S. 586, 587, 32 L. Ed. 543.

**31. Judgment recovered on note by assignee**.—*Ober v. Gallagher*, 93 U. S. 199, 203, 23 L. Ed. 829.

**32. Suits to compel specific performance of contracts**.—*Corbin v. Black Hawk County*, 105 U. S. 659, 26 L. Ed. 1136; *Kolze v. Hoadley*, 200 U. S. 76, 83, 50 L. Ed. 377; *Shoecraft v. Bloxham*, 124 U. S. 730, 731, 31 L. Ed. 574; *Mexican Nat. R. Co. v. Davidson*, 157 U. S. 201, 206, 39 L. Ed. 672; *Plant Investment Co. v. Jacksonville, etc., R. Co.*, 152 U. S. 71, 72, 38 L. Ed. 358; *Bernards Township v. Stebbins*, 109 U. S. 341, 354, 27 L. Ed. 956; *New Orleans v. Benjamin*, 153 U. S. 411,



eee. *Actions in Tort*—(aaa) *Action for Recovery of Chose in Action*.—The assignee of a chose in action may maintain a suit in the circuit court to recover possession of the specific thing, though the court would have no jurisdiction of the suit if brought by the assignors.<sup>33</sup> Therefore, an assignee of a package of bank notes may bring an action of replevin for the package in the circuit court, although the assignor could not himself have sued in that court.<sup>34</sup>

(bbb) *Action for Damages*—aaaa. *Wrongful Taking or Detention of Chose in Action*.—This clause has no application to the case of a suit by the assignee of a chose in action to recover damages for its wrongful taking or detention.<sup>35</sup>

bbbbb. *Trespass to Real Estate*.—The act depriving the federal courts of jurisdiction of suits by assignees, in cases of diversity of citizenship of the parties, does not embrace, within its exceptions to the jurisdiction of those courts, suits by an assignee upon claims for trespass for cutting and removing timber.<sup>36</sup>

fff. *Actions or Suits by Bank of United States*.—The bank of the United States could sue in the circuit court, as indorsee or bearer of a promissory note, although the original payee or indorser could not sue in the same courts, being a citizen of the same state with the defendants.<sup>37</sup>

ggg. *Actions on Municipal Warrants, etc.*—An action on warrants or certificates issued by the municipal corporation or township is one to recover the contents of a chose in action within the meaning of the act of 1888, and the assignees thereof cannot sue thereon in the federal courts upon the ground of diversity of citizenship, unless his assignor could have maintained the action.<sup>38</sup>

hhh. *Actions on Mortgages*—(aaa) *Suits for Foreclosure*.—A suit to foreclose a mortgage is an action to recover the contents of a chose in action, and can only be maintained in the federal courts by an assignee of the mortgage,

433, 38 L. Ed. 764. See, generally, the title SPECIFIC PERFORMANCE.

"The contents of a contract, as a chose in action, in the sense of § 629, are the rights created by it in favor of a party in whose behalf stipulations are made in it which he has a right to enforce in a suit founded on the contract; and a suit to enforce such stipulations is a suit to recover such contents." *Corbin v. Black Hawk County*, 105 U. S. 659, 26 L. Ed. 1136; *Kolze v. Hoadley*, 200 U. S. 76, 83, 50 L. Ed. 377; *New Orleans v. Benjamin*, 153 U. S. 411, 433, 38 L. Ed. 764; *Plant Investment Co. v. Jacksonville, etc., R. Co.*, 152 U. S. 71, 76, 38 L. Ed. 358.

A suit which really is one for the specific performance of contracts, to enforce them, to realize the fruits of the rights secured by them to the purchasers, and to reinstate the plaintiff in the position which he is entitled to occupy under the contracts as assignee thereof, is one to recover the contents of the contracts. *Corbin v. Black Hawk County*, 105 U. S. 659, 665, 26 L. Ed. 1136.

**Contract to convey lands.**—A suit in equity to enforce the performance of a contract for the conveyance of lands, is one to recover the contents of a chose in action. *Shoecraft v. Bloxham*, 124 U. S. 730, 731, 31 L. Ed. 574; *Plant Investment Co. v. Jacksonville, etc., R. Co.*, 152 U. S. 71, 72, 38 L. Ed. 358.

**33. Action for recovery of specific chose in action.**—*Bushnell v. Kennedy*, 9 Wall. 387, 391, 19 L. Ed. 736; *Deshler v.*

*Dodge*, 16 How. 622, 631, 14 L. Ed. 1084; *Blacklock v. Small*, 127 U. S. 96, 103, 32 L. Ed. 70; *Ambler v. Eppinger*, 137 U. S. 480, 482, 34 L. Ed. 765; *Mexican Nat. R. Co. v. Davidson*, 157 U. S. 201, 206, 39 L. Ed. 672.

**34.** *Deshler v. Dodge*, 16 How. 622, 14 L. Ed. 1084.

**35. Action for damages for wrongful taking or detention of chose in action.**—*Bushnell v. Kennedy*, 9 Wall. 387, 391, 19 L. Ed. 736; *Deshler v. Dodge*, 16 How. 622, 631, 14 L. Ed. 1084; *Blacklock v. Small*, 127 U. S. 96, 104, 32 L. Ed. 70; *Ambler v. Eppinger*, 137 U. S. 480, 482, 34 L. Ed. 765; *Mexican Nat. R. Co. v. Davidson*, 157 U. S. 201, 206, 39 L. Ed. 672.

**36. Action for damages for trespass to real estate.**—*Ambler v. Eppinger*, 137 U. S. 480, 482, 34 L. Ed. 765.

**37. Suits by bank of United States.**—*United States Bank v. Planters' Bank*, 9 Wheat. 904, 6 L. Ed. 244. See ante, "Suits Arising under Constitution, Laws or Treaties," VII, C, 4, b, (1).

**38. Municipal warrants or certificates.**—*New Orleans v. Benjamin*, 153 U. S. 411, 38 L. Ed. 764; *Indiana v. Glover*, 153 U. S. 513, 517, 39 L. Ed. 243.

An action on warrants or certificates issued by the police board of a city, and to enforce their payment by decree over against the city, cannot be maintained by an assignee, unless the assignee was competent to sue. *New Orleans v. Benjamin*, 153 U. S. 411, 38 L. Ed. 764.

where his assignor was competent to file a like bill,<sup>39</sup> and this is true although the bill prays other incidental relief.<sup>40</sup>

(bbb) *Actions for Mortgaged Property*.—The assignee of a mortgage may bring suit in the federal court to recover the possession of mortgaged premises if a citizen of a state other than that of the tenant in possession, whether the mortgagee could have maintained it or not.<sup>41</sup>

iii. *Action for Damages for Breach of Contract*.—The assignee of a claim for damages for the breach of a contract by a carrier of passengers and goods, cannot sue thereon in the federal courts on the ground of diverse citizenship of the parties, unless the assignee could have sued thereon in such courts.<sup>42</sup>

jjj. *Suit by Assignee of Judgment to Set Aside Conveyance Void as to Judgment*.—A suit by the assignee of a judgment to set aside as fraudulent certain sales and conveyances of real estate made by the judgment debtor and subject to the payment of the judgment, cannot be brought in the circuit court of the United States unless the party in whose favor the judgment was rendered could have brought suit therein.<sup>43</sup>

kkk. *Action on Lease*.—When a party claims in a federal court through an assignment of a lease, the jurisdiction being invoked on the ground of diverse citizenship, he must show affirmatively that the action might have been sustained by the assignor if no assignment had been made.<sup>44</sup>

lll. *Action on New Contract Made with Assignee*.—A promise made directly to a person upon a consideration which he has furnished may be sued on the federal courts by the latter, where the parties are citizens of different states, although the promisee is the assignee of the defendant.<sup>45</sup>

**39. Suit to foreclose mortgage.**—Kolze *v.* Hoadley, 200 U. S. 76, 83, 50 L. Ed. 377; Sheldon *v.* Sill, 8 How. 441, 12 L. Ed. 1147; Blacklock *v.* Small, 127 U. S. 96, 32 L. Ed. 70; Deshler *v.* Dodge, 16 How. 622, 631, 14 L. Ed. 1084; Bernards Township *v.* Stebbins, 109 U. S. 341, 354, 27 L. Ed. 956.

Where the mortgagor and mortgagee reside in the same state, and the mortgagee assigns the mortgage to a citizen of another state, the assignee cannot file his bill for foreclosure in the circuit court of the United States. Sheldon *v.* Sill, 8 How. 441, 12 L. Ed. 1147.

**40. Bill for foreclosure and other relief.**—Blacklock *v.* Small, 127 U. S. 96, 32 L. Ed. 70; Kolze *v.* Hoadley, 200 U. S. 76, 83, 50 L. Ed. 377.

A mortgagee assigned his interest in the mortgage and bond secured thereby to a person in trust for the benefit of his children. The trustee received payment in confederate money, which was not receivable as legal tender, and executed a release of the mortgage to the mortgagor. The beneficiaries under the trust filed a bill against the mortgagor praying that the payment of the bond and mortgage be disallowed; that satisfaction of the mortgage be annulled and the mortgage re-established and declared a subsisting lien; that the mortgagor be ordered to deliver up the bond and mortgage; and for a decree for the payment to them by the mortgagor of the amount due, and for a sale of the mortgaged premises. It was held that the federal court had no jurisdiction, the assignor and the defendant being citizens of the same state, since the suit was in substance one for the foreclosure

of the mortgage. Blacklock *v.* Small, 127 U. S. 96, 103, 32 L. Ed. 70, distinguishing Deshler *v.* Dodge, 16 How. 622, 14 L. Ed. 1084; Bushnell *v.* Kennedy, 9 Wall. 387, 19 L. Ed. 736.

Where a bill is filed to foreclose a mortgage, and it appears by the bill itself that the mortgage has been fraudulently released to the mortgagor by a deed of which plaintiff had no notice, and the fraud is a mere incident, the bill is still one to recover the contents of a mortgage within the meaning of the act, and will not lie in a federal court unless the plaintiff's assignor might have maintained the bill, if no assignment or transfer had been made. Kolze *v.* Hoadley, 200 U. S. 76, 83, 50 L. Ed. 377.

**41. Action for recovery of mortgaged premises.**—Deshler *v.* Dodge, 16 How. 622, 631, 14 L. Ed. 1084; Smith *v.* Kernochen, 7 How. 198, 12 L. Ed. 660.

**42. Claim for damages for breach of contract of carriage.**—North American Transp., etc., Co. *v.* Morrison, 178 U. S. 262, 267, 44 L. Ed. 1061.

**43. Suit by assignee of judgment to set aside conveyance void as to judgment.**—Mississippi Mills *v.* Cohn, 150 U. S. 202, 37 L. Ed. 1052.

**44. Lease.**—Bradley *v.* Rhines, 8 Wall. 393, 396, 19 L. Ed. 467.

**45. New contract made with assignee.**—American Colortype Co. *v.* Continental Colortype Co., 188 U. S. 104, 164, 47 L. Ed. 404.

A New Jersey corporation became an assignee of the assets and good will of an Illinois corporation. Among the contracts transferred were two contracts between the Illinois corporation and two



(dd) *Citizenship of Assignor*—aaa. *At What Time Assignor's Diversity of Citizenship Must Have Existed.*—The inquiry as to the right of the assignee to maintain a suit in the federal courts as depending on the competency of his assignor to sue, is to be determined as of the date of the commencement of the suit.<sup>46</sup> Thus the assignee may sue in the federal courts where, at the time of instituting the action, the assignor could have sued therein, although the assignor was not competent to sue at the time when the contract was executed,<sup>47</sup> or assigned.<sup>48</sup>

bbb. *Burden of Proof.*—In a suit brought by the assignee of a chose in action in the federal court on the contract so assigned, it is necessary that plaintiff show affirmatively that such action could have been sustained if brought by the original obligee.<sup>49</sup>

(ee) *Effect of Restriction on Causes Removed from State Courts.*—The restriction of the original jurisdiction of the circuit courts in respect of suits by an assignee, whose assignor could not be sued in that court, by the act of 1789, and 1875, did not apply to a suit removed from a state court under the 12th section.<sup>50</sup> But the restriction of act of 1888 applies to causes removed to

employees by which they agreed to remain in the company's employment for a certain length of time and not to divulge any secret relating to the business for a certain time. These employees knew of and consented to the transfer. Subsequently the employees got up a rival corporation and proceeded to work for them and divulged the trade secrets to it. The rival corporation was chartered under the laws of Illinois. It was held that the old corporation could maintain a suit for injunction against the employees and the rival corporation in the circuit court of the United States. *American Colortype Co. v. Continental Colortype Co.*, 188 U. S. 104, 47 L. Ed. 404.

46. *Citizenship of assignor at time of commencement of suit governs.*—*Emsheimer v. New Orleans*, 186 U. S. 33, 43, 46 L. Ed. 1042; *Kirkman v. Hamilton*, 6 Pet. 20, 8 L. Ed. 305.

47. *Where assignor could not sue when contract executed.*—*Kirkman v. Hamilton*, 6 Pet. 20, 8 L. Ed. 305.

H. and D., citizens of Tennessee, gave their promissory note to T. R. & Co., also citizens of Tennessee, payable in fifteen months; before the note became due T. R. & Co. removed to and became citizens of Alabama, and also before the day appointed for the payment of the note, indorsed it to K., a citizen of Alabama; and in the declaration on the note, the plaintiff averred, that T. R. & Co. were citizens of Alabama. Held, that the circuit court of Tennessee had jurisdiction of the suit, under the 11th section of the act of 1789; the payees of the note having, before the note became due, become citizens of Alabama, could have prosecuted a suit on the note in the circuit court of Tennessee, if no assignment had been made. *Kirkman v. Hamilton*, 6 Pet. 20, 8 L. Ed. 305.

An action on certificates of indebtedness executed by a township trustee on behalf of the township, cannot be sued on in the federal courts, by an assignee

or transferee thereof, unless his transferor was competent to sue. *Indiana v. Glover*, 155 U. S. 513, 517, 39 L. Ed. 243.

48. *Where assignor could not sue at time of assignment.*—*Emsheimer v. New Orleans*, 186 U. S. 33, 43, 46 L. Ed. 1042.

"But it is objected that the restriction relates to the time when the paper was assigned, and not to the time of the commencement of the suit; and that if there were intermediate assignees, jurisdiction in respect of them must appear, and does not appear on the face of this bill. We are of opinion that the inquiry is to be determined as of the date when the suit is commenced. Jurisdiction vests then and cannot be divested by subsequent change of residence; but jurisdiction cannot be held to have vested prior to action brought. There have been many decisions to this effect, the same question being presented under all the facts from 1789." *Emsheimer v. New Orleans*, 186 U. S. 33, 43, 46 L. Ed. 1042.

49. *Burden of proof as to right of assignor to sue.*—*Bradley v. Rhines*, 8 Wall. 393, 19 L. Ed. 467; *Turner v. Bank*, 4 Dall. 8, 1 L. Ed. 718; *Mullen v. Torrance*, 9 Wheat. 537, 6 L. Ed. 154; *United States Bank v. Moss*, 6 How. 31, 12 L. Ed. 331.

50. *Statute formerly not applicable on removal.*—*Clafin v. Commonwealth Ins. Co.*, 110 U. S. 81, 91, 28 L. Ed. 76; *Green v. Custard*, 23 How. 484, 16 L. Ed. 471; *Bushnell v. Kennedy*, 9 Wall. 387, 19 L. Ed. 736; *Lexington v. Butler*, 14 Wall. 282, 20 L. Ed. 809; *Delaware County Comm'rs v. Diebold Safe, etc., Co.*, 133 U. S. 473, 33 L. Ed. 674; *Mexican Nat. R. Co. v. Davidson*, 157 U. S. 201, 207, 39 L. Ed. 672. See, generally, the title REMOVAL OF CAUSES.

By the second section of the act of March 3, 1875, c. 137, 18 Stat. 470, the exception out of the original jurisdiction as to assignees of choses in action occupied the same relative position as in the act of 1789, and the same conclusion was



the federal courts from the state courts as well as to actions originally instituted in the federal courts.<sup>51</sup>

(m) *Parties Collusively Made or Joined*.—If it appears that the parties to a suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable in the federal courts, it is the duty of the court to dismiss the suit.<sup>52</sup>

(3) *Claims of Land under Grants from Different States*.—The constitution expressly extends the judicial power of the United States to controversies between citizens of the same state claiming land under grants from different states.<sup>53</sup> The jurisdiction in such cases is not affected by the equitable title of

reached in regard to it, namely, that the restriction upon the commencement of suits contained in § 1 did not apply to the removal of suits under § 2. *Mexican Nat. R. Co. v. Davidson*, 157 U. S. 201, 207, 39 L. Ed. 672; *Clafin v. Commonwealth Ins. Co.*, 110 U. S. 81, 28 L. Ed. 76; *Delaware County v. Comm'r's Diebold Safe, etc., Co.*, 133 U. S. 473, 33 L. Ed. 674; *Goldey v. Morning News*, 156 U. S. 518, 39 L. Ed. 517.

The restriction of the 11th section of the judiciary act did not apply to cases transferred from state courts under the act of March 2, 1867, giving to either party in certain cases a right to transfer a suit brought in a state court where either makes affidavit, etc., "that he has reason to believe, and does believe, that from prejudice or local influence he will not be able to obtain justice in such court." *Lexington v. Butler*, 14 Wall. 282, 20 L. Ed. 809.

**51. Act of 1888 applies on removal, as well as in other cases.**—*Mexican Nat. R. Co. v. Davidson*, 157 U. S. 201, 39 L. Ed. 672.

**52. Parties collusively made or joined.**—Act of March 3, 1875, 18 Stat. 470, c. 137; *Lake County Comm'r's v. Dudley*, 173 U. S. 243, 251, 43 L. Ed. 684; *Lehigh Min. & Mfg. Co. v. Kelly*, 160 U. S. 327, 40 L. Ed. 444; *Nashua, etc., R. Corp. v. Boston, etc., R. Corp.*, 136 U. S. 356, 374, 34 L. Ed. 363; *Morris v. Gilmer*, 129 U. S. 315, 32 L. Ed. 690; *Farmington v. Pillsbury*, 114 U. S. 138, 29 L. Ed. 114; *Deputron v. Young*, 134 U. S. 241, 252, 33 L. Ed. 923; *Cross v. Allen*, 141 U. S. 528, 533, 35 L. Ed. 843; *Lanier v. Nash*, 121 U. S. 404, 30 L. Ed. 947; *Merritt v. Bowdoin College*, 169 U. S. 551, 42 L. Ed. 850; *Waite v. Santa Cruz*, 184 U. S. 302, 325, 46 L. Ed. 552; *Dawson v. Columbia, etc., Trust Co.*, 197 U. S. 178, 181, 49 L. Ed. 713; *Williams v. Nottawa*, 104 U. S. 209, 26 L. Ed. 719; *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827; *Bernards Township v. Stebbins*, 109 U. S. 341, 355, 27 L. Ed. 956; *New Providence v. Halsey*, 117 U. S. 336, 29 L. Ed. 904; *Chicago v. Mills*, 204 U. S. 321, 332, 51 L. Ed. 504; *Hartog v. Memory*, 116 U. S. 588, 591, 29 L. Ed. 725; *Hayden v. Manning*, 106 U. S. 586, 589, 27 L. Ed. 306; *Manhattan Life Ins. Co. v. Broughton*, 109 U. S. 121, 125, 27 L. Ed. 878; *Quincy v. Steel*, 120 U. S. 241, 245, 30 L. Ed. 624; *Turner v. Farmers'*

*Loan, etc., Co.*, 106 U. S. 552, 555, 27 L. Ed. 273; *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379, 386, 28 L. Ed. 462; *Shreveport v. Cole*, 129 U. S. 36, 32 L. Ed. 589; *Steigleder v. McQuesten*, 198 U. S. 141, 142, 49 L. Ed. 986.

This provision is not superseded by the act of 1887-8, and is still in force. *Steigleder v. McQuesten*, 198 U. S. 141, 142, 49 L. Ed. 986; *Lehigh Min. & Mfg. Co. v. Kelly*, 160 U. S. 327, 40 L. Ed. 444; *Lake County Comm'r's v. Dudley*, 173 U. S. 243, 43 L. Ed. 684; *Defiance Water Co. v. Defiance*, 191 U. S. 184, 48 L. Ed. 140; *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 48 L. Ed. 870.

**Substitution of trustee by court.**—The assured and payee named in a policy, was a citizen of New Jersey, and as such, might have sued the company, a corporation under the laws of New York, in the circuit court of the United States. A citizen of the same state was appointed as trustee for the assured in the stead of a former trustee, who was a citizen of New York, by a court of competent jurisdiction. It was held that under these circumstances, the mere fact that one object in having him appointed was to enable a suit to be brought in the circuit court was not sufficient to require or justify the construction that he was improperly, and it could not be pretended that he was collusively, made a plaintiff for the purpose of creating a case cognizable by that court. *Manhattan Life Ins. Co. v. Broughton*, 109 U. S. 121, 125, 27 L. Ed. 878.

**Colorable transfers or conveyances.**—See ante, "Colorable Transfers or Conveyances," VII, C, 4, b, (2), (k), bb.

**Fraudulent or fictitious change of domicile.**—See ante, "Fraudulent or Fictitious Change," VII, C, 4, b, (2), (g), bb.

**53. Claims of land under grants from different states.**—*Colson v. Lewis*, 2 Wheat. 377, 379, 4 L. Ed. 266; *Pawlet v. Clark*, 9 Cranch 292, 3 L. Ed. 735; *United States Bank v. Deveaux*, 5 Cranch 61, 3 L. Ed. 38; *Stevenson v. Fain*, 195 U. S. 165, 170, 49 L. Ed. 142; *Handly v. Anthony*, 5 Wheat. 374, 5 L. Ed. 113; *Rhode Island v. Massachusetts*, 12 Pet. 657, 727, 9 L. Ed. 1233.

Where the jurisdiction of the courts of the United States depends, not on the character of the parties, but upon the nature of the case, the circuit courts derive

the parties prior to the grant under which they claim,<sup>54</sup> nor by the fact that the grants,<sup>55</sup> or the warrants upon which they are founded,<sup>56</sup> were issued by the same state, provided the state has been separated or divided before the action brought.

(4) *Suits between Aliens or between Citizens and Aliens.*—See the title ALIENS, vol. 1, pp. 220, 224, 240, 242.

(5) *Suits by United States.*—The circuit court has jurisdiction concurrent with the courts of the states of any controversy in which the United States are plaintiffs or petitioners.<sup>57</sup>

(6) *Suits between Citizens and Foreign States.*—The circuit court has jurisdiction of a suit between citizens of a state and a foreign state.<sup>58</sup>

c. *Concurrent Jurisdiction with District Courts.*—See ante, "Concurrent Jurisdiction with Circuit Courts," VII, B, 3, e.

d. *Amount in Controversy.*—(1) *Amount Necessary to Give Jurisdiction.*—(a) *General Rule.*—Since the passage of the act of 1887, the circuit court has no jurisdiction of suits arising under the constitution and laws of the United States, or suits between citizens of different states, or suits between citizens and aliens, unless the amount in controversy exceeds two thousand dollars exclusive of interest and costs.<sup>59</sup>

no jurisdiction from the judiciary act, except in the case of a controversy between citizens of the same state claiming lands under grants from different states. *United States Bank v. Deveaux*, 5 Cranch 61, 3 L. Ed. 38.

**Course of appeal, where citizens of different states claim land under grants of different states.**—As the circuit court has no jurisdiction over citizens of different states merely upon the ground that they claim title to land by grants from different states, the supreme court cannot review the judgment of the circuit court in such case, the jurisdiction having been invoked upon the ground of diversity of citizenship, but the course of appeal is to the circuit court of appeals. *Stevenson v. Fain*, 195 U. S. 165, 170, 49 L. Ed. 142. See, generally, the title APPEAL AND ERROR, vol. 1, p. 333.

**54. Jurisdiction not affected by equitable title of parties prior to grant.**—*Colson v. Lewis*, 2 Wheat. 377, 379, 4 L. Ed. 266.

If the controversy is founded upon the conflicting grants of different states, the judicial power of the courts of the United States extends to the case, whatever may have been the equitable title of the parties, prior to the grant. *Colson v. Lewis*, 2 Wheat. 377, 379, 4 L. Ed. 266.

**55. Separation of state after issuance of grant.**—*Pawlet v. Clark*, 9 Cranch 292, 3 L. Ed. 735.

The federal courts have jurisdiction, where one party claims land under a grant from the state of New Hampshire, and the other under a grant from the state of Vermont, although, at the time of the first grant, Vermont was part of New Hampshire. *Pawlet v. Clark*, 9 Cranch 292, 3 L. Ed. 735.

**56. Separation of state subsequent to issue of warrants on which grant founded.**—*Colson v. Lewis*, 2 Wheat. 377, 4 L. Ed. 260.

The jurisdiction of the circuit courts of the United States extends to a case between citizens of Kentucky, claiming lands, exceeding the value of \$500, under different grants, the one issued by the state of Kentucky, and the other by the state of Virginia, but upon warrants issued by Virginia, and locations founded thereon, prior to the separation of Kentucky from Virginia. It is the grant which passes the legal title to the land, and if the controversy is founded upon the conflicting grants of different states, the judicial power of the courts of the United States extends to the case, whatever may have been the equitable title of the parties, prior to the grant. *Colson v. Lewis*, 2 Wheat. 377, 4 L. Ed. 266.

**57. Suits by United States.**—25 Stat. 434; *United States v. Sayward*, 160 U. S. 493, 498, 40 L. Ed. 508; *United States Fidelity, etc., Co. v. Kenyon*, 204 U. S. 349, 51 L. Ed. 516; *United States v. Mooney*, 116 U. S. 104, 105, 29 L. Ed. 550.

**Jurisdiction as dependent on amount in controversy.**—See post, "Suits by United States," VII, C, 4, d, (1), (b).

**58. Suits between citizens and foreign states.**—Const. U. S., art. 3, § 2; act of Aug. 13, 1888, 25 Stat. 434; *Colombia v. Cauca Co.*, 190 U. S. 524, 47 L. Ed. 1159; *French Republic v. Saratoga Vichy Spring Co.*, 191 U. S. 427, 48 L. Ed. 247; *The Sapphire*, 11 Wall. 164, 20 L. Ed. 127 (holding that a foreign sovereign may sue a citizen in the circuit court).

**The Cherokee nation is not a "foreign state"** within the meaning of the statute. *Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L. Ed. 25.

**59. General rule.**—25 Stat. 434; *Mexican Nat. R. Co. v. Davidson*, 157 U. S. 201, 39 L. Ed. 672; *Handlev v. Stutz*, 137 U. S. 366, 34 L. Ed. 706; *Giles v. Harris*, 189 U. S. 475, 485, 47 L. Ed. 909; *Citizens' Bank v. Cannon*, 164 U. S. 319, 321, 41 L. Ed.

(b) *Suits by United States*.—The circuit court has jurisdiction of suits in which the United States are plaintiffs or petitioners, without regard to the amount in dispute.<sup>60</sup> This rule applies where the United States is the real party plaintiff, although the suit incidentally benefits another party.<sup>61</sup>

(c) *Suits for Deprivation of Civil Rights*.—See the title CIVIL RIGHTS, vol. 3, p. 822.

(d) *Claim to Land under Grants from Different States*.—The circuit court has jurisdiction of a suit between citizens of the same state claiming land under grants from different states without regard to the amount in controversy.<sup>62</sup>

(e) *Suits for Infringement of Trademarks*.—Under the trademark act of 1881, United States courts had jurisdiction of suits for the infringement of trademarks without regard to the amount in controversy.<sup>63</sup>

(f) *Suits under Special Acts of Congress*.—Congress may provide by special act for federal jurisdiction without regard to the amount involved.<sup>64</sup>

451; Northern Pac. R. Co. v. Walker, 148 U. S. 391, 392, 37 L. Ed. 494; Wiley v. Sinkler, 179 U. S. 58, 64, 45 L. Ed. 84; United States v. Sayward, 160 U. S. 493, 40 L. Ed. 508; Holt v. Indiana Mfg. Co., 176 U. S. 68, 72, 44 L. Ed. 374; Fishback v. Western Union Tel. Co., 161 U. S. 96, 40 L. Ed. 630; In re Hohorst, 150 U. S. 653, 659, 37 L. Ed. 1211; Globe Refin. Co. v. Landa Cotton Oil Co., 190 U. S. 540, 47 L. Ed. 1171; Kirby v. American Soda Fountain Co., 194 U. S. 141, 146, 48 L. Ed. 911; Postal Tel. Cable Co. v. Alabama, 155 U. S. 482, 486, 39 L. Ed. 231; Blackburn v. Portland Gold Min. Co., 175 U. S. 571, 44 L. Ed. 276; Barrow Steamship Co. v. Kane, 170 U. S. 100, 42 L. Ed. 964; Shoshone Min. Co. v. Rutter, 177 U. S. 505, 44 L. Ed. 864; Cochran v. Montgomery County, 199 U. S. 260, 267, 50 L. Ed. 182; Swafford v. Templeton, 185 U. S. 487, 492, 46 L. Ed. 1005; Vance v. Vandercock (No. 2), 170 U. S. 468, 480, 42 L. Ed. 1111; Interior Const., etc., Co. v. Gibney, 160 U. S. 217, 219, 40 L. Ed. 401; Scott v. Donald, 165 U. S. 107, 41 L. Ed. 648; Building & Loan Ass'n v. Price, 169 U. S. 45, 52, 42 L. Ed. 655; St. Louis, etc., R. Co. v. McBride, 141 U. S. 127, 131, 35 L. Ed. 659; McDaniel v. Traylor, 196 U. S. 415, 49 L. Ed. 533; In re Pennsylvania Co., 137 U. S. 451, 454, 34 L. Ed. 738; Smithers v. Smith, 204 U. S. 632, 642, 51 L. Ed. 656; United States Fidelity, etc., Co. v. Kenyon, 204 U. S. 349, 354, 51 L. Ed. 516.

Prior to the passage of the act of 1887, the amount required to be involved in order to give the circuit courts jurisdiction in the above class of cases was \$500 exclusive of costs. Colson v. Lewis, 2 Wheat. 377, 4 L. Ed. 266; Elk v. Wilkins, 112 U. S. 94, 28 L. Ed. 643; Railroad Co. v. Mississippi, 102 U. S. 135, 136, 26 L. Ed. 96; Claflin v. Commonwealth Ins. Co., 110 U. S. 81, 28 L. Ed. 76; The Baltimore, 8 Wall. 377, 19 L. Ed. 463; Dow v. Johnson, 100 U. S. 158, 175, 25 L. Ed. 632; Green v. Litter, 8 Cranch 229, 3 L. Ed. 545; Smith v. Lyon, 133 U. S. 315, 318, 33 L. Ed. 635; Virginia Coupon Cases, 114 U. S. 269, 323, 29 L. Ed. 185.

60. *Suits by United States*.—25 Stat.

434; United States v. Sayward, 160 U. S. 493, 498, 40 L. Ed. 508; United States Fidelity, etc., Co. v. Kenyon, 204 U. S. 349, 51 L. Ed. 516; United States v. Mooney, 116 U. S. 104, 105, 29 L. Ed. 550.

61. *Where United States real plaintiff*.—United States Fidelity, etc., Co. v. Kenyon, 204 U. S. 349, 51 L. Ed. 516.

The act of congress of August 13, 1894, provides in effect, that persons contracting with the United States for the performance of public work shall execute a bond which, upon the failure of the contractor to make payment for material and labor, may be sued on in the name of the United States for the benefit of the person furnishing the labor or material. It was held that an action brought, under this statute, by the United States for the benefit of the person furnishing labor or material is one in which the United States is plaintiff or petitioner, and cognizable in the circuit court without regard to the amount involved. United States Fidelity, etc., Co. v. Kenyon, 204 U. S. 349, 51 L. Ed. 516.

62. *Claims to land under grants from different states*.—25 Stat. 434; United States v. Sayward, 160 U. S. 493, 498, 40 L. Ed. 508.

63. *Suits for infringement of trademarks*.—Elgin Nat. Watch Co. v. Illinois Watch Case Co., 179 U. S. 665, 45 L. Ed. 365; In re Keasbey & Mattison Co., 160 U. S. 221, 40 L. Ed. 402.

It has been questioned whether the act of 1888 providing that United States courts shall have jurisdiction only where the amount in controversy exceeds, exclusive of interest and costs, the sum or value of \$2,000, controls a suit for the infringement of trademarks, since the trademark act of 1881 provides that in such case United States courts shall have jurisdiction without regard to the amount in controversy. In re Keasbey & Mattison Co., 160 U. S. 221, 40 L. Ed. 402.

64. *Suits under special acts of congress*.—Southern Kansas R. Co. v. Briscoe, 144 U. S. 133, 36 L. Ed. 377 (construing the act of July 4, 1884, giving jurisdiction to certain circuit courts therein named of suits between the Southern Kansas Rail-



(2) *What Constitutes*—(a) *Meaning of Phrase "Matter in Dispute."*—The words "matter in dispute," in the 12th section of the judiciary act, do not refer to the disputes in the country, or the intentions or expectations of the parties concerning them, but to the claim presented on the record to the legal consideration of the court.<sup>65</sup>

(b) *Claims for Liquidated Damages.*—In actions in which the amount recoverable is liquidated by the terms of the contract sued on, the amount fixed in the contract is the matter in dispute.<sup>66</sup>

(c) *Claims for Unliquidated Damages*—aa. *General Rule.*—In actions for unliquidated damages the general rule is that the amount of the plaintiff's claim in his petition or other pleading is the test of jurisdiction.<sup>67</sup>

bb. *Unfounded, Remote or Colorable Claims.*—The rule that the plaintiff's

way Company and inhabitants of the Indian country, through whose territory the road passed, without regard to the amount in dispute).

**65. Matter in dispute defined.**—*Kanouse v. Martin*, 15 How. 198, 208, 14 L. Ed. 660. See, also, *Green v. Lister*, 8 Cranch 229, 3 L. Ed. 545.

**66. Claims for liquidated damages.**—*Wilson v. Daniel*, 3 Dall. 401, 407, 1 L. Ed. 655; *Building & Loan Ass'n v. Price*, 169 U. S. 45, 53, 42 L. Ed. 655.

In an action of debt on a bond for £100, the principal and interest are put in demand and the plaintiff can recover no more, though he may lay his damages at £10,000. The form of the action, therefore, gives in that case the test of jurisdiction. *Wilson v. Daniel*, 3 Dall. 401, 407, 1 L. Ed. 655.

Where a bill filed by a building and loan association against one of its members to collect a debt and foreclose a mortgage showed that there had been a default for six months in the payment of dues and that there was due from defendants at commencement of suit the sum of four thousand dollars, less the sum of twelve hundred dollars of monthly dues which had been paid, leaving due the sum of \$2,800, together with and in addition to the interest on \$2,000 which the defendant had borrowed from the plaintiff, it was held that the matter in dispute, was not merely \$2,000 money loaned, together with the interest on that sum, but the principal sum. *Building & Loan Ass'n v. Price*, 169 U. S. 45, 53, 42 L. Ed. 655.

**67. General rule.**—*Smithers v. Smith*, 204 U. S. 632, 642, 51 L. Ed. 656; *Smith v. Greenhow*, 109 U. S. 669, 27 L. Ed. 1080; *Wiley v. Sinkler*, 179 U. S. 58, 45 L. Ed. 84; *Barry v. Edmunds*, 116 U. S. 550, 29 L. Ed. 729; *Scott v. Donald*, 165 U. S. 107, 41 L. Ed. 648; *Schunk v. Moline, etc., Co.*, 147 U. S. 500, 37 L. Ed. 255; *Day v. Woodworth*, 13 How. 363, 14 L. Ed. 182; *Vance v. Vandercook Co.* (No. 2), 170 U. S. 468, 42 L. Ed. 1111; *Hulsecamp v. Teel*, 2 Dall. 358, 1 L. Ed. 414; *Mexican Nat. R. Co. v. Davidson*, 157 U. S. 201, 39 L. Ed. 672; *Kanouse v. Martin*, 15 How. 198, 208, 14 L. Ed. 660.

**Effect of defense to part of claim.**—The rule that the plaintiff's allegations of value

govern in determining the jurisdiction, except where upon the face of his own pleadings it is not legally possible for him to recover the jurisdictional amount, controls even where the declarations show that a perfect defense might be interposed to a sufficient amount of the claim to reduce it below the jurisdictional amount. *Smithers v. Smith*, 204 U. S. 632, 642, 51 L. Ed. 656; *Schunk v. Moline, etc., Co.*, 147 U. S. 500, 37 L. Ed. 255.

**Effect where recovery less than \$2,000.**—That the amount of the recovery fell short of the sum of two thousand dollars does not withdraw the cases from the jurisdiction of the court, where the declaration alleged damages in the sum of six thousand dollars, as a jury would be at liberty to find any amount not in excess of that sum. The jurisdiction, having once validly attached, would not be defeated by the fact that the recoveries were for sums less than two thousand dollars. As said in the case of *Day v. Woodworth*, 13 How. 363, 14 L. Ed. 182: "The amount has always been left to the discretion of the jury, as the degree of the punishment to be then inflicted must depend on the particular circumstances of each case." *Scott v. Donald*, 165 U. S. 107, 41 L. Ed. 648. See, also, *Green v. Lister*, 8 Cranch 229, 3 L. Ed. 545.

**In an action of trespass, or assault and battery**, where the law prescribes no limitation as to the amount to be recovered and the plaintiff has a right to estimate his damages at any sum, the damage stated in the declaration is the thing put in demand, and presents the only criterion which, from the nature of the action, can be resorted to in settling the question of jurisdiction. *Wilson v. Daniel*, 3 Dall. 401, 407, 1 L. Ed. 655, quoted with approval in *Barry v. Edmunds*, 116 U. S. 550, 560, 29 L. Ed. 729.

**Action for rejecting vote.**—Where in an action for damages for wrongfully rejecting the plaintiff's vote for a member of congress, the damages are laid at \$2,500, the circuit court has jurisdiction. *Wiley v. Sinkler*, 179 U. S. 58, 65, 45 L. Ed. 84.

**Action for breach of contract.**—A suit for \$1,731 damages for breach of contract is not within the jurisdiction of the circuit court. *Mexican Nat. R. Co. v. Davidson*, 157 U. S. 201, 39 L. Ed. 672.

claim is the test of jurisdiction does not apply, however, where upon inspection of his pleading it appears that, as a matter of law it is not possible for him to recover the jurisdictional amount.<sup>68</sup> Thus, if, from the nature of the case, the jurisdictional amount is not recoverable,<sup>69</sup> or if the jurisdictional amount is made up only by adding a claim for remote damages,<sup>70</sup> or if it appears that the amount claimed in the plaintiff's pleadings is colorable and fraudulent, and beyond the reasonable expectation of recovery, and made for the purpose of creating jurisdiction,<sup>71</sup> the case will be dismissed.

**68. Claim obviously not recoverable.**—*Smithers v. Smith*, 204 U. S. 632, 642, 51 L. Ed. 656; *Schacker v. Hartford Fire Ins. Co.*, 93 U. S. 241, 23 L. Ed. 862; *Lee v. Watson*, 1 Wall. 337, 17 L. Ed. 557; *Vance v. Vandercook Co.* (No. 2), 170 U. S. 468, 42 L. Ed. 1111; *North American Transp., etc., Co. v. Morrison*, 178 U. S. 262, 44 L. Ed. 1061; *Globe Ref. Co. v. Landa Cotton Oil Co.*, 190 U. S. 540, 47 L. Ed. 1171.

Where the plaintiff asserts, as his cause of action, a claim which he cannot be legally permitted to sustain by evidence, a mere ad damnum clause will not confer jurisdiction on the circuit court, but the court on motion or demurrer, or of its own motion, may dismiss the suit. *North American Transp., etc., Co. v. Morrison*, 178 U. S. 262, 267, 44 L. Ed. 1061.

**69. Jurisdictional amount not recoverable because of nature of case.**—*Vance v. Vandercook Co.* (No. 2), 170 U. S. 468, 42 L. Ed. 1111; *Wilson v. Daniel*, 3 Dall. 401, 407, 1 L. Ed. 655; *Barry v. Edmunds*, 116 U. S. 550, 560, 29 L. Ed. 729; *North American Transp., etc., Co. v. Morrison*, 178 U. S. 262, 267, 44 L. Ed. 1061.

In determining from the face of a pleading whether the amount really in dispute is sufficient to confer jurisdiction upon a court of the United States, it is settled that if from the nature of the case as stated in the pleadings there could not legally be a judgment for an amount necessary to the jurisdiction, jurisdiction cannot attach even though the damages be laid in the declaration at a larger sum. *Vance v. Vandercook Co.* (No. 2), 170 U. S. 468, 472, 42 L. Ed. 1111; *Barry v. Edmunds*, 116 U. S. 550, 29 L. Ed. 729; *Wilson v. Daniel*, 3 Dall. 401, 1 L. Ed. 655.

Since the courts of South Carolina have held that in an action of trover consequential damages are not recoverable, and have also held that in the action of claim and delivery, damages for the detention must have respect to the property and to a direct injury arising from the detention, it follows that they cannot be considered in making up the jurisdictional amount, though claimed in the declaration. *Vance v. Vandercook Co.* (No. 2), 170 U. S. 468, 480, 42 L. Ed. 1111.

**70. Claim for remote damages.**—*North American Transp., etc., Co. v. Morrison*, 178 U. S. 262, 44 L. Ed. 1061.

In an action against a carrier for breach of a contract of carriage, it appeared that after part of the journey was made the

carrier refused to continue it. The complaint claimed damages as follows: \$200 paid by him as fare; expenses incurred in having to return to the place from which he started, \$72.50; the wages which he would have earned had he not started upon the journey, \$320; loss of baggage, \$29.25; and about \$1,700 for wages and profits which he would have earned had he been carried to the destination called for in his contract. It was held that the claim for wages and profits was too remote, and that the other items being insufficient to make up the jurisdictional amount, the jurisdiction could not be sustained. *North American Transp., etc., Co. v. Morrison*, 178 U. S. 262, 44 L. Ed. 1061.

In *Pacific Express Co. v. McDowell*, 35 L. Ed. 757, the plaintiff sued the defendant for damages for a conspiracy to prevent his election as justice of the peace, and for failure to deliver election tickets which prevented him from being voted upon at the regular election. The petition claimed an amount less than \$2,000 for the value of the tickets, expenses and exemplary damages, and \$3,000 for mental suffering. The circuit court entertained jurisdiction, and the plaintiff recovered \$600 damages, although it was contended by the defendant that the amount claimed for mental suffering could not be taken into consideration. Judgment affirmed by a divided court.

**71. Colorable or fraudulent claims.**—*Smithers v. Smith*, 204 U. S. 632, 643, 51 L. Ed. 656; *Globe Ref. Co. v. Landa Cotton Oil Co.*, 190 U. S. 540, 47 L. Ed. 1171; *Barry v. Edmunds*, 116 U. S. 550, 561, 29 L. Ed. 729; *Put-in-Bay Waterworks, etc., Co. v. Ryan*, 181 U. S. 409, 430, 45 L. Ed. 927; *Wetmore v. Rymer*, 169 U. S. 115, 119, 42 L. Ed. 682; *Bowman v. Chicago, etc., R. Co.*, 115 U. S. 611, 29 L. Ed. 502.

However stringent and far reaching the rule may be that the plaintiff's statement of his case governs in determining the jurisdiction, it does not exclude the power of the court to protect itself against fraud. *Smithers v. Smith*, 204 U. S. 632, 643, 51 L. Ed. 656.

Where the judge of the circuit court, upon sufficient evidence, finds that the damages have been claimed and magnified fraudulently beyond the jurisdictional amount, the action should be dismissed. *Smith v. Greenhow*, 109 U. S. 669, 27 L. Ed. 1080; *Smithers v. Smith*, 204 U. S. 632, 643, 51 L. Ed. 656; *Globe Refin. Co.*

(d) *Suits to Prevent Future Loss or Damage*.—In a suit to prevent a future loss or damage to the complainant, the object to be gained by the bill is the test of jurisdiction.<sup>72</sup>

(e) *Suits to Enjoin Taxes*.—In a suit to enjoin the enforcement of taxes or assessments, the amount of the tax sought to be enjoined is the test of jurisdiction.<sup>73</sup>

*v. Landa Cotton Oil Co.*, 190 U. S. 540, 47 L. Ed. 1171.

"In *Smith v. Greenhow*, 109 U. S. 669, 671, 27 L. Ed. 1080, the value of the property taken was stated in the declaration to be \$100, while the damages for the alleged trespass was laid at \$6,000, and no circumstances of malice or of special damage were averred. It was said by the court: 'We cannot, of course, assume as a matter of law that the amount laid, or a less amount, greater than \$500, is not recoverable upon the case stated in the declaration, and cannot, therefore, justify the order remanding the cause on the ground that the matter in dispute does not exceed the sum or value of \$500. But if the circuit court had found, as matter of fact, that the amount of damages stated in the declaration was colorable, and had been laid beyond the amount of a reasonable expectation of recovery, for the purpose of creating a case removable under the act of congress, so that, in the words of the 5th section of the act of 1875, it appeared that the suit "did not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court," the order remanding it to the state court could have been sustained.'" *Barry v. Edmunds*, 116 U. S. 550, 559, 29 L. Ed. 729.

**72. Suits to prevent future loss or damage.**—*Mississippi, etc., R. Co. v. Ward*, 2 Black 485, 17 L. Ed. 311; *Hunt v. New York Cotton Exchange*, 205 U. S. 322, 336, 51 L. Ed. 821; *Scott v. Donald*, 165 U. S. 107, 41 L. Ed. 648; *McNeill v. Southern R. Co.*, 202 U. S. 543, 558, 50 L. Ed. 1142.

Although a small claim for demurrage may have been the origin of the litigation, if there is invoked in the controversy presented by the bill not only the right to enforce against a railway company the payment of statutory penalties much in excess of two thousand dollars, but also the right of that company to carry on interstate commerce in a state without becoming subject to such orders and directions of the corporation commission which so directly burdened such commerce as to amount to a regulation thereof, and this latter right is alleged in the bill to be of the necessary jurisdictional value, which averment is supported by testimony, and the master and the court below have found such to be the fact, there is no merit in the contention that there is a want of jurisdiction in the circuit court. *McNeill v. Southern R. Co.*, 202 U. S. 543, 558, 50 L. Ed. 1142.

It was alleged in a bill for injunction, and there was evidence to show, that the

complainant intended to import for his own use, from time to time as he may need the same, ales, wines and liquors, the products of other states, of the value exceeding two thousand dollars, which were threatened to be seized by the state constables, claiming to act under the dispensary law. The agreed statement of facts contained the following statements: "Previous to filing of bill and temporary injunction granted in this case the state constables seized, intended and threatened to seize in future, all intoxicating liquors, whatsoever, coming into the state from other states and foreign countries, and to carry out in full all the provisions of the dispensary law of January 2, 1895; and the value of the right of importation of ales, wines and other liquors, products of other states and countries, is of the value of two thousand dollars and upwards; and the difference in the price to the consumer, like the plaintiff, of such liquor bought at the state dispensary of South Carolina and bought out of the state is about fifty to seventy-five per cent. in favor of imported liquors." It was held that such statements sufficiently concede that the pecuniary value of plaintiff's rights in controversy exceeded the value of two thousand dollars, and that it could not be reasonably claimed that the plaintiff must postpone his application to the circuit court, as a court of equity, until his property to an amount exceeding in value two thousand dollars had been actually seized and confiscated, and when the preventive remedy by injunction would be of no avail. *Scott v. Donald*, 165 U. S. 107, 114, 41 L. Ed. 648.

**Suit to enjoin use of stock exchange quotations.**—A suit to enjoin a person from receiving and using the quotations of sales on the New York Cotton Exchange is within the jurisdiction, where the loss which the plaintiff might sustain from their continued receipt and use by the defendant would exceed \$2,000. *Hunt v. New York Cotton Exchange*, 205 U. S. 322, 323, 51 L. Ed. 821.

**Suit to abate nuisance.**—Where, on a bill in equity to abate a nuisance, the jurisdiction is tested by the value of the object to be gained by the bill, and that object is the removal of the nuisance, it is not necessary to show that the plaintiff's damage amounts to the sum which is required to give the courts of the United States jurisdiction. *Mississippi, etc., R. Co. v. Ward*, 2 Black 485, 17 L. Ed. 311.

**73. Suit to enjoin taxes.**—*Holt v. Indiana Mfg. Co.*, 176 U. S. 68, 72, 44 L. Ed.



(f) *Creditors' Suits*.—If in a suit by several creditors of a corporation on behalf of all, if the claims of the original complainants exceed two thousand dollars, the circuit court has jurisdiction, although the claim of one or more of the original or intervening creditors standing alone, is less than that amount.<sup>74</sup>

(g) *Suit by Taxpayers to Enjoin Bond Issue*.—In a suit by a taxpayer to enjoin a bond issue, the amount of the complainant's interest, and not the amount of the entire issue of bonds, is the amount in controversy.<sup>75</sup>

(h) *Exclusion of Interest*.—The amount in controversy must exceed two thousand dollars exclusive of interest,<sup>76</sup> but this does not defeat the jurisdiction where the principal sum demanded in the action is made up in part of a claim for interest.<sup>77</sup>

(i) *Joinder of Interests of Several Parties*—aa. *Parties Having Common or Undivided Interests*.—If several persons be joined in a suit in equity or admiralty, and have a common and undivided interest, though separable as between themselves, the amount of their joint claim or liability will be the test of jurisdiction.<sup>78</sup>

374; *Citizens' Bank v. Cannon*, 164 U. S. 319, 41 L. Ed. 451; *Fishback v. Western Union Tel. Co.*, 161 U. S. 96, 40 L. Ed. 630. See post, "Joinder of Interests of Several Parties," VII, C, 4, d, (2), (i).

The effect on future taxation of a decision that the particular taxation is invalid cannot be availed of to add to the sum or value of the matter in dispute. *Holt v. Indiana Mfg. Co.*, 176 U. S. 68, 72, 44 L. Ed. 374.

**74. Creditors' suits.**—*Handley v. Stutz*, 137 U. S. 366, 34 L. Ed. 706.

Three creditors of a corporation filed a bill in equity against the corporation and its stockholders, in which it was alleged that the corporation was insolvent, and that the stockholders had paid nothing for their stock, and were liable to the corporation to that amount which constituted a trust fund for the payment of its debts. The amount of the liability of the defendants exceeded \$2,000. The claims of two of the original plaintiffs exceeded \$2,000 each, but one was for less, and subsequently other creditors, whose claims were for a less amount than \$2,000 each, intervened as plaintiffs. It was held that as the sums alleged to be due from the corporation to the original plaintiffs amounted to more than \$2,000 the court had jurisdiction as such a bill could not have been filed by one creditor on his own behalf only. *Handley v. Stutz*, 137 U. S. 366, 34 L. Ed. 706.

**75. Suit by taxpayer to enjoin bond issue.**—*Colvin v. Jacksonville*, 158 U. S. 456, 460, 39 L. Ed. 1053. See, also, *Caffrey v. Oklahoma*, 177 U. S. 346, 348, 44 L. Ed. 799.

Where the court found as a matter of fact that the entire amount of taxes which the complainant would be obliged to pay as interest and sinking fund, on account of a proposed issue of bonds, was less than \$2,000, the bill to enjoin the issue was properly dismissed. *Colvin v. Jacksonville*, 158 U. S. 456, 460, 39 L. Ed. 1053.

**76. Exclusion of interest.**—*Brown v.*

*Webster*, 156 U. S. 328, 39 L. Ed. 440; *Edwards v. Bates County*, 163 U. S. 269, 41 L. Ed. 155.

**77. Principal demand one in part for interest.**—*Brown v. Webster*, 156 U. S. 328, 39 L. Ed. 440; *Edwards v. Bates County*, 163 U. S. 269, 41 L. Ed. 155.

A bought a tract of land from B for \$1,200, and was subsequently ousted from possession by a third person, whose claim of title was sustained in a proceeding brought for that purpose. Subsequently A brought suit in the federal court against B to recover damages for the eviction, the amount claimed in his petition being the sum of \$6,342.40. Part of A's claim consisted of a claim for interest upon the purchase price. It was held that the circuit court had jurisdiction. "Here the entire damage claimed was the principal demand without reference to the constituent elements entering therein. This demand was predicated on a distinct cause of action—eviction from the property bought. Thus considered, the attack on the jurisdiction is manifestly unsound, since its premise is that a sum, which was an essential ingredient in the principal claim, should be segregated therefrom, and be considered as a mere accessory thereto." *Brown v. Webster*, 156 U. S. 328, 39 L. Ed. 440.

In an action on municipal bonds with coupons attached, the matured coupons are to be treated as an independent principal demand and not as interest, and if the face of the bonds and matured coupons exceed the sum of \$2,000 the circuit court has jurisdiction, although the face of the bond itself does not exceed \$2,000. *Edwards v. Bates County*, 163 U. S. 269, 41 L. Ed. 155.

**78. Parties having common or undivided interest.**—*Wheless v. St. Louis*, 180 U. S. 379, 382, 45 L. Ed. 583; *Clay v. Field*, 138 U. S. 464, 34 L. Ed. 1044; *Smithers v. Smith*, 204 U. S. 632, 633, 51 L. Ed. 656; *McDaniel v. Traylor*, 196 U. S. 415, 49 L. Ed. 533.

Suits against two persons in which it is

bb. *Parties Having Distinct Interests.*—Where several persons having distinct interests, are joined for the sake of convenience only, and because they form a class of parties whose rights or liabilities arose out of the same transaction, or have relation to a common fund or mass of property sought to be administered, such distinct demands or liabilities cannot be aggregated together for the purpose of giving the circuit court jurisdiction, but each must stand or fall by itself alone.<sup>79</sup> Distinct and separate interest of complainants in a suit for relief against taxes or assessments cannot be united for the purpose of making up the amount necessary to give the circuit court jurisdiction.<sup>80</sup> And upon a like principle, the separate interests of the defendants in a suit for relief against assessments or taxes cannot be joined to make up the jurisdictional amount.<sup>81</sup>

claimed that they have jointly damaged the plaintiff for a sum in excess of \$2,000, and jointly deprived him of land the value of which exceeds that sum, is cognizable in the circuit court. *Smithers v. Smith*, 204 U. S. 632, 633, 51 L. Ed. 656.

**A suit in equity to remove a cloud from the title**, the plaintiffs being the joint owners of an undivided interest of one-half of the property, and the defendants having several claims against it which, in the aggregate, exceeds the sum of \$2,000, and which by combination and conspiracy were procured to be allowed against the property, is one the essence of which is the alleged fraudulent combination and conspiracy to fasten upon the estate the liability procured by such fraudulent combination and conspiracy, and the amount or sum in dispute is the aggregate of the defendants' claims, and where this exceeds \$2,000, the United States circuit court has jurisdiction, the parties being citizens of different states. *McDaniel v. Traylor*, 196 U. S. 415, 49 L. Ed. 533, distinguishing *Walter v. Northeastern R. Co.*, 147 U. S. 370, 37 L. Ed. 206.

**A suit against a state revenue agent to enjoin taxes** for an amount in excess of \$2,000 is within the jurisdiction of the court, where the agent represents all of the parties interested and the bill does not show how that sum, if collected, would be parcelled out to the several municipalities interested. *Illinois Central R. Co. v. Adams*, 180 U. S. 28, 39, 45 L. Ed. 410.

**79. Parties having distinct interests.**—*Wheless v. St. Louis*, 180 U. S. 379, 382, 45 L. Ed. 583; *Clay v. Field*, 138 U. S. 464, 34 L. Ed. 1044; *Walter v. Northeastern R. Co.*, 147 U. S. 370, 37 L. Ed. 206; *Northern Pac. R. Co. v. Walker*, 148 U. S. 391, 392, 37 L. Ed. 494; *Fishback v. Western Union Tel. Co.*, 161 U. S. 96, 100, 40 L. Ed. 630; *Illinois Central R. Co. v. Adams*, 180 U. S. 28, 39, 45 L. Ed. 410.

"It is well settled in this court that when two or more plaintiffs, having several interests, unite for the convenience of litigation in a single suit, it can only be sustained in the court of original jurisdiction, or on appeal in this court, as to those whose claims exceed the jurisdictional amount; and that when two or more defendants are sued by the same plaintiff in one suit, the test of jurisdiction

is the joint or several character of the liability to the plaintiff. This was the distinct ruling of this court in *Seaver v. Bigelows*, 5 Wall. 208, 18 L. Ed. 595; *Russell v. Stansell*, 105 U. S. 303, 26 L. Ed. 989; *Farmers' Loan, etc., Co. v. Waterman*, 106 U. S. 265, 27 L. Ed. 115; *Hawley v. Fairbanks*, 108 U. S. 543, 27 L. Ed. 829; *Stewart v. Dunham*, 115 U. S. 61, 29 L. Ed. 329; *Gibson v. Shufeldt*, 122 U. S. 27, 30 L. Ed. 1083; *Clay v. Field*, 138 U. S. 464, 34 L. Ed. 1044." *Walter v. Northeastern R. Co.*, 147 U. S. 370, 373, 37 L. Ed. 206.

**80. Joinder of interest of plaintiffs in suit for relief against taxes.**—*Wheless v. St. Louis*, 180 U. S. 379, 382, 45 L. Ed. 583, reaffirmed in *Stearns v. Todd*, 204 U. S. 669, 51 L. Ed. 672; *Brown v. Denver*, 186 U. S. 480, 46 L. Ed. 1259; *Ogden City v. Armstrong*, 168 U. S. 224, 42 L. Ed. 444; *Russell v. Stansell*, 105 U. S. 303, 26 L. Ed. 989; *Walter v. Northeastern R. Co.*, 147 U. S. 370, 37 L. Ed. 206.

**81. Joinder of interest of defendants in suit for relief against taxes.**—*Walter v. Northeastern R. Co.*, 147 U. S. 370, 37 L. Ed. 206; *Northern Pac. R. Co. v. Walker*, 148 U. S. 391, 37 L. Ed. 494; *Fishback v. Western Union Tel. Co.*, 161 U. S. 96, 40 L. Ed. 630; *Citizens' Bank v. Cannon*, 164 U. S. 319, 321, 41 L. Ed. 451; *Illinois Central R. Co. v. Adams*, 180 U. S. 28, 39, 45 L. Ed. 410.

The rule applicable to several plaintiffs having separate claims, that each must represent an amount sufficient to give the court jurisdiction, is equally applicable to several liabilities of different defendants to the same plaintiff. *Walter v. Northeastern R. Co.*, 147 U. S. 370, 374, 37 L. Ed. 206.

In a suit to enjoin taxes assessed by several counties, where the record does not show that the amount of the assessments and taxes, forming the subject of the litigation, levied in any one of the counties, exceed the sum of \$2,000, the circuit court has no jurisdiction. *Northern Pac. R. Co. v. Walker*, 148 U. S. 391, 392, 37 L. Ed. 494.

A bill alleged that the defendants were about to assess and collect state and parish taxes for the years 1889, 1890, 1891 and 1892, and the amended bill alleged a similar purpose as to taxes for 1893.

(j) *Claims Made in Cross Bill.*—See the titles APPEAL AND ERROR, vol. 1, p. 887; REMOVAL OF CAUSES.

(3) *Matters Not Reducible to Money Value.*—The jurisdiction, conferred by congress upon any court of the United States, of suits at law or in equity in which the matter in dispute exceeds the sum or value of a certain number of dollars, includes no case in which the right of neither party is capable of being valued in money,<sup>82</sup> such as proceedings by habeas corpus,<sup>83</sup> or suits for divorce.<sup>84</sup>

(4) *Change in Value of Subject Matter Pending Suit.*—Jurisdiction once acquired, cannot be taken away by any change in the value of the subject of controversy.<sup>85</sup>

(5) *Transfers to Make Jurisdictional Amount.*—The circuit court cannot, since the act of 1875, entertain a suit upon municipal bonds payable to bearer, the real owners of which have transferred them to the plaintiffs of record for the sole purpose of suing thereon in the courts of the United States for the benefit of such owners, who could not have sued there in their own names, by reason of the insufficient value of their claims.<sup>86</sup>

(6) *Effect of Defense as Diminishing Amount.*—The fact that there is a valid defense to a cause of action, although apparent on the face of the petition, does not diminish the amount that is claimed, nor determine what is the matter in

Neither bill contained a specific allegation as to the amount of the assessment or taxes for any one parish, but averred that the taxes so assessed exceeded, exclusive of interest and costs, the sum of two thousand dollars. It was held that the court had no jurisdiction, as the bill must be understood to mean that the aggregate amount of the taxes for the several parishes exceeded two thousand dollars, and the theory of that part of the bill evidently was that the amount involved, in order to confer jurisdiction on the circuit court, could be reached by adding together the taxes for the several parishes. *Citizens' Bank v. Cannon*, 164 U. S. 319, 321, 41 L. Ed. 451.

"In *Walter v. Northeastern R. Co.*, 147 U. S. 370, 37 L. Ed. 206, we held that 'a circuit court of the United States has no jurisdiction over a bill in equity to enjoin the collection of taxes from a railroad company, when distinct assessments in separate counties, no one of which amounts to two thousand dollars, and for which, in case of payment under protest, separate suits must be brought to recover back the amounts paid, are joined together in the bill, making an aggregate of over two thousand dollars.'" *Fishback v. Western Union Tel. Co.*, 161 U. S. 96, 100, 40 L. Ed. 630.

Where it was nowhere shown that the amount of any one of distinct county assessments, the collection of which was entrusted to tax collectors, exceeded \$2,000, while, on the contrary, the total valuation of the property of the telegraph company assessed as belonging to or operated by it in any one county was such as to preclude the idea that the amount of the assessment in such county would approach two thousand dollars, although if these county assessments were aggregated they would considerably exceed two thousand

dollars, it was held that the several county clerks or tax collectors could be joined in a single suit in a federal court and the jurisdiction sustained on the ground that the total amount involved exceeds the jurisdictional limitation. *Fishback v. Western Union Tel. Co.*, 161 U. S. 96, 100, 40 L. Ed. 630.

**82. Matters not reducible to money value.**—*Kurtz v. Moffitt*, 115 U. S. 487, 498, 29 L. Ed. 458.

**83. Habeas corpus.**—*Kurtz v. Moffitt*, 115 U. S. 487, 29 L. Ed. 458.

**84. Suits for divorce.**—*De La Rama v. De La Rama*, 201 U. S. 303, 307, 50 L. Ed. 765.

**85. Change in value of subject matter pending suit.**—*Kirby v. American Soda Fountain Co.*, 194 U. S. 141, 146, 48 L. Ed. 911; *Cooke v. United States*, 2 Wall. 218, 17 L. Ed. 755.

"It is the general rule that when the jurisdiction of a circuit court of the United States has once attached it will not be ousted by subsequent change in the conditions. *Morgan v. Morgan*, 2 Wheat. 290, 4 L. Ed. 242; *Clarke v. Mathewson*, 12 Pet. 164, 9 L. Ed. 1041; *Kanouse v. Martin*, 15 How. 198, 14 L. Ed. 660; *Cooke v. United States*, 2 Wall. 218, 17 L. Ed. 755." *Kirby v. American Soda Fountain Co.*, 194 U. S. 141, 145, 48 L. Ed. 911.

**86. Transfer in order to make jurisdictional amount.**—*Williams v. Nottawa*, 104 U. S. 209, 26 L. Ed. 719; *Bernards Township v. Stebbins*, 109 U. S. 341, 355, 27 L. Ed. 956; *Waite v. Santa Cruz*, 184 U. S. 302, 328, 46 L. Ed. 552.

Where bonds for a less amount than that necessary to give the circuit court jurisdiction are transferred to one who holds other similar bonds, in order that the transferee may bring suit in the federal court for relief because of the accidental omission of seals from all of the bonds,



dispute; for it cannot be said in advance that that defense will be presented by the defendant, or, if presented, sustained by the court.<sup>87</sup>

(7) *Effect of Denial of Value of Matter in Dispute.*—The mere denial that the matter in dispute is of the value alleged in the bill does not, of itself, deprive the court of jurisdiction, but merely presents a question of fact into which the court has jurisdiction to inquire.<sup>88</sup>

(8) *Effect Where Part of Claim Is Not Due.*—The fact that part of the claim sued on is not due, is immaterial, where the whole amount claimed is sufficient to make up the jurisdictional amount.<sup>89</sup>

(9) *Proof of Value of Amount in Dispute.*—In cases where the demand is not for money, and the nature of the action does not require the value of the thing demanded to be stated in the declaration, the practice of courts of the United States is, to allow the value to be given in evidence.<sup>90</sup>

(10) *Dismissal for Want of Jurisdictional Amount.*—A suit cannot be properly dismissed by a circuit court as not substantially involving a controversy within its jurisdiction, because of want of jurisdictional amount unless the facts, when made to appear on the record, create a legal certainty of that conclusion.<sup>91</sup>

e. *Ancillary Jurisdiction*—(1) *Jurisdiction Dependent on Original Suit.*—Federal courts have jurisdiction of proceedings ancillary to an original action or suit, independent of any distinct ground of federal jurisdiction therefor.<sup>92</sup> The

the court has no jurisdiction as to those bonds which were thus transferred for the purpose of creating a case cognizable in the federal courts. *Bernards Township v. Stebbins*, 109 U. S. 341, 354, 27 L. Ed. 956; *Waite v. Santa Cruz*, 184 U. S. 302, 328, 46 L. Ed. 552.

**87. Defense as diminishing amount.**—*Schunk v. Moline, etc., Co.*, 147 U. S. 500, 504, 37 L. Ed. 255; *Smithers v. Smith*, 204 U. S. 632, 642, 51 L. Ed. 656.

"Although there might be a perfect defense to the suit for at least the amount not yet due, yet the fact of a defense, and a good defense, too, would not affect the question as to what was the amount in dispute. Suppose an action were brought on a nonnegotiable note for \$2,500, the consideration for which was fully stated in the petition, and which was a sale of lottery tickets, or any other matter distinctly prohibited by statute, can there be a doubt that the circuit court would have jurisdiction? There would be presented a claim to recover the \$2,500; and whether that claim was sustainable or not, that would be the real sum in dispute." *Schunk v. Moline, etc., Co.*, 147 U. S. 500, 504, 37 L. Ed. 255.

**88. Effect of denial of value of matter in dispute.**—*Put-in-Bay Waterworks, etc., Co. v. Ryan*, 181 U. S. 409, 430, 45 L. Ed. 927.

**89. Part of claim not due.**—In *Schunk v. Moline, etc., Co.*, 147 U. S. 500, 37 L. Ed. 255, the plaintiff's petition prayed judgment on several promissory notes, of which some, amounting to \$530, were due, and others, amounting to \$1,664, were not due. It was held that the court had jurisdiction.

**90. Proof of value of amount in dispute.**—*Ex parte Bradstreet*, 7 Pet. 634, 8 L. Ed. 810.

**91. Dismissal for want of jurisdictional amount.**—*Wetmore v. Rymer*, 169 U. S. 115, 128, 42 L. Ed. 682; *Smithers v. Smith*, 204 U. S. 632, 643, 51 L. Ed. 656; *Globe Ref. Co. v. Landa Cotton Oil Co.*, 190 U. S. 540, 47 L. Ed. 1171.

If upon the case stated there could legally be a recovery for the amount necessary to the jurisdiction, and that amount is claimed, it would be necessary, in order to defeat the jurisdiction since the passage of the act of March 3, 1875, for the court to find, as matter of fact, upon evidence legally sufficient, "that the amount of damages stated in the declaration was colorable, and had been laid beyond the amount of a reasonable expectation of recovery, for the purpose of creating a case" within the jurisdiction of the court. Then it would appear to the satisfaction of the court that the suit "did not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court. *Barry v. Edmunds*, 116 U. S. 550, 560, 29 L. Ed. 729; *Globe Ref. Co. v. Landa Cotton Oil Co.*, 190 U. S. 540, 547, 47 L. Ed. 1171.

**92. Jurisdiction dependent on original suit.**—*Clarke v. Mathewson*, 12 Pet. 164, 9 L. Ed. 1041; *Gunter v. Atlantic Coast Line R. Co.*, 200 U. S. 273, 292, 50 L. Ed. 477; *Raphael v. Trask*, 194 U. S. 272, 278, 48 L. Ed. 973; *Julian v. Central Trust Co.*, 193 U. S. 93, 48 L. Ed. 629; *Krippendorf v. Hyde*, 110 U. S. 276, 25 L. Ed. 145; *Pacific Railroad v. Missouri Pac. R. Co.*, 111 U. S. 505, 28 L. Ed. 498; *New Orleans v. Fisher*, 180 U. S. 185, 196, 45 L. Ed. 485; *Root v. Woolworth*, 150 U. S. 401, 37 L. Ed. 1123; *Dunn v. Clarke*, 8 Pet. 1, 8 L. Ed. 845; *Jones v. Andrews*, 10 Wall. 327, 331, 19 L. Ed. 935, cited and explained in *Christmas v. Russell*, 14 Wall. 69, 81, 20 L. Ed. 762; *Bernards Township v. Steb-*

jurisdiction of such proceedings is in nowise dependent upon the diversity of the citizenship of the parties thereto,<sup>93</sup> nor, indeed, upon the amount in controversy.<sup>93a</sup>

(2) *What Are Ancillary Proceedings*—(a) *Definition*.—Ancillary bills are ordinarily bills maintained in the same court as that in which the original bill is filed, with a view to protect the rights adjudicated by the court in reference to the subject matter of the litigation, and in aid of the jurisdiction of the court, with a purpose of carrying out its decree and rendering effectual rights to be secured or already adjudicated.<sup>94</sup> The question is not whether the bill is supplemental or original in the technical sense of equity pleading; but whether it is to be considered as supplemental, or entirely new and original, in that sense which the supreme court has sanctioned with reference to the line that divides jurisdiction of the federal courts from that of the state courts.<sup>95</sup>

bins, 109 U. S. 341, 356, 27 L. Ed. 956; *Mississippi Mills v. Cohn*, 150 U. S. 202, 208, 37 L. Ed. 1052; *Pope v. Louisville, etc., R. Co.*, 173 U. S. 573, 577, 43 L. Ed. 814; *Rouse v. Letcher*, 156 U. S. 47, 31 L. Ed. 341; *Gregory v. Van Ee*, 160 U. S. 643, 40 L. Ed. 566; *Carey v. Houston, etc., R. Co.*, 161 U. S. 115, 40 L. Ed. 638.

The federal courts may exercise the powers of courts of superior general jurisdiction; and it undoubtedly exists over all suits and proceedings ancillary, auxiliary, or supplemental to other suits, of which the circuit courts have cognizance as courts of the United States. *Carey v. Houston, etc., R. Co.*, 161 U. S. 115, 127, 40 L. Ed. 638.

**93. Jurisdiction not dependent on diversity of citizenship.**—*Pope v. Louisville, etc., R. Co.*, 173 U. S. 573, 577, 43 L. Ed. 814; *Blair v. Chicago*, 201 U. S. 400, 402, 50 L. Ed. 801; *Gableman v. Peoria, etc., R. Co.*, 179 U. S. 335, 342, 45 L. Ed. 220; *Krippendorf v. Hyde*, 110 U. S. 276, 25 L. Ed. 145; *White v. Ewing*, 159 U. S. 36, 37, 40 L. Ed. 67; *Rouse v. Letcher*, 156 U. S. 47, 49, 31 L. Ed. 341; *Julian v. Central Trust Co.*, 193 U. S. 93, 113, 48 L. Ed. 629; *Root v. Woolworth*, 150 U. S. 401, 413, 37 L. Ed. 1123; *Pacific Railroad v. Missouri Pac. R. Co.*, 111 U. S. 505, 28 L. Ed. 498; *Reilly v. Golding*, 10 Wall. 56, 19 L. Ed. 858; *Gregory v. Van Ee*, 160 U. S. 643, 40 L. Ed. 566; *Carey v. Houston, etc., R. Co.*, 161 U. S. 115, 40 L. Ed. 638.

In an ancillary proceeding a plea to the jurisdiction setting up want of diversity of citizenship of the parties is immaterial and is properly stricken out. *New Orleans v. Fisher*, 180 U. S. 185, 196, 45 L. Ed. 485.

**93a. Jurisdiction not dependent upon amount in controversy.**—*White v. Ewing*, 159 U. S. 36, 37, 40 L. Ed. 67; *Gumbel v. Pitkin*, 124 U. S. 131, 150, 31 L. Ed. 374; *Krippendorf v. Hyde*, 110 U. S. 276, 284, 25 L. Ed. 145.

The circuit court of the United States in a general creditor's suit properly pending therein for the collection, administration, and distribution of the assets of an insolvent corporation, has jurisdiction to hear and determine an ancillary suit in-

stituted in the same cause by its receiver in accordance with its order, against debtors of such corporation, although in said suit, the receiver claimed the right to recover from debtor a sum not exceeding \$2,000. *White v. Ewing*, 159 U. S. 36, 37, 40 L. Ed. 67.

**94. Ancillary suits defined.**—*Raphael v. Trask*, 194 U. S. 272, 48 L. Ed. 973; *Julian v. Central Trust Co.*, 193 U. S. 93, 113, 48 L. Ed. 629.

"A bill filed to continue a former litigation in the same court, or which relates to some matter already partly litigated in the same court, or which is an addition to a former litigation in the same court, by the same parties or their representatives standing in the same interest, or to obtain and secure the fruits, benefits and advantages of the proceedings and judgment in a former suit in the same court by the same or additional parties, standing in the same interest, or to prevent a party from using the proceedings and judgment of the same court for fraudulent purposes, or to restrain a party from using a judgment to perpetrate an injustice, or obtain an inequitable advantage over other parties to the former judgment or proceeding, or to obtain any equitable relief in regard to, or connected with, or growing out of, any judgment or proceeding at law rendered in the same court, or to assert any claim, right, or title to property in the custody of the court, or for the defense of any property rights, or the collection of assets of any estate being administered by the court, is an ancillary suit." *Bates on Federal Equity Procedure*, vol. 1, § 97, note. Quoted with approval in *Julian v. Central Trust Co.*, 193 U. S. 93, 113, 48 L. Ed. 629.

Where a bill does not relate to some matter already litigated in the same court by the same persons, and which is not either in addition to, or a continuance of an original suit, it is an original bill, not an ancillary one. *Christmas v. Russell*, 14 Wall. 69, 20 L. Ed. 762.

**95. Distinguished from supplemental bill in equity pleading.**—*Minnesota Co. v. St. Paul Co.*, 2 Wall. 609, 17 L. Ed. 886; *Carey v. Houston, etc., R. Co.*, 161 U. S. 115, 128, 40 L. Ed. 638; *Pope v. Louisville, etc., R.*

(b) *Cross Bill*.—The federal courts have jurisdiction of a cross bill irrespective of the citizenship of the parties.<sup>96</sup>

(c) *Suits in Relation to Federal Judgments*—aa. *Suits to Construe Judgment*.—A bill to construe a judgment decree or order of a federal court may be maintained as an ancillary suit.<sup>97</sup>

bb. *Suits to Enjoin Judgment*.—A bill filed on the equity side of the court to restrain or regulate judgments or suits at law in the same court, and thereby prevent injustice or an inequitable advantage under mesne or final process, is not an original suit, but ancillary and dependent, supplementary merely to an original suit out of which it has arisen, and is maintained without reference to the citizenship or residence of the parties.<sup>98</sup>

Co., 173 U. S. 573, 43 L. Ed. 814. See, generally, the title EQUITY.

"No one, for instance, would hesitate to say that, according to the English chancery practice, a bill to enjoin a judgment at law, is an original bill in the chancery sense of the word. Yet this court has decided many times, that when a bill is filed in the circuit court, to enjoin a judgment of that court, it is not to be considered as an original bill, but as a continuation of the proceeding at law; so much so that the court will proceed in the injunction suit without actual service of subpoena on the defendant, and though he be a citizen of another state, if he were a party to the judgment at law." *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609, 633, 17 L. Ed. 886; *Carey v. Houston, etc., R. Co.*, 161 U. S. 115, 128, 40 L. Ed. 638.

**96. Cross bill.**—*Morgan's, etc., Steamship Co. v. Texas Cent. R. Co.*, 137 U. S. 171, 201, 34 L. Ed. 625; *Jones v. Andrews*, 10 Wall. 327, 333, 19 L. Ed. 935; *Dewey v. West Fairmont Gas Coal Co.*, 123 U. S. 329, 31 L. Ed. 179; *Krippendorf v. Hyde*, 110 U. S. 276, 25 L. Ed. 145; *Pacific Railroad v. Missouri Pac. R. Co.*, 111 U. S. 505, 28 L. Ed. 498. See, generally, the title CROSS BILLS.

Where property, which is the subject matter of a suit in equity, is in actual possession of a United States circuit court, that court has jurisdiction of a cross bill to determine the ultimate possession of the property regardless of the citizenship of the parties. *Morgan's, etc., Steamship Co. v. Texas Cent. R. Co.*, 137 U. S. 171, 201, 34 L. Ed. 625.

A case pending in the state courts of West Virginia by a New York corporation against a West Virginia partnership was removed to the federal court. The action was one for breach of contract to receive and pay for a certain quantity of coal. In accordance with a statute of West Virginia, which provides that a creditor may file a bill to set aside fraudulent or voluntary conveyances without obtaining a judgment, the defendants filed a bill in the circuit court of the United States wherein the original action was pending against the New York corporation and a corporation of West Virginia, in which it was averred that the New York corporation had become insolvent and made a fraudulent as-

signment of its property to the West Virginia corporation. The bill then set out the facts that the New York corporation had broken its contract to them and become liable to them for defects in the coal actually delivered, and prayed that the amount of damages sustained by them might be ascertained and the assets of the New York corporation, so fraudulently assigned, subjected to the payment thereof. It was held, that the suit in question was an exercise of jurisdiction on the part of the circuit court ancillary to that which it had already acquired in the action at law, and it might well be entertained. *Dewey v. West Fairmont Gas Coal Co.*, 123 U. S. 329, 31 L. Ed. 179.

**97. Bill to construe judgment or decree.**—*Minnesota Co. v. St. Paul Co.*, 2 Wall. 609, 17 L. Ed. 886. See, generally, the title JUDGMENTS AND DECREES.

Where a bill in equity is necessary to have a construction of the orders, decrees, and acts made or done by a federal court, the bill is properly filed in such federal court as distinguished from any state court; and it may be entertained in such federal court, even though parties who are interested in having the construction made would not, from want of proper citizenship, be entitled to proceed by original bill of any kind in a court of the United States. *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609, 17 L. Ed. 886.

**98. Bill to enjoin judgment.**—*Freeman v. Howe*, 24 How. 450, 460, 16 L. Ed. 749; *Krippendorf v. Hyde*, 110 U. S. 276, 25 L. Ed. 145; *Jones v. Andrews*, 10 Wall. 327, 19 L. Ed. 935; *Christmas v. Russell*, 14 Wall. 69, 20 L. Ed. 762; *Webb v. Barnwall*, 116 U. S. 193, 197, 29 L. Ed. 595; *Logan v. Patrick*, 5 Cranch 288, 3 L. Ed. 103; *Johnson v. Christian*, 125 U. S. 642, 645, 31 L. Ed. 820. See, generally, the titles INJUNCTIONS; JUDGMENTS AND DECREES.

A bill stated that the defendant had obtained a judgment in ejectment in the circuit court, and was seeking to oust the plaintiff from the possession of the land involved, by a writ of possession founded on the judgment. The bill further set forth that the plaintiff in the suit had not been admitted to interpose in the ejectment suit an equitable defense to the same, which they state with particularity, and which they



cc. *Suits to Set Aside Judgment*.—A bill to set aside a judgment or decree of a federal court, if ancillary to the original action, may be maintained in the federal courts, although not supported by any independent ground of federal jurisdiction.<sup>99</sup>

dd. *Suits to Enforce Judgment*.—A bill filed for the purpose of enforcing a federal judgment, is ancillary to and dependent upon the original suit, and an appropriate proceeding for the purpose of obtaining satisfaction and may be maintained in the federal court with regard to the citizenship of the parties thereto.<sup>1</sup>

ee. *Suit to Quiet Title Derived from Federal Judgment*.—A suit to quiet title to land of a person claiming by virtue of a federal judgment rendered in his

seek to avail themselves of herein. One of the prayers of the bill was for a perpetual injunction restraining the defendant from enforcing or attempting to enforce against the land the judgment in ejectment. The answer admitted the recovery of the judgment in the same court. It was held that this was sufficient to give the circuit court jurisdiction of the case, without any averment of the citizenship of the parties. *Johnson v. Christian*, 125 U. S. 642, 645, 31 L. Ed. 820.

The complainants filed their bill in the circuit court of Ohio, praying for an injunction to a judgment in an ejectment, and for a conveyance of the premises. All the complainants were residents in the state of Ohio, and so were the defendants. The judgment was obtained in the circuit court by G, a citizen of Virginia, and the defendant Clarke held the land recovered, under the will of G, in trust. It was held that jurisdiction might be sustained, so far as to stay execution at law against D; he was the representative of G, and although he was a citizen of Ohio, yet this fact, under the circumstances, did not deprive the court of an equitable control over the judgment; but beyond this, the decree could not extend. *Dunn v. Clarke*, 8 Pet. 1, 8 L. Ed. 845.

The circuit court has jurisdiction, in a suit in equity, to stay proceedings upon a judgment at law between the same parties, although the subpoena be served upon the defendant out of the district in which the court sits. *Logan v. Patrick*, 5 Cranch 288, 3 L. Ed. 103.

A, having recovered a judgment against B and C in the district court for the parish of New Orleans, B, on the ground among others that the judgment, having been obtained by default and without lawful service upon him, was void, filed a petition in that court praying for a decree of nullity and for an injunction. An injunction and citation were issued and served upon A, who thereupon, alleging that he was a citizen of Missouri and B a citizen of Louisiana, prayed that the action of nullity be removed to the circuit court of the United States. It having been so removed, and B's petition amended by converting it into a bill so as to conform to the practice in equity, that court, on a final hearing upon the pleadings and proofs, the latter including an exemplification of the

record and proceedings in the original suit, dissolved the injunction and dismissed the bill. Held, that the causes relied on for the nullity of the judgment being, under the Code of Louisiana, vices of form, the proceeding by petition was substantially a continuation of the original suit, and that the circuit court could not take a cognizance thereof. *Barrow v. Hunton*, 99 U. S. 80, 25 L. Ed. 407.

99. *Bill to set aside decree*.—*Lacassagne v. Chapuis*, 144 U. S. 119, 126, 36 L. Ed. 368; *Carey v. Houston*, etc., R. Co., 161 U. S. 115, 127, 40 L. Ed. 638; *Pacific Railroad v. Missouri Pac. R. Co.*, 111 U. S. 505, 28 L. Ed. 498.

Where a suit for foreclosure of a mortgage is brought in the federal court upon the ground of the diversity of citizenship of parties, and the decree of sale is made and confirmed, a bill in the same court by the defendant attacking the decree as fraudulent and seeking to set it aside, may be maintained in the United States court, although some of the defendants to the latter bills are citizens of the same state as the complainants therein, as such a proceeding is one ancillary to the suit for foreclosure. *Pacific Railroad v. Missouri Pac. R. Co.*, 111 U. S. 505, 28 L. Ed. 498.

A suit between two aliens, brought in the same circuit court in which a former decree was rendered, to impeach that decree, is within the jurisdiction of the circuit court. *Lacassagne v. Chapuis*, 144 U. S. 119, 126, 36 L. Ed. 368.

1. *Bill to enforce judgment*.—*Railroad Companies v. Chamberlain*, 6 Wall. 748, 750, 18 L. Ed. 859.

Where a bill was filed by a Wisconsin railroad company to set aside a judgment, and a lease in the nature of a mortgage to secure the same, and another railroad corporation created by the same state, having become equitable owner of the lease and mortgage, was admitted as defendant, and also filed a cross bill to have the judgment enforced, the circuit court dismissed the original bill on the merits, and also dismissed the cross bill for want of jurisdiction, the parties being all citizens of the same state; held, that this latter decree was erroneous; the proceeding being merely ancillary to the judgment in the circuit court, which could only be enforced in that court. *Railroad Companies v. Chamberlain*, 6 Wall. 748, 18 L. Ed. 859.

favor, or in favor of his grantor, is one ancillary to the original proceeding in the federal courts, and may be maintained in the circuit court by one who is a citizen of the same state as the person asserting the pretended title.<sup>2</sup>

(d) *Injunction against Proceedings at Law*.—A bill to enjoin a proceeding in a federal court,<sup>3</sup> or to enjoin a proceeding in a state court which tends to interfere with or nullify an action of the federal court in a case properly before it,<sup>4</sup> is ancillary or supplementary to the proceedings first instituted in the federal court.

(e) *Relief from Wrongful Seizure under Federal Process*.—One whose property has been wrongfully taken and held under process issuing from a federal court may proceed in that court for relief, notwithstanding the fact that he and the party against whom the relief is prayed are citizens of the same state.<sup>5</sup>

(f) *Preventing Conflict between State and Federal Courts*—aa. *In General*.—The prevention of the conflict of authority between the state and federal courts, and the protection and preservation of the jurisdiction of each, free from encroachments by the other, are considerations which lie at the very foundation of ancillary jurisdiction.<sup>6</sup>

**2. Suit to quiet title of one claiming under federal court.**—*Root v. Woolworth*, 150 U. S. 401, 37 L. Ed. 1123.

In a suit in equity in the United States courts between citizens of different states for the purpose of quieting title to real estate, a judgment was rendered in favor of the plaintiff, and afterwards, the title therein in dispute came by mesne conveyance to a third person. The defendant in the suit notwithstanding the decree against him entered into possession, and the purchaser from the plaintiff filed a bill in the same court to enjoin him from occupying and asserting his pretended title. It was held that the bill was an ancillary bill over which the circuit court had jurisdiction, although the complainant therein and the defendant were citizens of the same state. *Root v. Woolworth*, 150 U. S. 401, 37 L. Ed. 1123.

**3. Bill to enjoin proceedings in federal court.**—*Jones v. Andrews*, 10 Wall. 327, 19 L. Ed. 935.

A bill for injunction to restrain proceedings of garnishment against the complainant's property instituted in the circuit court, and also praying the benefit of a set-off against the garnishing creditor's demand, is not an original suit, but is a defensive or supplementary suit, in which the jurisdiction of the court does not depend on the citizenship of the parties, but on the cognizance of the original case. *Jones v. Andrews*, 10 Wall. 327, 19 L. Ed. 935.

**4. Injunction against judgment of state court.**—*French v. Hay*, 22 Wall. 231, 238, 22 L. Ed. 799. See, also, *Gunter v. Atlantic Coast Line R. Co.*, 200 U. S. 273, 292, 50 L. Ed. 477.

When, in a case which is properly removed from a state court, under one of the acts of congress relating to removals, into the circuit court of the United States, a complainant getting a decree in the state court and sending a transcript of it into another state, sues the defendant on it there, the circuit court into which the case is removed may enjoin the complainant

from proceedings in any such or other distant court until it hears the case; and if, after hearing, it annuls the decree in the state court, and dismisses, as wanting equity, the bill on which the decree was made, may make the injunction perpetual. *French v. Hay*, 22 Wall. 231, 238, 22 L. Ed. 799.

The prohibition in the judiciary act against the granting of injunctions by the courts of the United States touching proceedings in state courts has no application to a case where the act of a state court will interfere with or nullify the action of a federal court in a case properly before it. The prior jurisdiction of the court takes the case out of the operation of that provision. *French v. Hay*, 22 Wall. 231, 238, 22 L. Ed. 799.

"Indeed, the proposition that the eleventh amendment, or § 720 of the Revised Statutes, controls a court of the United States in administering relief, although the court was acting in a matter ancillary to a decree rendered in a cause over which it had jurisdiction, is not open for discussion. *Dietzsch v. Huidekoper*, 103 U. S. 494, 26 L. Ed. 497; *Prout v. Starr*, 188 U. S. 537, 47 L. Ed. 584; *Julian v. Central Trust Co.*, 193 U. S. 93, 112, 48 L. Ed. 629." *Gunter v. Atlantic Coast Line R. Co.*, 200 U. S. 273, 292, 50 L. Ed. 477.

**5. Relief from wrongful seizure under federal process.**—*Gumbel v. Pitkin*, 124 U. S. 131, 31 L. Ed. 374; *Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749; *Krippendorf v. Hyde*, 110 U. S. 276, 25 L. Ed. 145; *Covell v. Heyman*, 111 U. S. 176, 28 L. Ed. 390.

**Wrongful seizure under execution.**—*Covell v. Heyman*, 111 U. S. 176, 28 L. Ed. 390.

**Wrongful seizure under attachment.**—*Gumbel v. Pitkin*, 124 U. S. 131, 31 L. Ed. 374; *Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749; *Krippendorf v. Hyde*, 110 U. S. 276, 25 L. Ed. 145.

**6. Preventing conflict of jurisdiction between state and federal court.**—*Bates on Federal Equity Prac.*, § 97, note, quoted

bb. *Preserving Force and Effect of Federal Processes or Orders.*—Where an unjust advantage has been obtained by one party over another by a perversion and abuse of the orders of a federal court, the party injured may come to the same court to have this abuse corrected, and to carry into effect the real intention and decree of the court, while the property which is the subject of contest is still within the control of the court and subject to its order, without regard to the citizenship of the parties.<sup>7</sup>

(g) *Proceedings to Enforce Forthcoming Bonds.*—A proceeding in a federal court, by rule to show cause, to enforce a forthcoming bond given for the release of property attached in a proceeding before that court, is incidental and ancillary to the original suit, and the jurisdiction is not defeated merely because the parties to the rule are citizens of the same state.<sup>8</sup>

with approval *Julian v. Central Trust Co.*, 193 U. S. 93, 113, 48 L. Ed. 629. See, to the same effect, *Krippendorf v. Hyde*, 110 U. S. 276, 283, 25 L. Ed. 145.

**7. Preserving force and effect of federal processes or orders.**—*Minnesota Co. v. St. Paul Co.*, 2 Wall. 609, 633, 17 L. Ed. 886; *Gumbel v. Pitkin*, 124 U. S. 131, 144, 31 L. Ed. 374; *Krippendorf v. Hyde*, 110 U. S. 276, 283, 25 L. Ed. 145; *Julian v. Central Trust Co.*, 193 U. S. 93, 48 L. Ed. 629; *Riverdale Cotton Mills v. Alabama, etc.*, Mfg. Co., 198 U. S. 188, 195, 49 L. Ed. 1008.

"The equitable powers of the courts of the United States, sitting as courts of law, over their own process, to prevent abuse, oppression and injustice, are inherent, and as extensive and efficient as may be required by the necessity for their exercise and may be invoked by strangers to the litigation as incident to the jurisdiction already vested, without regard to the citizenship of the complaining and intervening party." *Gumbel v. Pitkin*, 124 U. S. 131, 144, 31 L. Ed. 374; *Krippendorf v. Hyde*, 110 U. S. 276, 283, 25 L. Ed. 145.

"And when, in the exercise of that power, it becomes necessary to forbid to strangers to the action the resort to the ordinary remedies of the law for the restoration of property in that situation, as happens when otherwise conflicts of jurisdiction must arise between courts of the United States and of the several states, the very circumstance appears which gives the party a title to an equitable remedy, because he is deprived of a plain and adequate remedy at law: and the question of citizenship, which might become material as an element of jurisdiction in a court of the United States when the proceeding is pending in it, is obviated by treating the intervention of the stranger to the action in his own interest as what Mr. Justice Story calls in *Clarke v. Mathewson*, 12 Pet. 164, 9 L. Ed. 1041, a dependent bill." *Gumbel v. Pitkin*, 124 U. S. 131, 144, 31 L. Ed. 374; *Krippendorf v. Hyde*, 110 U. S. 276, 283, 25 L. Ed. 145.

"So the equitable powers of courts of law over their own process, to prevent abuses, oppression, and injustice, are inherent and equally extensive and efficient, as is also their power to protect their own

jurisdiction and officers in the possession of property that is in the custody of the law. *Buck v. Colbath*, 3 Wall. 334, 18 L. Ed. 257; *Hagan v. Lucas*, 10 Pet. 400, 9 L. Ed. 470." *Gumbel v. Pitkin*, 124 U. S. 131, 144, 31 L. Ed. 374.

Where a corporate defendant admitted, in a suit to foreclose a mortgage on its property that it was a citizen of a state which gave the federal court jurisdiction of the foreclosure suit, and after the decree of foreclosure, attacks the decree upon the ground that the federal court was without jurisdiction, as he was a citizen of the same state with the plaintiff, the court has power to protect its decree as against any action which such litigant may take in any state court. *Riverdale Cotton Mills v. Alabama, etc.*, Mfg. Co., 198 U. S. 188, 49 L. Ed. 1008.

In *Julian v. Central Trust Co.*, 193 U. S. 93, 48 L. Ed. 629, after a suit in a federal court for foreclosure of a mortgage resulting in decree, sale, confirmation and delivery of possession to the purchaser, a state court attempted to subject the property to a judgment rendered in that court against the mortgagor on a cause of action arising subsequently to the delivery of possession under the foreclosure proceedings. It was held within the competency of the federal court to restrain the action in the state court in order to protect the title it had conveyed by the foreclosure proceedings. In the opinion it was said: "If the sheriff is allowed to sell the very property conveyed by the federal decree, such action has the effect to annul and set it aside, because in the view of the state court it was ineffectual to pass the title to the purchaser. In such case we are of opinion that a supplemental bill may be filed in the original suit with a view to protecting the prior jurisdiction of the federal court and to render effectual its decree. \* \* \* 'In such cases where the federal court acts in aid of its own jurisdiction and to render its decree effectual, it may, notwithstanding § 720, Rev. Stat., restrain all proceedings in a state court which would have the effect of defeating or impairing its jurisdiction.'" *Riverdale Cotton Mills v. Alabama, etc.*, Mfg. Co., 198 U. S. 188, 195, 49 L. Ed. 1008.

**8. Proceedings to enforce forthcoming bond.**—*Reilly v. Golding*, 10 Wall. 56, 19



(h) *Suits by or against Receivers.*—Where a federal court takes property into its possession by a receiver, it may entertain jurisdiction of suits by the receiver to accomplish the end sought and directed by a suit in which the appointment was made,<sup>9</sup> or of suits against the receiver, or the property in his hands,<sup>10</sup> without regard to the citizenship of the parties.

(i) *Suits with Respect to Property in Custody of Court.*—It is well settled that where property is in the actual possession of a court, this draws to it the right to decide upon conflicting claims to its ultimate possession and control, and where assets are in the course of administration, all persons entitled to participate may come in, under the jurisdiction acquired between the original parties, by ancillary or supplemental proceedings, even though jurisdiction would be

L. Ed. 858. See, generally, the title **FORTHCOMING AND DELIVERY BONDS**.

By the practice of the courts of Louisiana, a practice which has been adopted in the circuit court in that district, the mode of proceeding in an attachment suit against a surety on a forthcoming bond given to obtain a release of property attached, is by rule to show cause; and this proceeding being merely incidental to the original suit, a jurisdiction existing in such suit will not cease, because the parties to the rule are citizens of the same state. Especially is this true where the defendant in the rule has appeared and answered on merits, and the case has gone to judgment. *Reilly v. Golding*, 10 Wall. 56, 19 L. Ed. 858.

**9. Suits by receiver.**—*Pope v. Louisville, etc.*, R. Co., 173 U. S. 573, 577, 43 L. Ed. 814; *Blair v. Chicago*, 201 U. S. 400, 402, 50 L. Ed. 801; *Gableman v. Peoria, etc.*, R. Co., 179 U. S. 335, 342, 45 L. Ed. 220; *Krippendorf v. Hyde*, 110 U. S. 276, 25 L. Ed. 145; *White v. Ewing*, 159 U. S. 36, 37, 40 L. Ed. 67; *In re Tyler*, 149 U. S. 164, 181, 37 L. Ed. 689; *Rouse v. Letcher*, 156 U. S. 47, 49, 31 L. Ed. 341; *Gregory v. Van Ee*, 160 U. S. 643, 40 L. Ed. 566; *Carey v. Houston, etc.*, R. Co., 161 U. S. 115, 40 L. Ed. 638; *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609, 632, 17 L. Ed. 886; *Morgan's etc.*, *Steamship Co. v. Texas Cent. R. Co.*, 137 U. S. 171, 34 L. Ed. 625. See, generally, the title **RECEIVERS**.

As the judgments recovered are payable from the property or funds in the course of administration, the actions may be regarded as ancillary in the sense of subordination to such administration. *Gableman v. Peoria, etc.*, R. Co., 179 U. S. 335, 342, 45 L. Ed. 220.

When an action or suit is commenced by a receiver, appointed by a circuit court, to accomplish the ends sought and directed by the suit in which the appointment was made, such action or suit is regarded as ancillary so far as the jurisdiction of the circuit court as a court of the United States is concerned. *Pope v. Louisville, etc.*, R. Co., 173 U. S. 573, 577, 43 L. Ed. 814.

Ancillary bills by the receivers are maintainable in aid of the court's jurisdiction to settle controversies as to the property which is to be administered and disposed

of under the orders and decree of the court. *Blair v. Chicago*, 201 U. S. 400, 402, 50 L. Ed. 801.

**If property has been taken illegally from the custody of the receiver**, it is clear that the court has not lost thereby the jurisdiction over the property, or the right to determine where it shall go; so far as that right is involved in that suit. *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609, 632, 17 L. Ed. 886.

**Suit by receiver to remove cloud from title.**—Where the attitude and claims of a city cast a cloud upon the title to street railway property which is in the hands of the receivers to be administered under the orders of the court, the receivers may, with the authority of the court, proceed by ancillary bill to protect the jurisdiction and right to administer the property, and to determine the validity of the claims of the parties which cast a cloud upon the franchises and rights claimed by the companies and the receivers, and in such case it was proper to grant an injunction until the rights of the parties could be determined. *Blair v. Chicago*, 201 U. S. 400, 449, 50 L. Ed. 801.

**10. Action against receiver or property in receiver's hands.**—*Byers v. McAuley*, 149 U. S. 608, 618, 37 L. Ed. 867; *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609, 632, 17 L. Ed. 886.

When the federal court takes property into its custody, as it does sometimes by a receiver, it may entertain jurisdiction of claims against that property in favor of citizens of the same state as the receiver, or either of the parties. But that is an ancillary jurisdiction; it is in aid of that which it has acquired by virtue of the seizure of the property, and in order, it having possession, that it may make final disposition of the property. Possession of the res draws to the court having possession all controversies concerning the res. *Byers v. McAuley*, 149 U. S. 608, 618, 37 L. Ed. 867.

If property is in the hands of the receiver of the circuit court, nothing can be plainer than that any litigation for its possession must take place in that court, without regard to the citizenship of the parties. *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609, 632, 17 L. Ed. 886.

lacking if such proceedings had been originally and independently prosecuted.<sup>11</sup> But if the property is not actually in the custody or control of the court, it has no jurisdiction of an ancillary suit with respect thereto.<sup>12</sup>

(j) *Motion against Marshal for Money Collected*.—A motion against a United States marshal to recover money collected by him under execution, with damages, is a proceeding ancillary to that in which the execution is issued, and of which federal courts have jurisdiction irrespective of the citizenship of the parties.<sup>13</sup>

(k) *Creditors' Suits*.—Where a creditor's bill is brought in the United States circuit court, on behalf of the complainants and all other creditors choosing to come in and share the expense of the litigation, the court has jurisdiction if the original parties were citizens of different states, although other creditors come in under the bill who are citizens of the same state as the defendant, as such a proceeding is ancillary to the jurisdiction acquired between the original parties.<sup>14</sup>

**11. Determination of questions relating to property in custody of court.**—*Rouse v. Letcher*, 156 U. S. 47, 49, 31 L. Ed. 341; *Morgan's, etc., Steamship Co. v. Texas Cent. R. Co.*, 137 U. S. 171, 201, 34 L. Ed. 625; *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609, 17 L. Ed. 886; *People's Bank v. Calhoun*, 102 U. S. 256, 26 L. Ed. 101; *Krippeendorf v. Hyde*, 110 U. S. 276, 25 L. Ed. 145.

In a foreclosure suit, the circuit court, having jurisdiction of the subject matter and the parties, appointed a receiver, who, pursuant to its orders, took possession of the mortgaged road. In an action between other parties, subsequently brought in a state court, an attachment was sued out and levied upon the road. Pending an application thereupon made to the circuit court, to restrain the plaintiff from further proceeding with his attachment, he and the defendant to the action consented to its removal to the circuit court, where, upon a finding that the road was not, at the date of the levy of the attachment, the property of that defendant, the writ was dismissed. Held, that the circuit court had the right to determine upon the conflicting claims to the possession of the road, and that the parties to the action, by consenting to transfer it, did no more, in effect, than that court might have compelled them to do. *People's Bank v. Calhoun*, 102 U. S. 256, 26 L. Ed. 101.

Where a sentence of condemnation has been finally pronounced, in a case of seizure, this court, as an incident to the possession of the principal cause, has a right to proceed to decree a distribution of the proceeds, according to the terms prescribed by law; and it is a familiar practice to institute proceedings for the purpose of such distribution whenever a doubt occurs as to the rights of the parties, who are entitled to share in the distribution. *McLane v. United States*, 6 Pet. 404, 8 L. Ed. 443.

**Questions arising after termination of principal suit.**—The doctrine that, after a decree which disposes of a principal subject of litigation and settles the right of the parties in regard to that matter, there may subsequently arise important matters

requiring the judicial action of the court in relation to the same property and some of the same rights litigated in the main suit, making necessary substantive and important orders and decrees in which the most material rights of the parties may be passed upon by the court and in such cases the jurisdiction of the court may be invoked by supplemental bill or bill in the nature of a supplemental bill, irrespective of the citizenship of the parties. *Julian v. Central Trust Co.*, 193 U. S. 93, 113, 48 L. Ed. 629; *Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749.

**12. Property not in custody of court.**—*Stillman v. Combe*, 197 U. S. 436, 440, 49 L. Ed. 822.

The parties to a suit to try title to land which had been occupied by the United States, but not paid for by it, agreed to unite in perfecting the title in one of the claimants, in order that the government might purchase and pay for the property. This they did, under an agreement that the money received by the claimant in whom the title was decreed should be deposited in a bank, and the rights of the several claimants thereto determined by arbitrators, named in the agreement. One of the arbitrators named died before the money was paid over, and another refused to act, and the claimants who recovered the judgment were attempting, it was alleged, to defeat the arbitration, and to appropriate the entire sum to his own use. It was held, that the federal courts had no jurisdiction of a bill by the other claimants to obtain a distribution of the fund by the court, on the ground that it was ancillary to the suit to try title. *Stillman v. Combe*, 197 U. S. 436, 440, 49 L. Ed. 822.

**13. Motion against marshal to recover money collected.**—*Gwin v. Breedlove*, 2 How. 29, 11 L. Ed. 167. See, generally, the title UNITED STATES MARSHALS.

**14. Creditors' suits.**—*Stewart v. Dunham*, 115 U. S. 61, 29 L. Ed. 329; *White v. Ewing*, 159 U. S. 36, 39, 40 L. Ed. 67. See, also, *Pope v. Louisville, etc., R. Co.*, 173 U. S. 573, 43 L. Ed. 814. See, generally, the title CREDITORS' SUITS.

"Such a proceeding would be ancillary to

(1) *Preservation of Property to Meet Decree*.—A federal court has no ancillary jurisdiction of a suit to preserve property to meet the decree of another federal court, where there is no showing that such action is necessary, and there is no privity of contract or trust relation between the parties to the second suit.<sup>15</sup>

(m) *Suits to Enjoin Sale under Execution*.—A suit to restrain an execution sale under a federal judgment, is ancillary to the original suit.<sup>16</sup>

(n) *Bill of Revivor*.—Where the court had jurisdiction of an original bill, and the defendants appeared and defended the suit, a bill of revivor may be maintained irrespective of the citizenship of the parties thereto, as it is a mere continuance of the original suit.<sup>17</sup>

(o) *Bill of Review*.—A bill of review is an ancillary proceeding maintainable in the federal courts without regard to the citizenship of the parties.<sup>18</sup>

(3) *Proceedings Ancillary to Original Suit against State*.—Where a federal court has obtained jurisdiction of a suit against a state, by the state's consent

the jurisdiction acquired between the original parties, and it would be merely a matter of form whether the new parties should come in as co-complainants, or before a master, under a decree ordering a reference to prove the claims of all persons entitled to the benefit of the decree. If the latter course had been adopted, no question of jurisdiction could have arisen. The adoption of the alternative is, in substance, the same thing." *Stewart v. Dunham*, 115 U. S. 61, 64, 29 L. Ed. 329.

**Suits by receiver appointed in creditor's suit.**—See post, "Suits by or against Receivers," VII, C, 4, e, (2), (h).

**15. Preservation of property to meet decree.**—*Raphael v. Trask*, 194 U. S. 272, 278, 48 L. Ed. 973.

Where there is no privity of contract or trust relation between the plaintiff and the defendant, a bill to protect the plaintiff's security or to stay waste cannot be maintained in a federal court of one state, as ancillary to a bill of foreclosure brought by him in federal court of another state, in the absence of any showing that the defendant company cannot respond to any decree which may be rendered against it in the latter suit, especially where the bill in the former suit alleges that the defendant has accumulated a large surplus. *Raphael v. Trask*, 149 U. S. 272, 278, 48 L. Ed. 973.

**16. Suit to restrain execution sale under judgment.**—*Chicago, etc., R. Co. v. Third Nat. Bank*, 134 U. S. 276, 288, 33 L. Ed. 900.

**17. Bill of revivor.**—*Whyte v. Gibbs*, 20 How. 541, 542, 15 L. Ed. 1016; *Clarke v. Mathewson*, 12 Pet. 164, 9 L. Ed. 1041.

In the 31st section of the judiciary act of 1789, congress manifestly treats the revivor of a suit, by or against the representatives of the deceased party, as a matter of right, and as a mere continuance of the original suit; without any distinction as to the citizenship of the representative, whether he belongs to the same state where the cause is pending or to another state. *Clarke v. Mathewson*, 12 Pet. 164, 9 L. Ed. 1041.

A bill was filed by W., a citizen of Connecticut, against M. and others, citizens of

Rhode Island, in the circuit court of the United States for the district of Rhode Island; and an answer was put in to the bill, and the cause was referred to a master for an account; pending these proceedings, the complainant died; and administration of his effects was granted to C., a citizen of Rhode Island, who filed a bill of revivor in the circuit court. The laws of Rhode Island do not permit a person residing out of the state to take out administration of the effects of a deceased person within the state; and make such administration indispensable to the prosecution and defense of any suit in the state, in right of the estate of the deceased. Held, that the bill of revivor was in no just sense an original suit, but was a mere continuation of the original suit; the parties to the original suit were citizens of different states; and the jurisdiction of the court completely attached to the controversy; having so attached, it could not be divested by any subsequent proceedings; and the circuit court of Rhode Island had rightful authority to proceed to its final determination. *Clarke v. Mathewson*, 12 Pet. 164, 9 L. Ed. 1041.

**18. Bill of review.**—*Jones v. Andrews*, 10 Wall. 327, 333, 19 L. Ed. 935; *French v. Hay*, 22 Wall. 231, 238, 22 L. Ed. 799. See, generally, the title BILL OF REVIEW, vol. 3, p. 244.

Where a judgment had been obtained in the circuit court of the United States for the district of Kentucky, in a suit brought by a citizen of Maryland against certain persons in Kentucky, and the judgment was afterwards perpetually enjoined at the instance of the defendants, and a bill was filed by a citizen of Kentucky against the original defendants, who were also citizens of Kentucky, this bill was properly dismissed by the court for the want of jurisdiction, and it was held that the circumstance that the complainant claimed that his bill was one in the nature of a bill of review of a decree rendered between citizens of different states, was not sufficient to divest it of its character of an original bill. *Wickliffe v. Eve*, 17 How. 468, 15 L. Ed. 163.



to be sued, it may entertain jurisdiction of an ancillary proceeding to make its decree effective, and its jurisdiction in such a proceeding is not affected by the provision of the 11th amendment prohibiting suits against states.<sup>19</sup>

f. *Transfer between Circuit Courts*.—Under certain circumstances, suits pending in one circuit court may be transferred to the most convenient circuit court in the next adjacent state.<sup>20</sup> The statute providing for transfer in such case was not repealed by the act of March 3, 1863, providing that the circuit judge of one circuit may request the judge of another circuit to hold his court during a specified term.<sup>21</sup>

g. *Jurisdictional Averments*—(1) *General Rules*—(a) *Necessity for Averment of Jurisdictional Facts*.—Since the jurisdiction of the circuit court is limited in the sense that it has none except that conferred by the constitution and laws of the United States, and the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears, it is essential that the facts which give it jurisdiction should be distinctively and positively averred in the pleadings or should appear affirmatively with equal distinctness in other parts of the record.<sup>22</sup>

(b) *Necessity for Averments to Be Positive*.—The jurisdiction must appear positively from the plaintiff's pleadings; it is not enough that it may be argumentatively inferred.<sup>23</sup>

(c) *Judicial Notice of Jurisdictional Facts*.—Where there is no averment in the plaintiff's pleadings sufficient to give the court jurisdiction, the court cannot

**19. Proceedings ancillary to original suit against state.**—*Gunter v. Atlantic Coast Line R. Co.*, 200 U. S. 273, 292, 50 L. Ed. 477. See, generally, the title STATE.

**20. Transfer between circuit courts.**—Act of Feb. 28, 1839 (5 Stat. 322); *Supervisors v. Rogers*, 7 Wall. 175, 19 L. Ed. 162.

Congress has power to transfer pending proceedings from one inferior court of the United States to another. *Stuart v. Laird*, 1 Cranch 299, 2 L. Ed. 115.

**21. Act providing for transfer not repealed.**—*Supervisors v. Rogers*, 7 Wall. 175, 19 L. Ed. 162.

**22. Necessity for averment of facts showing jurisdiction.**—*Continental Ins. Co. v. Rhoads*, 119 U. S. 237, 30 L. Ed. 380; *Bushnell v. Kennedy*, 9 Wall. 387, 390, 19 L. Ed. 736; *Turner v. Bank*, 4 Dall. 8, 1 L. Ed. 718; *Brown v. Keene*, 8 Pet. 112, 8 L. Ed. 885; *Robertson v. Cease*, 97 U. S. 646, 24 L. Ed. 1057; *Hanford v. Davies*, 163 U. S. 273, 41 L. Ed. 157; *Anderson v. Watt*, 138 U. S. 694, 708, 34 L. Ed. 1078; *Kennedy v. Bank*, 8 How. 586, 12 L. Ed. 1209; *Scott v. Sandford*, 19 How. 393, 15 L. Ed. 691.

"Every suitor who brings an action in a court of the United States must aver in his pleadings a state of facts which, under the national constitution and laws, gives to the court jurisdiction of his suit." *Bushnell v. Kennedy*, 9 Wall. 387, 390, 19 L. Ed. 736, citing *Turner v. Bank*, 4 Dall. 8, 1 L. Ed. 718.

"It was settled at a very early day that the facts on which the jurisdiction of the circuit courts rest must, in some form, appear on the face of the record of all suits prosecuted before them. *Turner v.*

*Bank*, 4 Dall. 8, 1 L. Ed. 718; *Bushnell v. Kennedy*, 9 Wall. 387, 19 L. Ed. 736; *Hornthall v. The Collector*, 9 Wall. 560, 19 L. Ed. 560; *Ex parte Smith*, 94 U. S. 455, 24 L. Ed. 165; *Robertson v. Cease*, 97 U. S. 646, 24 L. Ed. 1057; *Grace v. American Cent. Ins. Co.*, 109 U. S. 278, 27 L. Ed. 932; *Bors v. Preston*, 111 U. S. 252, 28 L. Ed. 419; *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379, 28 L. Ed. 462; *Hancock v. Holbrook*, 112 U. S. 229, 28 L. Ed. 714. And it is error for a court to proceed without its jurisdiction is shown. *Grace v. American Cent. Ins. Co.*, 109 U. S. 278, 27 L. Ed. 932; *Thayer v. Life Ass'n*, 112 U. S. 717, 28 L. Ed. 864; *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379, 28 L. Ed. 462." *Continental Ins. Co. v. Rhoads*, 119 U. S. 237, 239, 30 L. Ed. 380.

In courts of a special limited jurisdiction, the pleadings must contain averments which bring the cause within the jurisdiction of the court, or the whole proceedings will be erroneous. *United States v. Clarke*, 8 Pet. 436, 8 L. Ed. 1001.

Where, a tribunal of limited jurisdiction is created by congress to determine rights of property, a party seeking relief must present for adjudication a case clearly within the act, or relief cannot be given. *United States v. Sandoval*, 167 U. S. 278, 294, 42 L. Ed. 168; *United States v. Clarke*, 8 Pet. 436, 8 L. Ed. 1001; *United States v. Santa Fe*, 165 U. S. 675, 41 L. Ed. 874.

**23. Necessity for positive averments.**—*Continental Ins. Co. v. Rhoads*, 119 U. S. 237, 240, 30 L. Ed. 380; *Brown v. Keene*, 8 Pet. 112, 8 U. S. 885; *Robertson v. Cease*, 97 U. S. 646, 24 L. Ed. 1057; *Hanford v. Davies*, 163 U. S. 273, 41 L. Ed. 157; *Anderson v. Watt*, 138 U. S. 694, 702, 34 L. Ed. 1078.

take jurisdiction merely because it has judicial notice of facts which would have given it jurisdiction had they been properly pleaded by the plaintiff.<sup>24</sup>

(2) *Suits Arising under Constitution, Laws or Treaties*—(a) *Necessity for and Sufficiency of Averments*—aa. *General Rule*.—In order for a suit to be cognizable in the federal courts upon the ground that it arises under the constitution or laws of the United States it must appear from the plaintiff's pleading, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which really and substantially involves a dispute or controversy as to a right which depends on the construction of the constitution or some law or treaty of the United States.<sup>25</sup> If the allegation is so palpably

**24. Judicial notice of jurisdictional facts.**—*Mountain View Min., etc., Co. v. McFadden*, 180 U. S. 533, 535, 45 L. Ed. 656. See, also, *Mutual Life Ins. Co. v. McGrew*, 188 U. S. 291, 309, 47 L. Ed. 480; *Powell v. Brunswick County*, 150 U. S. 433, 37 L. Ed. 1134. See, generally, the title JUDICIAL NOTICE.

In *Mountain View Min., etc., Co. v. McFadden*, 180 U. S. 533, 535, 45 L. Ed. 656, the averments of the plaintiff's pleading were not sufficient to give the court jurisdiction, but it was contended that the jurisdiction could be maintained by the courts taking judicial notice of the fact "that the Mountain View lode claim was located upon what had been or was an Indian reservation" and "by the act of congress declaring the north half of the reservation, upon which the claim was located, to have been restored to the public domain." It was held that the court could not take judicial notice of facts not relied on in the plaintiff's pleadings, and that it was, therefore, without jurisdiction.

**25. Necessity and sufficiency of averments.**—*Western Union Tel. Co. v. Ann Arbor R. Co.*, 178 U. S. 239, 243, 44 L. Ed. 1052; *Gold-Washing, etc., Co. v. Keyes*, 96 U. S. 199, 24 L. Ed. 656; *Blackburn v. Portland Gold Min. Co.*, 175 U. S. 571, 44 L. Ed. 276; *Lampasas v. Bell*, 180 U. S. 276, 282, 45 L. Ed. 527; *Press Pub. Co. v. Monroe*, 164 U. S. 105, 112, 41 L. Ed. 367; *Colorado Cent. Consol. Min. Co. v. Turck*, 150 U. S. 138, 37 L. Ed. 1030; *Hanford v. Davies*, 163 U. S. 273, 279, 41 L. Ed. 157; *Tennessee v. Union, etc., Bank*, 152 U. S. 454, 460, 38 L. Ed. 511; *Metcalf v. Watertown*, 128 U. S. 586, 32 L. Ed. 543; *Filhiol v. Maurice*, 185 U. S. 108, 110, 46 L. Ed. 827; *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 65, 68, 46 L. Ed. 808; *Third Street, etc., R. Co. v. Lewis*, 173 U. S. 457, 460, 43 L. Ed. 766; *McCain v. Des Moines*, 174 U. S. 168, 181, 43 L. Ed. 936; *Shreveport v. Cole*, 129 U. S. 36, 32 L. Ed. 589; *New Orleans v. Benjamin*, 153 U. S. 411, 38 L. Ed. 764; *Florida, etc., R. Co. v. Bell*, 176 U. S. 321, 327, 44 L. Ed. 486; *Arkansas v. Kansas, etc., Coal Co.*, 183 U. S. 185, 188, 46 L. Ed. 144; *Oregon, etc., R. Co. v. Skottowe*, 162 U. S. 490, 40 L. Ed. 1048; *American Sugar Refin. Co. v. New Orleans*, 181 U. S. 277, 281, 45 L. Ed. 859; *Shoshone Min. Co. v. Rutter*, 177 U. S. 505, 507, 44 L. Ed. 864; *Chicago, etc., R.*

*Co. v. Martin*, 178 U. S. 245, 248, 44 L. Ed. 1055; *Gableman v. Peoria, etc., R. Co.*, 179 U. S. 335, 339, 45 L. Ed. 220; *Underground Railroad v. New York City*, 193 U. S. 416, 422, 48 L. Ed. 733; *Defiance Water Co. v. Defiance*, 191 U. S. 184, 48 L. Ed. 140; *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 65, 48 L. Ed. 870; *Arbuckle v. Blackburn*, 191 U. S. 405, 413, 48 L. Ed. 239; *Banker's Mut. Casualty Co. v. Minneapolis, etc., R. Co.*, 192 U. S. 371, 381, 48 L. Ed. 484; *Starin v. New York*, 115 U. S. 248, 29 L. Ed. 388; *Spencer v. Duplan Silk Co.*, 191 U. S. 526, 530, 48 L. Ed. 287; *Muse v. Arlington Hotel Co.*, 168 U. S. 430, 42 L. Ed. 531; *Montana Catholic Missions v. Missoula County*, 200 U. S. 118, 126, 50 L. Ed. 398; *Chrystal Springs, etc., Co. v. Los Angeles*, 177 U. S. 169, 44 L. Ed. 720; *Boston, etc., Min. Co. v. Montana Ore, etc., Co.*, 188 U. S. 632, 47 L. Ed. 626; *Boston, etc., Min. Co. v. Montana Ore, etc., Co.*, 188 U. S. 632, 645, 47 L. Ed. 626; *Boston, etc., Min. Co. v. Chile Gold Min. Co.*, 188 U. S. 645, 47 L. Ed. 634; *Robinson v. Anderson*, 121 U. S. 522, 30 L. Ed. 1021; *Filhiol v. Torney*, 194 U. S. 356, 360, 48 L. Ed. 1014; *Pacific Electric R. Co. v. Los Angeles*, 194 U. S. 112, 118, 48 L. Ed. 896; *Chappell v. Waterworth*, 155 U. S. 102, 39 L. Ed. 85; *Postal Tel. Cable Co. v. Alabama*, 155 U. S. 482, 39 L. Ed. 231; *United States v. American Bell Tel. Co.*, 159 U. S. 548, 40 L. Ed. 255; *Texas & Pac. R. Co. v. Cody*, 166 U. S. 606, 41 L. Ed. 1132; *Pratt v. Paris Gas Light, etc., Co.*, 168 U. S. 255, 42 L. Ed. 458; *Walker v. Collins*, 167 U. S. 57, 42 L. Ed. 76; *Sawyer v. Kochersperger*, 170 U. S. 303, 42 L. Ed. 1046; *Ex parte Smith*, 94 U. S. 455, 24 L. Ed. 165; *Leather Manufacturers' Bank v. Cooper*, 120 U. S. 778, 781, 30 L. Ed. 816; *Central R. Co. v. Mills*, 113 U. S. 249, 257, 28 L. Ed. 949; *Joy v. St. Louis*, 201 U. S. 332, 341, 50 L. Ed. 776; *Devine v. Los Angeles*, 202 U. S. 313, 333, 50 L. Ed. 1046; *Carson v. Dunham*, 121 U. S. 421, 30 L. Ed. 992; *Borgmeyer v. Idler*, 159 U. S. 408, 412, 40 L. Ed. 199; *Empire State-Idaho Min., etc., Co. v. Hanley*, 198 U. S. 292, 298, 49 L. Ed. 1056.

"The rule is settled that a case does not arise under the constitution or laws of the United States unless it appears from plaintiff's own statement, in the outset, that some title, right, privilege or immunity on which recovery depends will

unfounded that it constitutes not even a color for the jurisdiction of the circuit court, the court should dismiss the bill.<sup>26</sup>

bb. *Federal Question First Raised by Defendant*.—The fact that the defendant sets up a defense arising under the constitution and laws of the United States is not sufficient to confer jurisdiction.<sup>27</sup>

be defeated by one construction of the constitution or laws of the United States, or sustained by the opposite construction. *Gold-Washing, etc., Co. v. Keyes*, 96 U. S. 199, 24 L. Ed. 656; *Starin v. New York*, 115 U. S. 248, 29 L. Ed. 388; *New Orleans v. Benjamin*, 153 U. S. 411, 38 L. Ed. 764; *Blackburn v. Portland Gold Min. Co.*, 175 U. S. 571, 44 L. Ed. 276; *Shoshone Min. Co. v. Rutter*, 177 U. S. 503, 44 L. Ed. 864." *Bankers' Mut. Casualty Co. v. Minneapolis, etc., R. Co.*, 192 U. S. 371, 385, 48 L. Ed. 484.

Where jurisdiction is claimed on account of the subject matter of the action, and not on account of the citizenship of the parties, it is incumbent on the plaintiff to show, in his pleadings or otherwise, that his action arose under the laws of the United States, and if he fails to do so, the court has no jurisdiction, although he claims title through such laws, but not that his title in that respect is disputed. *Ex parte Smith*, 94 U. S. 455, 24 L. Ed. 165.

If the plaintiff claims that his suit is one arising under a revenue law, he must show it in his pleadings, or otherwise. *Ex parte Smith*, 94 U. S. 455, 456, 24 L. Ed. 165.

**Averments must be positive.**—"It is well settled that, as the jurisdiction of the circuit court of the United States is limited in the sense that it has no other jurisdiction than that conferred by the constitution and laws of the United States, the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears; and that it is not sufficient that jurisdiction may be inferred argumentatively from averments in the pleadings, but the averments should be positive. *Brown v. Keene*, 8 Pet. 112, 8 L. Ed. 885; *Grace v. American Cent. Ins. Co.*, 109 U. S. 278, 27 L. Ed. 932, and authorities cited. These principles have been applied in cases where the jurisdiction of the circuit court was invoked upon the ground of diverse citizenship. But they are equally applicable where its original jurisdiction of a suit between citizens of the same state is invoked upon the ground that the suit is one arising under the constitution or laws of the United States." *Hanford v. Davies*, 163 U. S. 273, 279, 41 L. Ed. 157.

**Legal construction of pleading to be adopted.**—"The question whether a party claims a right under the constitution or laws of the United States is to be ascertained by the legal construction of its own allegations, and not by the effect attributed to those allegations by the ad-

verse party." *Tennessee v. Union, etc., Bank*, 152 U. S. 454, 460, 38 L. Ed. 511; *Central R. Co. v. Mills*, 113 U. S. 249, 28 L. Ed. 949.

"Even under the act of 1875, the jurisdiction of the circuit court of the United States could not be sustained over a suit originally brought in that court, upon the ground that the suit was one arising under the constitution, laws or treaties of the United States, unless that appeared in the plaintiff's statement of his own claim. This was distinctly adjudged, and the reasons clearly stated, in *Metcalf v. Watertown*, 128 U. S. 586, 32 L. Ed. 543." *Tennessee v. Union, etc., Bank*, 152 U. S. 454, 460, 38 L. Ed. 511.

Under the act of August 13, 1888, c. 866, 25 Stat. 434, "the circuit court of the United States has no jurisdiction, either original or by removal from a state court, of a suit as one arising under the constitution, laws or treaties of the United States, unless that appears by the plaintiff's statement to be a necessary part of his claim. *Tennessee v. Union, etc., Bank*, 152 U. S. 454, 38 L. Ed. 511; *Metcalf v. Watertown*, 128 U. S. 586, 32 L. Ed. 543; *Colorado Cent. Consol. Min. Co. v. Turck*, 150 U. S. 138, 37 L. Ed. 1030." *Third Street, etc., R. Co. v. Lewis*, 173 U. S. 457, 460, 43 L. Ed. 766.

23. **Dismissal where allegations unfounded.**—*McCain v. Des Moines*, 174 U. S. 168, 181, 43 L. Ed. 936; *Barney v. New York City*, 193 U. S. 430, 48 L. Ed. 737; *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 65, 48 L. Ed. 870.

The statute is peremptory in this particular, and requires the court to dismiss the case whenever at any time it shall appear that its jurisdiction has been improperly invoked. *Excelsior Wooden Pipe Co. v. Pacific Bridge Co.*, 185 U. S. 282, 287, 46 L. Ed. 910.

27. **Federal question first raised by defendants pleadings.**—*Metcalf v. Watertown*, 128 U. S. 586, 589, 32 L. Ed. 543; *Colorado Cent. Consol. Min. Co. v. Turck*, 150 U. S. 138, 37 L. Ed. 1030; *Florida, etc., R. Co. v. Bell*, 176 U. S. 321, 327, 44 L. Ed. 486; *Press Pub. Co. v. Monroe*, 164 U. S. 105, 112, 41 L. Ed. 367.

Where the original jurisdiction of a circuit court of the United States is invoked upon the sole ground that the determination of the suit depends upon some question of a federal nature, it must appear, from the declaration or the bill of the party suing, that the suit is of that character; in other words, it must appear, in that class of cases, that the suit was one of which the circuit court, at the time its



cc. *Averment by Plaintiff That Defense Will Raise Federal Question.*—A suggestion of one party, that the other will or may set up a claim under the constitution or laws of the United States, does not make the suit one arising under that constitution or those laws,<sup>28</sup> even though the plaintiff in his original plead-

jurisdiction is invoked, could properly take cognizance. If it does not so appear, then the court, upon demurrer, or motion, or upon its own inspection of the pleading, must dismiss the suit; just as it would remand to the state court a suit which the record, at the time of removal, failed to show was within the jurisdiction of the circuit court. It cannot retain it in order to see whether the defendant may not raise some question of a federal nature upon which the right of recovery will finally depend; and if so retained, the want of jurisdiction, at the commencement of the suit, is not cured by an answer or plea which may suggest a question of that kind. *Metcalf v. Watertown*, 128 U. S. 586, 589, 32 L. Ed. 543; *Colorado Cent. Consol. Min. Co. v. Turck*, 150 U. S. 138, 143, 37 L. Ed. 1030; *Florida, etc., R. Co. v. Bell*, 176 U. S. 321, 327, 44 L. Ed. 486.

**Cases removed from state courts.**—"It has been often decided by this court that a suit may be said to arise under the constitution or laws of the United States, within the meaning of that act, even where the federal question upon which it depends is raised, for the first time in the suit, by the answer or plea of the defendant. But these were removal cases, in each of which the grounds of federal jurisdiction were disclosed either in the pleadings, or in the petition or affidavit for removal; in other words, the case, at the time the jurisdiction of the circuit court of the United States attached, by removal, clearly presented a question or questions of a federal nature. *Railroad Co. v. Mississippi*, 102 U. S. 135, 26 L. Ed. 96; *Ames v. Kansas*, 111 U. S. 449, 462, 28 L. Ed. 482; *Pacific Railroad Removal Cases*, 115 U. S. 1, 11, 29 L. Ed. 319; *Southern Pac. R. Co. v. California*, 118 U. S. 109, 112, 30 L. Ed. 103." *Metcalf v. Watertown*, 128 U. S. 586, 589, 32 L. Ed. 543; *Colorado Cent. Consol. Min. Co. v. Turck*, 150 U. S. 138, 143, 37 L. Ed. 1030.

But under § 1 of the act of March 3, 1887, as corrected by the act of August 13, 1888, 24 Stat. 552; 25 Stat. 433 the test of the right of removal is that the case must be one over which the circuit court might have exercised original jurisdiction. *Boston, etc., Min. Co. v. Montana Ore, etc., Co.*, 188 U. S. 632, 640, 47 L. Ed. 626; *Third Street, etc., R. Co. v. Lewis*, 173 U. S. 457, 43 L. Ed. 766; *Boston, etc., Min. Co. v. Montana Ore Co.*, 188 U. S. 645, 47 L. Ed. 634; *Boston, etc., Min. Co. v. Chile Gold Min. Co.*, 188 U. S. 645, 47 L. Ed. 634; *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 64, 48 L. Ed. 870.

**28. Suggestion that defense will arise under constitution.**—*Tennessee v. Union, etc.,*

*Bank*, 152 U. S. 454, 464, 38 L. Ed. 511; *Florida, etc., R. Co. v. Bell*, 176 U. S. 321, 330, 44 L. Ed. 486; *Devine v. Los Angeles*, 202 U. S. 313, 333, 50 L. Ed. 1046; *Joy v. St. Louis*, 201 U. S. 332, 341, 50 L. Ed. 776; *Metcalf v. Watertown*, 128 U. S. 586, 589, 32 L. Ed. 543; *Boston, etc., Min. Co. v. Montana Ore, etc., Co.*, 188 U. S. 632, 47 L. Ed. 626; *Boston, etc., Min. Co. v. Montana Ore, etc., Co.*, 188 U. S. 645, 47 L. Ed. 634; *Boston, etc., Min. Co. v. Chile Gold Min. Co.*, 188 U. S. 645, 47 L. Ed. 634; *Arkansas v. Kansas, etc., Coal Co.*, 183 U. S. 185, 46 L. Ed. 144; *Colorado Cent. Consol. Min. Co. v. Turck*, 150 U. S. 138, 143, 37 L. Ed. 1030; *Third Street, etc., R. Co. v. Lewis*, 173 U. S. 457, 43 L. Ed. 766; *Filhiol v. Torney*, 194 U. S. 356, 360, 48 L. Ed. 1014; *Robinson v. Anderson*, 121 U. S. 522, 30 L. Ed. 1021; *Press Pub. Co. v. Monroe*, 164 U. S. 105, 112, 41 L. Ed. 367; *Chappell v. Waterworth*, 155 U. S. 102, 39 L. Ed. 85; *Walker v. Collins*, 167 U. S. 57, 42 L. Ed. 76; *Sawyer v. Kochersperger*, 170 U. S. 303, 42 L. Ed. 1046.

"Jurisdiction in this class of cases must be based upon the fact that the case is one arising under the constitution or laws of the United States. If it appear to be such in the plaintiff's pleading simply because of the allegations as to what the defenses are on the part of the defendant, if when the answer comes in it is seen that no defense in fact is set up or insisted upon, it is then seen that no such case exists as stated in the complaint, and no jurisdiction therefore exists to try questions which are not of a kind coming within the statute, and the court should then dismiss for want of jurisdiction." *Boston, etc., Min. Co. v. Montana Ore, etc., Co.*, 188 U. S. 632, 643, 47 L. Ed. 626; *Boston, etc., Min. Co. v. Montana Ore, etc., Co.*, 188 U. S. 645, 47 L. Ed. 634; *Boston, etc., Min. Co. v. Chile Gold Min. Co.*, 188 U. S. 645, 47 L. Ed. 634.

"The cases hold that to give the circuit court original jurisdiction the federal question must appear necessarily in the statement of the plaintiff's cause of action, and not as mere allegations of the defense which the defendants intend to set up or which they rely upon. *Third Street, etc., R. Co. v. Lewis*, 173 U. S. 457, 43 L. Ed. 766." *Boston, etc., Min. Co. v. Montana Ore, etc., Co.*, 188 U. S. 632, 640, 47 L. Ed. 626; *Boston, etc., Min. Co. v. Montana Ore, etc., Co.*, 188 U. S. 645, 47 L. Ed. 634; *Boston, etc., Min. Co. v. Chile Gold Min. Co.*, 188 U. S. 645, 47 L. Ed. 634.

"This is so held in *Robinson v. Anderson*, 121 U. S. 522, 30 L. Ed. 1021. In that case Mr. Chief Justice Waite, speaking for this court and delivering its opinion, said:

ing answers the defense which he alleges will be set up by the defendant.<sup>29</sup>

dd. *Reference to Particular Clause of Constitution Relied on.*—It is not essential to the maintenance of the jurisdiction of the circuit court of a suit arising under the constitution, that the pleadings should refer, in words, to the particular clause of the constitution relied on to sustain the claim of immunity in question, but only that the essential facts averred must show, not by inference or argumentatively, but clearly and distinctively, that the suit is one of which the circuit court is entitled to take cognizance.<sup>30</sup>

ee. *In Particular Cases*—(aa) *Impairment of Obligation of Contracts.*—If the jurisdiction of the federal courts is invoked upon the ground that a state law impairs the obligation of contracts, facts must be averred in the plaintiff's pleadings showing such violation or intended violation in order to sustain the jurisdiction.<sup>31</sup> The circuit court cannot be given jurisdiction by the suggestion

'Even if the complaint, standing by itself, made out a case of jurisdiction, which we do not decide, it was taken away as soon as the answers were in, because if there was jurisdiction at all it was by reason of the averments in the complaint as to what the defenses against the title of the plaintiffs would be, and these were of no avail as soon as the answers were filed and it was made to appear that no such defenses were relied on.' See, also, *Chrystal Springs, etc., Co. v. Los Angeles*, 82 Fed. Rep. 114, affirmed in 177 U. S. 169, 44 L. Ed. 720." *Boston, etc., Min. Co. v. Montana Ore, etc., Co.*, 188 U. S. 632, 643, 47 L. Ed. 626; *Boston, etc., Min. Co. v. Chile Montana Ore, etc., Co.*, 188 U. S. 645, 47 L. Ed. 634; *Boston, etc., Min. Co. v. Chile Gold Min. Co.*, 188 U. S. 645, 47 L. Ed. 634; *Florida Central, etc., R. Co. v. Bell*, 176 U. S. 321, 330, 44 L. Ed. 486.

"The right of the plaintiff to sue cannot depend on the defense which the defendant may choose to set up. His right to sue is anterior to that defense, and must depend on the state of things when the action is brought." *Filhiol v. Torney*, 194 U. S. 356, 360, 48 L. Ed. 1014; *Osborn v. United States Bank*, 9 Wheat. 738, 6 L. Ed. 204; *Tennessee v. Union, etc., Bank*, 152 U. S. 454, 459, 38 L. Ed. 511. Where the plaintiffs' statement of their right to the possession of land disclosed no case within the jurisdiction of the circuit court, that jurisdiction was not established by allegations as to the defense which the defendant might make or the circumstances under which he took possession. *Filhiol v. Torney*, 194 U. S. 356, 361, 48 L. Ed. 1014.

The jurisdiction of the circuit court cannot be sustained by reason of the allegations that defendant's adverse claims are based on an erroneous construction of the treaty of Guadalupe Hidalgo, the act of March 3, 1851, and the acts of the legislature of California, and ordinances and charters of the city of Los Angeles. *Devine v. Los Angeles*, 202 U. S. 313, 334, 50 L. Ed. 1046.

29. *When complainant answers defense.*—*Boston, etc., Min. Co. v. Montana Ore, etc., Co.*, 188 U. S. 632, 639, 47 L. Ed. 626. See, also, *Tennessee v. Union, etc., Bank*,

152 U. S. 454, 38 L. Ed. 511.

Mr. Justice Peckham, speaking for the court, in *Boston, etc., Min. Co. v. Montana Ore, etc., Co.*, 188 U. S. 632, 47 L. Ed. 626, said: "It would be wholly unnecessary and improper in order to prove complainant's cause of action to go into any matters of defense which the defendants might possibly set up, and then attempt to rely on such defense, and thus, if possible, to show that a federal question might or probably would arise in the course of the trial of the case. To allege such defense and then make an answer to it before the defendant has the opportunity to itself plead or prove its own defense is inconsistent with any known rule of pleading so far as we are aware, and is improper. \* \* \* The rule is a reasonable and just one that the complainant in the first instance shall be confined to a statement of its cause of action, leaving the defendant to set up in his answer what his defense is. \* \* \* The cases hold that to give the circuit court jurisdiction the federal question must appear necessarily in the statement of the plaintiff's cause of action, and not as mere allegations of the defense which the defendants intend to set up or which they rely upon." *Devine v. Los Angeles*, 202 U. S. 313, 333, 50 L. Ed. 1046, citing *Third Street, etc., R. Co. v. Lewis*, 173 U. S. 457, 43 L. Ed. 766.

"The facts alleged must show the nature of the suit, and it must plainly appear that it arises under the constitution or laws of the United States; that is, there must be a real and substantial dispute as to the effect or construction of the constitution or of some law of the United States, upon the determination of which the recovery depends. *Shreveport v. Cole*, 129 U. S. 36, 32 L. Ed. 589; *New Orleans v. Benjamin*, 153 U. S. 411, 38 L. Ed. 764." *McCain v. Des Moines*, 174 U. S. 168, 181, 43 L. Ed. 936.

30. *Reference to particular clause of constitution relied on.*—*Hanford v. Davies*, 163 U. S. 273, 280, 41 L. Ed. 157, citing *Ansbro v. United States*, 159 U. S. 695, 40 L. Ed. 310.

31. *Impairment of obligation of contract.*—*Bienville Water Supply Co. v. Mobile*, 175 U. S. 109, 42 L. Ed. 92.

of the impairment of a contract in respect of which the complainant seeks no relief, and where there is no averment raising such an issue.<sup>32</sup> But the jurisdiction in such cases depends upon the allegations of the plaintiff's pleadings and not upon the facts as subsequently proved.<sup>33</sup>

(bb) *Denial of Due Process of Law*.—If the plaintiff's purpose is to present a case under the clause of the federal constitution relating to due process of law, the ground upon which the court can take cognizance of a suit of that character between citizens of the same state should be clearly and distinctly stated in his pleading. An averment that a court acted entirely without jurisdiction and without color of authority, is too general and indefinite to show that its proceedings were wanting in due process of law.<sup>34</sup>

(b) *Estoppel to Deny Averments*.—A plaintiff making averments as to federal questions which confer jurisdiction on a federal court, cannot deny the truthfulness of them, on a second trial in that court.<sup>35</sup>

(3) *Suits between Citizens of Different States*.—(a) *Necessity of Alleging Citizenship*.—The jurisdiction of a circuit court of the United States is limited in the sense that it has no other jurisdiction than that conferred by the constitution and laws of the United States, and the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears. Hence, when jurisdiction is invoked on the ground of diverse citizenship of the parties, it must appear upon the record that the citizenship is such as to justify the court in taking cognizance of the case.<sup>36</sup>

**32. Where pleading seeks no relief as to contract impaired.**—*New Orleans v. Benjamin*, 153 U. S. 411, 432, 38 L. Ed. 764.

**33. Jurisdiction dependent upon allegations.**—*City R. Co. v. Citizens' St. R. Co.*, 166 U. S. 557, 41 L. Ed. 1114; *Pacific Electric R. Co. v. Los Angeles*, 194 U. S. 112, 118, 48 L. Ed. 896.

"We do not mean, however, that a mere claim in words is sufficient—a substantial controversy must be presented." *Pacific Electric R. Co. v. Los Angeles*, 194 U. S. 112, 117, 48 L. Ed. 896.

"Whether the state had or had not impaired the obligation of this contract was not a question which could properly be passed upon, on a motion to dismiss, so long as the complainant claimed in its bill that it had that effect, and such claim was apparently made in good faith and was not a frivolous one." *City R. Co. v. Citizens' St. R. Co.*, 166 U. S. 557, 564, 41 L. Ed. 1114, quoted in *Illinois Cent. R. Co. v. Adams*, 180 U. S. 28, 36, 45 L. Ed. 410, *Pacific Electric R. Co. v. Los Angeles*, 194 U. S. 112, 117, 48 L. Ed. 896. See, also, *New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79, 35 L. Ed. 943.

**34. Denial of due process of law.**—*Hanford v. Davies*, 163 U. S. 273, 279, 41 L. Ed. 157.

**35. Estoppel to deny jurisdictional averments.**—*Cooke v. Avery*, 147 U. S. 375, 37 L. Ed. 209.

**36. Necessity of alleging citizenship.**—*Union Mut. Life Ins. Co. v. Kirchoff*, 169 U. S. 103, 42 L. Ed. 677; *Anderson v. Watt*, 138 U. S. 694, 702, 34 L. Ed. 1078; *Robertson v. Cease*, 97 U. S. 646, 24 L. Ed. 1057; *Brown v. Keene*, 8 Pet. 112, 8 L. Ed. 885; *Scott v. Sandford*, 19 How. 393, 394, 15 L. Ed. 691; *Capron v. Van*

*Noorden*, 2 Cranch 126, 2 L. Ed. 229; *Briges v. Sperry*, 95 U. S. 401, 24 L. Ed. 390; *Grace v. American Cent. Ins. Co.*, 109 U. S. 278, 283, 27 L. Ed. 932; *Stevens v. Nichols*, 130 U. S. 230, 231, 32 L. Ed. 914; *Livingston v. Story*, 11 Pet. 351, 414, 9 L. Ed. 746; *Hanford v. Davies*, 163 U. S. 273, 279, 41 L. Ed. 157; *Great Southern, etc., Hotel Co. v. Jones*, 177 U. S. 449, 453, 44 L. Ed. 842; *Cameron v. Hodges*, 127 U. S. 322, 325, 32 L. Ed. 132; *Godfrey v. Terry*, 97 U. S. 171, 24 L. Ed. 944; *Chapman v. Barney*, 129 U. S. 677, 681, 32 L. Ed. 800; *Morgan v. Callender*, 4 Cranch 370, 2 L. Ed. 650; *Mail Co. v. Flanders*, 12 Wall. 130, 135, 20 L. Ed. 249; *Timmons v. Elyton Land Co.*, 139 U. S. 378, 35 L. Ed. 195; *Parker v. Ormsby*, 141 U. S. 81, 35 L. Ed. 654; *Kellam v. Keith*, 144 U. S. 568, 36 L. Ed. 544; *King Bridge Co. v. Otoe County*, 120 U. S. 225, 226, 30 L. Ed. 623; *Metcalf v. Watertown*, 128 U. S. 586, 32 L. Ed. 543; *Mason v. Rollins*, 13 Wall. 602, 20 L. Ed. 527; *Johnson v. Christian*, 125 U. S. 642, 31 L. Ed. 820; *Oxley Stave Co. v. Butler County*, 166 U. S. 648, 655, 41 L. Ed. 1149; *Halsted v. Buster*, 119 U. S. 341, 30 L. Ed. 462; *Manufacturing Co. v. Bradley*, 105 U. S. 175, 181, 26 L. Ed. 1034; *Covington Drawbridge Co. v. Shepherd*, 21 How. 112, 16 L. Ed. 38; *Bushnell v. Kennedy*, 9 Wall. 387, 19 L. Ed. 736; *Ex parte Smith*, 94 U. S. 455, 24 L. Ed. 165; *Bors v. Preston*, 111 U. S. 252, 28 L. Ed. 419; *Hancock v. Holbrook*, 112 U. S. 229, 28 L. Ed. 714; *Thayer v. Life Ass'n*, 112 U. S. 717, 28 L. Ed. 864; *Steigleder v. McQuesten*, 198 U. S. 141, 142, 49 L. Ed. 986; *Riverdale Cotton Mills v. Alabama, etc., Mfg. Co.*, 198 U. S. 188, 193, 49 L. Ed. 1008; *Edwards v. Tanneret*, 12 Wall. 446, 450, 20 L. Ed. 415; *Bailey v. Dozier*,



(b) *Sufficiency of Averments*—aa. *Necessity for Allegations to Be Positive*.—The citizenship, or the facts which in legal intendment constitute it, should be distinctively and positively averred in the pleadings, or should appear affirmatively with equal distinctness in other parts of the record; it is not sufficient that jurisdiction may be inferred argumentatively from the averments.<sup>37</sup>

6 How. 23, 12 L. Ed. 328; *Roberts v. Lewis*, 144 U. S. 653, 656, 36 L. Ed. 579; *Wolfe v. Hartford Life, etc., Ins. Co.*, 148 U. S. 389, 37 L. Ed. 493; *Menard v. Goggan*, 121 U. S. 253, 30 L. Ed. 914; *Hegler v. Faulkner*, 127 U. S. 482, 32 L. Ed. 210; *Turner v. Enrille*, 4 Dall. 7, 1 L. Ed. 717; *Course v. Stead*, 4 Dall. 22, 1 L. Ed. 724; *Morgan v. Gay*, 19 Wall. 81, 22 L. Ed. 100; *Emory v. Grenough*, 3 Dall. 369, 1 L. Ed. 640; *Jackson v. Allen*, 132 U. S. 27, 33 L. Ed. 249; *Crehore v. Ohio, etc., R. Co.*, 131 U. S. 240, 33 L. Ed. 144; *Abercrombie v. Dupuis*, 1 Cranch 343, 2 L. Ed. 129; *Interior Const., etc., Co. v. Gibney*, 160 U. S. 217, 219, 40 L. Ed. 401; *Wood v. Wagnon*, 2 Cranch 9, 2 L. Ed. 191; *Sullivan v. Fulton Steamboat Co.*, 6 Wheat. 450, 5 L. Ed. 302; *Mullen v. Torrance*, 9 Wheat. 537, 6 L. Ed. 154; *Turner v. Bank*, 4 Dall. 8, 1 L. Ed. 718; *Smith v. Clapp*, 15 Pet. 125, 10 L. Ed. 684; *The Assessors v. Osbornes*, 9 Wall. 567, 19 L. Ed. 748; *Thomas v. Board of Trustees*, 195 U. S. 207, 211, 49 L. Ed. 160; *Jones v. Andrews*, 10 Wall. 327, 19 L. Ed. 935; *Hornthall v. The Collector*, 9 Wall. 560, 565, 19 L. Ed. 560; *Bingham v. Cabot*, 3 Dall. 382, 1 L. Ed. 646; *Gassies v. Ballon*, 6 Pet. 761, 8 L. Ed. 573; *Breedlove v. Nicolet*, 7 Pet. 413, 8 L. Ed. 731; *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379, 382, 28 L. Ed. 462; *Railway Co. v. Ramsey*, 22 Wall. 322, 326, 22 L. Ed. 823; *Everhart v. Huntsville College*, 120 U. S. 223, 30 L. Ed. 623; *Continental Ins. Co. v. Rhoads*, 119 U. S. 237, 30 L. Ed. 380; *Peper v. Fordyce*, 119 U. S. 469, 30 L. Ed. 435.

"When jurisdiction depends upon diverse citizenship the absence of sufficient averments or of facts in the record showing such required diversity of citizenship is fatal and cannot be overlooked by the court, even if the parties fail to call attention to the defect, or consent that it may be waived. *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379, 28 L. Ed. 462; *Martin v. Baltimore, etc., R. Co.*, 151 U. S. 673, 38 L. Ed. 311; *Powers v. Chesapeake, etc., R. Co.*, 169 U. S. 92, 42 L. Ed. 673." *Thomas v. Board of Trustees*, 195 U. S. 207, 211, 49 L. Ed. 160.

In *Gassies v. Ballon*, 6 Pet. 761, 8 L. Ed. 573, it was said that the authorities, on the question of the jurisdiction of the courts of the United States on the allegation of citizenship, in proceedings in those courts, have gone as far in limiting the jurisdiction of those courts, as it would be reasonable and proper to go.

In a suit to enjoin the trustee in a deed of trust for selling the property under the power contained in the deed, the trustee

is a necessary party, and if there is no averment as to his citizenship the bill is bad. *Thayer v. Life Ass'n*, 112 U. S. 717, 28 L. Ed. 864.

Where a contract, under which a party would be prevented, from want of proper citizenship, from suing in the federal courts, is set out but as inducement to a subsequent one under which he would not be so prevented, the jurisdiction of such courts will not be taken away from the fact of the old contract being set forth as inducement only somewhat indefinitely. Coming, in such a case, within the principle of a contract defectively stated, but not of one defective, the mode of stating it is cured by the verdict. *De Sobry v. Nicholson*, 3 Wall. 420, 18 L. Ed. 263.

**Citizenship of all parties to be stated.**—A bill described the plaintiff as a citizen of the state of Illinois, and three defendants as citizens of the state of Illinois, and one defendant as commissioner of internal revenue, without averring that he was a citizen of any state. It was held that the averment was not sufficient to give the circuit court jurisdiction. *Mason v. Rollins*, 13 Wall. 602, 20 L. Ed. 527.

**Reversal for want of jurisdictional averments.**—Unless it appears upon the face of the record, when brought to the supreme court that the circuit court had jurisdiction, the judgment must be reversed. *Scott v. Sandford*, 19 How. 393, 394, 15 L. Ed. 691; *Capron v. Van Noorden*, 2 Cranch 126, 2 L. Ed. 229; *Bors v. Preston*, 111 U. S. 252, 255, 28 L. Ed. 419; *Grace v. American Cent. Ins. Co.*, 109 U. S. 278, 27 L. Ed. 932; *Robertson v. Cease*, 97 U. S. 646, 24 L. Ed. 1057; *Roberts v. Lewis*, 144 U. S. 653, 656, 36 L. Ed. 579; *Brown v. Keene*, 8 Pet. 112, 8 L. Ed. 885; *Continental Ins. Co. v. Rhoads*, 119 U. S. 237, 30 L. Ed. 380. See the title APPEAL AND ERROR, vol. 1, p. 333.

When the record, as by writ of error, does not show that the circuit court had jurisdiction, the supreme court has jurisdiction to revise and correct the error, like any other error in the court below. It does not and cannot dismiss the case for want of jurisdiction here; for that would leave the erroneous judgment of the court below in full force, and the party injured without remedy. But it must reverse the judgment, and, as in any other case of reversal, send a mandate to the circuit court to conform its judgment to the opinion. *Scott v. Sandford*, 19 How. 393, 394, 15 L. Ed. 691.

**37. Necessity for allegations to be positive.**—*Hanford v. Davies*, 163 U. S. 273, 280, 41 L. Ed. 157; *Union Mut. Life Ins.*

bb. *Averment of Residence*.—It has long been settled that residence and citizenship are wholly different things within the meaning of the constitution and the laws defining and regulating the jurisdiction of the circuit courts of the United States; and that a mere averment of residence in a particular state is not an averment of citizenship in that state for the purposes of jurisdiction.<sup>28</sup> The rule is unaffected by the fourteenth amendment of the constitution, de-

Co. v. Kirchoff, 169 U. S. 103, 121, 42 L. Ed. 677; Oxley Stave Co. v. Butler County, 166 U. S. 648, 665, 41 L. Ed. 1149; Chapman v. Barney, 129 U. S. 677, 681, 32 L. Ed. 800; Wolfe v. Hartford Life, etc., Ins. Co., 148 U. S. 389, 37 L. Ed. 493; Continental Ins. Co. v. Rhoads, 119 U. S. 237, 240, 30 L. Ed. 380; Brown v. Keene, 8 Pet. 112, 8 L. Ed. 885; Robertson v. Cease, 97 U. S. 646, 24 L. Ed. 1057; Grace v. American Cent. Ins. Co., 109 U. S. 278, 283, 27 L. Ed. 932; Turner v. Enrille, 4 Dall. 7, 1 L. Ed. 717; Course v. Stead, 4 Dall. 22, 1 L. Ed. 724.

Allegation of citizenship is sufficiently made when it appears fairly, and in such a way as to leave no room for reasonable doubt, from the bill or declaration, of what states the respective parties are citizens. Jones v. Andrews, 10 Wall. 327, 19 L. Ed. 935.

Where the declaration, in an action on a note, begins with an averment that the drawer and endorser are citizens of the same state, but afterwards avers that the indorser, who was also the payee, was an alien and citizen of Texas, this was sufficient to maintain the jurisdiction. Bailey v. Dozier, 6 How. 23, 12 L. Ed. 328.

Where a bill described the plaintiff as a citizen of the state of Illinois, and did not aver that any of the defendants were citizens of any other state, it was held that the averment was not sufficient to give the circuit court jurisdiction. Mason v. Rollins, 13 Wall. 602, 20 L. Ed. 527.

A bill described the complainant as a citizen of the state of Illinois, and one defendant as of the District of Columbia, and a citizen of the state of — and other defendants as citizens of the state of Illinois. It was held that the averment was not sufficient to give the circuit court jurisdiction. Mason v. Rollins, 13 Wall. 602, 20 L. Ed. 527.

**Necessity of naming state of which party is a citizen.**—A petition stating that the defendant is a citizen of a particular state, of which state none of the plaintiffs are citizens, is not sufficient. It must be stated that the complainants are citizens of some other named state or aliens, as they might be citizens of a territory or the District of Columbia, in which case they would not be entitled to sue in the federal courts. Cameron v. Hodges, 127 U. S. 322, 32 L. Ed. 132.

**Necessity of averring state of which party is a citizen to be one of United States.**—Where a count alleged a party to be a citizen of the state of Missouri, after that state had been admitted as a state into the Union, it was held sufficient, as every

court in the nation was bound to take notice of the admission of a state, as one of the United States, without any express averment of the fact. Wright v. Hollingsworth, 1 Pet. 165, 168, 7 L. Ed. 96.

**38. Averments of residence not equivalent to averments of citizenship.**—Brown v. Keene, 8 Pet. 112, 116, 8 L. Ed. 885; Bingham v. Cabot, 3 Dall. 382, 1 L. Ed. 646; Abercrombie v. Dupuis, 1 Cranch 343, 2 L. Ed. 129; Robertson v. Cease, 97 U. S. 646, 648, 24 L. Ed. 1057; Parker v. Overman, 18 How. 137, 15 L. Ed. 318; Steigleder v. McQuesten, 198 U. S. 141, 143, 49 L. Ed. 986; Everhart v. Huntsville College, 120 U. S. 223, 30 L. Ed. 623; Turner v. Bank, 4 Dall. 8, 1 L. Ed. 718; Shaw v. Quincy Min. Co., 145 U. S. 444, 447, 36 L. Ed. 768; Grace v. American Cent. Ins. Co., 109 U. S. 278, 27 L. Ed. 932; Timmons v. Elyton Land Co., 139 U. S. 378, 35 L. Ed. 195; Denny v. Pironi, 141 U. S. 121, 35 L. Ed. 657; Southern Pac. Co. v. Denton, 146 U. S. 202, 205, 36 L. Ed. 943; Sun Printing, etc., Ass'n v. Edwards, 194 U. S. 377, 382, 48 L. Ed. 1027; Mexican Cent. R. Co. v. Duthie, 189 U. S. 76, 47 L. Ed. 715; Horne v. Hammond Co., 155 U. S. 393, 39 L. Ed. 197; Union Mut. Life Ins. Co. v. Kirchoff, 169 U. S. 103, 111, 42 L. Ed. 677; Continental Ins. Co. v. Rhoads, 119 U. S. 237, 30 L. Ed. 380; Menard v. Goggan, 121 U. S. 253, 30 L. Ed. 914; Anderson v. Watt, 138 U. S. 694, 702, 34 L. Ed. 1078; Wolfe v. Hartford Life, etc., Ins. Co., 148 U. S. 389, 37 L. Ed. 493; Galveston, etc., R. Co. v. Gonzales, 151 U. S. 496, 38 L. Ed. 248; Oxley v. Stave Co. v. Butler County, 166 U. S. 648, 655, 41 L. Ed. 1149. See, also, the title CITIZENSHIP, vol. 3, p. 795.

"It was held by this court from the beginning that an averment that a party resided within the state or the district in which the suit was brought was not sufficient to support the jurisdiction, because in the common use of words a resident might not be a citizen, and therefore it was not stated expressly and beyond ambiguity that he was a citizen of the state, which was the fact on which the jurisdiction depended under the provisions of the constitution, and of the judiciary act. Bingham v. Cabot, 3 Dall. 382, 1 L. Ed. 646; Turner v. Bank, 4 Dall. 8, 1 L. Ed. 718; Abercrombie v. Dupuis, 1 Cranch 343, 2 L. Ed. 129; Hodgson v. Bowerbank, 5 Cranch 303, 3 L. Ed. 108; Brown v. Keene, 8 Pet. 112, 8 L. Ed. 885." Shaw v. Quincy Min. Co., 145 U. S. 444, 447, 36 L. Ed. 768.

A petition filed in the district court of

claring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."<sup>39</sup>

cc. *Averment That Party Is "of" a Certain State*.—A mere statement that a party to a cause is "of" a certain state, or "of" a certain place within a state, is not sufficient to show that he is a citizen of that state.<sup>40</sup>

dd. *In What Part of Record Citizenship Must Appear*—(aa) *Citizenship Deducible from Record*.—While it is customary for the citizenship of the parties to be stated in the plaintiff's pleading, this is by no means essential, for it is

Louisiana averred that the plaintiff was a citizen of the state of Maryland, and that the defendant was a resident of the state of Louisiana, holding his fixed and permanent domicile in the parish of St. Charles. It was held that the averment of jurisdiction was not sufficient. *Brown v. Keene*, 8 Pet. 112, 8 L. Ed. 885.

A complaint stated that a firm consisting of three members was engaged in doing business in New York and contained the further allegation that two of the partners were residents of that state, and that the defendant was a corporation under the laws of Missouri. It was held that the citizenship of the parties was not sufficiently stated. *Grace v. American Cent. Ins. Co.*, 109 U. S. 278, 284, 27 L. Ed. 932.

An averment that "the petitioners, who are hereinafter styled plaintiffs, are and were at the times of the accrual of the cause of action hereinafter stated, a mercantile firm, composed as aforesaid, engaged in the wholesale wine and liquor business in the city and county of Los Angeles, California, where both of said plaintiffs also reside," is not the equivalent of an averment of citizenship, and is insufficient to give the circuit court jurisdiction. *Denny v. Pironi*, 141 U. S. 121, 123, 35 L. Ed. 657.

In *Abercrombie v. Dupuis*, 1 Cranch 343, 2 L. Ed. 129, the plaintiffs below averred, "that they do severally reside without the limits of the district of Georgia, to wit, in the state of Kentucky." The defendant was called "Charles Abercrombie, of the district of Georgia, aforesaid." The judgment in favor of the plaintiff below was reversed, on the authority of the case of *Bingham v. Cabot*, 3 Dall. 382, 1 L. Ed. 646; *Brown v. Keene*, 8 Pet. 112, 116, 8 L. Ed. 885.

The allegation that the plaintiff, in the action in the circuit court for the western district of Texas, resides in the county of Mason and state of Illinois, is not a sufficient averment of his citizenship in Illinois. *Robertson v. Cease*, 97 U. S. 646, 24 L. Ed. 1057.

A petition which stated that Edmund Menard, the plaintiff, "resides in Randolph County, in the state of Illinois," and that the defendants, "reside in the city of Galveston," in the state of Texas, is not sufficient. *Menard v. Goggan*, 121 U. S. 253, 30 L. Ed. 914.

A petition averred that one of the plaintiffs was a resident of the state of North Carolina and that two of them were residents of South Carolina and that the defendant was a corporation chartered under the laws of the state of Alabama, and, by amendment, twelve other plaintiffs were added whose citizenship was not stated. It was held, that the petition was insufficient. *Timmons v. Elyton Land Co.*, 139 U. S. 378, 35 L. Ed. 195.

39. *Rule unaffected by fourteenth amendment*.—*Shaw v. Quincy Min. Co.*, 145 U. S. 444, 447, 36 L. Ed. 768, citing *Robertson v. Cease*, 97 U. S. 646, 24 L. Ed. 1057; *Grace v. American Cent. Ins. Co.*, 109 U. S. 278, 27 L. Ed. 932; *Timmons v. Elyton Land Co.*, 139 U. S. 378, 35 L. Ed. 195; *Denny v. Pironi*, 141 U. S. 121, 35 L. Ed. 657.

40. *Statement that party is "of" certain state*.—*Jackson v. Ashton*, 8 Pet. 148, 8 L. Ed. 898; *Horne v. Hammond Co.*, 155 U. S. 393, 39 L. Ed. 197; *Cooper v. Newell*, 155 U. S. 532, 39 L. Ed. 249; *Wood v. Wagon*, 2 Cranch 9, 2 L. Ed. 191; *Grace v. American Cent. Ins. Co.*, 109 U. S. 278, 284, 27 L. Ed. 932.

Where the title of a cause described plaintiff as "of Chelsea in said district," and the decedent as "late of Chelsea," and the defendant as "a corporation organized under the laws of the state of Michigan," and the amended declaration commenced thus: "Plaintiff says that she is the widow of the late Granville P. Horne of Chelsea, Suffolk County, Commonwealth of Massachusetts, and that she was duly appointed by the probate court of Suffolk County, administratrix of his estate," it was held that as the transcript of the record did not show that the circuit court had jurisdiction of the suit, and as counsel, upon having their attention called to the matter, furnished nothing of record which would supply the defect, the judgment would be reversed and the cause be remanded to the circuit court for further proceedings. *Horne v. Hammond Co.*, 155 U. S. 393, 39 L. Ed. 197, reaffirmed in *Cooper v. Newell*, 155 U. S. 532, 39 L. Ed. 249.

A petition stating the plaintiff to be a citizen of the state of Pennsylvania, and the defendant, to be of Georgia, aforesaid is insufficient. *Wood v. Wagon*, 2 Cranch 9, 2 L. Ed. 191.



well settled that it is sufficient to sustain the jurisdiction if it appears affirmatively in some form from the entire record.<sup>41</sup>

(bb) *Statement in Remittitur*.—The mere recital of the citizenship of the parties in a remittitur entered in the case incorporates it into the record and obviates the objection to the original petition.<sup>42</sup>

(cc) *Statement in Stipulation Placed in Record*.—Where the parties by stipulation and agreement place on file, and make a part of the record, a writing admitting that the citizenship of the parties was such as to give the court jurisdiction and stating what that citizenship is, it is sufficient.<sup>43</sup>

(dd) *Statement in Caption of Pleading*.—A statement of the citizenship of the parties in the caption of pleadings is not sufficient.<sup>44</sup>

#### 41. Citizenship deducible from record.

—*Sun Printing, etc., Ass'n v. Edwards*, 194 U. S. 377, 382, 48 L. Ed. 1027; *Gordon v. Third Nat. Bank*, 144 U. S. 97, 103, 36 L. Ed. 360; *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379, 382, 28 L. Ed. 462; *Robertson v. Cease*, 97 U. S. 646, 24 L. Ed. 1057; *Railway Co. v. Ramsey*, 22 Wall. 322, 22 L. Ed. 823; *Grace v. American Cent. Ins. Co.*, 109 U. S. 278, 283, 27 L. Ed. 932; *Mexican Cent. R. Co. v. Pinkney*, 149 U. S. 194, 200, 37 L. Ed. 699; *Briges v. Sperry*, 95 U. S. 401, 24 L. Ed. 390; *Scott v. Sandford*, 19 How. 393, 15 L. Ed. 691; *Anderson v. Watt*, 138 U. S. 694, 702, 34 L. Ed. 1078; *Denny v. Pironi*, 141 U. S. 121, 124, 35 L. Ed. 657.

The whole record may be looked to for the purpose of curing a defective averment of citizenship, where jurisdiction in a federal court is asserted to depend upon diversity of citizenship, and if the requisite citizenship is anywhere expressly averred in the record, or facts are therein stated which in legal intendment constitute such allegation, that is sufficient. *Sun Printing, etc., Ass'n v. Edwards*, 194 U. S. 377, 48 L. Ed. 1027.

In the *Sun Printing, etc., Ass'n v. Edwards*, 194 U. S. 377, 48 L. Ed. 1027, a case certified from the circuit court of appeals on a question as to jurisdiction of the circuit court, the complaint averred that it appeared from the record that the plaintiff was legally domiciled in the state of Delaware and that he had no intention of changing his domicile. It was held that as it was impossible for him to have been a citizen of another state, district or territory than Delaware, where his legal domicile was, he must have been either a citizen of Delaware or a citizen or subject of a foreign state, and in either one of these contingencies the circuit court had jurisdiction.

#### Statement in papers not part of record.

—The rulings in *Railway Co. v. Ramsey*, 22 Wall. 322, 22 L. Ed. 823, approved in *Briges v. Sperry*, 95 U. S. 401, 24 L. Ed. 390, that citizenship need not necessarily be averred in the pleadings, if it otherwise affirmatively appears by the record, does not apply to papers copied into the transcript which do not make a part of the record by bill of exceptions, or by an order of the court referring to them, or by some other mode recognized by law.

*Robertson v. Cease*, 97 U. S. 646, 24 L. Ed. 1057.

"When we declared that the record, other than the pleadings, may be referred to in this court, to ascertain the citizenship of parties, we alluded only to such portions of the transcript as properly constituted the record upon which we must base our final judgment, and not to papers which had been improperly inserted in the transcript." *Robertson v. Cease*, 97 U. S. 646, 648, 24 L. Ed. 1057.

As to what constitutes record, see, generally, the title APPEAL AND ERROR, vol. 2, p. 196, et seq.

42. *Statement in remittitur*.—*Denny v. Pironi*, 141 U. S. 121, 124, 35 L. Ed. 657.

43. *Statement of agreement placed on record*.—*Railway Co. v. Ramsey*, 22 Wall. 322, 22 L. Ed. 823. See, also, *Denny v. Pironi*, 141 U. S. 121, 124, 35 L. Ed. 657.

"Thus in *Railway Co. v. Ramsey*, 22 Wall. 322, 22 L. Ed. 823, which was a case removed from a state court, the averment of citizenship did not appear in the pleadings, but the parties, by stipulation and agreement placed on file, and made part of the record, admitted that the cause was brought into the circuit court by transfer from the state court in accordance with the statutes in such case provided. By the same stipulation it was made to appear that all the original files in the cause had been destroyed by fire. The court held that, while consent of parties cannot give the courts of the United States jurisdiction, they may admit facts which show jurisdiction, and the courts may act judicially upon such admission, and that it would be presumed that the petition for removal stated facts sufficient to entitle the party to have the transfer made. Said the chief justice, speaking for the court: 'As both the court and the parties accepted the transfer, it cannot for a moment be doubted that the files did then contain conclusive evidence of the existence of the jurisdictional facts.'" *Denny v. Pironi*, 141 U. S. 121, 124, 35 L. Ed. 657.

44. *Statement in caption*.—*Jackson v. Ashton*, 8 Pet. 148, 8 L. Ed. 898; *Livingston v. Story*, 11 Pet. 351, 414, 9 L. Ed. 746.

The caption of the bill was in the following terms, "Thomas Jackson, a citizen of the state of Virginia, William Goodwin

(ee) *Statement in Original, but Not in Amended, Pleadings.*—If the citizenship of the parties is properly averred in the original petition, it is immaterial that it is not sufficiently stated in the amended petition.<sup>45</sup>

(ff) *Statement in Joinder in Demurrer.*—An averment of citizenship in a joinder in demurrer, not being objected to at the time, is sufficient to give jurisdiction.<sup>46</sup>

(gg) *Statement in Summons.*—Where the citizenship of the parties appears from the summons, the jurisdiction may be sustained, although the averments of his pleadings are not sufficient for this purpose.<sup>47</sup>

ee. *Actions by or against Artificial Bodies*—(aa) *Corporations.*—In actions by or against corporations on the ground of diversity of citizenship it was formerly the rule that it was necessary that the citizenship of the individual corporators be stated,<sup>48</sup> but it is now well settled that the citizenship of a corporation

Jackson and Maria Congreve Jackson, citizens of Virginia, infants, by their father and next friend, the said Thomas Jackson *v.* The Reverend William E. Ashton, a citizen of the state of Pennsylvania: In equity." In the body of the bill, it was stated that "the defendant is of Philadelphia." The title or caption of the bill is no part of the bill, and does not remove the objection to the defects in the pleadings; the bill and proceedings should state the citizenship of the parties, to give the court jurisdiction of the case. Jackson *v.* Ashton, 8 Pet. 148, 8 L. Ed. 898.

45. *Insufficiency of averment in amended petition.*—Mexican Cent. R. Co. *v.* Pinkney, 149 U. S. 194, 200, 37 L. Ed. 699.

"The rule is that, to give the circuit courts of the United States jurisdiction on the ground of the diverse citizenship of the parties, the facts showing the requisite diverse citizenship must appear in such papers as properly constitute the record of the case. The original petition is properly a part of the record; and, as that made the proper averments as to the citizenship of the parties, the point raised by the first assignment of error is not well taken." Mexican Cent. R. Co. *v.* Pinkney, 149 U. S. 194, 200, 37 L. Ed. 699.

46. *Statement in joinder in demurrer.*—Bradstreet *v.* Thomas, 12 Pet. 59, 9 L. Ed. 999 (this was a suit by an alien against a citizen). See, also, Kennedy *v.* Bank, 8 How. 586, 612, 12 L. Ed. 1209.

47. *Statement in summons.*—Where the complaint, in an action by a national bank, alleged the plaintiff to be a national bank organized and doing business in Tennessee and the defendant to be a resident of Alabama, and the summons described the defendant as a citizen of Alabama and the plaintiff as a citizen of Tennessee, the diverse citizenship of the parties appeared affirmatively and with sufficient distinctness from the record, of which the summons forms a part, and the court declined to reverse the judgment on this ground, although greater care should have been exercised by the plaintiff in the averments upon that subject. Gordon *v.* Third Nat. Bank, 144 U. S. 97, 103, 36 L. Ed. 360.

Where the writ had stated both of the defendants to be citizens of another state than that of which the plaintiff was a citizen, and one of the defendants had been returned not found by the marshal, under the laws of Alabama, it is not necessary, in the declaration, to aver the citizenship of the absent defendant. Smith *v.* Clapp, 15 Pet. 125, 10 L. Ed. 684.

48. *Former rule as to pleading corporate citizenship.*—Cowles *v.* Mercer County, 7 Wall. 118, 121, 19 L. Ed. 86; Breithaupt *v.* Bank, 1 Pet. 238, 7 L. Ed. 127; Hope Ins. Co. *v.* Boardman, 5 Cranch 57, 3 L. Ed. 36; Sullivan *v.* Fulton Steamboat Co., 6 Wheat. 450, 5 L. Ed. 302; Shaw *v.* Quincy Min. Co., 145 U. S. 444, 451, 36 L. Ed. 768; United States Bank *v.* Deveau, 5 Cranch 61, 3 L. Ed. 38; Commercial, etc., Bank *v.* Slocomb, 14 Pet. 60, 10 L. Ed. 354; Barrow Steamship Co. *v.* Kane, 170 U. S. 100, 107, 42 L. Ed. 964.

"In all the cases, prior to 1844, it was held necessary to aver the requisite citizenship of the corporators. Then the whole question underwent a thorough re-examination in the case of Louisville, etc., R. Co. *v.* Letson, 2 How. 497, 11 L. Ed. 353; and it was held that a corporation created by the laws of a state, and having its place of business within that state, must, for the purposes of suit, be regarded as a citizen within the meaning of the constitution giving jurisdiction founded upon citizenship. This decision has been since reaffirmed, and must now be taken as the settled construction of the constitution." Cowles *v.* Mercer County, 7 Wall. 118, 121, 19 L. Ed. 86.

Thus in Hope Ins. Co. *v.* Boardman, 5 Cranch 57, 3 L. Ed. 36, where the company was described in the declaration as "a company legally incorporated by the legislature of the state of Rhode Island and Providence Plantations, and established at Providence," the judgment was reversed because there was no averment that the members of the corporation were citizens of Rhode Island, the court holding that an aggregate corporation as such was not a citizen within the meaning of the constitution. Paul *v.* Virginia, 8 Wall. 168, 178, 19 L. Ed. 357.

is properly pleaded by stating that it was created under the laws of a certain state, without averring anything as to the citizenship of the members of the corporation.<sup>49</sup> The plaintiff must name the state under whose laws the corporation was created,<sup>50</sup> which must be a different one from that of which the other party is averred to be a citizen.<sup>51</sup> A mere averment that a corporation is a citizen of a certain state,<sup>52</sup> unless it was incorporated by public law of which

The complainants were stated in the bill, to be citizens of the state of South Carolina; the defendant, the bank of Georgia, as a body corporate, existing under an act of the legislature; but the citizenship of the individual corporators was not stated; the averment, in the original bill, was that William B. Bullock and Samuel Hale were citizens of Georgia, and residents therein; William B. Bullock was afterwards designated in the bill, as "president of the mother bank, and Samuel Hale, as the president of the branch bank of Augusta, in the state of Georgia." The courts of the United States have no jurisdiction of the case; the record does not show that the defendants were citizens of Georgia, nor are there any distinct allegations, that the stockholders of the bank are citizens of that state. *Breithaupt v. Bank*, 1 Pet. 238, 7 L. Ed. 127.

**49. Present mode of pleading corporate citizenship.**—*Marshall v. Baltimore, etc.*, R. Co., 16 How. 314, 325, 14 L. Ed. 953; *Louisville, etc., R. Co. v. Letson*, 2 How. 497, 11 L. Ed. 353; *Dodge v. Tulleys*, 144 U. S. 451, 36 L. Ed. 501; *Sun Printing, etc., Ass'n v. Edwards*, 194 U. S. 377, 48 L. Ed. 1027; *Paul v. Virginia*, 8 Wall. 168, 178, 19 L. Ed. 357; *Pennsylvania v. Quick-silver Co.*, 10 Wall. 553, 556, 19 L. Ed. 998; *St. Louis, etc., R. Co. v. James*, 161 U. S. 545, 557, 40 L. Ed. 802; *Muller v. Dows*, 94 U. S. 444, 24 L. Ed. 207; *Ohio, etc., R. Co. v. Wheeler*, 1 Black 286, 297, 17 L. Ed. 130; *Railroad Co. v. Harris*, 12 Wall. 65, 81, 20 L. Ed. 354; *Express Co. v. Railroad Co.*, 99 U. S. 191, 198, 25 L. Ed. 319; *Express Co. v. Kountze, Bros.*, 8 Wall. 342, 19 L. Ed. 457; *Blake v. McClung*, 172 U. S. 239, 259, 43 L. Ed. 432; *Brock v. Northwestern Fuel Co.*, 130 U. S. 341, 32 L. Ed. 905; *St. Joseph, etc., R. Co. v. Steele*, 167 U. S. 659, 42 L. Ed. 315; *Piquignot v. Pennsylvania R. Co.*, 16 How. 104, 14 L. Ed. 863; *Philadelphia, etc., R. Co. v. Quigley*, 21 How. 202, 214, 16 L. Ed. 73; *Gordon v. Third Nat. Bank*, 144 U. S. 97, 36 L. Ed. 360; *Insurance Co. v. Francis*, 11 Wall. 210, 20 L. Ed. 77; *Shaw v. Quincy Min. Co.*, 145 U. S. 444, 452, 36 L. Ed. 763; *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. Ed. 451.

An averment that the defendant is a foreign corporation, formed under and created by the laws of the state of New York, is a sufficient averment that the defendant is a citizen of New York. *Express Co. v. Kountze Bros.*, 8 Wall. 342, 343, 19 L. Ed. 457.

An allegation of the complaint, admitted by the answer, "that defendant is

a domestic corporation, duly organized and existing under the laws of New York, having its principal office for the transaction of business in the southern district of New York," clearly imports that the corporation was originally created by the state of New York. The presumption necessarily follows that the corporation is composed of citizens of that state, and consequently the corporation is entitled to sue or be sued in the courts of the United States as a citizen of New York. *Sun Printing, etc., Ass'n v. Edwards*, 194 U. S. 377, 381, 48 L. Ed. 1027.

The citizenship of Cornell University is sufficiently disclosed by an allegation that it is a corporation duly organized under the laws of the state of New York. *Dodge v. Tulleys*, 144 U. S. 451, 456, 36 L. Ed. 501.

**50. Stating law of creation.**—*Piquignot v. Pennsylvania R. Co.*, 16 How. 104, 14 L. Ed. 863; *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. Ed. 451.

Where a suit was brought in which the plaintiff was described as a citizen of France, against the Pennsylvania Railroad Company, without any averment that the defendants were a corporation under the laws of Pennsylvania, or that the place of business of the corporation was there, or that its corporators, managers, or directors were citizens of Pennsylvania, the absence of such an averment was fatal to the jurisdiction of the court. *Piquignot v. Pennsylvania R. Co.*, 16 How. 104, 14 L. Ed. 863.

**51. Difference of citizenship to be averred.**—*Muller v. Dows*, 94 U. S. 444, 24 L. Ed. 207; *St. Joseph, etc., R. Co. v. Steele*, 167 U. S. 659, 42 L. Ed. 315.

A bill alleged that the plaintiff was a corporation created and subsisting under and by virtue of the laws of Kansas and Nebraska and that the defendant was a citizen of Kansas. It was held that it did not sufficiently show that the plaintiff and defendant were citizens of different states. *St. Joseph, etc., R. Co. v. Steele*, 167 U. S. 659, 42 L. Ed. 315.

While it should appear by the declaration, or bill of complaint, that the corporation was created by the state whereof the adverse party is not a citizen, a defective averment of that fact may be cured by the subsequent pleadings. *Muller v. Dows*, 94 U. S. 444, 24 L. Ed. 207.

**52. Averments that corporation is citizen of state.**—*Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. Ed. 451.

Where a corporation is sued, it is not enough, in order to give jurisdiction, to



the court is bound to take judicial notice,<sup>53</sup> or that it is doing business in a certain state,<sup>54</sup> is not sufficient.

(bb) *Joint-Stock Companies*.—In an action by or against a joint-stock company, the citizenship of the members of the company must be averred.<sup>55</sup>

(cc) *Associations*.—In a suit by or against a partnership association the citizenship of the individual members must be stated.<sup>56</sup>

(dd) *Partnerships*.—In an action by or against a partnership the citizenship of each of its members must be stated in the record.<sup>57</sup>

say that the corporation is a citizen of the state where the suit is brought. But an averment is sufficient, when admitted by a demurrer, that the corporation was created by the laws of the state, and had its principal place of business there. *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. Ed. 451.

**53. Same.—Corporations created under public law.**—*Covington Drawbridge Co. v. Shepherd*, 20 How. 227, 15 L. Ed. 896.

An averment, in pleading, that the Covington Drawbridge Company were citizens of Indiana, was sufficient to give jurisdiction to the circuit court of the United States, because the company was incorporated by a public statute of the state which the court was bound judicially to notice. *Covington Drawbridge Co. v. Shepherd*, 20 How. 227, 15 L. Ed. 896.

**54. Averment that corporation is doing business in state.**—*Brock v. Northwestern Fuel Co.*, 130 U. S. 341, 32 L. Ed. 905; *Pennsylvania v. Quicksilver Co.*, 10 Wall. 553, 19 L. Ed. 998; *Insurance Co. v. Francis*, 11 Wall. 210, 20 L. Ed. 77.

An allegation that a corporation is doing business in a state does not necessarily import that it was created by the laws of that state. *Brock v. Northwestern Fuel Co.*, 130 U. S. 341, 32 L. Ed. 905.

In a suit against a corporation by a citizen of one state, an averment that the defendant is a body politic by the law of another state, named and "doing business" in it, is not sufficient to give jurisdiction to this court. \* *Pennsylvania v. Quicksilver Co.*, 10 Wall. 553, 19 L. Ed. 998.

An averment in a declaration that the defendant is a corporation created by an act of the legislature of the state of New York, located in Aberdeen, Mississippi, and doing business there under the laws of the state, is not an averment that the defendant is a citizen of Mississippi. *Insurance Co. v. Francis*, 11 Wall. 210, 20 L. Ed. 77.

**55. Joint-stock company.**—*Chapman v. Barney*, 129 U. S. 677, 32 L. Ed. 800; *Great Southern, etc., Hotel Co. v. Jones*, 177 U. S. 449, 454, 44 L. Ed. 842; *Lafayette Ins. Co. v. French*, 18 How. 404, 405, 15 L. Ed. 451.

In *Chapman v. Barney*, 129 U. S. 677, 682, 32 L. Ed. 800, which was an action in the circuit court of the United States by the United States Express Company, the court said: "On looking into the record we find no satisfactory showing as to the citizenship of the plaintiff. The

allegation of the amended petition is, that the United States Express Company is a joint-stock company organized under a law of the state of New York, and is a citizen of that state. But the express company cannot be a citizen of New York, within the meaning of the statutes regulating jurisdiction, unless it be a corporation. The allegation that the company was organized under the laws of New York is not an allegation that it is a corporation. In fact, the allegation is that the company is not a corporation, but a joint-stock company—that is, a mere partnership. And although it may be authorized by the laws of the state of New York to bring suit in the name of its president, that fact cannot give the company power, by that name, to sue in a federal court. The company may have been organized under the laws of the state of New York, and may be doing business in that state, and yet all the members of it may not be citizens of that state. The record does not show the citizenship of Barney or of any of the members of the company. They are not shown to be citizens of some state other than Illinois. *Grace v. American Cent. Ins. Co.*, 109 U. S. 278, 283, 27 L. Ed. 932, and authorities there cited. For these reasons we are of opinion that the record does not show a case of which the circuit court could take jurisdiction." Quoted in *Great Southern, etc., Hotel Co. v. Jones*, 177 U. S. 449, 454, 44 L. Ed. 842.

**56. Suits against partnership association.**—*Great Southern, etc., Hotel Co. v. Jones*, 177 U. S. 449, 44 L. Ed. 842.

**57. Partnership.**—*Raphael v. Trask*, 194 U. S. 272, 48 L. Ed. 973; *Great Southern, etc., Hotel Co. v. Jones*, 177 U. S. 449, 458, 44 L. Ed. 842; *Ross v. Duval*, 13 Pet. 45, 10 L. Ed. 51.

A declaration in the circuit court of the United States for the Virginia district, stated the plaintiffs to be "merchants, and partners trading under the firm, and by the name and style of Duval & Co., of Philadelphia, in Pennsylvania." This was insufficient to give jurisdiction to the court in the action, if the exception had been taken by plea, or by writ of error, within the limitation of such writ. *Ross v. Duval*, 13 Pet. 45, 10 L. Ed. 51.

But an averment in the declaration, that the plaintiffs were a firm of natural persons, associated for the purpose of carrying on the banking business in Omaha, Nebraska Territory (a place which, at the

(ee) *Unincorporated Board*.—In order for a citizen of one state to sue in the federal courts, on the ground of diverse citizenship, an unincorporated board, which, under the laws of another state has power to sue and be sued, the citizenship of the individual members of the board must be specifically set out.<sup>58</sup>

ff. *Suits by Stockholders on Behalf of Corporation*.—See the title STOCK AND STOCKHOLDERS.

gg. *Suits by Assignees*.—In a suit by an assignee, the bill or other pleading must contain an averment showing that the suit could have been maintained by the assignor if no assignment had been made.<sup>59</sup> The allegation that the as-

time of the suit brought, was remote from the great centers of trade and commerce), and had been for a period of eighteen months engaged in that business, at that place, is equivalent to saying that they had their domicile there, and is a sufficient averment of citizenship. *Express Co. v. Kountze Bros.*, 8 Wall. 342, 19 L. Ed. 457.

58. **Action against unincorporated board having power to sue and be sued.**—*Thomas v. Board of Trustees*, 195 U. S. 207, 217, 49 L. Ed. 160.

Where a board of trustees of a state university are entitled to sue and be sued by their collective name, and are bound by judgments rendered against them in that name, in a suit brought against them by a citizen of another state, jurisdiction sufficiently appears, without bringing the several persons constituting the board before the court as defendants, where the bill alleges that each individual trustee is a citizen of the state. *Thomas v. Board of Trustees*, 195 U. S. 207, 217, 49 L. Ed. 160.

In a suit in the federal court for Ohio against the board of trustees of the Ohio State University, by a citizen of a different state, it was alleged that the institution was created by and existed under the laws of the state of Ohio, but it was not alleged to be a corporation of that state, nor was the citizenship of the members of the board specifically stated. It was held that the bill was insufficient to sustain the jurisdiction. *Thomas v. Board of Trustees*, 195 U. S. 207, 217, 49 L. Ed. 160.

The constitution of Ohio provides that no person shall be elected or appointed to any office in the state unless he possesses the qualifications of an elector, and an elector must be a citizen of that state. In a suit in the federal courts by a citizen of another state against the board of trustees of the Ohio State University, an institution which was not a corporation under the Ohio laws, the citizenship of the members of the board of trustees was not specifically alleged in the bill, but it was contended that their citizenship sufficiently appeared because of the constitutional provision above stated. It was held that the bill was not sufficient. *Thomas v. Board of Trustees*, 195 U. S. 207, 217, 49 L. Ed. 160.

59. **Pleading citizenship of assignor.**—*Kolze v. Hoadley*, 200 U. S. 76, 83, 50 L.

Ed. 377; *Turner v. Bank*, 4 Dall. 8, 1 L. Ed. 718; *Mullen v. Torrance*, 9 Wheat. 537, 6 L. Ed. 154; *Bradley v. Rhines*, 8 Wall. 393, 19 L. Ed. 467; *Anderson v. Watt*, 138 U. S. 694, 34 L. Ed. 1078; *Robertson v. Cease*, 97 U. S. 646, 24 L. Ed. 1057; *Brock v. Northwestern Fuel Co.*, 130 U. S. 341, 32 L. Ed. 905; *North American, Transp., etc., Co. v. Morrison*, 178 U. S. 262, 268, 44 L. Ed. 1061; *Bailey v. Dozier*, 6 How. 23, 12 L. Ed. 328; *Holmes v. Goldsmith*, 147 U. S. 150, 157, 37 L. Ed. 118; *Morgan v. Gay*, 19 Wall. 81, 83, 22 L. Ed. 100; *New Orleans v. Benjamin*, 153 U. S. 411, 38 L. Ed. 764; *Metcalf v. Watertown*, 128 U. S. 586, 588, 32 L. Ed. 543; *Corbin v. Black Hawk County*, 105 U. S. 659, 667, 26 L. Ed. 1136; *United States Bank v. Moss*, 6 How. 31, 12 L. Ed. 331; *Gibson v. Chew*, 16 Pet. 315, 10 L. Ed. 977; *Turner v. Bank*, 4 Dall. 8, 1 L. Ed. 718; *Montalet v. Murray*, 4 Cranch 46, 2 L. Ed. 545.

If it do not appear upon the record that a suit might have been maintained in the courts of the United States, between the original parties to a contract, no suit can be maintained upon it, in those courts, by any subsequent holder. *Montalet v. Murray*, 4 Cranch 46, 2 L. Ed. 545; *Benjamin v. New Orleans*, 169 U. S. 161, 163, 42 L. Ed. 700; *Parker v. Ormsby*, 141 U. S. 81, 35 L. Ed. 654; *Turner v. Bank*, 4 Dall. 8, 1 L. Ed. 718; *Metcalf v. Watertown*, 128 U. S. 586, 32 L. Ed. 543.

"It has been frequently held by this court that, in an action in a circuit court of the United States, by an assignee of a chose in action, the record must affirmatively show, by apt allegations, that the assignor could have maintained the action. Thus, Mr. Justice Strong, in delivering the opinion of the court, in the case of *Morgan v. Gay*, 19 Wall. 81, 83, 22 L. Ed. 100, said: 'In *Turner v. Bank*, 4 Dall. 8, 1 L. Ed. 718, it was distinctly ruled that when an action upon a promissory note is brought in a federal court by an indorser against the maker, not only the parties to the suit, but also the citizenship of the payee and the indorser, must be averred in the record to be such as to give the court jurisdiction.'" *Holmes v. Goldsmith*, 147 U. S. 150, 157, 37 L. Ed. 118.

Where a citizen of one state as indorsee of inland bills, drawn or accepted by a citizen of another—the plaintiff claiming through the indorsement of the payee, or

signor, which was a corporation, was "doing business in the state of Iowa," does not necessarily import that it was created by the laws of that state.<sup>60</sup>

(c) *Amendment of Averments*.—A defect in averring citizenship is curable by amendment, and it is not only within the power but the duty of the circuit court, on its attention being called to the fact, to allow such an amendment to be made.<sup>61</sup> The amendment may be made even after judgment, if the court still has control of the record.<sup>62</sup> While an amendment of the record so as to properly state the citizenship of the parties cannot be made in the supreme court,<sup>63</sup> the court below may, in its discretion, allow it to be done when the case gets back.<sup>64</sup>

(d) *Denial of Averments*.—Where the allegations of citizenship in the petition are not denied by the answer, they are to be taken as true.<sup>65</sup> If, under the state practice, the general denial of allegations puts them in issue, such a denial puts the question of citizenship in issue.<sup>66</sup>

(4) *Amount in Controversy*—(a) *Necessity and Sufficiency of Averments*.—The sufficiency of the amount in controversy to give jurisdiction, must be affirmatively stated in the pleadings or record.<sup>67</sup> Where the allegation in the

of the payee and subsequent indorsers—sues the drawer or acceptor, in the circuit court, the eleventh section of the judiciary act requires that the citizenship of such payee, or of such payee and subsequent indorsers, be alleged to be different from that of the defendant. It is not enough to allege that the plaintiff is a citizen of one state and the defendant of another. *Morgan v. Gay*, 19 Wall. 81, 22 L. Ed. 100.

In an action on a note, by an assignee or indorsee, the payee's citizenship must be stated in the record. *Montalet v. Murray*, 4 Cranch 46, 2 L. Ed. 545; *Turner v. Bank*, 4 Dall. 8, 1 L. Ed. 718.

60. Allegation that assignor corporation was doing business in certain state.—*Brock v. Northwestern Fuel Co.*, 130 U. S. 341, 342, 32 L. Ed. 905.

61. Amendment in circuit court.—In general.—*Howard v. De Cordova*, 177 U. S. 609, 614, 44 L. Ed. 908; *Great Southern, etc., Hotel Co. v. Jones*, 193 U. S. 532, 540, 48 L. Ed. 778; *Mexican Cent. R. Co. v. Duthie*, 189 U. S. 76, 47 L. Ed. 715; *Grealey v. Lowe*, 155 U. S. 58, 75, 39 L. Ed. 69. See, generally, the title AMENDMENTS, vol. 1, p. 288.

In *Kennedy v. Bank*, 8 How. 586, 612, 12 L. Ed. 1209, it was said: "But the mandate of this court which contained the amendment, as to the citizenship of the stockholders of the bank, agreed to by the counsel, was filed on the 6th of May, 1830, in the circuit court, and it necessarily became a part of the record of that court. This was before the final decree was entered, and it removed the objection to the jurisdiction of the court. After this, the decree could not have been reversed for the want of jurisdiction."

Amendment in cases removed from state courts.—See the title REMOVAL OF CAUSES.

62. After judgment.—*Mexican Cent. R. Co. v. Duthie*, 189 U. S. 76, 47 L. Ed. 715.

63. Amendment in supreme court.—*Continental Ins. Co. v. Rhoads*, 119 U. S. 237, 240, 30 L. Ed. 380.

64. Amendment after reversal.—*Continental Ins. Co. v. Rhoads*, 119 U. S. 237, 240, 30 L. Ed. 380; *Morgan v. Gay*, 19 Wall. 81, 22 L. Ed. 100; *Robertson v. Cease*, 97 U. S. 646, 24 L. Ed. 1057; *Great Southern, etc., Hotel Co. v. Jones*, 177 U. S. 449, 458, 44 L. Ed. 842; *Great Southern, etc., Hotel Co. v. Jones*, 193 U. S. 532, 540, 48 L. Ed. 778; *Halsted v. Buster*, 119 U. S. 341, 342, 30 L. Ed. 462.

The defendant having made no objection in the court below to its jurisdiction, by reason of the nonaverment of the citizenship of the plaintiff, the supreme court, in reversing the judgment, may grant leave to the latter to amend his declaration in respect to his citizenship at the commencement of the suit, if it be such as to authorize that court to proceed with the trial. *Robertson v. Cease*, 97 U. S. 646, 24 L. Ed. 1057.

In *Morgan v. Gay*, 19 Wall. 81, 22 L. Ed. 100, the judgment of the court below was reversed, because it did not affirmatively appear that the citizenship of the parties was such as to give it jurisdiction; and the cause was sent back, "that amendment may be made in the pleadings, showing the citizenship of the indorser of the bills, if it be such as to give the court jurisdiction of the case." *Robertson v. Cease*, 97 U. S. 646, 650, 24 L. Ed. 1057.

65. Allegations not denied taken to be true.—*Deputron v. Young*, 134 U. S. 241, 251, 33 L. Ed. 923, citing *Philadelphia, etc., R. Co. v. Quigley*, 21 How. 202, 214, 16 L. Ed. 73. See, generally, the title PLEADING.

66. Effect of general denial.—*Roberts v. Lewis*, 144 U. S. 653, 36 L. Ed. 579.

67. Amount in controversy to appear from pleading.—*Citizens' Bank v. Cannon*, 164 U. S. 319, 322, 41 L. Ed. 451; *Blackburn v. Portland Gold Min. Co.*, 175 U. S. 571, 44 L. Ed. 276; *Fishback v. Western Union Tel. Co.*, 161 U. S. 96, 100, 40 L.



complaint is that the "amount in dispute," exclusive of interest and cost exceeds \$2,000, this is a sufficient averment of jurisdiction of amount. It is not necessary to aver that the "matter in dispute" exceeds that amount.<sup>68</sup>

(b) *Amendment of Averment*.—The bill may be amended to show an amount within the jurisdiction of the court.<sup>69</sup> But the action of the court in refusing to permit an amendment of the proceedings in this respect is not reviewable.<sup>70</sup>

(5) *Averments as to Venue*.—See the title *VENUE*.

h. *Objections to Jurisdiction*.—As to the former rule as to objections by plea in abatement, see the title *ABATEMENT, REVIVAL AND SURVIVAL*, vol. 1, p. 35, et seq. As to objection by demurrer, see the title *DEMURRERS*. As to dismissal by court, under act of 1875, when the case is not one really cognizable by the federal courts, see the title *DISMISSAL, DISCONTINUANCE AND NONSUIT*.

**D. Circuit Court of Appeals**.—The circuit court of appeals, which is a court created by statute, is not in terms endowed with any original jurisdiction.<sup>71</sup>

**E. Supreme Court**—1. *JURISDICTION*—a. *Original Jurisdiction*—(1) *Origin and Nature*.—The original jurisdiction of the supreme court is derived directly from the constitution;<sup>72</sup> it has no common-law jurisdiction.<sup>73</sup> The supreme

Ed. 630; *Ex parte Smith*, 94 U. S. 455, 24 L. Ed. 165; *Metcalf v. Watertown*, 128 U. S. 586, 32 L. Ed. 543.

**Failure to object in lower court**.—Where a suit to compel enrollment of names on the voting lists is brought in the circuit court of the United States, and there is no averment as to the amount in dispute, or that there is any, but no objection is made in that court on this ground, where the amendment could have been made, if necessary, it will not be regarded as a sufficient ground for dismissal by the supreme court. *Giles v. Harris*, 189 U. S. 475, 485, 47 L. Ed. 909, citing *Mills v. Green*, 159 U. S. 651, 40 L. Ed. 293.

**68. Mode of averring jurisdictional amount**.—*Blackburn v. Portland Gold Min. Co.*, 175 U. S. 571, 44 L. Ed. 276.

**69. Amendment of averment**.—*North-eastern Pac. R. Co. v. Walker*, 148 U. S. 391, 37 L. Ed. 494; *Giles v. Harris*, 189 U. S. 475, 485, 47 L. Ed. 909; *Carr v. Fife*, 156 U. S. 494, 39 L. Ed. 508.

Where the record is defective in not containing an allegation that the matter in dispute exceeds two thousand dollars, an amendment by affidavits, disclosing that the value of the matter in dispute exceeds that sum, cures the defect. *Carr v. Fife*, 156 U. S. 494, 497, 39 L. Ed. 508.

**70. Refusal of amendment not subject to review**.—*Ex parte Bradstreet*, 7 Pet. 634, 8 L. Ed. 810. See, generally, the title *APPEAL AND ERROR*, vol. 1, p. 333.

**71. Circuit court of appeals**.—*Whitney v. Dick*, 202 U. S. 132, 137, 50 L. Ed. 963. As to appellate jurisdiction, see the title *APPEAL AND ERROR*, vol. 1, p. 810, et seq.

**72. Jurisdiction derived from constitution**.—*Osborn v. United States Bank*, 9 Wheat. 738, 821, 6 L. Ed. 204; *Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 60; *Ex parte Watkins*, 7 Pet. 568, 572, 8 L. Ed. 786; *United States v. Hudson*, 7 Cranch 32, 33, 3 L. Ed. 259; *Ex parte Dorr*, 3 How. 103, 104, 11 L. Ed. 514.

The constitution establishes the su-

preme court, and defines its jurisdiction. It enumerates cases in which its jurisdiction is original and exclusive; and then defines that which is appellate, but does not insinuate, that in any such case, the power cannot be exercised in its original form, by courts of original jurisdiction. *Osborn v. United States Bank*, 9 Wheat. 738, 821, 6 L. Ed. 204.

Of all the courts which the United States may, under their general powers, constitute, one only, the supreme court, possesses jurisdiction derived immediately from the constitution, and of which the legislative power cannot deprive it. *United States v. Hudson*, 7 Cranch 32, 33, 3 L. Ed. 259.

The supreme court does not owe its existence or its powers to the legislative department of the government. It is created by the constitution, and represents one of the three great divisions of power in the government of the United States, to each of which the constitution has assigned its appropriate duties and powers, and made each independent of the other in performing its appropriate functions. The power conferred on this court is exclusively judicial, and it cannot be required or authorized to exercise any other. *Gordon v. United States*, 117 U. S., appx., 697, 699.

"This court exists by a direct grant from the people of their judicial power; it is exercised by their authority, as their agent, selected by themselves, for the purposes specified. The people of the states as they respectively became parties to the constitution, gave to the judicial power of the United States, jurisdiction over themselves, controversies between states, between citizens of the same or different states, claiming lands under their conflicting grants, within disputed territory." *Rhode Island v. Massachusetts*, 12 Pet. 657, 9 L. Ed. 1233.

**73. No common-law jurisdiction**.—*Ex parte Dorr*, 3 How. 103, 104, 11 L. Ed. 514.

The supreme court cannot exercise origi-

court is one of limited and special original jurisdiction, and its action must be confined to the particular cases, controversies and parties over which the constitution and laws have authorized it to act.<sup>74</sup>

(2) *Construction of Grant of Jurisdiction.*—Affirmative words in the constitution, declaring in what cases the supreme court shall have original jurisdiction, must be construed negatively as to all other cases.<sup>75</sup> The judiciary act has always been considered a contemporaneous exposition of the highest authority with respect to the constitutional provisions vesting original jurisdiction in the supreme court.<sup>76</sup>

(3) *Power of Congress to Restrict or Extend.*—The original jurisdiction of the supreme court is fixed by the constitution, and can be neither enlarged nor restricted by congress.<sup>77</sup>

(4) *To What Cases Jurisdiction Extends*—(a) *In General.*—The constitution provides that in all cases affecting ambassadors or other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction.<sup>78</sup> The original jurisdiction depends solely on the

inal jurisdiction except where given by the constitution. *Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 60; *Ex parte Watkins*, 7 Pet. 568, 572, 8 L. Ed. 786.

Upon the death of a public officer who is a party defendant to a proceeding in mandamus, the supreme court cannot make his successor a party to the proceedings, as this would be an exercise of original jurisdiction. *United States v. Boutwell*, 17 Wall. 604, 609, 21 L. Ed. 721.

**74. Supreme court a court of limited jurisdiction.**—*Rhode Island v. Massachusetts*, 12 Pet. 657, 9 L. Ed. 1233.

Any proceeding without the limits prescribed, is coram non iudice, and its action a nullity; and whether the want or excess of power is objected to by a party, or is apparent to the court, it must surcease its action, or proceed extrajudicially. *Rhode Island v. Massachusetts*, 12 Pet. 657, 9 L. Ed. 1233.

**75. Construction of constitutional grant.**—*Ex parte Vallandigham*, 1 Wall 243, 252, 17 L. Ed. 589.

**76. Judiciary act as explaining constitution.**—“The judiciary act of September 24, 1789, c. 20, drawn by Senator (afterwards Chief Justice) Ellsworth, and passed—within six months after the organization of the government under the constitution, and on the day before the first ten amendments were proposed to the legislatures of the states—by the first congress, in which were many eminent men who had been members of the convention which formed the constitution, has always been considered as a contemporaneous exposition of the highest authority. *Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257; *Parsons v. Bedford*, 3 Pet. 433, 7 L. Ed. 732; *Bors v. Preston*, 111 U. S. 252, 28 L. Ed. 419; *Ames v. Kansas*, 111 U. S. 449, 28 L. Ed. 482; *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 32 L. Ed. 239.” *Capital Traction Co. v. Hof*, 174 U. S. 1, 9, 43 L. Ed. 873.

**77. Power of congress to restrict or extend.**—*Martin v. Hunter*, 1 Wheat. 304, 4 L. Ed. 97; *Cohens v. Virginia*, 6 Wheat.

264, 5 L. Ed. 257; *Ames v. Kansas*, 111 U. S. 449, 466, 28 L. Ed. 482; *Rhode Island v. Massachusetts*, 12 Pet. 657, 9 L. Ed. 1233; *Harrison v. Nixon*, 9 Pet. 483, 510, 9 L. Ed. 201; *In the Matter of Metzger*, 5 How. 176, 191, 12 L. Ed. 104; *Ex parte Clarke*, 100 U. S. 399, 408, 25 L. Ed. 715; *United States v. Ferreira*, 13 How. 40, 51, 14 L. Ed. 42.

The supreme court alone possesses jurisdiction derived immediately from the constitution, and of which the legislative power cannot deprive it. *Ex parte Wisner*, 203 U. S. 449, 455, 51 L. Ed. 264; *United States v. Hudson*, 7 Cranch 32, 3 L. Ed. 259; *Stevenson v. Fain*, 195 U. S. 165, 167, 49 L. Ed. 142.

The original jurisdiction of this court, and its power to receive appellate jurisdiction, are created and defined by the constitution; and the legislative department of the government can enlarge neither one nor the other. *Daniels v. Railroad Co.*, 3 Wall. 250, 254, 18 L. Ed. 224.

Congress cannot require the supreme court to express an opinion on a case in which its judicial power cannot be exercised, and where its judgment would not be final and conclusive upon the rights of the parties. *La Abra Silver Min. Co. v. United States*, 175 U. S. 423, 457, 44 L. Ed. 223; *Gordon v. United States*, 2 Wall. 561, 17 L. Ed. 921.

**78. Original jurisdiction—In general.**—*Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 287, 32 L. Ed. 239; *Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L. Ed. 25; *Louisiana v. Texas*, 176 U. S. 1, 14, 44 L. Ed. 347; *Ames v. Kansas*, 111 U. S. 449, 463, 28 L. Ed. 482; *Ex parte Hung Hang*, 108 U. S. 552, 553, 27 L. Ed. 811; *United States v. Texas*, 143 U. S. 621, 642, 36 L. Ed. 285; *California v. Southern Pac. Co.*, 157 U. S. 229, 257, 39 L. Ed. 683; *Cohens v. Virginia*, 6 Wheat. 264, 392, 5 L. Ed. 257; *Stevenson v. Fain*, 195 U. S. 165, 167, 49 L. Ed. 142; *Fowler v. Lindsey*, 3 Dall. 411, 414, 1 L. Ed. 658; *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U. S. 511,

character of the parties, and is confined to the cases in which are those enumerated parties and those only.<sup>79</sup>

(b) *Cases Affecting Ambassadors, Ministers or Consuls*.—See the title AMBASSADORS AND CONSULS, vol. 1, p. 285.

(c) *Cases to Which State Is a Party*.—aa. *Necessity for State to Be Real Party*.—In order for the supreme court to take jurisdiction on account of the interest that a state has in the controversy, the state must be substantially a party.<sup>80</sup> It is not sufficient that a state is a nominal party,<sup>81</sup> or that its interests may be consequentially affected by a case to which it is not even a nominal party.<sup>82</sup> A suit by or against the governor of a state, as such, in his official character, is a suit by or against the state.<sup>83</sup>

bb. *Necessity for Properly Organized State Government*.—In order to the exercise, by a state, of the right to sue in the supreme court, there needs to be a state government, competent to represent the state in its relations with the national government, so far at least as the institution and prosecution of a suit is concerned.<sup>84</sup>

cc. *Political Questions*.—The province of the supreme court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.<sup>85</sup>

514, 42 L. Ed. 1126; *Chisholm v. Georgia*, 2 Dall. 419, 477, 1 L. Ed. 440.

Neither the constitution nor the congress ever contemplated that any court of the United States should take cognizance of anything savoring of criminality against a state. *Respublica v. Cobbett*, 3 Dall. 467, 476, 1 L. Ed. 683.

**79. Original jurisdiction dependent on character of parties.**—*California v. Southern Pac. Co.*, 157 U. S. 229, 39 L. Ed. 683; *United States v. Texas*, 143 U. S. 621, 36 L. Ed. 285; *Louisiana v. Texas*, 176 U. S. 1, 16, 44 L. Ed. 347.

**80. Necessity for state to be real party.**—*Kansas v. United States*, 204 U. S. 331, 341, 51 L. Ed. 510; *Fowler v. Lindsey*, 3 Dall. 411, 1 L. Ed. 658; *Osborn v. United States Bank*, 9 Wheat. 738, 6 L. Ed. 204; *Virginia Coupon Cases*, 114 U. S. 269, 287, 29 L. Ed. 185. See, also, *Minnesota v. Hitchcock*, 185 U. S. 373, 386, 46 L. Ed. 954; *In re Ayers*, 123 U. S. 443, 31 L. Ed. 216.

Where it is apparent that the name of the state is being used simply for the prosecution in the supreme court of the claim of the railroad company, original jurisdiction cannot be maintained. *Kansas v. United States*, 204 U. S. 331, 341, 51 L. Ed. 510.

**81. State a nominal party.**—*Kansas v. United States*, 204 U. S. 331, 341, 51 L. Ed. 510.

**82. State's interest involved, but state not a party.**—*Fowler v. Lindsey*, 3 Dall. 411, 414, 1 L. Ed. 658.

Where in an action of ejectment a plaintiff claimed that the land in dispute lay in Connecticut, and the defendant that it was within the state of New York, it was held that the case was not one within the constitutional grant of original jurisdiction and that a decision in the case between individual citizens could not affect

the rights of the states. Where a state is not either nominally or really a party, the original jurisdiction of the supreme court cannot be invoked. *Fowler v. Lindsey*, 3 Dall. 411, 1 L. Ed. 658; *New York v. Connecticut*, 4 Dall. 1, 1 L. Ed. 715.

**83. Suit by or against governor of state.**—*Kentucky v. Dennison*, 24 How. 66, 16 L. Ed. 717.

**84. Necessity for properly organized state government.**—*Texas v. White*, 7 Wall. 700, 701, 19 L. Ed. 227.

While Texas was controlled by a government hostile to the United States, and in affiliation with a hostile confederation, waging war upon the United States, no suit, instituted in her name, could be maintained in this court. It was necessary that the government and the people of the state should be restored to peaceful relations to the United States, under the constitution, before such a suit could be prosecuted. *Texas v. White*, 7 Wall. 700, 701, 19 L. Ed. 227.

**85. Political questions.**—*Louisiana v. Texas*, 176 U. S. 1, 23, 44 L. Ed. 347; *Marbury v. Madison*, 1 Cranch 137, 170, 2 L. Ed. 60; *Georgia v. Stanton*, 6 Wall. 50, 18 L. Ed. 721; *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 288, 32 L. Ed. 289; *Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L. Ed. 25; *Washington v. Northern Securities Co.*, 185 U. S. 254, 255, 46 L. Ed. 897.

"These considerations lead to the definition of political and judicial power and questions; the former is that which a sovereign or state exerts by his or its own authority, as reprisal and confiscation; the latter is that which is granted to a court or judicial tribunal. So, of controversies between states; they are in their nature political, when the sovereign or state reserves to itself the right of deciding of it; makes it the 'subject of



dd. *Suits between States*—(aa) *General Rule*.—In suits between two states the supreme court has exclusive original jurisdiction,<sup>86</sup> even in the absence of any act of congress regulating the mode and form in which it shall be exercised.<sup>87</sup>

(bb) *Necessity for State to Be Pecuniarily Interested*.—The mere fact that a state had no pecuniary interest in the controversy would not defeat the original jurisdiction of the supreme court, which might be invoked by the state as *parens patriæ*, trustee, guardian or representative of all or a considerable portion of its citizens.<sup>88</sup>

a treaty, to be settled as between states independent,' or 'the foundation of representations from state to state.' This is political equity, to be adjudged by the parties themselves, as contradistinguished from judicial equity, administered by a court of justice, decreeing the *equum et bonum* of the case, let who or what be the parties before them." *Rhode Island v. Massachusetts*, 12 Pet. 657, 738, 9 L. Ed. 1233.

A bill in equity filed by one of the United States to enjoin the secretary of war and other officers who represent the executive authority of the United States from carrying into execution certain acts of congress, on the ground that such execution would annul and totally abolish the existing state government of the state and establish another and different one in its place—in other words, would overthrow and destroy the corporate existence of the state by depriving it of all the means and instrumentalities whereby its existence might, and otherwise would be maintained—calls for a judgment upon a political question, and will therefore not be entertained by this court. *Georgia v. Stanton*, 6 Wall. 50, 18 L. Ed. 721.

This character of the bill is not changed by the fact that in setting forth the political rights sought to be protected, the bill avers that the state has real and personal property (as for example, the public buildings, etc.), of the enjoyment of which, by the destruction of its corporate existence, the state will be deprived; such averment not being the substantive ground of the relief sought. *Georgia v. Stanton*, 6 Wall. 50, 18 L. Ed. 721.

A bill filed on behalf of the Cherokees seeking to restrain a state from the forcible exercise of legislative power over a neighboring people asserting their independence, their right to which the state denied; which bill requires the supreme court to control the legislature of a state and to restrain the exertion of its physical force, savors too much of the exercise of political power, to be within the proper province of the judicial department. *Cherokee Nation v. Georgia*, 5 Pet. 1, 2, 8 L. Ed. 25.

"Thus, in *Kentucky v. Dennison*, 24 How. 66, 16 L. Ed. 717, where the state of Kentucky, by her governor, applied to this court in the exercise of its original jurisdiction for a writ of mandamus to the governor of Ohio to compel him to

surrender a fugitive from justice, this court, while holding that the case was a controversy between two states, decided that it had no authority to grant the writ." *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 288, 32 L. Ed. 239.

"*Mississippi v. Johnson*, 4 Wall. 475, 18 L. Ed. 437, and *Georgia v. Stanton*, 6 Wall. 50, 18 L. Ed. 721, were cases of unsuccessful attempts by a state, by a bill in equity against the president or the secretary of war, described as a citizen of another state, to induce this court to restrain the defendant from executing, in the course of his official duty, an act of congress alleged to unconstitutionally affect the political rights of the state." *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 296, 32 L. Ed. 239.

86. *Suits between states*.—*Kentucky v. Dennison*, 24 How. 66, 16 L. Ed. 717; *Louisiana v. Texas*, 176 U. S. 1, 15, 44 L. Ed. 347; *Missouri v. Illinois*, 180 U. S. 208, 219, 45 L. Ed. 497; *Kansas v. Colorado*, 185 U. S. 125, 142, 46 L. Ed. 838; *Kansas v. Colorado*, 206 U. S. 46, 51 L. Ed. 956; *Missouri v. Illinois*, 200 U. S. 496, 50 L. Ed. 572; *South Dakota v. North Carolina*, 192 U. S. 286, 48 L. Ed. 448; *Rhode Island v. Massachusetts*, 12 Pet. 657, 9 L. Ed. 1233; *Virginia v. West Virginia*, 206 U. S. 290, 51 L. Ed. 1068; *Florida v. Georgia*, 11 How. 293, 13 L. Ed. 702; *New Jersey v. New York*, 3 Pet. 461, 7 L. Ed. 741.

The jurisdiction of suits between states was not affected by the 11th amendment. *Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257; *Virginia v. West Virginia*, 206 U. S. 290, 51 L. Ed. 1068; *South Dakota v. North Carolina*, 192 U. S. 286, 315, 48 L. Ed. 448.

Consent to be sued is given by a state when admitted to the Union. *Virginia v. West Virginia*, 206 U. S. 290, 319, 51 L. Ed. 1068; *Rhode Island v. Massachusetts*, 12 Pet. 657, 9 L. Ed. 1233.

It is not to be presumed that a state will refuse to carry out a decree rendered against it by the supreme court. If, however, it does repudiate the decree, the court may then consider the means of enforcing it. *Virginia v. West Virginia*, 206 U. S. 290, 319, 51 L. Ed. 1068.

87. *Necessity for act of congress prescribing manner of exercising jurisdiction*.—*Kentucky v. Dennison*, 24 How. 66, 16 L. Ed. 717.

88. *Necessity for state to be pecuniarily interested*.—*Kansas v. Colorado*, 185 U.

(cc) *Controversy Must Be Directly between States*.—In order to maintain jurisdiction of a bill of complaint filed by one state against another, it must appear that the controversy to be determined is a controversy arising directly between the states and not a controversy in the vindication of grievances of particular individuals.<sup>89</sup>

(dd) *Nature and Object of Suit*—aaa. *In General*.—Although the constitution does not, in terms, extend the judicial power to all controversies between two or more states, yet it, in terms, excludes none, whatever may be their nature or subject.<sup>90</sup> But every matter which would warrant a resort to equity by one citizen against another in the same jurisdiction will not warrant an interference by the supreme court with the action of a state.<sup>91</sup> In order to warrant the supreme court in taking jurisdiction the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the court is prepared deliberately to maintain against all considerations on the other side.<sup>92</sup>

bbb. *Suits to Enforce State Bonds*.—Where bonds issued by a state in aid of a railroad comes into the hands of another state, the latter may sue thereon in the supreme court, although the bonds were donated to the complainant for the purpose of giving the supreme court jurisdiction.<sup>93</sup>

S. 125, 142, 46 L. Ed. 838; *Missouri v. Illinois*, 180 U. S. 208, 45 L. Ed. 497; *Kansas v. Colorado*, 206 U. S. 46, 51 L. Ed. 956; *Louisiana v. Texas*, 176 U. S. 1, 19, 44 L. Ed. 347.

**89. Controversy must be directly between states.**—*Louisiana v. Texas*, 176 U. S. 1, 16, 44 L. Ed. 347.

It is difficult to conceive of a direct issue between two states in respect of a matter where no effort at accommodation has been made. *Louisiana v. Texas*, 176 U. S. 1, 18, 44 L. Ed. 347.

There must be a direct issue between them, and the subject matter must be susceptible of judicial solution. *Louisiana v. Texas*, 176 U. S. 1, 18, 44 L. Ed. 347.

**90. Jurisdiction embraces all cases.**—*Rhode Island v. Massachusetts*, 12 Pet. 667, 9 L. Ed. 1233; *Kansas v. Colorado*, 206 U. S. 46, 51 L. Ed. 956.

"Speaking generally, it may be observed that the judicial power of a nation extends to all controversies justiciable in their nature, the parties to which or the property involved in which may be reached by judicial process, and when the judicial power of the United States was vested in the supreme and other courts all the judicial power which the nation was capable of exercising was vested in those tribunals, and unless there be some limitations expressed in the constitution it must be held to embrace all controversies of a justiciable nature arising within the territorial limits of the nation, no matter who may be the parties thereto." *Kansas v. Colorado*, 206 U. S. 46, 83, 51 L. Ed. 956.

"The reference we have made to the derivation of the words 'controversies between two or more states' manifestly indicates that the framers of the constitution intended that they should include something more than controversies over 'territory or jurisdiction;' for in the original draft as reported the latter contro-

versies were to be disposed of by the senate, and controversies other than those by the judiciary, to which by amendment all were finally committed. But it is apparent that the jurisdiction is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute and the matter in itself properly justiciable." *Louisiana v. Texas*, 176 U. S. 1, 15, 44 L. Ed. 347.

**91. Matters entitling private persons to relief.**—*Missouri v. Illinois*, 200 U. S. 496, 521, 50 L. Ed. 572.

**92. Missouri v. Illinois**, 200 U. S. 496, 521, 50 L. Ed. 572.

**93. Suits to enforce state bonds.**—*South Dakota v. North Carolina*, 192 U. S. 286, 48 L. Ed. 448.

"Obviously that jurisdiction is not affected by the fact that the donor of these bonds could not invoke it. The payee of a foreign bill of exchange may not sue the drawer in the federal court of a state of which both are citizens, but that does not oust the court of jurisdiction of an action by a subsequent holder if the latter be a citizen of another state. The question of jurisdiction is determined by the status of the present parties, and not by that of prior holders of the thing in controversy. Obviously, too, the subject matter is one of judicial cognizance. If anything can be considered as justiciable it is a claim for money due on a written promise to pay—and if it be justiciable does it matter how the plaintiff acquires title, providing it be honestly acquired? It would seem strangely inconsistent to take jurisdiction of an action by South Dakota against North Carolina on a promise to pay made by the latter directly to the former, and refuse jurisdiction of an action on a like promise made by the latter to an individual and by him sold or donated to the former." *South Dakota v. North Carolina*, 192 U. S. 286, 312, 48 L. Ed. 448.

ccc. *Suits for Recovery of Debts and for Accounting.*—The supreme court has original jurisdiction of a suit between the state of Virginia and the state of West Virginia, the object of which is a settlement, and to that end a determination and adjudication of the amount due by the latter to the former as the proportion of the debt of the original state which the former has assumed to pay.<sup>94</sup>

ddd. *Preventing Pollution of Watercourses.*—The threatened pollution of the waters of a river flowing between states, under the authority of one of them, thereby putting the health and comfort of the citizens of the other in jeopardy, presents a cause of action justiciable in the supreme court under the constitution.<sup>95</sup>

eee. *Preventing Unreasonable Use of Waters of Stream.*—The supreme court has original jurisdiction of a suit by one state against another to enjoin the latter from using waters of a river which flows through both states in such quantities as to be detrimental to the rights of the former.<sup>96</sup>

**94. Suit for recovery of debts and for accounting.**—*Virginia v. West Virginia*, 206 U. S. 290, 319, 51 L. Ed. 1068.

In an action by Virginia against West Virginia for an accounting and to compel her to assume and pay a just proportion of the public debt of the state of Virginia existing at the time of the separation of the two states, it was contended that the supreme court had no jurisdiction because of the compact entered into between the states by which the question of the liability of West Virginia was to be submitted to the arbitrament and award of the legislature of West Virginia as the sole tribunal which could pass upon it. It appeared that the ordinance of Virginia providing for the formation of a new state declared that the new state should take upon itself a just proportion of the public debt then existing, and that the constitution of West Virginia when admitted into the Union provided for the assumption by that state of an equitable proportion of the public debt, to be ascertained by the legislature as soon as practicable. It was held that the jurisdiction was not defeated by the compact, and that it might well be inquired why, in the forty-three years that elapsed after the compact was made, West Virginia had taken no steps to comply with it. *Virginia v. West Virginia*, 206 U. S. 290, 51 L. Ed. 1068.

**95. Preventing of pollution of watercourses.**—*Missouri v. Illinois*, 180 U. S. 208, 45 L. Ed. 497; *Missouri v. Illinois*, 200 U. S. 496, 50 L. Ed. 572; *Kansas v. Colorado*, 185 U. S. 125, 142, 46 L. Ed. 838.

The acts of one state in seeking to promote the health and prosperity of its inhabitants by a system of public works, which endangers the health and prosperity of the inhabitants of another and adjacent state, creates a sufficient basis for a controversy, in the sense of the constitution and the supreme court has jurisdiction of a bill for an injunction. *Missouri v. Illinois*, 180 U. S. 208, 219, 45 L. Ed. 497.

Where a bill by the state of Missouri

against Illinois alleged that an artificial channel or drain constructed by a sanitary district for purposes of sewerage under authority derived from the state of Illinois, created a continuing nuisance dangerous to the health of the people of the state of Missouri, and the bill charged that the acts of defendants, if not restrained, would result in poisoning the water supply of the inhabitants of Missouri, and in injuriously affecting that portion of the bed of the Mississippi River lying within its territory, a demurrer was overruled. *Missouri v. Illinois*, 180 U. S. 208, 45 L. Ed. 497.

Under the authority of an act of the legislature of Illinois and of an act of congress, the city of Chicago constructed an artificial sewage channel between Lake Michigan and a river whose waters emptied into a tributary of the Mississippi. The state of Missouri brought a suit in the supreme court against Illinois, seeking relief against the discharge of the sewage through this channel, in which it was alleged that it rendered the waters of the Mississippi river unfit for human consumption, because of the presence therein of disease germs. It was held that the supreme court had jurisdiction. *Missouri v. Illinois*, 200 U. S. 496, 50 L. Ed. 572.

The fact that the city of Chicago is not on the natural water shed of the Mississippi, but is brought there by artificial means is immaterial, where the change was made under authority of an act of the legislature and of an act of congress. *Missouri v. Illinois*, 200 U. S. 496, 50 L. Ed. 572.

**96. Suits to enjoin interference with water rights.**—*Kansas v. Colorado*, 206 U. S. 46, 51 L. Ed. 956; *Kansas v. Colorado*, 185 U. S. 125, 142, 46 L. Ed. 838.

As to rights of each state as to waters flowing through both, see the title **WATERS AND WATERCOURSES**.

The state of Kansas filed her bill as representing and on behalf of her citizens, as well as in vindication of her alleged rights as an individual owner, against the state of Colorado, seeking re-



fff. *Controversies as to Boundaries*.—The supreme court has original jurisdiction, under the constitution, of controversies between states of the Union concerning their boundaries.<sup>97</sup> And this jurisdiction is not defeated because in deciding the question of boundary it is necessary to consider and construe contracts and agreements between the states, nor because the judgment or decree of the court may affect the territorial limits of the jurisdiction of the states that are parties to the suit.<sup>98</sup>

ggg. *Abuse of Powers by State Officers*.—When there is no agreement, whose breach might create it, a controversy between states does not arise unless the action complained of is state action, and acts of state officers in abuse or excess of their powers cannot be laid hold of as in themselves committing one state to a distinct collision with a sister state.<sup>99</sup>

lief in respect of being deprived of the waters of the Arkansas river accustomed to flow through and across the state, and the consequent destruction of the property of herself and of her citizens and injury to their health and comfort. It appeared that the water was diverted by the state of Colorado for purposes of irrigation. It was held that the action complained of was state action and not the action of state officers in abuse or excess of their powers, and the supreme court had original jurisdiction. *Kansas v. Colorado*, 185 U. S. 125, 142, 46 L. Ed. 838.

**97. Controversy as to boundaries.**—

*Virginia v. West Virginia*, 11 Wall. 39, 20 L. Ed. 67; *Missouri v. Iowa*, 7 How. 660, 12 L. Ed. 861; *Florida v. Georgia*, 17 How. 478, 15 L. Ed. 181; *Alabama v. Georgia*, 23 How. 505, 16 L. Ed. 556; *Rhode Island v. Massachusetts*, 12 Pet. 657, 9 L. Ed. 1233; *Louisiana v. Mississippi*, 202 U. S. 1, 50 L. Ed. 913; *Missouri v. Illinois*, 200 U. S. 496, 50 L. Ed. 572; *Missouri v. Illinois*, 180 U. S. 208, 45 L. Ed. 497; *Virginia v. Tennessee*, 148 U. S. 503, 37 L. Ed. 537; *United States v. Texas*, 143 U. S. 621, 641, 36 L. Ed. 285; *Tennessee v. Virginia*, 190 U. S. 64, 47 L. Ed. 956; *Tennessee v. Virginia*, 177 U. S. 501, 44 L. Ed. 863; *Missouri v. Nebraska*, 197 U. S. 577, 49 L. Ed. 881; *Iowa v. Illinois*, 202 U. S. 59, 50 L. Ed. 934; *Kansas v. Colorado*, 185 U. S. 125, 140, 46 L. Ed. 838; *Hans v. Louisiana*, 134 U. S. 1, 33 L. Ed. 842; *Louisiana v. Texas*, 176 U. S. 1, 15, 44 L. Ed. 347; *Iowa v. Illinois*, 151 U. S. 238, 252, 38 L. Ed. 145; *New Jersey v. New York*, 5 Pet. 284, 8 L. Ed. 127; *Missouri v. Kentucky*, 11 Wall. 395, 20 L. Ed. 116; *Indiana v. Kentucky*, 136 U. S. 479, 34 L. Ed. 329; *Nebraska v. Iowa*, 143 U. S. 359, 36 L. Ed. 186.

"In this respect the judicial department of our government is distinguished from the judicial department of any other country, drawing to itself by the ordinary modes of peaceful procedure the settlement of questions as to boundaries and consequent rights of soil and jurisdiction between states, possessed, for purposes of internal government, of the powers of independent communities, which otherwise might be the fruitful cause of prolonged and harassing conflicts." Vir-

*ginia v. Tennessee*, 148 U. S. 503, 504, 37 L. Ed. 537.

"There is neither the authority of law or reason for the position that boundary between nations or states is, in its nature, any more a political question than any other subject on which they may contend; none can be settled without war or treaty, which is by political power; but, under the old and new confederacy, they could and can be settled by a court constituted by themselves, as their own substitutes, authorized to do that for states, which states alone could do before." *Rhode Island v. Massachusetts*, 12 Pet. 657, 658, 9 L. Ed. 1233.

The exercise, by the supreme court of original jurisdiction in a suit brought by one state against another to determine the boundary line between them, or in a suit brought by the United States against a state to determine the boundary between a territory of the United States and that state, so far from infringing, in either case, upon the sovereignty, is with the consent of the state sued. Such consent was given by the state when admitted into the Union upon an equal footing in all respects with the other states. *United States v. Texas*, 143 U. S. 621, 646, 36 L. Ed. 285.

A question of boundary between two states arising from inconsistencies in the acts admitting them is within the original jurisdiction of the supreme court. *Louisiana v. Mississippi*, 202 U. S. 1, 50 L. Ed. 913.

The supreme court has jurisdiction of a bill filed by the state of Rhode Island against the state of Massachusetts, to ascertain and establish the northern boundary between the states; that the rights of sovereignty and jurisdiction be restored and confirmed to the plaintiffs; and they be quieted in the enjoyment thereof, and their title; and for other and further relief. *Rhode Island v. Massachusetts*, 12 Pet. 657, 9 L. Ed. 1233.

**98. Virginia v. West Virginia**, 11 Wall. 39, 20 L. Ed. 67.

**99. Abuse of powers by state officers.**—*Louisiana v. Texas*, 176 U. S. 1, 22, 44 L. Ed. 347. See, also, *Kansas v. Colorado*, 185 U. S. 125, 142, 46 L. Ed. 838.

In order that a controversy between

hhh. *Transfer of Cause of Action to State for Purpose of Suit.*—An absolute transfer or gift of the subject of the cause of action to a state, does not defeat the original jurisdiction of the supreme court of suits between states, notwithstanding the fact that the motive of the transfer was to give the supreme court jurisdiction.<sup>1</sup> But a state, to whom, pursuant to her statutes, some of her citizens, holding bonds of another state, have assigned them in order to enable her to sue on and collect them for the benefit of the assignors, cannot maintain a suit against the other state in the supreme court.<sup>2</sup>

ee. *Suits between State and United States.*—The supreme court has original jurisdiction of suits between a state and the United States,<sup>3</sup> whether the United States is a party plaintiff or defendant.<sup>4</sup> However, before suit may be brought

states, justiciable in this court, can be held to exist, something more must be put forward than that the citizens of one state are injured by the maladministration of the laws of another. *Louisiana v. Texas*, 176 U. S. 1, 22, 44 L. Ed. 347.

The state of Louisiana brought a suit in the supreme court against the state of Texas to enjoin the latter and its officers from establishing or enforcing, under the guise of a quarantine for yellow fever, any embargo or absolute prohibition upon interstate commerce between the two states. The complaint did not allege that the Texas laws in respect to quarantine were invalid, but that the health officers by rules and regulations framed thereunder, placed an embargo in fact on all interstate commerce between the states, which the governor of the state of Texas refused to remove. The bill alleged that the rules and regulations were too stringent, and were purposely framed to benefit the state of Texas and the city of Galveston, at the expense of the state of Louisiana and the city of New Orleans. It was held that as the relief sought was merely against the abuse of powers of the officers of the state of Texas, the supreme court had no jurisdiction. *Louisiana v. Texas*, 176 U. S. 1, 44 L. Ed. 347.

Where no controversy exists between states, it is not for the supreme court to restrain the governor of a state in the discharge of his executive functions in a matter lawfully confided to his discretion and judgment. *Louisiana v. Texas*, 176 U. S. 1, 23, 44 L. Ed. 347.

A suggestion that the bill can be maintained as against a health officer alone on the theory that his conduct is in violation or in excess of a valid law of the state is without merit as the remedy for that would clearly lie with the state authorities. *Louisiana v. Texas*, 176 U. S. 1, 23, 44 L. Ed. 347.

1. *Absolute transfer.*—*South Dakota v. North Carolina*, 192 U. S. 286, 310, 48 L. Ed. 448.

2. *Transfer not absolute, and suit brought for benefit of transferrer.*—*New Hampshire v. Louisiana*, 108 U. S. 76, 27 L. Ed. 656. See, also, *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 289, 32 L. Ed. 239; *Louisiana v. Texas*, 176 U. S. 1, 16, 44 L. Ed. 347.

3. *Suits between state and United States.*—*United States v. North Carolina*, 136 U. S. 211, 34 L. Ed. 336; *United States v. Michigan*, 190 U. S. 379, 47 L. Ed. 1103; *United States v. Texas*, 143 U. S. 621, 36 L. Ed. 285; *Minnesota v. Hitchcock*, 185 U. S. 373, 46 L. Ed. 954; *Oregon v. Hitchcock*, 202 U. S. 60, 61, 50 L. Ed. 935. See, generally, the titles STATES; UNITED STATES.

"Unless a state is exempt altogether from suit by the United States, we do not perceive upon what sound rule of construction suits brought by the United States in this court—especially if they be suits the correct decision of which depends upon the constitution, laws or treaties of the United States—are to be excluded from its original jurisdiction as defined in the constitution. That instrument extends the judicial power of the United States 'to all cases,' in law and equity, arising under the constitution, laws and treaties of the United States, and to controversies in which the United States shall be a party, and confers upon this court original jurisdiction 'in all cases in which a state shall be party,' that is, in all cases mentioned in the preceding clause in which a state may, of right, be made a party defendant as well as in all cases in which a state may, of right, institute, a suit in a court of the United States." *United States v. Texas*, 143 U. S. 621, 644, 36 L. Ed. 285.

*Suit for accounting.*—A bill in equity by the United States against a state for an accounting and a recovery of money was sustained. *United States v. Michigan*, 190 U. S. 379, 47 L. Ed. 1103.

*Controversies as to boundaries.*—The supreme court can, under the constitution, take cognizance of an original suit brought by the United States against a state to determine the boundary between one of the territories and such state. *United States v. Texas*, 143 U. S. 621, 641, 36 L. Ed. 285.

*Suit on state bonds.*—An action may be brought in the supreme court by the United States against a state upon bonds issued by the state and held by the United States. *United States v. North Carolina*, 136 U. S. 211, 216, 34 L. Ed. 330.

4. *Immaterial whether United States plaintiff or defendant.*—*Minnesota v.*

against the United States it must have given its consent to be sued.<sup>5</sup> If the United States is the real party defendant, and has not consented to be sued, the supreme court cannot entertain jurisdiction although the United States is not named in the record as a party defendant.<sup>6</sup>

ff. *Suits between States and Citizens of Other States or Aliens*—(aa) *Suits by States*—aaa. *General Rule*.—The supreme court has original but not exclusive jurisdiction of suits by states against citizens of other states or aliens.<sup>7</sup>

Hitchcock, 185 U. S. 373, 384, 46 L. Ed. 954.

Where there is a controversy to which the United States may be regarded as a party, it is one to which the judicial power of the United States extends, and is, of course, a matter of indifference whether the United States is a party plaintiff or defendant. It could not fairly be adjudged that the judicial power of the United States extends to those cases in which the United States is a party plaintiff and does not extend to those cases in which it is a party defendant. *Minnesota v. Hitchcock*, 185 U. S. 373, 384, 46 L. Ed. 954.

5. **Consent of United States to be sued.**—*Minnesota v. Hitchcock*, 185 U. S. 373, 387, 46 L. Ed. 954; *Oregon v. Hitchcock*, 202 U. S. 60, 61, 50 L. Ed. 935; *Kansas v. United States*, 204 U. S. 331, 341, 51 L. Ed. 510; *United States v. Lee*, 106 U. S. 196, 27 L. Ed. 171. See, also, *Wisconsin v. Duluth*, 96 U. S. 379, 24 L. Ed. 668. See, generally, the title UNITED STATES.

The state of Oregon brought a suit against the secretary of the interior and the commissioner of the general land office to enjoin them from allotting or patenting lands within the Klamath reservation which were swamped and overflowed. The state asserted title to these lands by virtue of the act of congress of Sept. 28, 1850 granting overflowed lands to the states, and by virtue of the act of March 12, 1860 extending the benefits of this act to the recently admitted state of Oregon. It was held that the court had no jurisdiction, since there was no act of congress waiving immunity of the United States or consenting that it be sued in respect to swamp lands, either within or without the Indian reservation, and there was no act of congress assuming full responsibility in behalf of its wards, the Indians, for the result of any suit affecting their rights in these lands. *Oregon v. Hitchcock*, 202 U. S. 60, 50 L. Ed. 935.

A bill by the state of Minnesota to enjoin the secretary of the interior and commissioner of the general land office from selling any sections of land in an Indian reservation, upon the ground that such sections were reserved to the state for the benefit of its schools by the act of congress establishing the territorial government of Minnesota, is one to which the United States is a party defendant, and of which the supreme court has original jurisdiction, since by the act of March 2, 1901, 31 Stat. 950, the United States has,

in effect, consented to be sued with respect to school lands in an Indian reservation. *Minnesota v. Hitchcock*, 185 U. S. 373, 46 L. Ed. 954.

In *Wisconsin v. Duluth*, 96 U. S. 379, 24 L. Ed. 668, a bill sought to restrain the improvement of a harbor on Lake Superior, according to a system adopted and put in execution under authority of congress, and was for that reason dismissed, without considering the general question whether a state, in order to maintain a suit in this court, must have some proprietary interest that has been affected by the defendant.

6. **United States real party, though not named in record.**—*Minnesota v. Hitchcock*, 185 U. S. 373, 387, 46 L. Ed. 954; *Oregon v. Hitchcock*, 202 U. S. 60, 61, 50 L. Ed. 935.

The question whether the United States is a party to a controversy is not determined by the mere nominal party on the record but by the question of the effect of the judgment or decree which can be entered. *Minnesota v. Hitchcock*, 185 U. S. 373, 387, 46 L. Ed. 954.

In a suit to enjoin the secretary of the interior from selling or patenting public lands, the United States is the real party defendant although not named as such in the plaintiff's pleadings. *Oregon v. Hitchcock*, 202 U. S. 60, 50 L. Ed. 935.

7. **Suits between states and citizens of other states or aliens.**—Rev. Stat. § 687; *California v. Southern Pac. Co.*, 157 U. S. 229, 258, 39 L. Ed. 683; *Minnesota v. Northern Securities Co.*, 184 U. S. 199, 46 L. Ed. 499; *Pennsylvania v. Quick-silver Co.*, 10 Wall. 553, 19 L. Ed. 998; *Florida v. Anderson*, 91 U. S. 667, 23 L. Ed. 290; *United States v. Texas*, 143 U. S. 621, 644, 36 L. Ed. 285; *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 32 L. Ed. 239; *Oregon v. Hitchcock*, 202 U. S. 60, 68, 50 L. Ed. 935; *Minnesota v. Hitchcock*, 185 U. S. 373, 46 L. Ed. 954; *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 51 L. Ed. 1038; *Georgia v. Stanton*, 6 Wall. 50, 75, 18 L. Ed. 721; *Ames v. Kansas*, 111 U. S. 449, 463, 28 L. Ed. 482; *Texas v. White*, 7 Wall. 700, 19 L. Ed. 227; *Alabama v. Burr*, 115 U. S. 413, 29 L. Ed. 435; *Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. 518, 14 L. Ed. 249; *Respublica v. Cobbett*, 3 Dall. 467, 476, 1 L. Ed. 683; *Kansas v. Colorado*, 206 U. S. 46, 83, 51 L. Ed. 956; *Louisiana v. Texas*, 176 U. S. 1, 15, 44 L. Ed. 347; *In re Massachusetts*, 197 U. S. 482, 49 L. Ed. 845;



bbb. *Reason for Jurisdiction.*—The object of vesting in the courts of the United States jurisdiction of suits by one state against the citizens of another was to enable such controversies to be determined by a national tribunal, and thereby to avoid the partiality, or suspicion of partiality, which might exist if the plaintiff state were compelled to resort to the courts of the state of which the defendants were citizens.<sup>8</sup>

ccc. *Citizenship of Defendant.*—In order to sustain the original jurisdiction of the supreme court on the ground that the suit is one by a state against a citizen of another state, the real, and not merely the nominal, defendant must be a citizen of another state.<sup>9</sup> The supreme court has no original jurisdiction in a suit between a state and a citizen of another state, when it is necessary to join with the latter, as parties, citizens of the complainant state.<sup>10</sup> As it is well settled that a corporation is a citizen of the state creating it, within the meaning of those provisions of the constitution and statutes of the United States which define the jurisdiction of the federal courts.<sup>11</sup>

ddd. *Jurisdiction as Dependent on Nature of Relief Sought*—(aaa) *In General.*—The grant of jurisdiction to the supreme court was not intended to confer upon it jurisdiction of a suit or prosecution by one state, of such a nature that it could not, on the settled principles of public and international law, be entertained by the judiciary of the other state at all.<sup>12</sup>

*Plaquemines Tropical Fruit Co. v. Henderson*, 170 U. S. 511, 42 L. Ed. 1126.

**Where a state has a controversy with an alien** about a contract, or other matter of a civil nature, the supreme court of the United States has original jurisdiction of it, and the circuit or district courts have nothing to do with such a case. The reason seems to be founded in a respect for the dignity of a state, that the action may be brought in the first instance before the highest tribunal, and also that this tribunal would be most likely to guard against the power and influence of a state over a foreigner. *Respublica v. Cobbett*, 3 Dall. 467, 476, 1 L. Ed. 683.

**Concurrent jurisdiction of state courts.**—The state courts have jurisdiction concurrent with the supreme court of the United States of suits by a state against citizens of other states or aliens. *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U. S. 511, 521, 42 L. Ed. 1126; *Ames v. Kansas*, 111 U. S. 449, 464, 28 L. Ed. 482.

**8. Reason for jurisdiction.**—*Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 289, 32 L. Ed. 239.

**9. Citizen of another state must be real party.**—*Oregon v. Hitchcock*, 202 U. S. 60, 61, 50 L. Ed. 935 (where the United States was the real party defendant, and jurisdiction was denied, because it had not consented to be sued).

In *Florida v. Anderson*, 91 U. S. 667, 676, 23 L. Ed. 290, a bill in equity was filed by Florida against citizens of Georgia, and the marshal of the United States for the northern district of Florida was made a formal defendant by reason of having in his hands an execution at the suit of some of the other defendants. Jurisdiction was sustained on the ground that the marshal was merely a formal

party against whom no relief was sought. *California v. Southern Pac. Co.*, 157 U. S. 229, 259, 39 L. Ed. 683.

**10. Joinder of citizens of plaintiff as defendants.**—*Minnesota v. Northern Securities Co.*, 184 U. S. 199, 46 L. Ed. 499; *Florida v. Anderson*, 91 U. S. 667, 23 L. Ed. 290; *California v. Southern Pac. Co.*, 157 U. S. 229, 257, 39 L. Ed. 683.

In *California v. Southern Pac. Co.*, 157 U. S. 229, 257, 39 L. Ed. 683, it was said: "This brings us to consider what the effect would be if the Oakland Water Front Company and the city of Oakland were made parties defendant. The case would then be between the state of California on the one hand and a citizen of another state and citizens of California on the other. This court could not exercise original jurisdiction under such circumstances."

**11. Suits by state against corporation of another state.**—*Wisconsin v. Pelican Ins. Co.*, 127 U. S. 256, 287, 32 L. Ed. 239; *Kansas Pac. R. Co. v. Atchison, etc., R. Co.*, 112 U. S. 414, 28 L. Ed. 794; *Paul v. Virginia*, 8 Wall. 168, 178, 19 L. Ed. 357; *Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. 518, 14 L. Ed. 249.

**12. Jurisdiction as dependent on nature of relief sought.**—*Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 289, 32 L. Ed. 239; *Hans v. Louisiana*, 134 U. S. 1, 33 L. Ed. 842; *Louisiana v. Texas*, 176 U. S. 1, 15, 44 L. Ed. 347; *Kansas v. Colorado*, 185 U. S. 125, 141, 46 L. Ed. 838.

"The original jurisdiction of the supreme court, in cases where a state is a party, refers to those cases in which, according to the grant of power made in the preceding clause, jurisdiction might be exercised in consequence of the character of the party, and an original suit might be instituted in any of the federal courts; not to those cases in which an

(bbb) *Suits to Protect Property Rights*.—A suit by a state to protect its property rights may be maintained in the supreme court against citizens of another state.<sup>12</sup> Thus a suit to indemnify a state against a pecuniary liability which she alleged that she had incurred by reason of fraudulent acts of the defendant,<sup>14</sup> or to assert the title of the state to bonds belonging to her, and held by the defendants, citizens of other states, under an unlawful negotiation and transfer of the bonds,<sup>15</sup> or concerning the title to a railroad, where the state is the holder of bonds secured by a statutory lien upon the road, and has an interest in an internal improvement fund pledged to secure the payment of those bonds,<sup>16</sup> may be maintained in the supreme court.

(ccc) *Actions to Enforce Penal Laws of State*.—An original action cannot be maintained in the supreme court by one state to enforce its penal laws against a citizen of another state.<sup>17</sup>

(ddd) *Injunction against Nuisances*.—A state may file a bill in the supreme court to enjoin a citizen of another state from maintaining and conducting a manufacturing plant in a manner which causes injury to the plaintiff or its citizens.<sup>18</sup>

(eee) *Injunction against Obstruction to Navigation*.—A state may file a bill in equity against a citizen or corporation of another state to compel it to take down or heighten a bridge built by the defendant over a river, under a statute of the latter state, which obstructed the navigation of the river, in violation of a compact of the state, confirmed by act of congress.<sup>19</sup>

(bb) *Suits against State*.—Prior to the eleventh amendment, the supreme court had original jurisdiction of suits against a state by citizens of other states or aliens.<sup>20</sup> Since the eleventh amendment, which provides that the judicial

original suit might not be instituted in a federal court. Of the last description is every case between a state and its citizens, and perhaps every case in which a state is enforcing its penal laws. In such cases, therefore, the supreme court cannot take original jurisdiction." *Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257; *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 298, 32 L. Ed. 239.

**13. Suits to protect property rights of state.**—*Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 298, 32 L. Ed. 239; *Texas v. White*, 7 Wall. 700, 19 L. Ed. 227; *Florida v. Anderson*, 91 U. S. 667, 23 L. Ed. 290; *Alabama v. Burr*, 115 U. S. 413, 29 L. Ed. 435.

**14. Suit to indemnify state against liability incurred.**—*Alabama v. Burr*, 115 U. S. 413, 29 L. Ed. 435.

**15. Recovery of bonds from citizens of other states.**—*Texas v. White*, 7 Wall. 700, 19 L. Ed. 227.

**16. Florida v. Anderson**, 91 U. S. 667, 23 L. Ed. 290.

**17. Action to enforce penal laws of state.**—*Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257; *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 298, 32 L. Ed. 239; *California v. Southern Pac. Co.*, 157 U. S. 229, 259, 39 L. Ed. 683.

An action brought upon a judgment recovered by the state of Wisconsin in one of her own courts against a foreign corporation, for penalties imposed by a statute of Wisconsin for not making returns to the insurance commissioner of the state, as required by that statute, is not an action within the original jurisdiction

of this court. *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 298, 32 L. Ed. 239.

**18. Injunction against nuisance.**—*Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 51 L. Ed. 1038 (where a bill to enjoin the defendant from permitting the escape of gasses and fumes from its factories, in such manner as to injure the growing crops or trees in the plaintiff's territory, was sustained).

**19. Suit to enjoin obstruction of navigation.**—*Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. 518, 14 L. Ed. 249.

The state of Pennsylvania having constructed lines of canal and railroad, and other means of travel and transportation, which would be injured in their revenues by the obstruction in the River Ohio, created by a bridge at Wheeling, has a sufficiently direct interest to sustain an application to this court, in the exercise of original jurisdiction, for an injunction to remove the obstruction. The remedy at law would be incomplete. *Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. 518, 14 L. Ed. 249.

Congress has sanctioned the compact made between Virginia and Kentucky, viz: "That the use and navigation of the River Ohio, so far as the territory of Virginia or Kentucky is concerned, shall be free and common to the citizens of the United States." This compact is obligatory, and can be carried out by this court. *Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. 518, 519, 14 L. Ed. 249.

**20. Prior to eleventh amendment.**—*Chisholm v. Georgia*, 2 Dall. 419, 1 L. Ed. 440; *Ames v. Kansas*, 111 U. S. 449, 466, 28 L. Ed. 482.

power of the United States shall not be construed to extend to a suit against a state by a citizen of another state, or by a citizen or subject of a foreign state, the supreme court cannot entertain jurisdiction in a suit against a state brought by a citizen of another state or an alien.<sup>21</sup> The eleventh amendment prohibits suits against states and defeats the jurisdiction of the supreme court, in all cases in which a state, though not named as a party, is in fact the real party against which the relief is asked and the judgment will operate.<sup>22</sup>

gg. *Suits between State and Its Citizens*.—The supreme court has no original jurisdiction of a suit between a state and its citizens.<sup>23</sup>

hh. *Suits by Indian Tribes or Nations*.—An Indian tribe or nation within the United States is not a foreign state, in the sense of the constitution, and cannot maintain an action in the courts of the United States.<sup>24</sup>

ii. *Suits by Corporation of Which State Is a Shareholder*.—The circumstance that a state is a member of or shareholder in a private corporation, will not give the supreme court original jurisdiction of suits where the corporation is a party, nor oust the circuit courts of the jurisdiction vested in them by law.<sup>25</sup>

(d) *Prize Cases*.—The supreme court has no original jurisdiction in prize cases.<sup>26</sup>

**21. Since eleventh amendment.**—United States *v. Texas*, 143 U. S. 621, 644, 36 L. Ed. 285; *Ames v. Kansas*, 111 U. S. 449, 466, 28 L. Ed. 482; *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 287, 32 L. Ed. 239; *Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257.

Referring to the eleventh amendment, Mr. Chief Justice Waite, in *New Hampshire v. Louisiana*, 108 U. S. 76, 91, 27 L. Ed. 656, said: "The evident purpose of the amendment, so promptly proposed and finally adopted, was to prohibit all suits against a state by or for citizens of other states, or aliens, without the consent of the state to be sued, and in our opinion, one state cannot create a controversy with another state within the meaning of that term as used in the judicial clauses of the constitution by assuming the prosecution of debts owing by other states to its citizens." *Louisiana v. Texas*, 176 U. S. 1, 16, 44 L. Ed. 347.

**22. Construction of eleventh amendment.**—*Minnesota v. Hitchcock*, 185 U. S. 373, 386, 46 L. Ed. 954; *In re Ayers*, 123 U. S. 443, 31 L. Ed. 216; *Louisiana v. Texas*, 176 U. S. 1, 16, 44 L. Ed. 347; *New Hampshire v. Louisiana*, 108 U. S. 76, 27 L. Ed. 656.

It was at one time held that the eleventh amendment was applicable only to cases in which the state was named in the record as a party defendant. *Osborn v. United States Bank*, 9 Wheat. 738, 6 L. Ed. 204.

**23. Suits between state and its citizens.**—*California v. Southern Pac. Co.*, 157 U. S. 229, 258, 39 L. Ed. 683; *Minnesota v. Northern Securities Co.*, 184 U. S. 199, 46 L. Ed. 499; *Pennsylvania v. Quicksilver Co.*, 10 Wall. 553, 19 L. Ed. 998; *Ames v. Kansas*, 111 U. S. 449, 463, 28 L. Ed. 482; *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 297, 32 L. Ed. 239; *United States v. Texas*, 143 U. S. 621, 643, 36 L. Ed. 285; *Louisiana v. Texas*, 176 U. S. 1, 15, 44 L.

Ed. 347; *Cohens v. Virginia*, 6 Wheat. 264, 398, 5 L. Ed. 257.

In *Pennsylvania v. Quicksilver Co.*, 10 Wall. 553, 19 L. Ed. 998, an action brought in this court by the state of Pennsylvania was dismissed for want of jurisdiction, without considering the nature of the claim, because the record did not show that the defendant was a corporation created by another state. *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 297, 32 L. Ed. 239.

**24. Suits by Indian tribes or nations.**—*Cherokee Nation v. Georgia*, 5 Pet. 1, 20, 8 L. Ed. 25.

Motion for an injunction to prevent the execution of certain acts of the legislature of the state of Georgia, in the territory of the Cherokee nation of Indians, on behalf of the Cherokee nation; they claiming to proceed in the supreme court of the United States, as a foreign state, against the state of Georgia, under the provision of the constitution of the United States which gives to the court jurisdiction in controversies in which a state of the United States or the citizens thereof, and a foreign state, citizens or subjects thereof, are parties. The Cherokee nation is not a foreign state, in the sense in which the term "foreign state" is used in the constitution of the United States. *Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L. Ed. 25.

**25. Suits by corporation of which state a shareholder.**—*United States Bank v. Planters' Bank*, 9 Wheat. 904, 6 L. Ed. 244.

"The government, by becoming a corporation, lays down its sovereignty, so far as respects the transactions of the corporation, and exercises no power or privilege which is not derived from the charter." *United States Bank v. Planters' Bank*, 9 Wheat. 904, 908, 6 L. Ed. 244.

**26. In prize cases.**—The *William Bagaley*, 5 Wall. 377, 412, 18 L. Ed. 583; The



(e) *Ancillary Jurisdiction*.—In cases over which the supreme court possesses neither original nor appellate jurisdiction, it cannot grant ancillary relief.<sup>27</sup>

(f) *Consent as Conferring Jurisdiction*.—Neither the failure of the parties to object, nor their consent, can confer jurisdiction on the supreme court where it otherwise does not exist.<sup>28</sup>

(g) *Jurisdiction with Respect to Extraordinary Remedies*.—As to the jurisdiction of the supreme court of extraordinary remedies, see the titles CERTIORARI, vol. 3, p. 651; HABEAS CORPUS; INJUNCTIONS; MANDAMUS; PROHIBITION.

(h) *Jurisdiction as Dependent on Supreme Court*.—The original jurisdiction of the supreme court is conferred by the constitution, without limit to the amount in controversy, and congress has never imposed, if indeed it could impose, any such limit.<sup>29</sup>

(5) *Concurrent Jurisdiction of Inferior Courts*.—Except where the original jurisdiction of the supreme court is made exclusive, congress may confer concurrent jurisdiction on the inferior courts of the United States of cases which are originally cognizable in the supreme court.<sup>30</sup>

b. *Appellate Jurisdiction*.—See the titles ADMIRALTY, vol. 1, p. 119; APPEAL AND ERROR, vol. 1, p. 333.

2. PROCEDURE—a. *In Exercise of Original Jurisdiction*—(1) *Leave to File Bill*.—The usual practice in equity is for the supreme court to hear an application for filing of an original bill in that court *ex parte*,<sup>31</sup> though under special circumstances a different course has been pursued,<sup>32</sup> and ordinarily the motion

Alicia, 7 Wall. 571, 573, 19 L. Ed. 84. See, generally, the title PRIZE.

27. *Ancillary jurisdiction*.—In *re Glaser*, 198 U. S. 171, 173, 49 L. Ed. 1000; In *re Massachusetts*, 197 U. S. 482, 49 L. Ed. 845.

As to grant of certiorari, mandamus or prohibition, see the titles CERTIORARI, vol. 3, p. 651; MANDAMUS; PROHIBITION.

28. *Consent as conferring jurisdiction*.—*Minnesota v. Hitchcock*, 185 U. S. 373, 382, 46 L. Ed. 954. See, generally, the title JURISDICTION.

The silence of counsel does not waive the question, nor would the express consent of the parties give to this court a jurisdiction which was not warranted by the constitution and laws. It is the duty of every court of its own motion to inquire into the matter irrespective of the wishes of the parties, and be careful that it exercises no powers save those conferred by law. Consent may waive an objection so far as respects the person, but it cannot invest a court with a jurisdiction which it does not by law possess over the subject matter. *Minnesota v. Hitchcock*, 185 U. S. 373, 382, 46 L. Ed. 954.

29. *Amount in controversy*.—*Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 300, 32 L. Ed. 239.

30. *Concurrent jurisdiction of inferior courts*.—*Ames v. Kansas*, 111 U. S. 449, 28 L. Ed. 482; *Bors v. Preston*, 111 U. S. 252, 28 L. Ed. 419. See post, "Exclusive, Concurrent or Conflicting Jurisdiction," XII.

31. *Ex parte hearing as to leave to file original bill*.—*Washington v. Northern Securities Co.*, 185 U. S. 254, 255, 46 L. Ed.

897; *Georgia v. Grant*, 6 Wall. 241, 18 L. Ed. 848.

Though there is no general rule of court in regard to the matter, yet where a party desires to file a bill in original jurisdiction in equity, it has been usual to hear a motion in his behalf for leave to do so. This motion, except in peculiar circumstances (as where the bill asked to be filed was against the president of the United States), is heard only on the part of the complainant. *Georgia v. Grant*, 6 Wall. 241, 18 L. Ed. 848.

32. *Special circumstances where ex parte hearing denied*.—*Mississippi v. Johnson*, 4 Wall. 475, 18 L. Ed. 437.

In *Louisiana v. Texas*, 176 U. S. 1, 44 L. Ed. 347, the case stated shows that "argument was had on objections to granting leave, but it appearing to the court the better course in this instance, leave was granted, and the bill filed, whereupon defendants demurred, and the cause was submitted on the oral argument already had and printed briefs." *Washington v. Northern Securities Co.*, 185 U. S. 254, 255, 46 L. Ed. 897.

"In *Minnesota v. Northern Securities Co.*, 184 U. S. 199, 46 L. Ed. 499, application to file a similar bill to that before us, and seeking similar relief, was made, and after examining the bill we directed notice to be given and heard argument on both sides. The result was that leave to file was denied because of the want of certain indispensable parties, who could not be brought in without defeating our constitutional jurisdiction." *Washington v. Northern Securities Co.*, 185 U. S. 254, 255, 46 L. Ed. 897.

for leave to file is granted as matter of course.<sup>32</sup>

(2) *Mode of Proceeding*.—In cases in which the supreme court has original jurisdiction, the form of proceeding is not regulated by act of congress,<sup>34</sup> but by the rules and orders of the court.<sup>35</sup> These rules and orders are framed in analogy to the practice in the English court of chancery.<sup>36</sup> But the court does not follow this practice, where it would embarrass the case by unnecessary technicality or defeat the purposes of justice.<sup>37</sup>

**33. Leave granted as matter of course.**—*Mississippi v. Johnson*, 4 Wall. 475, 18 L. Ed. 437; *Washington v. Northern Securities Co.*, 185 U. S. 254, 255, 46 L. Ed. 897.

**34. Mode of proceeding not regulated by statute.**—*Florida v. Georgia*, 17 How. 478, 15 L. Ed. 181; *New Jersey v. New York*, 5 Pet. 284, 8 L. Ed. 127; *Kentucky v. Dennison*, 24 How. 66, 98, 16 L. Ed. 717; *Gordon v. United States*, 117 U. S., appx., 697, 701.

Congress has passed no act for the special purpose of prescribing the mode of proceeding in suits instituted against a state, or in any suit in which the supreme court is to exercise the original jurisdiction conferred by the constitution. *New Jersey v. New York*, 5 Pet. 284, 8 L. Ed. 127; *Florida v. Georgia*, 17 How. 478, 15 L. Ed. 181.

In all cases where original jurisdiction is given by the constitution, this court has authority to exercise it without any further act of congress to regulate its process or confer jurisdiction, and the court may regulate and mould the process it uses in such manner as in its judgment will best promote the purposes of justice. *Kentucky v. Dennison*, 24 How. 66, 98, 16 L. Ed. 717.

**35. Procedure regulated by rules of court.**—*Florida v. Georgia*, 17 How. 478, 15 L. Ed. 181; *Gordon v. United States*, 117 U. S., appx., 697, 701.

**36. Rules framed according to English chancery practice.**—*Florida v. Georgia*, 17 How. 478, 15 L. Ed. 181; *California v. Southern Pac. Co.*, 157 U. S. 229, 249, 39 L. Ed. 683; *Grayson v. Virginia*, 3 Dall. 320, 1 L. Ed. 619; *Hayburn's Case*, 2 Dall. 409, 411, 1 L. Ed. 436; *Pennsylvania v. Wheeling, etc., Bridge Co.*, 12 How. 518, 14 L. Ed. 249; *Rhode Island v. Massachusetts*, 14 Pet. 210, 10 L. Ed. 423.

"In cases of original jurisdiction it has been determined that this court will frame its proceedings according to those which had been adopted in the English courts in analogous cases, and that the rules of courts in chancery should govern in conducting the case to a final issue. *Rhode Island v. Massachusetts*, 12 Pet. 657, 9 L. Ed. 1233; *Rhode Island v. Massachusetts*, 13 Pet. 23, 10 L. Ed. 41; *Rhode Island v. Massachusetts*, 14 Pet. 210, 10 L. Ed. 423; *Rhode Island v. Massachusetts*, 15 Pet. 233, 10 L. Ed. 721; *Georgia v. Grant*, 6 Wall. 241, 18 L. Ed. 848." *California v. Southern Pac. Co.*, 157 U. S. 229, 249, 39 L. Ed. 683.

In a boundary case between two states of the Union in the supreme court of the

United States, the rules and practice of the court of chancery should, substantially, govern in conducting the suit to a final issue. *Rhode Island v. Massachusetts*, 14 Pet. 210, 10 L. Ed. 423; *Massachusetts v. Rhode Island*, 12 Pet. 657, 735, 9 L. Ed. 1233.

No court acts differently in deciding on boundary between states than on lines between separate tracts of land; if there is uncertainty where the line is, if there is a confusion of boundaries by the nature of interlocking grants, the obliteration of marks, the intermixing of possession under different proprietors, the effects of accident, fraud or time, or other kindred causes, it is a case appropriate to equity. An issue at law is directed, a commission of boundary awarded; or, if the court are satisfied, without either, they decree what and where the boundary of a farm, a manor, province, or a state, is and shall be. *Rhode Island v. Massachusetts*, 12 Pet. 657, 658, 9 L. Ed. 1233.

**Bill and cross bill** is deemed the most appropriate mode of proceeding applicable to boundary cases between two states, as it always offers an opportunity to the court of making an affirmative decree for the one side or the other, and of establishing by its authority the disputed line, and of having it permanently marked by commissioners of its own appointment, if that be necessary, as in this cause it is. *Missouri v. Iowa*, 7 How. 660, 667, 12 L. Ed. 861.

**37. Departure from rules to promote justice.**—*Florida v. Georgia*, 17 How. 478, 15 L. Ed. 181; *Rhode Island v. Massachusetts*, 14 Pet. 210, 10 L. Ed. 423; *California v. Southern Pac. Co.*, 157 U. S. 229, 249, 39 L. Ed. 683; *Grayson v. Virginia*, 3 Dall. 320, 1 L. Ed. 619.

In a controversy where two sovereign states are contesting the boundary between them, it is the duty of the court to mould the rules of chancery practice and pleading in such a manner as to bring the case to a final hearing on its merits; it is too important in its character, and the interests concerned too great, to be decided upon the mere technical principles of chancery pleading. *Rhode Island v. Massachusetts*, 14 Pet. 210, 10 L. Ed. 423.

The general rule prescribes to us an adoption of that practice, which is founded on the custom and usage of courts of admiralty and equity, constituted on similar principles; but still, it is thought, that we are also authorized to make such deviations as are necessary to adapt the process

(3) *Appearance by Defendant*.—If, in an original suit in the supreme court, the defendant fails to appear,<sup>38</sup> or withdraws his appearance,<sup>39</sup> the complainant may proceed in the cause *ex parte*.

(4) *Process*—(a) *In General*.—Where an original suit against a state is filed in the supreme court, process issues as a matter of course, where there is no appearance by the defendant to object to the motion therefor.<sup>40</sup>

(b) *On Whom Served*.—In suits against a state, the process should be served on the governor and attorney general of the state.<sup>41</sup> Service on the governor alone is not sufficient.<sup>42</sup>

(c) *Time of Service*.—Process of subpoena issuing out of the supreme court, in any suit in equity, must be served on the defendant, sixty days before the return day of the process.<sup>43</sup>

and rules of the court to the peculiar circumstances of this country, subject to the interposition, alteration and control of the legislature. *Grayson v. Virginia*, 3 Dall. 320, 1 L. Ed. 619.

**38. Failure of defendant to appear.**—*Grayson v. Virginia*, 3 Dall. 320, 1 L. Ed. 619; *Huger v. South Carolina*, 3 Dall. 339, 341, 1 L. Ed. 627; *Chisholm v. Georgia*, 2 Dall. 419, 1 L. Ed. 440; *Massachusetts v. Rhode Island*, 12 Pet. 755, 9 L. Ed. 1272; *Rhode Island v. Massachusetts*, 12 Pet. 653, 657, 9 L. Ed. 1233; *New Jersey v. New York*, 5 Pet. 284, 8 L. Ed. 127.

The practice seems to be well settled that in suits against a state, if the state shall neglect to appear, on due service of process, no coercive measures will be taken to compel appearance but the complainant will be allowed to proceed *ex parte*. *Massachusetts v. Rhode Island*, 12 Pet. 755, 9 L. Ed. 1272.

Where the service of the subpoena is proved, the complainant is entitled to proceed *ex parte*; and may move for and obtain commissions, to take the examination of witnesses in several of the states. *Huger v. South Carolina*, 3 Dall. 339, 341, 1 L. Ed. 627.

In a suit against a state judgment may be entered in default of an appearance. *Chisholm v. Georgia*, 2 Dall. 419, 1 L. Ed. 440.

**39. Withdrawal of appearance.**—*Rhode Island v. Massachusetts*, 12 Pet. 657, 754, 9 L. Ed. 1233.

**40. Process issues as matter of course.**—*New Jersey v. New York*, 3 Pet. 461, 7 L. Ed. 741. See, also, *Rhode Island v. Massachusetts*, 7 Pet. 651, 8 L. Ed. 816.

A notice was given by the solicitors for the state of New Jersey to the governor of the state of New York, dated the 12th of January, 1830, stating that a bill had been filed on the equity side of the supreme court, by the state of New Jersey, against the people of the state of New York, and that on the 13th of February, following, the court would be moved in the case for such order as the court might deem proper, etc., afterwards, on the day appointed, no counsel having appeared for the state of New York, on the motion of the counsel for the state of New Jersey, for a subpoena to be served on the gov-

ernor and attorney general of the state of New York; the court said, as no counsel appears to argue the motion on the part of the state of New York, and the precedent for granting it has been established, upon very grave and solemn argument, the court do not require an *ex parte* argument in favor of their authority to grant the subpoena, but will follow the precedent heretofore established; the state of New York will be at liberty to contest the proceeding, at a future time, in the course of the cause, if they shall choose so to do. *New Jersey v. New York*, 3 Pet. 461, 7 L. Ed. 741.

**41. Service on governor and attorney general.**—Rule 5, 108 U. S. 574; *In re Ayers*, 123 U. S. 443, 497, 31 L. Ed. 216; *Chisholm v. Georgia*, 2 Dall. 419, 1 L. Ed. 440; *Grayson v. Virginia*, 3 Dall. 320, 1 L. Ed. 619; *Kentucky v. Dennison*, 24 How. 66, 16 L. Ed. 717; *United States v. Lee*, 106 U. S. 196, 206, 27 L. Ed. 171; *Fitts v. McGhee*, 172 U. S. 516, 526, 43 L. Ed. 535. See, also, *Florida v. Georgia*, 11 How. 293, 13 L. Ed. 702.

**42. Service on governor alone not sufficient.**—*New Jersey v. New York*, 3 Pet. 461, 7 L. Ed. 741.

The subpoena issued on the filing of a bill, in which the state of New Jersey was complainant and the state of New York was defendant, was served upon the governor and attorney general of New York, sixty days before the return day, the day of the service and return inclusive; a second subpoena issued, which was served on the governor of New York only, the attorney general being absent; there was no appearance by the state of New York. This is not like the case of several defendants, where a service on one might be good, though not on another; here, the service prescribed by the rule is to be on the governor, and on the attorney general; a service on one is not sufficient to entitle the court to proceed. *New Jersey v. New York*, 3 Pet. 461, 7 L. Ed. 741.

**43. Time of service.**—*New Jersey v. New York*, 5 Pet. 284, 8 L. Ed. 127; *Grayson v. Virginia*, 3 Dall. 320, 1 L. Ed. 619; *Washington v. Northern Securities Co.*, 185 U. S. 254, 256, 46 L. Ed. 897; *New York v. Connecticut*, 4 Dall. 1, 6, 1 L. Ed.



(d) *Sufficiency of Service*.—In a suit against a state where a copy of the process is delivered to the attorney general, and another copy left at the governor's house, and the original is likewise shown to the secretary of the state, the service is sufficient.<sup>44</sup>

(5) *Proceeding in Absence of Party*.—Where an original cause is pending in the supreme court to be disposed of there in the first instance and in the exercise of an exceptional jurisdiction, it does not comport with the gravity and finality which should characterize such an adjudication to proceed in the absence of parties whose rights would be in effect determined, even though they might not be technically bound in subsequent litigation in some other tribunal.<sup>45</sup>

(6) *Pleading*.—(a) *In General*.—In a case in which two sovereign states are contesting a question of boundary, the most liberal principles of practice and pleading ought, unquestionably, to be adopted, in order to enable both parties to present their respective claims in their full strength.<sup>46</sup>

(b) *Time of Filing Answer*.—The rules which govern courts of equity as to the allowance of time for filing an answer and other proceedings in suits between individuals will not be applied by the supreme court to controversies between states of the Union; the parties in such cases, must, in the nature of things, be incapable of acting with the promptness of an individual.<sup>47</sup>

(7) *Reference*.—The supreme court in the exercise of original jurisdiction may refer a cause to a commissioner, for the purpose of taking further proof, with instructions to report to the court.<sup>48</sup>

(8) *Costs*.—See the title *COSTS*, ante, p. 802.

b. *In Exercise of Appellate Jurisdiction*.—See the title *APPEAL AND ERROR*, vol. 1, p. 333.

**F. Court of Claims**—1. **ESTABLISHMENT AND NATURE**—a. *Power to Establish*.—Congress undoubtedly had power to establish the court of claims with special powers to examine testimony and decide, in the first instance, upon the validity and justice of any claim for money against the United States, subject to the supervision and control of congress, or a head of any of the executive departments.<sup>49</sup> The act creating the court of claims is not void as violating the constitutional provision guaranteeing a jury trial in suits at common law.<sup>50</sup>

715; *New Jersey v. New York*, 3 Pet. 461, 7 L. Ed. 741.

In a suit in the supreme court instituted against a state of the Union, the process should be served on the governor and attorney general of the state, sixty days before the return day of the process. *New Jersey v. New York*, 5 Pet. 284, 8 L. Ed. 127; *Grayson v. Virginia*, 3 Dall. 320, 1 L. Ed. 619.

44. **Sufficiency of service**.—*Huger v. South Carolina*, 3 Dall. 339, 1 L. Ed. 627.

45. **Proceeding in absence of party**.—*California v. Southern Pac. Co.*, 157 U. S. 229, 257, 39 L. Ed. 683; *Iowa v. Illinois*, 151 U. S. 238, 242, 38 L. Ed. 145.

In the exercise of original jurisdiction in the determination of the boundary line between sovereign states the supreme court proceeds only upon the utmost circumspection and deliberation, and no order can stand in respect of which full opportunity to be heard has not been afforded. *Iowa v. Illinois*, 151 U. S. 238, 242, 38 L. Ed. 145.

46. **Pleading**.—*Rhode Island v. Massachusetts*, 14 Pet. 210, 10 L. Ed. 423.

If a plea put in by the defendant may in any degree embarrass the complainant, in bringing out the proofs of the claim on which he relies, the case ought not to be

disposed of on such an issue; undoubtedly, the defendant must have the full benefit of the defense which the plea discloses, but at the same time, the proceedings ought to be so ordered as to give the complainant a full hearing on the whole of his case. *Rhode Island v. Massachusetts*, 14 Pet. 210, 10 L. Ed. 423.

47. **Time of filing answer**.—*Rhode Island v. Massachusetts*, 13 Pet. 23, 10 L. Ed. 41.

The state of Rhode Island, on leave granted at January term 1838, to amend a bill previously filed by the state against the state of Massachusetts, amended the bill at this term, by inserting in it references to papers filed at the term of 1838. The state of Massachusetts was allowed until the term of 1840 to answer. *Rhode Island v. Massachusetts*, 13 Pet. 23, 10 L. Ed. 41.

48. **Reference**.—*Pennsylvania v. Wheeling, etc., Bridge Co.*, 9 How. 647, 13 L. Ed. 294.

49. **Power to establish**.—*Gordon v. United States*, 117 U. S., appx., 697, 699; *Langford v. United States*, 101 U. S. 341, 344, 25 L. Ed. 1010.

50. **Effect as in v. airing right to jury trial**.—*McElrath v. United States*, 102 U. S. 426, 26 L. Ed. 189.

b. *Object of Establishment*.—Prior to the organization of the court of claims the only recourse of persons having claims against the United States was in an appeal to congress.<sup>51</sup> And it has been very aptly said that this court was established for the triple purpose of relieving congress, of protecting the government by regular investigation, and of benefiting the claimants by affording them a certain mode of examining and adjudicating upon their claims.<sup>52</sup>

c. *Nature*.—As at first organized, the court of claims was merely an auditing board, authorized to pass upon claims submitted to it, and report to the secretary of the treasury. But this character of the court was changed at an early day by act of congress in order that the supreme court might review its decision, which it had formerly refused to do.<sup>53</sup>

2. JURISDICTION—*a. Jurisdiction Dependent on Statute*.—The court of claims has no general jurisdiction over claims against the United States; it can take cognizance of only those matters which by the terms of some act of congress are committed to it, and then only subject to the condition or limitations prescribed by congress.<sup>54</sup>

b. *Construction of Statutes*.—Statutes extending the right to sue the government, and conferring jurisdiction upon the court of claims for that purpose, will, as a general rule, be strictly construed.<sup>55</sup> The jurisdiction of the court of claims

Suits against the government in the court of claims, whether reference be had to the claimant's demand, or to the defense, or to any set-off, or counterclaim which the government may assert, are not controlled by the seventh amendment. They are not suits at common law within its true meaning. The government cannot be sued, except with its own consent. It can declare in what court it may be sued, and prescribe the forms of pleading and the rules of practice to be observed in such suits. It may restrict the jurisdiction of the court to a consideration of only certain classes of claims against the United States. Congress, by the act in question, informs the claimant that if he avails himself of the privilege of suing the government in the special court organized for that purpose, he may be met with a set-off, counterclaim, or other demand of the government, upon which judgment may go against him, without the intervention of a jury, if the court, upon the whole case, is of opinion that the government is entitled to such judgment. If the claimant avails himself of the privilege thus granted, he must do so subject to the conditions annexed by the government to the exercise of the privilege. *McElrath v. United States*, 102 U. S. 426, 440, 26 L. Ed. 189.

51. *Remedy of claimants prior to establishment*.—*Schillinger v. United States*, 155 U. S. 163, 166, 39 L. Ed. 108.

52. *Triple purpose of court*.—*United States v. Klein*, 13 Wall. 128, 144, 20 L. Ed. 519.

53. *Change of character of court*.—*Langford v. United States*, 101 U. S. 341, 344, 25 L. Ed. 1010, citing *Gordon v. United States*, 2 Wall. 561, 17 L. Ed. 921. *Schillinger v. United States*, 155 U. S. 163, 166, 39 L. Ed. 108. See, generally, the title APPEAL AND ERROR, vol. 1, p. 333.

Originally the court of claims was a court merely in name, for this power extended only to the preparation of bills to

be submitted to congress, but this was changed by the act of 1863. *Schillinger v. United States*, 155 U. S. 163, 166, 39 L. Ed. 108.

54. *Jurisdiction dependent on act of congress*.—*Johnson v. United States*, 160 U. S. 546, 549, 40 L. Ed. 529; *Schillinger v. United States*, 155 U. S. 163, 39 L. Ed. 108; *United States v. Gleason*, 124 U. S. 255, 258, 31 L. Ed. 421; *United States v. Lee*, 106 U. S. 196, 227, 27 L. Ed. 171; *Nichols v. United States*, 7 Wall. 122, 126, 19 L. Ed. 125; *United States v. Choctaw, etc., Nations*, 179 U. S. 494, 45 L. Ed. 291; *McElrath v. United States*, 102 U. S. 426, 440, 26 L. Ed. 189; *Kendall v. United States*, 107 U. S. 123, 125, 27 L. Ed. 437.

"It is for congress to determine when and under what circumstances the government may be sued, and the court of claims has the right to entertain jurisdiction of cases against the United States and proceed to judgment only by virtue of acts of congress granting such jurisdiction, and is limited precisely to such cases both in regard to parties and the cause of action as congress has prescribed. *De Groot v. United States*, 5 Wall. 419, 431, 18 L. Ed. 700." *Austin v. United States*, 155 U. S. 417, 430, 39 L. Ed. 206.

If the court of claims has the right to entertain jurisdiction of cases in which the United States is defendant, and to render judgment against that defendant, it is only by virtue of acts of congress granting such jurisdiction, and it is limited precisely to such cases, both in regard to parties and to the cause of action, as congress has prescribed. *De Groot v. United States*, 5 Wall. 419, 431, 18 L. Ed. 700; *McElrath v. United States*, 102 U. S. 426, 440, 26 L. Ed. 189; *Kendall v. United States*, 107 U. S. 123, 125, 27 L. Ed. 437.

55. *Construction of statute conferring jurisdiction*.—*Blackfeather v. United States*, 190 U. S. 368, 376, 47 L. Ed. 1099.

cannot be enlarged by implication.<sup>56</sup>

c. *Power of Congress to Restrict Jurisdiction.*—Whenever congress chooses to withdraw from the jurisdiction of the court of claims any class of cases which has before been committed to its control, it has the power to do so or to prescribe the rule by which such cases may be determined.<sup>57</sup>

d. *Prerequisites to Jurisdiction.*—While the action of the auditing department, either in allowing or rejecting a claim, is not an essential prerequisite to the jurisdiction of the court of claims to hear it,<sup>58</sup> still if claims are presented to the department for allowance, and the department, in the exercise of its discretion, suspends action upon them until proper vouchers are furnished, or other reasonable requirements are complied with, the court should not assume jurisdiction until final action is taken.<sup>59</sup> A rule of the court of claims, requiring parties to present their claims to an executive department before suit in that court, is unauthorized and void.<sup>60</sup>

e. *Nature and Extent of Jurisdiction.*—(1) *Under General Statute.*—(a) *In General.*—The court of claims has jurisdiction to hear and determine all claims founded upon the constitution of the United States or any law of congress, except for pensions, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable, and also all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated or other demands whatsoever on the part of the government of the United States against any claimant against the government in said court.<sup>61</sup>

**56. Jurisdiction not to be enlarged by implication.**—*Price v. United States*, 174 U. S. 373, 375, 43 L. Ed. 1011.

**57. Power of congress to restrict jurisdiction.**—*De Groot v. United States*, 5 Wall. 419, 431, 18 L. Ed. 700; *In re Hall*, 167 U. S. 38, 42, 42 L. Ed. 69.

**58. Allowance or rejection of claim not a prerequisite.**—*United States v. Knox*, 128 U. S. 230, 234, 32 L. Ed. 465; *Clyde v. United States*, 13 Wall. 38, 20 L. Ed. 479; *United States v. Fletcher*, 147 U. S. 664, 667, 37 L. Ed. 322.

**Action for drawbacks.**—One who exports manufactured articles made up of imported articles upon which duty has been paid may recover the drawback, provided for by the act of Aug. 5, 1861, in the court of claims, even though the custom or other officers refuse to decide whether or not he is entitled to them. *Campbell v. United States*, 107 U. S. 407, 27 L. Ed. 592.

Where a statute declares that there shall be a rebate or drawback of a tax under certain circumstances, the amount to be determined under regulations prescribed by the secretary of the treasury, the inaction of the secretary is immaterial, and the drawback must be paid whether ascertained under the secretary's regulations or not, because the right to the drawback depends on the statute, and not on the secretary's regulations, which relate merely to the ascertainment of the amount. *Campbell v. United States*, 107 U. S. 407, 27 L. Ed. 592. See, also, *Dooley v. United States*, 182 U. S. 222, 229, 45 L. Ed. 1074; *Dunlap v. United States*, 173 U. S. 65, 72, 43 L. Ed. 616.

**Action for compensation or fees.**—

Where a United States commissioner presents his claim for fees for his services to the circuit court, which refuses to pass upon them, he may sue in the court of claims without presenting them to the secretary of the treasury. *United States v. Knox*, 128 U. S. 230, 231, 32 L. Ed. 465; *United States v. Ewing*, 140 U. S. 142, 144, 35 L. Ed. 388; *Southworth v. United States*, 151 U. S. 179, 183, 38 L. Ed. 119.

The presentation of a claim for compensation for carrying the mails, to the second assistant postmaster general, with whom all the business in relation to the claim had been previously transacted, is, in contemplation of law, the presentation of it to the postmaster general. *Alvord v. United States*, 95 U. S. 356, 24 L. Ed. 414.

**Suits to recover back taxes or revenue paid.**—See post, "Recovery Back of Taxes or Revenue Paid," VII, F, 2, e, (1), (j), bb.

**59. Court should not act until presented claims are passed on.**—So long as the claim is pending and awaiting final determination in the department, courts should not be called upon to interfere at least, unless it ignores such claim or fails to pass upon it within reasonable time. *United States v. Fletcher*, 147 U. S. 664, 667, 37 L. Ed. 322.

**60. Presentation of claims to executive department.**—*Clyde v. United States*, 13 Wall. 38, 20 L. Ed. 479; *United States v. Kaufman*, 96 U. S. 567, 571, 24 L. Ed. 792.

**61. General scope of jurisdiction.**—Act of March 3, 1887; *Schillinger v. United States*, 155 U. S. 163, 166, 39 L. Ed. 108;



(b) *Action on Contracts*—aa. *In General*.—The court of claims has jurisdiction of all claims against the United States arising out of any contract.<sup>62</sup> To give the court of claims jurisdiction upon the ground that the claim is one founded in contract, there must have been a coming together of minds of the parties.<sup>63</sup>

bb. *Implied Contracts*.—The court has jurisdiction of actions on implied contracts as well as of actions on express contracts.<sup>64</sup>

*Dooley v. United States*, 182 U. S. 222, 224, 45 L. Ed. 1074; *United States v. Jones*, 131 U. S. 1, 15, 33 L. Ed. 90; *Ford v. United States*, 116 U. S. 213, 215, 29 L. Ed. 608; *United States v. Cornell Steamboat Co.*, 202 U. S. 184, 189, 50 L. Ed. 987; *Bigby v. United States*, 188 U. S. 400, 47 L. Ed. 519; *United States v. Lynah*, 188 U. S. 445, 47 L. Ed. 539; *Meade v. United States*, 9 Wall. 691, 709, 19 L. Ed. 687; *Knote v. United States*, 95 U. S. 149, 157, 24 L. Ed. 442; *Nichols v. United States*, 7 Wall. 122, 128, 19 L. Ed. 125.

The original act of February 24th, 1855, establishing the court, gave it jurisdiction to hear and determine all claims founded upon any law of congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, which might be suggested to it by petition, and all claims which might be referred to the court by either house of congress. *Ex parte Atocha*, 17 Wall. 439, 443, 21 L. Ed. 696; *Clyde v. United States*, 13 Wall. 38, 39, 20 L. Ed. 479.

**62. Contracts.**—Act of March 3, 1887; *Case v. Terrell*, 11 Wall. 199, 201, 20 L. Ed. 134; *United States v. Jones*, 131 U. S. 1, 17, 33 L. Ed. 90; *Langford v. United States*, 101 U. S. 341, 345, 25 L. Ed. 1010; *United States v. Palmer*, 128 U. S. 262, 32 L. Ed. 442; *Schillinger v. United States*, 155 U. S. 163, 39 L. Ed. 108; *District of Columbia v. Barnes*, 192 U. S. 146, 152, 49 L. Ed. 699; *Russell v. United States*, 182 U. S. 516, 530, 45 L. Ed. 1210; *Harley v. United States*, 198 U. S. 229, 234, 49 L. Ed. 1029; *United States v. Berdan Fire-Arms Mfg. Co.*, 156 U. S. 552, 39 L. Ed. 530.

The provision restricting that jurisdiction to contracts express or implied refers to the well understood distinction between matters *ex contractu* and those *ex delicto*, and is founded on the principle, that while congress is willing to subject the government to suits on contracts, which can be valid only when made by some one thereunto vested with authority, or when under such authority something is by him done which raises an implied contract, that body did not intend to make the government liable to suit for the wrongful and unauthorized acts which are committed by its officers, under a mistaken zeal for the public good. *Langford v. United States*, 101 U. S. 341, 25 L. Ed. 1010.

The jurisdiction of that court has received frequent additions by the reference of cases to it under special statutes, and

by other changes in the general law; but the principle originally adopted, of limiting its general jurisdiction to cases of contract, remains. There can be no reasonable doubt that this limitation to cases of contract, express or implied, was established in reference to the distinction between actions arising out of contracts, as distinguished from those founded on torts, which is inherent in the essential nature of judicial remedies under all systems, and especially under the system of the common law. *Langford v. United States*, 101 U. S. 341, 345, 25 L. Ed. 1010.

**Contract for secret service made by president.**—An action cannot be maintained against the government, in the court of claims, upon a contract for secret services during the war, made between the president and the claimant. *Totten v. United States*, 92 U. S. 105, 23 L. Ed. 605.

**63. Necessity for meeting of minds.**—*Russell v. United States*, 182 U. S. 516, 530, 45 L. Ed. 1210; *Harley v. United States*, 198 U. S. 229, 234, 49 L. Ed. 1029; *Schillinger v. United States*, 155 U. S. 163, 39 L. Ed. 108; *United States v. Berdan Fire-Arms Mfg. Co.*, 156 U. S. 552, 39 L. Ed. 530.

"We held in *Russell v. United States*, 182 U. S. 516, 530, 45 L. Ed. 1210, that in order to give the court of claims jurisdiction, under the act of March 3, 1887, 24 Stat. 505, c. 359, defining claims of which the court of claims had jurisdiction, the demand sued on must be founded on 'a convention between the parties'—'a coming together of minds.'" And we excluded, as not meeting this condition, those contracts or obligations that the law is said to imply from a tort. *Schillinger v. United States*, 155 U. S. 163, 39 L. Ed. 108; *United States v. Berdan Fire-Arms Mfg. Co.*, 156 U. S. 552, 39 L. Ed. 530." *Harley v. United States*, 198 U. S. 229, 234, 49 L. Ed. 1029.

**64. Implied contracts.**—*Knote v. United States*, 95 U. S. 149, 24 L. Ed. 442; *Gibbons v. United States*, 8 Wall. 269, 19 L. Ed. 453; *United States v. Smith*, 94 U. S. 214, 24 L. Ed. 115; *United States v. Bostwick*, 94 U. S. 53, 69, 24 L. Ed. 65.

**Action for refusal to pay for goods contracted for.**—In the court of claims, the government is liable for refusing to receive and pay for what it has agreed to purchase. *Gibbons v. United States*, 8 Wall. 269, 19 L. Ed. 453.

When an individual who has been absolved from a contract, by the refusal of the proper officer to receive the articles

cc. *Unauthorized Contracts*.—The United States cannot be sued in the court of claims on a contract made by one of its agents or officers, without authority,<sup>65</sup> even though other contracts of a like nature have been submitted to the court of claims by congress for determination of the amount due thereunder.<sup>66</sup>

(c) *Action for Torts*.—It is well settled that the jurisdiction of the court of claims does not extend to claims against the United States originating in torts.<sup>67</sup>

when tendered, afterwards consents to deliver them under a threat of an officer that he will withhold money justly due to the plaintiff, he can only recover the contract price, whatever may have been the current market value of the articles. *Gibbons v. United States*, 8 Wall. 269, 19 L. Ed. 453.

**Action for breach of implied covenant in lease**.—An action against the United States for the breach of an implied covenant not to commit waste upon premises leased, may be brought in the court of claims. *United States v. Bostwick*, 94 U. S. 53, 69, 24 L. Ed. 65.

Where, during the occupancy under the lease, ornamental trees were destroyed; fences and walls torn down, and the materials used for sidewalks and the erection of other buildings, or carried away; and stone was quarried and gravel dug from a stone quarry and gravel pit on the premises, and taken away, it was held that this was voluntary waste for which the court of claims could award compensation. *United States v. Bostwick*, 94 U. S. 53, 69, 24 L. Ed. 65.

**Refusal to comply with working contract**.—By reason of its improper suspension of the work of a contractor, who had agreed to supply the skilled labor and the materials necessary for the erection of certain buildings for its use, the United States is liable in the court of claims for such damages as he has actually sustained. *United States v. Smith*, 94 U. S. 214, 24 L. Ed. 115.

**To constitute an implied contract with the United States for the payment of money upon which an action will lie in the court of claims**, there must have been some consideration moving to the United States, or they must have received the money charged with a duty to pay it over; or the claimant must have had a lawful right to it when it was received, as in the case of money paid by mistake. No such implied contract with the United States arises with respect to moneys received into the treasury as the proceeds of property forfeited and sold under the confiscation act of July 17, 1862. *Knote v. United States*, 95 U. S. 149, 24 L. Ed. 442.

**A fine imposed upon a person by a military commission**, which the offender has, after his release from imprisonment, consented to be applied on his indebtedness to the United States, even though illegally and improperly imposed in the first instance, cannot be recovered back by the offender by suit in the court of claims as upon implied contract. "Even if the original payment to the government was under

duress, he had the right, subsequently, to agree, as he did, that what the government coerced him to pay was, in fact, fairly due upon a proper settlement of his accounts." *Carver v. United States*, 111 U. S. 609, 28 L. Ed. 540.

**65. Unauthorized contracts**.—*United States v. McDougall*, 121 U. S. 89, 30 L. Ed. 861.

No officer of the government was authorized to bind the United States by any contract for the subsistence of Indians not based upon appropriations made by congress and the court of claims has no jurisdiction of an action to enforce such contract. *United States v. McDougall*, 121 U. S. 89, 98, 30 L. Ed. 861.

**66. United States v. McDougall**, 121 U. S. 89, 30 L. Ed. 861.

**67. Claims founded in tort**.—*United States v. Weld*, 127 U. S. 51, 57, 32 L. Ed. 62; *Langford v. United States*, 101 U. S. 341, 345, 25 L. Ed. 1010; *German Bank v. United States*, 148 U. S. 573, 580, 37 L. Ed. 564; *Hill v. United States*, 149 U. S. 593, 598, 37 L. Ed. 862; *Gibbons v. United States*, 8 Wall. 269, 19 L. Ed. 453; *United States v. Jones*, 131 U. S. 1, 33 L. Ed. 90; *Belknap v. Schild*, 161 U. S. 10, 17, 40 L. Ed. 599; *Bigby v. United States*, 188 U. S. 400, 47 L. Ed. 519; *Dooley v. United States*, 182 U. S. 222, 226, 45 L. Ed. 1074; *Russell v. United States*, 182 U. S. 516, 530, 45 L. Ed. 1210; *Schillinger v. United States*, 155 U. S. 163, 39 L. Ed. 108; *United States v. Berdan Fire-Arms Co.*, 156 U. S. 552, 39 L. Ed. 530; *Gibson v. United States*, 166 U. S. 269, 41 L. Ed. 996; *Morgan v. United States*, 14 Wall. 531, 20 L. Ed. 738; *United States v. Cumming*, 130 U. S. 452, 32 L. Ed. 1029; *Hijo v. United States*, 194 U. S. 315, 48 L. Ed. 994; *Reed v. United States*, 11 Wall. 591, 20 L. Ed. 220; *Reybold v. United States*, 15 Wall. 202, 207, 21 L. Ed. 57.

"The reason for this restriction is very obvious on a moment's reflection. While congress might be willing to subject the government to the judicial enforcement of valid contracts, which could only be valid as against the United States when made by some officer of the government acting under lawful authority, with power vested in him to make such contracts, or to do acts which implied them, the very essence of a tort is that it is an unlawful act, done in violation of the legal rights of some one. For such acts, however high the position of the officer or agent of the government who did or commanded them, congress did not intend to subject the government to the results of a suit in that

And it is equally well settled that the distinction between contract and tort, cannot be evaded by framing the claim as upon an implied contract.<sup>68</sup> Nor is a waiver of the exemption from suit to be implied from an act of congress submitting a claim to the court for decision.<sup>69</sup>

(d) *Civil War Claims*.—The jurisdiction of the court of claims does not extend to any claim against the United States growing out of the destruction, or appropriation of, or damage to, property by the army or navy engaged in the suppression of the rebellion.<sup>70</sup> The term "appropriation" includes all taking and use of property by the army or navy, in the course of the war, not authorized

court. This policy is founded in wisdom, and is clearly expressed in the act defining the jurisdiction of the court; and it would ill become us to fritter away the distinction between actions *ex delicto* and actions *ex contractu*, which is well understood in our system of jurisprudence, and thereby subject the government to payment of damages for all the wrongs committed by its officers or agents, under a mistaken zeal, or actuated by less worthy motives." *Langford v. United States*, 101 U. S. 341, 345, 25 L. Ed. 1010.

**Torts of officers.**—The government is not liable on an implied assumpsit, for the torts of its officer committed while in its service, and apparently for its benefit. To admit such liability would involve the government in all its operations, in embarrassments, losses, and difficulties, subversive of the public interest. When the injury to individuals in such cases merits redress by the government, the remedy is with congress. The statute does not confer jurisdiction on the court of claims. *Gibbons v. United States*, 8 Wall. 269, 19 L. Ed. 453.

An army contractor who had agreed to furnish certain oats at a fixed price had, after the delivery of part of the amount, been released from the obligation to deliver the balance. He was, however, carried before the military authority, and, influenced by threats, agreed to deliver, and did deliver, the full quantity of oats specified in the contract. He brought suit for the difference between the contract price and the market price of the oats at the time of delivery. It was said that "if such pressure was brought to bear upon him as would make the renewal of the contract void, as being obtained by duress, then there was no contract, and the proceeding was a tort for which the officer may have been personally liable," but that it was not within the court of claims act. *Gibbons v. United States*, 8 Wall. 269, 19 L. Ed. 453.

**Misfeasance or nonfeasance of the register of the treasury** in wrongfully canceling bonds cannot be made the ground for an action against the United States in the court of claims. *German Bank v. United States*, 148 U. S. 573, 37 L. Ed. 564.

**Personal injuries.**—An action against the United States for damages for injuries received by the falling of an elevator in a

government building, cannot be maintained in the circuit court or in the court of claims. *Bigby v. United States*, 188 U. S. 400, 47 L. Ed. 519.

**Injuries in improving navigation.**—One who suffers damages by the improvement by the United States, under authority of an act of congress passed for that purpose, of a navigable river, cannot sue in the court of claims. *Gibson v. United States*, 166 U. S. 269, 41 L. Ed. 996.

**68. Tort not to be made contract claim by pleadings.**—*Hill v. United States*, 149 U. S. 593, 598, 37 L. Ed. 862; *Gibbons v. United States*, 8 Wall. 269, 19 L. Ed. 453; *Langford v. United States*, 101 U. S. 341, 25 L. Ed. 1010; *United States v. Jones*, 131 U. S. 1, 33 L. Ed. 90.

**69. Waiver of exemption not implied.**—*United States v. Cumming*, 130 U. S. 452, 32 L. Ed. 1029.

The exemption of the United States from suits for torts of its officers is not defeated by an act of congress permitting certain persons "to sue in court of claims, which court shall pass upon the law and facts as to the liability of the United States for the acts of its officers." *United States v. Cumming*, 130 U. S. 452, 32 L. Ed. 1029.

**70. Civil war claims.**—*Ford v. United States*, 116 U. S. 213, 215, 29 L. Ed. 608; *United States v. Winchester, etc.*, R. Co., 163 U. S. 244, 258, 41 L. Ed. 145; *Perrin v. United States*, 12 Wall. 315, 20 L. Ed. 412; *United States v. Kimbal*, 13 Wall. 636, 20 L. Ed. 503; *Filor v. United States*, 9 Wall. 45, 19 L. Ed. 549; *United States v. Russell*, 13 Wall. 623, 20 L. Ed. 474; *Pugh v. United States*, 13 Wall. 633, 20 L. Ed. 711; *Slawson v. United States*, 16 Wall. 310, 21 L. Ed. 356; *United States v. Bostwick*, 94 U. S. 53, 24 L. Ed. 65.

**Want of jurisdiction not affected by act of 1869.**—The jurisdiction of the court of claims to pass upon claims against the United States, growing out of the destruction or appropriation of property by the army or navy engaged in the suppression of the rebellion, which jurisdiction was taken away by act of July 4th, 1864, was not restored even as to steamboats by the joint resolution of 23d December, 1869, relating to the mode of settling for them when impressed into the service of the United States during the rebellion. *United States v. Kimbal*, 13 Wall. 636, 20 L. Ed. 503.



by contract with the government.<sup>71</sup> Thus a claim for property taken by the military authorities of the United States,<sup>72</sup> for property leased by government officers without authority,<sup>73</sup> or for property destroyed in bombarding a town,<sup>74</sup> is not within the jurisdiction of the court of claims. The court of claims may, however, exercise jurisdiction of a claim where no appropriation was actually intended or made.<sup>75</sup> A claim cannot be divested of its character as a "war claim" by anything done or omitted to be done by any officer or department of the government.<sup>76</sup>

(e) *Claims Dependent on or Growing Out of Treaties.*—The jurisdiction of the court of claims does not extend to cases growing out of or dependent on any

**71. Meaning of term "appropriation" as used in act limiting jurisdiction.**—*Filor v. United States*, 9 Wall. 45, 19 L. Ed. 549.

**72. Property taken by military authorities.**—*United States v. Winchester, etc.*, R. Co., 163 U. S. 244, 41 L. Ed. 145; *Pugh v. United States*, 13 Wall. 633, 20 L. Ed. 711.

A claim for iron rails taken from a railroad by the military authorities of the United States during the civil war, and subsequently sold by the government, is not within the jurisdiction of the court of claims. *United States v. Winchester, etc.*, R. Co., 163 U. S. 244, 41 L. Ed. 145.

A petition to the court of claims setting forth that the United States, during the late civil war, illegally, violently, and forcibly took possession of the petitioner's plantation, in one of the rebellious states, on the false pretext that it had been abandoned by the owner, and held it until January, 1866, during which time the United States, and the agents placed in charge of the plantation, destroyed and carried away the property of the petitioner to the value of \$42,508, does not present a case within the jurisdiction of that court, as the case made is barred by the act of July 4th, 1864, which excludes claims growing "out of the destruction or appropriation of or damage to property by the army or navy engaged in the suppression of the rebellion." *Pugh v. United States*, 13 Wall. 633, 20 L. Ed. 711.

**73. Property leased by officers without authority.**—No lease of premises at Key West for the use of the quarter-master's department, or any branch of it, in 1862, made by the acting assistant quartermaster at that place, was binding upon the government until approved by the quarter-master general, though the action of the subordinate officer in making such lease was taken by direction of the military commander at that station. Until such approval the action of the officer at Key West was ineffectual to fix any liability upon the government. The obligation of the government for the use of the property is what it would have been if the possession had been taken and held without the existence of the lease. The unauthorized acts of the officers at Key West cannot estop the government from insisting upon their invalidity, however bene-

ficial they may have proved to the United States. *Filor v. United States*, 9 Wall. 45, 19 L. Ed. 549.

**74. Property destroyed in bombarding town.**—*Perrin v. United States*, 12 Wall. 315, 20 L. Ed. 412.

A claim for property accidentally destroyed in the bombardment and burning of a town, by the naval forces of the United States, is not of itself within the jurisdiction of the court of claims. *Perrin v. United States*, 12 Wall. 315, 20 L. Ed. 412.

**75. No appropriation intended or made.**—The United States having, under a military emergency, during the rebellion, taken into its services certain already officered and manned steamers of a citizen of the United States, under circumstances which on a petition filed by the owner in the court of claims for remuneration, led the court to find "that when the same were respectively taken into the service of the United States, the officers acting for the government did not intend to 'appropriate' them, nor even their services, but did intend to compel the captains and crews with such steamers to perform the services needed, and to pay a reasonable compensation for such services, and that such was the understanding of the claimant;" and the property having been returned to the exclusive possession and control of its owner so soon as the emergency was over. Held, that there was no such "appropriation" as brought the case within the act of July 4th, 1864, which enacts "that the jurisdiction of the court of claims shall not extend to or include any claim against the United States growing out of \* \* \* the appropriation of property by the army or navy \* \* \* engaged in the suppression of the rebellion." *United States v. Russell*, 13 Wall. 623, 20 L. Ed. 474.

**76. Power of government to divest claim of character as war claim.**—After the suppression of the rebellion the military authorities had no such relations to property appropriated by them during the war as enabled them, by contract or otherwise, to turn a claim growing out of such appropriation into a claim based upon contract, and thereby give to the court of claims a jurisdiction denied to it by congress. *United States v. Winchester, etc.*, R. Co., 163 U. S. 244, 257, 41 L. Ed. 145.

treaty stipulation entered into with foreign nations or Indian tribes.<sup>77</sup> In order for the claim to come within this class there must be a direct and proximate connection between the treaty and the claim,<sup>78</sup> and the right upon which the claim is founded must have its origin in some treaty stipulation.<sup>79</sup> A claim for a part of the money paid to the United States under a treaty, is one growing out of a treaty;<sup>80</sup> but it has been held that a claim under an act of congress

**77. Claims growing out of or dependent on treaties.**—United States *v.* Weld, 127 U. S. 51, 57, 32 L. Ed. 62; *Ex parte Atocha*, 17 Wall. 439, 21 L. Ed. 696; *Alling v. United States*, 114 U. S. 562, 29 L. Ed. 272; *Great Western Ins. Co. v. United States*, 112 U. S. 193, 201, 28 L. Ed. 687.

Jurisdiction of the court of claims does not extend to claims against the government, not pending therein on December 1, 1862, growing out of or depending on treaty stipulations entered into with foreign nations or with Indian tribes. *Great Western Ins. Co. v. United States*, 112 U. S. 193, 201, 28 L. Ed. 687.

Claims under treaty stipulations are excluded from the general jurisdiction of the court of claims conferred by the acts of congress of February 24th, 1855, and March 3d, 1863; and when jurisdiction over such claims is conferred by special act, the authority of the court of claims to hear and determine them, and of the supreme court to review its action, is limited and controlled by the provisions of that act. *Ex parte Atocha*, 17 Wall. 439, 21 L. Ed. 696.

The act of March 3d, 1863, amending the act establishing the court of claims declared that the jurisdiction of the court should not extend to or include any claim against the government, not pending in the court on the 1st of December, 1862, growing out of, or dependent on, any treaty stipulation entered into with foreign nations or the Indian tribes. All the cases of which the court could subsequently take cognizance, by either the original or amendatory act, were cases arising out of contracts or transactions between the government or its officers and claimants; and in their decision the court was to be governed by those established rules of evidence which determine controversies between litigants in the ordinary tribunals of the country. Those acts have since then applied only to claims made directly against the United States, and for the payment of which they were primarily liable, if liable at all, and not to claims against other governments, the payment of which the United States had assumed or might assume by treaty. *Ex parte Atocha*, 17 Wall. 439, 444, 21 L. Ed. 696.

A had a claim against Spain which was presented to that government and acknowledged in a judgment against it given by a royal junta or special judicial tribunal of that country. Claims of American citizens against Spain were by the convention of Feb. 22d, 1819, made claims against the United States by a provision therein by,

which the United States undertook to make satisfaction to an amount not exceeding five million dollars for such claims as at the date of the treaty, were unliquidated, and statements of which had been presented to the department of the state, or to the minister of the United States. A did not present his claim to the commissioners appointed under this treaty in its unliquidated form but presented it in the shape of the judgment above mentioned, which they rejected. It was held that A had no cause of action against the United States over which the court of claims can exercise jurisdiction, as he could not show a claim founded upon any law of congress or upon any regulation of an executive department nor upon any contract express or implied. *Meade v. United States*, 9 Wall. 691, 19 L. Ed. 687.

**78. Connection between treaty and claim.**—United States *v.* Weld, 127 U. S. 51, 57, 32 L. Ed. 62.

"This ruling is analogous to that of the ancient and universal rule relating to damages in common-law actions; namely, that a wrongdoer shall be held responsible only for the proximate, and not for the remote, consequences of his action." *United States v. Weld*, 127 U. S. 51, 57, 32 L. Ed. 62.

A case arising from or growing out of a treaty is one involving rights given or protected by a treaty and does not include a claim which can only be asserted by disregarding the treaty or holding it inoperative. *United States v. Old Settlers*, 148 U. S. 427, 469, 37 L. Ed. 509, citing *Owings v. Norwood*, 5 Cranch 344 3 L. Ed. 120.

**79. Right must originate in treaty.**—United States *v.* Weld, 127 U. S. 51, 57, 32 L. Ed. 62.

**80. Claim for part of money awarded by treaty.**—*Great Western Ins. Co. v. United States*, 112 U. S. 193, 201, 28 L. Ed. 687; *Alling v. United States*, 114 U. S. 562, 29 L. Ed. 272.

A claim against the United States for a part of the money paid to it by the British government under the negotiations, treaty and award known as the Alabama claims treaty and Geneva award is one growing out of and depending upon a treaty stipulation with a foreign nation and is not within the jurisdiction of the court of claims. *Great Western Ins. Co. v. United States*, 112 U. S. 193, 201, 28 L. Ed. 687.

A claim against the United States for a part of the money awarded to it by the commission organized under the treaty of July 4, 1868, with Mexico, for the adjust-

distributing a fund secured to the United States by treaty is not one growing out of or in any way dependent on the treaty.<sup>81</sup>

(f) *Claims for Property Taken for Public Use*.—aa. *Property to Which Government Asserts No Title*.—When the United States takes for public use land to which it asserts no claim of title, but admits the ownership to be private or individual, there arises an implied obligation to pay the owner its just value, of which the court of claims has jurisdiction,<sup>82</sup> even though no formal proceedings for the condemnation are resorted to by the government.<sup>83</sup>

bb. *Property to Which Government Asserts Title*.—But an implied contract to pay does not arise where the officer of the government, asserting its ownership, commits a tort by taking forcible possession of the lands of an individual for public use.<sup>84</sup>

ment of the claims of the citizens of the respective countries against the government of the other for injuries to persons or property is a claim growing out of a treaty with a foreign nation and is not within the jurisdiction of the court of claims. *Alling v. United States*, 114 U. S. 562, 29 L. Ed. 272.

**81. Claim for money awarded, and distributed by act of congress.**—A claim under an act of congress distributing the unappropriated moneys of the Geneva award is not one arising under the treaty where the claimant does not seek to recover upon any supposed obligation created by the treaty of Washington but upon the subsequent appropriation made by an act of congress. *United States v. Weld*, 127 U. S. 51, 57, 32 L. Ed. 62.

**82. Property taken for public use.**—*Langford v. United States*, 101 U. S. 341, 343, 25 L. Ed. 1010; *United States v. Great Falls Mfg. Co.*, 112 U. S. 645, 658, 28 L. Ed. 846; *United States v. Lynah*, 188 U. S. 445, 47 L. Ed. 539. See, also, *Dooley v. United States*, 182 U. S. 222, 229, 45 L. Ed. 1074; *Hollister v. Benedict, etc., Mfg. Co.*, 113 U. S. 59, 67, 28 L. Ed. 901; *Schulinger v. United States*, 155 U. S. 163, 171, 39 L. Ed. 108. See, generally, the title EMINENT DOMAIN.

Where the United States erects dams and other obstructions in a navigable river and so hinders the flow of its water as to overflow the lands of riparian owners and injure them, the latter may maintain a suit for compensation for the taking of the land in the court of claims or in the circuit court sitting as a court of claims. *United States v. Lynah*, 188 U. S. 445, 47 L. Ed. 539.

Under the act of congress of July 15, 1882, a landowner had a right to proceed in the court of claims for damages for lands taken by the United States for the purposes of the Washington Aqueduct, where he was not satisfied with the amount awarded them by appraisers, provided suit was filed within one year. *Great Falls Mfg. Co. v. The Attorney General*, 124 U. S. 581, 31 L. Ed. 527.

**Property injured, but not taken.**—The plain meaning and intent of the legislature in the act of congress of July 15, 1882, was to provide for the case of those whose

lands or property rights were directly injured by the construction of the work proposed to be done, in building the Washington Aqueduct, as well as for the case of those injured by the taking of their lands. *United States v. Alexander*, 148 U. S. 186, 191, 37 L. Ed. 415; *Great Falls Mfg. Co. v. The Attorney General*, 124 U. S. 581, 31 L. Ed. 527.

Where a well about 500 feet distant from the line of the aqueduct went dry owing to excavations, it was held that the owner might recover damages in the court of claims. *United States v. Alexander*, 148 U. S. 186, 37 L. Ed. 415. See, generally, the title EMINENT DOMAIN.

**83. Effect of failure to institute formal condemnation proceedings.**—*United States v. Great Falls Mfg. Co.*, 112 U. S. 645, 658, 28 L. Ed. 846.

If the claimant makes no objection to the particular mode in which the property has been taken, but substantially waives it, by asserting that the government took the property for the public uses designated, the court is under no duty to make the objection in order to relieve the United States from the obligation to make just compensation. *United States v. Great Falls Mfg. Co.*, 112 U. S. 645, 658, 28 L. Ed. 846.

In such a case, it is difficult to perceive why the legal obligation of the United States to pay for what was thus taken pursuant to an act of congress, is not quite as strong as it would have been had formal proceedings for condemnation been resorted to for that purpose. *United States v. Great Falls Mfg. Co.*, 112 U. S. 645, 658, 28 L. Ed. 846.

**84. Where government asserts ownership to property.**—*Langford v. United States*, 101 U. S. 341, 25 L. Ed. 1010; *Hill v. United States*, 149 U. S. 593, 598, 37 L. Ed. 862; *United States v. Lynah*, 188 U. S. 445, 47 L. Ed. 539.

If, under claim that they belong to the government, an officer seizes for the use of an Indian agency buildings owned by a private citizen, no implied obligation of the United States to pay for the use and occupation of them is thereby raised. *Langford v. United States*, 101 U. S. 341, 25 L. Ed. 1010.

In *Hill v. United States*, 149 U. S. 593,



(g) *Claims for Salary and Fees.*—Claims by officers of the United States for fees or salary are properly brought in the court of claims.<sup>85</sup> Thus a claim of a commissioner of the United States circuit court for services rendered is within the jurisdiction of the court of claims.<sup>86</sup>

(h) *Claims for Salvage.*—A libel in personam for the salvage of property upon which duties had been paid to the United States, and which duties the United States might have been required to refund, may be maintained in the court of claims or under the act of March 3, 1887, in the United States district court sitting as a court of claims.<sup>87</sup>

(i) *Claims for Use of Patent by United States.*—The court of claims has no jurisdiction of an action against the United States by an inventor for an infringement of his patent,<sup>88</sup> or where there is no contract either expressed or implied for its use,<sup>89</sup> or where the inventor is an employee of the government, and the

37 L. Ed. 862, the plaintiff sued to recover from the United States for the use and occupation of land for a lighthouse. The land upon which the lighthouse was built was submerged land in Chesapeake Bay. The government pleaded that it had a paramount right to the use of the land, and that plea was demurred to. It was held that the circuit court had no jurisdiction. *United States v. Lynah*, 188 U. S. 445, 458, 47 L. Ed. 539.

**85. Claims for fees or salary.**—*United States v. Harmon*, 147 U. S. 268, 276, 37 L. Ed. 164; *United States v. Mitchell*, 109 U. S. 146, 27 L. Ed. 887; *Stewart v. United States*, 206 U. S. 185, 51 L. Ed. 1017; *United States v. Langston*, 118 U. S. 389, 30 L. Ed. 164; *United States v. Mosby*, 133 U. S. 273, 33 L. Ed. 625 (the last two cases were claims by minister and consul respectively, for salary and fee, and jurisdiction was taken without any discussion of the matter).

The claim of a naval officer for compensation expenses rests on acts of congress. *United States v. McDonald*, 128 U. S. 471, 473, 32 L. Ed. 506.

Where persons are appointed as special district attorneys, without compensation to prosecute suits to vacate a patent, they cannot maintain a suit in the court of claims against the United States for compensation, where they did not expect that the government would compensate them, and they looked to their clients for compensation, and the use of the name of the United States in the litigation was consented to with the express understanding that the United States should not be liable for compensation. *Coleman v. United States*, 152 U. S. 96, 99, 38 L. Ed. 368.

**86. Claims of United States commissioner.**—*United States v. Knox*, 128 U. S. 230, 32 L. Ed. 465.

A claim by a United States commissioner for an allowance for services in keeping a docket and making entries therein in regard to parties brought before him charged with violation of the laws of the United States is within the jurisdiction of the court of claims, where the commissioner has delivered his books to the district attorney, who returned them to him and informed him that the district

judge would not act upon the account. *United States v. Knox*, 128 U. S. 230, 32 L. Ed. 465.

**87. Claims for salvage.**—*United States v. Cornell Steamboat Co.*, 202 U. S. 184, 50 L. Ed. 987. See, generally, the title SALVAGE.

The suit is not one arising under the revenue laws merely because the statute requiring the refund of the duties was incidentally involved. *United States v. Cornell Steamboat Co.*, 202 U. S. 184, 50 L. Ed. 987.

**88. Infringement.**—*Russell v. United States*, 182 U. S. 516, 45 L. Ed. 1210; *Belknap v. Schild*, 161 U. S. 10, 17, 40 L. Ed. 599; *Schillinger v. United States*, 155 U. S. 163, 39 L. Ed. 108; *United States v. Berdan Fire-Arms Mfg. Co.*, 156 U. S. 552, 39 L. Ed. 530. See, generally, the title PATENTS.

The claimant claimed that a feature of his patent for fire arms was infringed by a rifle adopted by the government and purchased by them from a foreign company. It was held that, no contract being proved, he could not sue the United States in the court of claims for the infringement. *Russell v. United States*, 182 U. S. 516, 45 L. Ed. 1210.

In *Schillinger v. United States*, 155 U. S. 163, 39 L. Ed. 108, it was held that the court of claims had no jurisdiction of an action upon a claim against the government for the wrongful appropriation of a patent by the United States, against the protest of the patentee. It was said to be an action for damages sounding in tort, and therefore not maintainable. "Not only does the petition count upon a tort, but also the findings show a tort. That is the essential fact underlying the transaction and upon which rests every pretense of a right to recover. There was no suggestion of a waiver of the tort or a pretense of any implied contract until after the decision of the court of claims that it had no jurisdiction over an action to recover for the tort."

**89. Where there is no contract for use of patent.**—*Russell v. United States*, 182 U. S. 516, 45 L. Ed. 1210; *Harley v. United States*, 198 U. S. 229, 49 L. Ed. 1029; *Gill*

invention is perfected by using property or labor of the government, and the use of the invention by the government is assented to.<sup>90</sup> But where the government uses a patent with the consent of the owner and with the expectation on his part of receiving a reasonable compensation for the license, an implied contract for compensation arises, which is within the jurisdiction of the court of claims.<sup>91</sup>

(j) *Recovery Back of Payments*—aa. *Voluntary Payments*.—Congress has not intended to acknowledge the liability of the government to every individual who has paid to any one of its officers a sum in excess of the legal charge for property or services and given to that court the power to render judgment against it for such excess.<sup>92</sup>

bb. *Recovery Back of Taxes or Revenue Paid*.—The court of claims has jurisdiction of suits to recover back taxes,<sup>93</sup> or revenues,<sup>94</sup> improperly collected by

*v. United States*, 160 U. S. 426, 40 L. Ed. 480.

An employee of the government invented a machine which he submitted to his chief and which was adopted by the latter for use in the department with the approval of the secretary of the treasury. The employee objected to the use of the machine upon the ground that it had not been patented, and his chief promised to see that he was protected, and did in fact secure for him an attorney, who advised the inventor that the use of the machines by the department would not interfere with his procuring a patent, and after this no objection was made to their use. No agreement was made for compensation, though it was expected to be paid by the inventor, and it was understood by the department that no compensation would be paid because the inventor was an employee of the department. It was held that the court of claims had no jurisdiction of an action by the inventor against the government. *Harley v. United States*, 198 U. S. 229, 49 L. Ed. 1029.

90. *Invention by employee perfected by using property or labor of government*.—

An employee of the United States paid by salary or wages, who devises an improved method of doing his work, using the property or labor of the government to put his invention in practical form, and assenting to the use of such improvement, cannot, by taking out a patent on such invention, recover a royalty or other compensation for such use, and in such case the court of claims has no jurisdiction of an action by him against the government. *Gill v. United States*, 160 U. S. 426, 40 L. Ed. 480.

91. *Consent to use, with expectation of payment*.—*United States v. Palmer*, 128 U. S. 262, 32 L. Ed. 442; *United States v. Berdan Fire-Arms Mfg. Co.*, 156 U. S. 552, 39 L. Ed. 530; *Hollister v. Benedict, etc., Mfg. Co.*, 113 U. S. 59, 28 L. Ed. 901; *Belknap v. Schild*, 161 U. S. 10, 17, 40 L. Ed. 599; *Schillinger v. United States*, 155 U. S. 163, 39 L. Ed. 108; *United States v. Lynah*, 188 U. S. 445, 459, 47 L. Ed. 539; *Hill v. United States*, 149 U. S. 593, 599, 37 L. Ed. 862; *Dooley v. United States*,

182 U. S. 222, 229, 45 L. Ed. 1074. See, also, *Hubbell v. United States*, 179 U. S. 77, 45 L. Ed. 95.

The United States may be sued by a patentee for their use of his invention under a contract made with him by the United States or by their authorized officers. *Belknap v. Schild*, 161 U. S. 10, 17, 40 L. Ed. 599; *United States v. Burns*, 12 Wall. 246, 20 L. Ed. 388; *United States v. Palmer*, 128 U. S. 262, 32 L. Ed. 442; *United States v. Berdan Fire-Arms Mfg. Co.*, 156 U. S. 552, 39 L. Ed. 530.

92. *Recovery back of voluntary payments*.—*United States v. Edmondston*, 181 U. S. 500, 503, 45 L. Ed. 971; *United States v. Wilson*, 168 U. S. 273, 42 L. Ed. 464; *United States v. Mosby*, 133 U. S. 273, 33 L. Ed. 625.

*Voluntary overpayments for public lands*.—Hence one who under mistake voluntarily pays more for public land than the law requires cannot recover in the court of claims. *United States v. Edmondston*, 181 U. S. 500, 503, 45 L. Ed. 971.

*Voluntary payments by consul not recoverable*.—*United States v. Wilson*, 168 U. S. 273, 42 L. Ed. 464. See the title *AMBASSADORS AND CONSULS*, vol. 1, p. 283.

93. *Suits for recovery of taxes*.—*McKee v. United States*, 164 U. S. 287, 41 L. Ed. 437; *United States v. Savings Bank*, 104 U. S. 728, 26 L. Ed. 908. See, generally, the title *TAXATION*.

An action may be brought in the court of claims under the act of March 2, 1891, to create and pay to the several states moneys collected under the direct taxes levied by the act of congress of August 5, 1861. *McKee v. United States*, 164 U. S. 287, 41 L. Ed. 437.

In *United States v. Savings Bank*, 104 U. S. 728, 26 L. Ed. 908, the court of claims was held to have jurisdiction of a suit to recover back certain taxes and penalties assessed upon a savings bank.

94. *Suits for recovery of revenues*.—*United States v. Kaufman*, 96 U. S. 567, 568, 24 L. Ed. 792; *Dooley v. United States*, 182 U. S. 222, 45 L. Ed. 1074. See, also,

the United States, where the claimant has taken the steps required by statute to collect without suit,<sup>95</sup> especially where the claim has been presented and allowed by the proper authorities.<sup>96</sup> But where the statute providing for recovery back of revenue expressly provides specific remedies for that purpose, the special remedies are exclusive.<sup>97</sup>

*Swift Co. v. United States*, 111 U. S. 22, 28 L. Ed. 341. See, generally, the title REVENUE LAWS.

A brewer paid to the collector of internal revenue \$100 for special tax on his business from May 1, 1873, to April 30, 1874, for which a special tax stamp was given him. At the close of the year, it was found that he had manufactured less than five hundred barrels, and the commissioner of internal revenue allowed his claim for the excess paid by him. Upon proper application to the treasury, payment of the amount so allowed was refused. Held, that the allowance made by the commissioner, unless it be impeached in some appropriate form by the United States, is conclusive. That the court of claims has jurisdiction of a suit by the brewer against the United States to recover the amount, and that he is entitled to judgment therefor. *United States v. Kaufman*, 96 U. S. 567, 24 L. Ed. 792.

"In *United States v. American Tobacco Co.*, 166 U. S. 468, 41 L. Ed. 1081, the statute permitted the holder of stamps which he had paid for and not used, and which were spoiled or destroyed, etc., to apply to the commissioner of internal revenue to redeem or make allowance for such stamps. Application was so made, but the commissioner refused to redeem or make the allowance because of other facts stated in the case. The applicant filed his petition in the court of claims, and that court gave him judgment which was here affirmed." *Medbury v. United States*, 173 U. S. 492, 498, 43 L. Ed. 779.

The circuit court, as a court of claims, has cognizance of actions for the recovery of duties illegally exacted. *Dooley v. United States*, 182 U. S. 222, 223, 43 L. Ed. 1674.

**95. Necessity for claimant to take steps to collect without suit.**—*United States v. Savings Bank*, 104 U. S. 728, 26 L. Ed. 908.

Until an appeal is taken to the commissioner no suit whatever can be maintained to recover back taxes illegally assessed or erroneously paid. *United States v. Savings Bank*, 104 U. S. 728, 734, 26 L. Ed. 908.

If on appeal the claim is rejected, an action lies against the collector (Rev. Stat., § 3226), and through him, on establishing the error or illegality, a recovery can be had. If the claim is allowed, and payment for any cause refused, suit may be brought directly against the government in the court of claims. *United States v. Savings Bank*, 104 U. S. 728, 734, 26 L. Ed. 908.

The lodging of the appeal made out in

due form with the proper collector of internal revenue for the purpose of transmission to the commissioner in the usual course of business, under the requirements of the regulations of the secretary, was in legal effect a presentation of the appeal to the commissioner. The effect of the regulation was to designate the office of the collector of internal revenue as a proper place for the presentation of the appeal. *United States v. Savings Bank*, 104 U. S. 728, 734, 26 L. Ed. 908.

**96. Where claim has been presented and allowed.**—*United States v. Savings Bank*, 104 U. S. 728, 26 L. Ed. 908.

An allowance by the commissioner in this class of cases is not the simple passing of an ordinary claim by an ordinary accounting officer, but a statement of accounts by one having authority for that purpose under an act of Congress. *United States v. Savings Bank*, 104 U. S. 728, 734, 26 L. Ed. 908.

If payment is not made by reason of the refusal of any of the officers of the department to pass or pay the claim after it has once been allowed by the commissioner of internal revenue, the allowance may be used as the basis of an action against the United States in the court of claims, where it will be prima facie evidence of the amount that is due, and put on the government the burden of showing fraud or mistake. This burden is not overcome by proving that some other officer in the subsequent progress of the claim through the department declined to do what the law or treasury regulations required of him before payment could be obtained. The fact of fraud or mistake must be established by competent evidence, the same as any other fact in issue. *United States v. Savings Bank*, 104 U. S. 728, 733, 26 L. Ed. 908.

**97. Where specific remedy provided.**—*The Collector v. Hubbard*, 12 Wall. 1, 14, 20 L. Ed. 272; *Nichols v. United States*, 7 Wall. 122, 130, 19 L. Ed. 125. See the title ACTIONS, vol. 1, p. 108. And see, generally, the title REVENUE LAWS.

The mischiefs that would result, if the aggrieved party could disregard the provisions in the system designed expressly for his security and benefit, and sue at any time in the court of claims, forbid the idea that congress intended to allow any other modes to redress a supposed wrong in the operation of the revenue laws, than such as are particularly given by those laws. *Nichols v. United States*, 7 Wall. 122, 131, 19 L. Ed. 125.

Suits for such causes of action are absolutely prohibited until the taxpayer shall



cc. *Recovery Back of Penalties Imposed*.—The power of the secretary of the treasury to remit penalties, is one for the exercise of his discretion in a matter intrusted to him alone, and admits of no appeal to the court of claims or to any other court.<sup>98</sup>

(k) *Equitable Jurisdiction*—aa. *In General*.—As a general rule, the court of claims is without power to adjudicate upon merely equitable rights.<sup>99</sup> Thus suits for specific performance and to compel the issue and delivery of a patent for land,<sup>1</sup> or suits by the holder of a military bounty land warrant against the United States, for compensation on the allegation that the government has wrongfully appropriated to other uses the lands ceded for his benefit,<sup>2</sup> are not within its jurisdiction.

bb. *Reformation of Contracts*.—The court of claims has been held to possess power to reform a contract under its general jurisdiction in a suit for money due on a contract.<sup>3</sup>

(l) *Claims for Property Impressed into Service of United States*.—As a general rule, where property has been actually impressed into the service of the United States the court of claims has no jurisdiction of a claim for compensation for its use.<sup>4</sup>

appeal to the commissioners of internal revenue, and until the appeal has been decided, unless the decision is postponed longer than six months, in which case he is at liberty to sue within one year from the time when his appeal was taken. The *Collector v. Hubbard*, 12 Wall. 1, 14, 20 L. Ed. 272; *Nichols v. United States*, 7 Wall. 122, 130, 19 L. Ed. 125.

98. *Suits for recovery of penalties imposed*.—*Dorsheimer v. United States*, 7 Wall. 166, 19 L. Ed. 187 (construing acts of March 3, 1797 and June 3, 1864, as amended by § 179 of the act of March 3, 1865).

99. *No power to adjudicate equitable rights*.—*In general*.—*United States v. Gillis*, 95 U. S. 407, 24 L. Ed. 503; *Dooley v. United States*, 182 U. S. 222, 227, 45 L. Ed. 1074; *Bonner v. United States*, 9 Wall. 156, 19 L. Ed. 666; *United States v. Jones*, 131 U. S. 1, 14, 33 L. Ed. 90; *United States v. Drew*, 131 U. S. 21, 33 L. Ed. 93. See, generally, the title EQUITY.

1. *Suits for specific performance and to compel issuance of patent*.—*United States v. Jones*, 131 U. S. 1, 14, 33 L. Ed. 90; *United States v. Drew*, 131 U. S. 21, 33 L. Ed. 93; *United States v. Alire*, 6 Wall. 573, 18 L. Ed. 947; *District of Columbia v. Barnes*, 197 U. S. 146, 152, 49 L. Ed. 699. See, generally, the title SPECIFIC PERFORMANCE.

2. *Suits by holder of military land warrant*.—*Bonner v. United States*, 9 Wall. 156, 19 L. Ed. 666. See, generally, the title PUBLIC LANDS.

3. *Reformation under general jurisdiction*.—*United States v. Milliken Imprinting Co.*, 202 U. S. 168, 169, 50 L. Ed. 980. See, generally, the title RESCISSION, CANCELLATION AND REFORMATION.

The plaintiff, who was engaged in printing revenue stamps for the government, received from the government a circular asking for an application to continue printing stamps, and in which it was said no application would be received from

any one not then engaged in printing stamps. The plaintiff submitted his application and subsequently a formal contract was entered into between him and the government, which omitted the clause embodied in the circular as to giving contracts to persons not already having one. The government subsequently gave a contract to one with whom it had no contract at the time it sent out the circular. In an action by the plaintiff in the court of claims to reform the contract upon the ground that the omission of this clause was by mutual mistake, and for damages for profits which the plaintiff would have made had he not lost the customers due to the government having improperly entered into the other contract, it was held that the court had jurisdiction, but that the evidence did not warrant a reformation. *United States v. Milliken Imprinting Co.*, 202 U. S. 168, 50 L. Ed. 980.

4. *Claim for property impressed*.—*Morgan v. United States*, 14 Wall. 531, 20 L. Ed. 738; *Reybold v. United States*, 15 Wall. 202, 21 L. Ed. 57; *Hijo v. United States*, 194 U. S. 315, 48 L. Ed. 994; *United States v. Kimbal*, 13 Wall. 636, 20 L. Ed. 503.

An action to recover the value of the use of a vessel belonging to Spanish subjects and taken by the army and navy of the United States during the war with Spain, and used by the army, is not one within the jurisdiction of the court of claims, even though the vessel is retained and used pending negotiations for a treaty of peace, especially as the treaty, when finally concluded, barred such claim. *Hijo v. United States*, 194 U. S. 315, 48 L. Ed. 994.

The United States contracted with the master of a vessel to take a cargo of coal from Philadelphia to Port Royal, South Carolina. Upon the arrival at the latter port the authorities ordered the master to proceed to Key West, which he refused to do, and especially protested against

(m) *Actions for Drawbacks.*—One entitled to a drawback under the act of Aug. 5, 1861, where he exports a manufactured article made up of imported articles upon which duty has been paid, may sue in the court of claims to recover a drawback, which the customs officers refuse to allow.<sup>5</sup>

(n) *Claims for Nominal Damages.*—The court of claims has no jurisdiction of claims for mere nominal damages.<sup>6</sup>

(o) *Claims of State for Share in Proceeds of Sale of Public Lands.*—An action by the state for the recovery of the proceeds of swamp and overflowed lands sold by the United States,<sup>7</sup> or for the recovery of a certain per cent. of the amount of the proceeds of sales of public lands within a state, which is given to the state for public purposes,<sup>8</sup> may be maintained in the court of claims.

(p) *Enforcement of Judgment Recovered against Revenue Collector.*—One who recovers a judgment against a collector of internal revenue for wrongful seizure, which claim has been allowed and certified to be paid by the commissioner of internal revenue, with the approval of the secretary of the treasury, may sue the United States thereon in the court of claims; it is not necessary for the collector to pay the amount and then sue for reimbursement.<sup>9</sup>

(q) *Rejected Claims.*—The court of claims has no jurisdiction over claims which have been rejected, or reported on adversely, by any court, department or commissioner authorized to hear and determine the same.<sup>10</sup> It has been held that a disallowance of the claim by the first comptroller of the treasury, does not defeat the jurisdiction of the court of claims.<sup>11</sup>

(r) *Recovery of Excess Paid for Public Lands.*—Where a double price is paid for alternate sections of land within a railroad land grant and the railroad subsequently forfeits its right to the grant by failing to complete the road within the stipulated time, the patentee may maintain a suit in the court of claims to recover the excess paid for the land because of its being situated within the place limits of the railroad grant.<sup>12</sup>

(s) *Suit to Determine Whether Prior Judgment Properly Executed.*—Unquestionably, the court of claims has jurisdiction to entertain a suit brought for the purpose of determining whether or not a judgment previously rendered by it has been properly executed.<sup>13</sup>

sailing immediately, because of the condition of the tide. The vessel was taken in tow by a government tug, and in going out of the port struck a bar and was seriously injured. It was held that the conduct of the government was an impressment of the vessel and that the court of claims had no jurisdiction of a suit by the owner for compensation for the injury. *United States v. Kimbal*, 13 Wall. 636, 20 L. Ed. 503.

5. *Action for drawbacks.*—*Campbell v. United States*, 107 U. S. 407, 27 L. Ed. 592. See, also, generally, the title **REVENUE LAWS**.

6. *Claims for nominal damages.*—*Grant v. United States*, 7 Wall. 331, 19 L. Ed. 194. See, generally, the title **DAMAGES**.

7. *Action for proceeds of swamp lands.*—*United States v. Louisiana*, 123 U. S. 32, 31 L. Ed. 69; *United States v. Alabama*, 123 U. S. 39, 31 L. Ed. 73; *United States v. Mississippi*, 123 U. S. 39, 31 L. Ed. 73. See, generally, the title **PUBLIC LANDS**.

8. *Action for per cent. of proceeds of public land given to state.*—*United States v. Louisiana*, 123 U. S. 32, 31 L. Ed. 69.

9. *Enforcement of judgment recovered against collector of revenue.*—*United*

*States v. Frerichs*, 124 U. S. 315, 31 L. Ed. 471. See, generally, the title **REVENUE LAWS**.

10. *Rejected claims.*—Act of March 3, 1887, § 2; *United States v. Harmon*, 147 U. S. 268, 272, 37 L. Ed. 164.

11. *Disallowance of claim by comptroller of treasury.*—*United States v. Harmon*, 147 U. S. 268, 37 L. Ed. 164 (where the claim disallowed was one by a marshal to recover fees and disbursements).

12. *Recovery of excess paid for public lands.*—*Medbury v. United States*, 173 U. S. 492, 43 L. Ed. 779. See, generally, the title **PUBLIC LANDS**.

13. *Suit to determine whether prior judgment properly executed.*—*Pam-to-Pee v. United States*, 187 U. S. 371, 382, 47 L. Ed. 221.

By the act of March 19, 1890, congress gave the court of claims jurisdiction to determine the sum due the Pottawatomie Indians. The court ascertained that a certain sum was due them, but, being unable to identify the particular persons entitled to share in the judgment, rendered a judgment for the amount due, leaving it to the other departments of the government to ascertain the beneficiaries under the judgment. It was held that the court

(t) *Set-Off, Counterclaim, etc.*—The court of claims has jurisdiction to hear and determine all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or any other demand on the part of the United States against any claimant.<sup>14</sup> The government may set off a claim for conversion by the claimant of its property,<sup>15</sup> a liability on the part of the claimant as surety on a bond given to the United States,<sup>16</sup> and, in an action by an officer of the army or navy, overpayments made to the officer may be set off against his claim for expenses.<sup>17</sup>

(2) *Under Special Statutes*—(a) *In General*.—The court of claims has, by the general jurisdictional statute, jurisdiction over all claims founded on any law

of claims had jurisdiction of a suit brought to determine whether the prior judgment had been properly enforced by distributing the proceeds among those entitled; but that as it appeared that the government had been properly enforced by distributing the proceeds among those entitled; the court could not decree in favor of others, although it appeared that, in fact, they should have been given a portion of the judgment. *Pam-to-Pee v. United States*, 187 U. S. 371, 382, 47 L. Ed. 221.

**14. Set-offs, counterclaim, etc.**—Act of March 3, 1887, ch. 359, 24 Stat. 503; *McElrath v. United States*, 102 U. S. 426, 26 L. Ed. 189. See, generally, the title SET-OFF, RECOUPMENT AND COUNTERCLAIM.

The act permitting trial of claims and set-off without jury is not a violation of the seventh amendment. *McElrath v. United States*, 102 U. S. 426, 26 L. Ed. 189. See ante, "Power to Establish," VII, F, 1, a.

**Set-off in actions by United States.**—See the title UNITED STATES.

**15. Claim for conversion.**—A demand by the United States for the proceeds of Indian trust bonds, unlawfully converted to their own use by persons who had illegally procured and sold them, and had afterwards become wholly insolvent, is a demand arising upon an implied contract, or one which may be so treated by a waiver of the alleged fraud in the conversion of the bonds. It is, therefore, the proper subject of set-off by the United States to a demand made by the general assignees in insolvency of the parties who had thus converted the bonds to their own use, for the price of certain property formerly belonging to the insolvents, and by their said general assignees sold to the United States. *Allen v. United States*, 17 Wall. 207, 21 L. Ed. 553.

And even if, prior to the passage of the act of March 3d, 1863, amending the act establishing the court of claims, objection to the set-off existed in the fact that the demand of the United States was unliquidated (assuming that to have been fact), none could exist subsequent to it; the fifth section of that act covering this class of demands. *Allen v. United States*, 17 Wall. 207, 21 L. Ed. 553.

The amount of the proceeds of the bonds, though not determined by judicial proceedings, was sufficiently liquidated to be the subject of set-off, since it could be stated with certainty and interest be computed and added. *Allen v. United States*, 17 Wall. 207, 21 L. Ed. 553.

**16. Liability of claimant as surety on bond given to United States.**—A., in whose favor the allowance was made, being then indebted as surety on an official bond given to the United States, the amount of such indebtedness was properly retained by the treasury department as a set-off to await the final adjustment and settlement of the accounts of his principal. Held, that the court of claims was bound to adjudge accordingly. *McKnight v. United States*, 98 U. S. 179, 180, 25 L. Ed. 115.

The United States, by paying a part of the claim to the assignees, did not waive its right to withhold from them the residue. *McKnight v. United States*, 98 U. S. 179, 25 L. Ed. 115.

Where a claim against the United States was allowed by the proper officers of the treasury, and a part thereof paid to the assignees of the claimant, upon his receipt for the whole sum, the United States, when sued by them for the balance, cannot, on the ground that the assignment was not executed in the manner prescribed by law, set up as a counterclaim the amount so paid. *McKnight v. United States*, 98 U. S. 179, 25 L. Ed. 115.

**17. Overpayments to officers of army or navy.**—*United States v. Burchard*, 125 U. S. 176, 31 L. Ed. 662; *United States v. Stahl*, 151 U. S. 366, 38 L. Ed. 194; *McElrath v. United States*, 102 U. S. 426, 26 L. Ed. 189.

Where at the time of the settlement of the accounts of an officer in the army, he protested that the payment was insufficient and declared that he would not be bound by it, but accepted it under protest and would sue in the court of claims for the residue, it was held, that even if the United States would have been concluded had the officer made no protest, the fact that he accepted the amount under protest, reserving the right to sue, operated to defeat the estoppel which might otherwise have existed as to the government. *McElrath v. United States*, 102 U. S. 426, 26 L. Ed. 189.



of congress, and congress may, if it pleases, refer to it for decision any claim against the United States.<sup>18</sup>

(b) *Effect of Submission of Claims*.—An act of congress providing for the presentation of a claim to the court of claims and for a decision on the merits, does not imply an admission that there is anything due, where it does not assume to say that the claimant has any claim of a meritorious nature.<sup>19</sup> So the allowance by congress of particular claims, or the submission of them to the court of claims for determination, is not a recognition by the government of its liability upon every demand of like character in the hands of claimants so as to give the court jurisdiction as to the latter.<sup>20</sup>

(c) *Suits under Abandoned and Captured Property Act*.—See the title ABANDONED AND CAPTURED PROPERTY, vol. 1, p. 1.

(d) *Claims for Indian Depredations*—aa. *In General*.—The act of March 3, 1891, conferred jurisdiction on the court of claims over all claims for property of citizens of the United States taken or destroyed by Indians belonging to any tribe in amity with the United States, and also over cases which had been examined and allowed by the interior department, or authorized to be examined under acts of congress theretofore passed making an appropriation for the current and contingent expenses of the Indian department.<sup>21</sup>

bb. *Necessity for Tribe to Be in Amity with United States*.—In order for the court of claims to have jurisdiction of a claim for property taken or destroyed

**18. Jurisdiction under special statutes.**—*Dooley v. United States*, 182 U. S. 222, 224, 45 L. Ed. 1074.

**19. Effect of act submitting claim as admission of claim.**—*Stewart v. United States*, 206 U. S. 185, 51 L. Ed. 1017; *Leighton v. United States*, 161 U. S. 291, 40 L. Ed. 703; *Ford v. United States*, 116 U. S. 213, 218, 29 L. Ed. 608; *United States v. Cumming*, 130 U. S. 452, 32 L. Ed. 1029; *Oakes v. United States*, 174 U. S. 778, 43 L. Ed. 1169; *Kinkead v. United States*, 150 U. S. 483, 37 L. Ed. 1152.

Where a claim for rent of property by the United States is referred to the court of claims, the court is not estopped to pass upon the claimants title to the property, and, if they have none, may refuse to allow them anything. *Kinkead v. United States*, 150 U. S. 483, 37 L. Ed. 1152.

**20. Submission of one claim does not give jurisdiction of other similar claims.**—*United States v. McDougall*, 121 U. S. 89, 98; 30 L. Ed. 861.

The discretion which congress has in such matters would be very seriously trammelled, if the doctrine should be established, that it cannot appropriate money to pay particular claims, except at the risk of thereby recognizing the legal liability of the United States for the amount of other claims of the same general class. *United States v. McDougall*, 121 U. S. 89, 98, 30 L. Ed. 861.

That congress, by special acts, made provision for the payment of particular claims of the same class furnishes no ground whatever for the assumption that the government recognized its legal liability for the amount of such claims, much less for the amount of all other claims of like character. *United States v. McDougall*, 121 U. S. 89, 98, 30 L. Ed. 861.

**21. Claims for Indian depredations.**—*Johnson v. United States*, 160 U. S. 546, 40 L. Ed. 529; *Yerke v. United States*, 173 U. S. 439, 43 L. Ed. 760; *Contzen v. United States*, 179 U. S. 191, 45 L. Ed. 148; *United States v. Gorham*, 165 U. S. 316, 42 L. Ed. 779; *Corralitos Co. v. United States*, 178 U. S. 280, 44 L. Ed. 1069; *United States v. Martinez*, 195 U. S. 469, 49 L. Ed. 282.

A claim which had not been examined and allowed by the interior department, or which on March 3d, 1885, had not been filed, and was not pending in said department for examination, does not come within the second jurisdictional clause of the act of 1891. *Marks v. United States*, 161 U. S. 297, 305, 40 L. Ed. 706; *Johnson v. United States*, 160 U. S. 546, 40 L. Ed. 529.

A claim filed with the commissioner of Indian affairs, is not one which has been examined and allowed by the department of interior, within the meaning of § 2 of the act of March 3, 1891. *Yerke v. United States*, 173 U. S. 439, 43 L. Ed. 760.

**"Claims pending, but not yet examined,"** referred to in the act of March 3, 1885, means such claims as have been already presented and are before the department for consideration. *Johnson v. United States*, 160 U. S. 546, 552, 40 L. Ed. 529.

It was the manifest purpose of congress to empower the court of claims to receive and consider any document on file in the departments of the government or in the courts, having a bearing upon any material question arising in the consideration of any particular claim for compensation for Indian depredation, the court to allow the documents such weight as they were entitled to have. *Collier v. United States*, 173 U. S. 79, 83, 43 L. Ed. 621.

by Indians, the Indians must have belonged to a tribe in amity with the United States.<sup>22</sup> The word "amity" as used in the act means actual peace, and the fact that the tribe is under treaty with the government, is not sufficient alone to give the court of claims jurisdiction.<sup>23</sup> Hostilities carried on by a tribe for the special purpose of resisting the opening of a military road are sufficient to defeat the jurisdiction of a claim by a citizen for depredations by a member of the tribe.<sup>24</sup>

cc. *Citizenship of Claimant*.—The court of claims has no jurisdiction to adjudicate upon a claim under the Indian depredation act unless the claimant was a citizen of the United States at the time of the depredation.<sup>25</sup>

dd. *Depredation Must Have Been Committed within United States*.—In order for the court of claims to have jurisdiction, the depredations must have been committed within the territory of the United States.<sup>26</sup>

**22. Necessity for tribe to be in amity with United States.**—*Leighton v. United States*, 161 U. S. 291, 40 L. Ed. 703; *Marks v. United States*, 161 U. S. 297, 40 L. Ed. 706, reaffirmed in *Valk v. United States*, 168 U. S. 703, 42 L. Ed. 1211; *Collier v. United States*, 173 U. S. 79, 43 L. Ed. 621; *Johnson v. United States*, 160 U. S. 546, 40 L. Ed. 529; *United States v. Gorham*, 165 U. S. 316, 42 L. Ed. 779; *United States v. Martinez*, 195 U. S. 469, 49 L. Ed. 282.

The act of June 30, 1834, contained the same limitation as the act of 1891 with respect to the amity of the tribe to which the Indians belonged. *Leighton v. United States*, 161 U. S. 291, 40 L. Ed. 703.

**23. Meaning of "in amity with United States."**—*Marks v. United States*, 161 U. S. 297, 40 L. Ed. 706. See AMITY, vol. 1, p. 312.

When the petition filed in the court of claims alleges that a depredation was committed by an Indian or Indians belonging to a tribe in amity with the United States, it becomes the duty of that court to inquire as to the truth of that allegation, and its truth is not determined by the mere existence of a treaty between the United States and the tribe, or the fact that such treaty has never been formally abrogated by a declaration of war on the part of either, but that the inquiry is, whether as a matter of fact, the tribe was at the time, as a tribe, in a state of actual peace with the United States. If so, and the depredation was committed by a single individual, or a few individuals without the consent and against the knowledge of the tribe, the court may proceed to investigate the amount of the loss, and render judgment therefor. If, on the other hand, the tribe, as a tribe, was engaged in actual hostilities with the United States, the judgment of the court of claims must be that the allegation of the petition is not sustained, and that the claim is not one within its province to adjudicate. *Marks v. United States*, 161 U. S. 297, 304, 40 L. Ed. 706; *Collier v. United States*, 173 U. S. 79, 43 L. Ed. 621.

Under the Indian depredation act of March 3, 1891, granting to the court of claims jurisdiction over claims for property "destroyed by Indians belonging to any band, tribe or nation in amity with

the United States," all that congress intended was that when, as a matter of fact, a tribe was in the relation of actual peace with the United States, and by some individual, or individuals, without the consent or approval of the tribe, a depredation was committed upon the property of citizens of the United States, such depredation might be investigated, and the amount of the loss determined, and adjudicated by the court of claims. The jurisdiction is not dependent on the nonexistence of a treaty with the tribe to which the Indian belongs, but depends on whether, as a matter of fact, the tribe was at the time, as a tribe, in a state of actual peace with the United States, or whether, on the other hand, it was engaged in actual hostilities with the United States. *Marks v. United States*, 161 U. S. 297, 40 L. Ed. 706.

**24. Nature and character of hostilities.**—*Leighton v. United States*, 161 U. S. 291, 40 L. Ed. 703.

**25. Claims by aliens.**—*Contzen v. United States*, 179 U. S. 191, 192, 45 L. Ed. 148; *Johnson v. United States*, 160 U. S. 546, 40 L. Ed. 529; *Yerke v. United States*, 173 U. S. 439, 43 L. Ed. 760.

It is not sufficient that he becomes a citizen after the filing of the petition. *Contzen v. United States*, 179 U. S. 191, 45 L. Ed. 148.

The claimant, an alien at the time the depredation was committed, claimed under the second clause of the act of 1891, as one whose claim was pending before the department, but not yet examined, as provided in the act of March 3, 1885. This act provided for the investigation of such claims when made by citizens of the United States. It was held that the court had no jurisdiction of the plaintiff's claim. *Yerke v. United States*, 173 U. S. 439, 440, 40 L. Ed. 760, to the same effect, *Johnson v. United States*, 160 U. S. 546, 552, 40 L. Ed. 529.

**A corporation chartered either by the United States or a state is a citizen of the United States within the meaning of the act conferring jurisdiction on the court of claims over claims by citizens of the United States for depredations by Indians.** *United States v. Northwestern, etc., Co.*, 164 U. S. 686, 690, 41 L. Ed. 599.

**26. Depredations outside of United States.**—*Corralitos Co. v. United States*,



ee. *Depredations on Property within Reservation*.—The court of claims has jurisdiction of a claim by a citizen of the United States for injury or loss of property due to Indian depredations while being taken or carried through an Indian reservation, over a trail lawfully established.<sup>27</sup>

ff. *Depredation Must Not Have Been by Tribe or Band*.—The act causing the injury must not have been committed by a tribe or band, but by individual members thereof.<sup>28</sup>

gg. *Consequential Damages to Property Not Taken or Destroyed*.—The fact that the value of other property not taken or destroyed is under the conditions surrounding the claimant and his property diminished, does not give the court of claims jurisdiction to award damages for the diminution in value.<sup>29</sup>

hh. *Claims Accruing Prior to July 1, 1865*.—The act of March 3, 1891, provided that no claim accruing prior to July 1, 1865, should be considered by the court unless it had been allowed or was pending prior to the passage of that act, before the secretary of the interior or congress, or before any superintendent, agent or subagent authorized to inquire into such claims.<sup>30</sup> It was also provided that no case should be considered pending unless evidence had been presented therein.<sup>31</sup> The word "evidence" as used in the act of 1891 must be considered as referring to the requirements of the act of 1872, and a case is not to be deemed pending merely because it was accompanied by the depositions of one of the plaintiffs; it must have been accompanied by the depositions of two or more persons having a personal cognizance of the facts as embraced in the declaration.<sup>32</sup>

(e) *Claims by Indians for Depredations against Them*.—Congress may con-

178 U. S. 280, 44 L. Ed. 1069 (where the depredations were committed in Mexico against a New York corporation by the Apache Indians).

**27. Depredations on property en route through Indian reservation**.—United States *v.* Andrews, 179 U. S. 96, 45 L. Ed. 105.

By the treaty of August, 1868, with the Kiowa and Comanche Indians, the Indians agreed that they would not attack any person at home or traveling. The United States agreed that no person except authorized officers or agents of the government should enter upon the Indian reservation. But by another clause the Indians agreed not to attack persons or cattle and not to oppose the construction of roads or other works of utility or necessity permitted by law. Section 17 of the act of 1834 provided that the liability of the government for property taken by Indians should arise only when the owner of the property taken was lawfully within the territory. The claimant's property was taken by the Indians while he was traveling in the Indian reservation over an established trail. It was held that the claimant was lawfully within the territory; was not a trespasser at the time his property was taken; that the finding of the court of claims that he was traveling over an established trail must be taken as a fact that he was traveling over a legally established trail; and that the court of claims had jurisdiction. United States *v.* Andrews, 179 U. S. 96, 45 L. Ed. 105.

**28. Depredations must not be by tribe or band**.—Montoya *v.* United States, 180 U. S. 261, 45 L. Ed. 521; Conners *v.* United States, 180 U. S. 271, 45 L. Ed. 525.

A claim for depredations committed by an independent band of Indians engaged in actual hostilities against the United States is not within the jurisdiction of the court of claims. Conners *v.* United States, 180 U. S. 271, 45 L. Ed. 525.

Where a band of about two hundred Indians belonging to several tribes committed hostilities and depredations upon citizens of the United States without the consent of the tribes to which they belonged, it was held that the court of claims had no jurisdiction of a claim for such damages. Montoya *v.* United States, 180 U. S. 261, 45 L. Ed. 521.

To constitute a "band" it is not necessary that the Indians composing it be a separate political entity, recognized as such, inhabiting a particular territory, and with whom treaties had been or might be made. These peculiarities would rather give them the character of tribes. The word "band" implies an inferior and less permanent organization, though it must be of sufficient strength of initiating hostile proceedings. Conners *v.* United States, 180 U. S. 271, 275, 45 L. Ed. 525.

**29. Consequential damages**.—Price *v.* United States, 174 U. S. 373, 43 L. Ed. 1011.

**30. Claims accruing prior to July 1, 1865**.—Nesbitt *v.* United States, 186 U. S. 153, 154, 46 L. Ed. 1100.

**31. Necessity for evidence to be presented prior to 1891**.—Nesbitt *v.* United States, 186 U. S. 153, 154, 46 L. Ed. 1100.

**32. Sufficiency of evidence**.—Nesbitt *v.* United States, 186 U. S. 153, 154, 46 L. Ed. 1100.



fer jurisdiction upon the court of claims to decide upon the amount to be allowed Indians for depredations committed against them.<sup>33</sup> Where a statute provides for liability of the United States for depredations against Indians, the court of claims may entertain jurisdiction of claims for depredations by other Indians as well as for depredations by white men.<sup>34</sup> Where it is provided by statute that the United States shall pay for depredations committed by white persons against Indians, the court of claims may entertain jurisdiction of such a claim,<sup>35</sup> but not where the depredation is committed by a negro.<sup>36</sup>

(f) *Claims by Indian Tribes.*—Jurisdiction may be conferred on the court of claims by congress to determine the rights of a tribe of Indians, under treaties previously made with them.<sup>37</sup> The court can only exercise such jurisdiction as is conferred upon it, and cannot be guided in its decision by the moral obligations of the government towards the Indians,<sup>38</sup> nor, as a general rule, go behind treaties previously made with them,<sup>39</sup> nor inquire into the political affairs

**33. Claims for depredations against Indians.**—United States *v. Navarre*, 173 U. S. 77, 43 L. Ed. 620; United States *v. Perryman*, 100 U. S. 235, 20 L. Ed. 645. See, generally, the title INDIANS.

**34. Depredation by other Indians.**—By the act of March 3, 1891, the claim of certain individual members of the Pottawatomie Indians for depredations committed against them were referred to the court of claims. It appeared that the depredations were committed in part by white men and in part by Indians, and both the act and the treaty, in pursuance of which the act was passed, were silent as to what depredations were to be paid for by the United States. It was held that the court of claims had jurisdiction to award damages for depredations by Indians as well as by white men. United States *v. Navarre*, 173 U. S. 77, 43 L. Ed. 620.

**35. Claims for depredations by white persons.**—Rev. Stat., §§ 2154, 2155; United States *v. Perryman*, 100 U. S. 235, 25 L. Ed. 645.

**36. Depredation by negro.**—United States *v. Perryman*, 100 U. S. 235, 25 L. Ed. 645.

**37. Claims by Indian tribes.**—United States *v. Blackfeather*, 155 U. S. 180, 39 L. Ed. 114; Blackfeather *v. United States*, 190 U. S. 368, 47 L. Ed. 1099; Pam-to-Pee *v. United States*, 187 U. S. 371, 382, 47 L. Ed. 221; United States *v. Old Settlers*, 148 U. S. 427, 464, 37 L. Ed. 509; United States *v. Choctaw, etc., Nations*, 179 U. S. 494, 45 L. Ed. 291; United States *v. Cherokee Nation*, 202 U. S. 101, 103, 121, 50 L. Ed. 949. See, generally, the title INDIANS.

The act of March 19, 1890, entitled "An act to ascertain the amount due the Pottawatomie Indians of Michigan and Indiana," conferred jurisdiction upon the court of claims to "try all questions of difference arising out of treaty stipulations with the said Pottawatomie Indians of Michigan and Indiana, and to render judgment thereon." The act granted power to said court to "review the entire question of difference de novo," and provided for an appeal to the supreme court by either party. Pam-to-Pee *v. United States*, 187 U. S. 371, 47 L. Ed. 221.

**38. Moral obligations of government not to be considered.**—Blackfeather *v. United States*, 190 U. S. 368, 47 L. Ed. 1099; United States *v. Blackfeather*, 155 U. S. 180, 190, 39 L. Ed. 114.

**39. Jurisdiction to go behind treaties.**—United States *v. Old Settlers*, 148 U. S. 427, 464, 37 L. Ed. 509; United States *v. Choctaw, etc., Nations*, 179 U. S. 494, 45 L. Ed. 291.

Jurisdiction was conferred on the court of claims to determine the amount, if any justly due from the United States to the Western Cherokees, in a manner involving the statement of an account for the investigation of controverted items and complicated and involved facts, and it was declared that it was "the intention of this act to allow the said court of claims unrestricted latitude in adjusting and determining the said claims, so that the rights, legal and equitable, both of the United States and of the said Indians, may be fully considered and determined." It was held that the latitude thus conferred must be deemed the unrestricted latitude of the court of equity in stating an account distributing a fund, and framing a decree so comprehensive and flexible as to secure to each suitor his joint or individual rights; but that the court of claims had no jurisdiction to go beyond a treaty with the Indians or to determine that it had been procured by duress or fraud, and declare it inoperative for that reason. United States *v. Old Settlers*, 148 U. S. 427, 464, 37 L. Ed. 509.

By the act of March 2, 1895, congress authorized suit to be brought in the court of claims, so that the rights, legal and equitable, of the United States and of the Choctaw and Chickasaw Nations, and the Wichita and Affiliated Bands of Indians in certain lands, which had been ceded to the United States, by treaty, "shall be fully considered and determined, and to try and determine all questions that may arise on behalf of either party"—provided that nothing in the act "shall be accepted or construed as a confession that the United States admit that the Choctaw and Chickasaw Nations have any claim to or inter-

of the tribes.<sup>40</sup> Where jurisdiction is given of a claim by a tribe merely, the claim of individual Indians cannot be considered.<sup>41</sup>

(g) *French Spoliation Claims*.—Jurisdiction of claims for damage done by French cruisers prior to 1800, generally known as spoliation claims, was specially conferred on the court of claims by acts of congress passed for that purpose.<sup>42</sup>

(h) *Claims for Property Impressed by Army*.—Congress may, if it sees fit to do so, give the court of claims jurisdiction to decide on the rights of a person to compensation for property impressed into the service of the United States by the army.<sup>43</sup>

(i) *Equitable Jurisdiction*—aa. *In General*.—Although as a general rule the court of claims is without power to adjudicate upon merely equitable rights, it may be given equitable jurisdiction by special act of congress.<sup>44</sup>

est in said lands or any part thereof." It was held that the court of claims was without authority to determine the rights of the parties upon the ground of mere justice or fairness, much less, under the guise of interpretation, to depart from the plain import of the words of the treaty; that its duty was to ascertain the intent of the parties according to the established rules for the interpretation of treaties; and that to hold otherwise would be to recognize an authority in the courts not only to reform or correct treaties, but to determine questions of mere policy in the treatment of the Indians which was the function alone of congress. *United States v. Choctaw, etc., Nations*, 179 U. S. 494, 45 L. Ed. 291.

The right to go behind treaties, statutory bars, and receipts in full may, however, be conferred on the court of claims by language appropriate for that purpose, and the act of July 1, 1902 with respect to the claims of the Cherokee tribes had this effect. *United States v. Cherokee Nation*, 202 U. S. 101, 103, 50 L. Ed. 949.

**40. Inquiry into political affairs of tribes.**—The act of June 28, 1898, authorizing a suit for the determination of the rights and interests of the Delaware Indians residing in the Cherokee Nation in the lands and funds of the Cherokee Nation under the compact of April, 1867, did not authorize an inquiry into the administration of the political affairs of the Cherokee Nation with a view to setting aside the adoption of constitutional amendments and the revision of political action in admitting persons to citizenship in the nation under authority of its constitution. *Delaware Indians v. Cherokee Nation*, 193 U. S. 127, 48 L. Ed. 646.

**41. Claim of individuals not determinable, where jurisdiction is given over tribal claim.**—*Blackfeather v. United States*, 190 U. S. 368, 47 L. Ed. 1099.

**42. French spoliation claims.**—*United States v. Gilliat*, 164 U. S. 42, 41 L. Ed. 344; *Buchanan v. Patterson*, 190 U. S. 353, 47 L. Ed. 1093. See, generally, CLAIMS, vol. 3, p. 847.

The action of the court was by the terms of the act made advisory only. Congress specifically withheld from the court any

right to render a judgment which would in any manner conclude the United States or commit it to the payment of any claims determined by the court under the third section of the act. All that congress did was to give jurisdiction to the court of claims to inquire into the matter of each claim which might be presented to it and to report to congress its opinion of the validity and the amount of the claim with a statement as to its ownership. The whole subject thereafter remained with congress subject to its future action. *Buchanan v. Patterson*, 190 U. S. 353, 361, 47 L. Ed. 1093.

Congress, by the act of Aug. 23, 1894, conferred on the court of claims jurisdiction to ascertain the proper person to be paid the sum which it had already acknowledged to be due the representatives of the original sufferers from the French spoliations. *United States v. Gilliat*, 164 U. S. 42, 41 L. Ed. 344.

In *United States v. Gilliat*, 164 U. S. 42, 41 L. Ed. 344, it was held that under the special statute therein referred to the certificate made by the court of claims and sent to the secretary of the treasury was conclusive, and the United States had no right of appeal from the conclusion stated in the certificate. *Buchanan v. Patterson*, 190 U. S. 353, 365, 47 L. Ed. 1093.

**43. Power of congress to give court jurisdiction of claims for property impressed.**—*United States v. Irwin*, 127 U. S. 125, 32 L. Ed. 99.

The act of congress referring to the court of claims for property claimed to have been taken and impressed into the service of the United States in the year of 1857 by orders of General Albert Sydney Johnson in the command of the Utah expedition, as well as for property alleged to have been sold to the government, did not give the court of claims jurisdiction to make an allowance for losses consequent upon the refusal of Colonel Johnson to permit the plaintiff's trains to proceed upon their journey, arising from the mere detention and delay occasioned thereby. *United States v. Irwin*, 127 U. S. 125, 32 L. Ed. 99.

**44. Equity jurisdiction under special act of congress.**—*District of Columbia v.*

bb. *Reformation of Contracts*.—The court of claims may unquestionably exercise jurisdiction to reform a contract under a special act giving it authority for that purpose.<sup>45</sup>

(j) *Action for Recovery of Rents*.—The court of claims may, by special act of congress, be given jurisdiction over a claim for rents, of which it could not otherwise exercise jurisdiction because of the apparent lack of legal title in the claimant.<sup>46</sup>

Barnes, 197 U. S. 146, 152, 49 L. Ed. 699. See, generally, the title EQUITY.

Contractors for the transportation of the mails between New York and New Orleans, touching at Havana, and between Havana and Chagres, having subsequently established a direct line between New York and Chagres, which made the passage between the latter points in a shorter time, by two days, than the mail ships running under the contract by way of Havana, consented to take the Chagres and California mails outward and homeward by the direct steamers, without requiring from the post office department a prior stipulation to pay for the extra service, but without precluding themselves from applying to congress for such compensation as it might deem just and reasonable. To this arrangement the postmaster general assented, with the understanding that his department did not thereby become responsible for any additional expense. Application was made to congress for equitable relief, and an act passed referring the claim to the court of claims, with directions to examine the same, and determine and adjudge what, if any, amount was due for extra service. Held, that the court of claims is authorized to adjudge such an allowance as is required *ex æquo et bono* by all the circumstances of the case. *Roberts v. United States*, 92 U. S. 41, 23 L. Ed. 646.

**Claims against District of Columbia.**—The act of June 16, 1880, as appears by its title, was intended to confer on the court of claims jurisdiction to hear and determine all outstanding claims against the District of Columbia. For that purpose it was recited in the first section of the act that the jurisdiction of the court should extend to and it should have original legal and equitable jurisdiction of claims arising out of the contracts made by the board of public works and extensions made thereof by the commissioners of the District of Columbia, and also of the claims arising out of the contracts made by the commissioners since the act of June 20, 1874, and broadly for all claims for work done by order or direction of the commissioners, and accepted by them for the use, purposes or benefit of the District of Columbia, and prior to the fourteenth day of March, 1876. The language used is of the most comprehensive character, and confers, for the purposes stated, original legal and equitable jurisdiction. *District of Columbia v. Barnes*, 197 U. S. 146, 150, 49 L. Ed. 699.

Under the act of June 16, 1880, conferring on the court of claims original legal and equitable jurisdiction to hear and determine all claims against the District of Columbia, including claims for work done by order or direction of the commissioners, and accepted by them for the district, the court may award compensation for work done under a verbal contract with the commissioners, and accepted by them, although not called for by the original contract. *District of Columbia v. Barnes*, 197 U. S. 146, 152, 49 L. Ed. 699.

**45. Special act giving authority to reform.**—*Harvey v. United States*, 105 U. S. 671, 26 L. Ed. 1206; *District of Columbia v. Barnes*, 197 U. S. 146, 49 L. Ed. 699. See the title RESCISSION, CANCELLATION AND REFORMATION.

Under the act of June 16, 1880, conferring on the court of claims jurisdiction to hear and determine all outstanding claims against the District of Columbia, the court may reform a contract so as to meet the intention of the parties. *District of Columbia v. Barnes*, 197 U. S. 146, 151, 49 L. Ed. 699.

Where a formal contract entered into between the government and the contractor for public improvements fails to embody some of the clauses embodied in the proposal and bid, the court of claims may reform the contract in this respect, where specially authorized to do so by act of congress. *Harvey v. United States*, 105 U. S. 671, 26 L. Ed. 1206.

**46. Action for recovery of rents.**—*Cross v. United States*, 14 Wall. 479, 20 L. Ed. 721.

The government had leased from A a warehouse for ten years, the rent payable by installments. A assigned his lease to B and died. B sued the government in the court of claims for certain installments of the rent which became due after the assignment. The court of claims dismissed the claim solely on the technical ground that the assignment of the lease was not so drawn as to vest B with a legal title to the accruing rents. Congress afterwards passed a joint resolution reciting that B had "heretofore" filed his petition, etc., on account of rents alleged to be "due," and that the court had dismissed the "said" petition on the sole ground of an alleged technical defect, and remanding "the said cause" to the court of claims for a further hearing, upon the testimony already taken "and such further testimony as either party might take," and ordering that if, on such further hearing, it should



(3) *Transmission of Claims by Executive Departments*—(a) *In General*.—Provision is made by several statutes for the transmission of claims by the head of executive departments to the court of claims for reports or adjudication.<sup>47</sup> These statutes, although passed at different times, are all parts of one general system, and the later ones do not repeal those first enacted.<sup>48</sup> The head of an executive department cannot give the court of claims jurisdiction of a claim which would not otherwise be cognizable by it, by transmitting it to the court of claims.<sup>49</sup>

(b) *Under § 1063 of Revised Statutes*.—Under § 1063 of the Revised Statutes any claim made against an executive department, involving disputed facts or controverted questions of law, where the amount in controversy exceeds three thousand dollars, or where the decisions will affect a class of cases, or furnish a precedent for the future action of any executive department in the judgment of a class of cases, without regard to the amount involved in the particular case, or where any authority, right, privilege or exemption is claimed or denied under the constitution of the United States," may be transmitted to the court of claims by the head of such department for final adjudication, provided, it is not barred by limitation, and is one of which, by reason of its subject matter and character, that court could take judicial cognizance at the voluntary suit of the claimant.<sup>50</sup>

(c) *Under Bowman Act*.—Any claim embraced by § 1063 of the Revised Statutes, without regard to its amount, and whether the claimant consents or not, may be transmitted under the Bowman act to the court of claims by the

appear that B was in justice and equity entitled to the rents due on the lease the court should render judgment in his favor: Provided that no money should be paid him from the treasury until after he had given indemnity against any demand which might be set up by the heirs of A (the original lessor) "under or by virtue of the said lease or contract." Held, that B could sue in the court of claims for all the rent that became due under the lease; and that the fact that, after the remand, he had filed his second petition for but the same rents for which he had filed his first, did not so exhaust the power of the court under the joint resolution as that he could not file a third one for additional rents; even though they were rents that were due when he filed his second petition and such as he might have included in a claim in it. *Cross v. United States*, 14 Wall. 479, 20 L. Ed. 721.

47. *Statutes providing for transmission of claims*.—*United States v. New York*, 160 U. S. 598, 615, 40 L. Ed. 551.

48. *Statutes all stand together as one system*.—*United States v. New York*, 160 U. S. 598, 613, 40 L. Ed. 551.

Section 1063 of the Revised Statutes, the second section of the Bowman act, and twelfth section of the Tucker act may be regarded as parts of one general system, covering different states of cases, and standing together without conflict in any essential particular. *United States v. New York*, 160 U. S. 598, 613, 40 L. Ed. 551.

The twelfth section of the Tucker act should be construed as not referring to claims which an executive department, proceeding under § 1063 of the Revised Statutes, seeks to have finally adjudicated by the court of claims, nor to claims de-

scribed in that section in respect of which the department, upon its own motion, and whether the claimant consents or not, desires from that court a report under the Bowman act, of facts and law for its guidance and action. It refers only to claims which the head of an executive department, with the expressed consent of the claimant, may send to the court of claims in order to obtain a report of facts and law which the department may regard as only advisory. It no doubt often happened that the head of a department did not desire action by the court of claims in relation to a particular claim, but, in order to meet the wishes of the claimant, was willing to have a finding by that court which was not followed by a judgment, nor by any report for the guidance and action of the department. *United States v. New York*, 160 U. S. 598, 613, 40 L. Ed. 551.

49. *Submission of claim not properly cognizable*.—*Hart v. United States*, 118 U. S. 62, 30 L. Ed. 96; *United States v. Winchester, etc.*, R. Co., 163 U. S. 244, 41 L. Ed. 145.

Thus a claim of a person whose disloyalty during the war bars his recovery under the act of March 2, 1867, cannot be made cognizable in the court of claims by the transmission of it to that court by the secretary of war for determination. *Hart v. United States*, 118 U. S. 62, 30 L. Ed. 96.

A war claim cannot be made cognizable by the department's act in sending it to court of claims. *United States v. Winchester, etc.*, R. Co., 163 U. S. 244, 41 L. Ed. 145.

50. *Under § 1063 of Revised Statutes*.—*United States v. New York*, 160 U. S. 598, 615, 40 L. Ed. 551.

head of the executive department in which it is pending, for a report to such department of facts and conclusions of law for "its guidance and action."<sup>51</sup>

(d) *Under Tucker Act*.—Any claim embraced by § 1063 of the Revised Statutes may, in the discretion of the executive department in which it is pending, and with the expressed consent of the plaintiff, be transmitted to the court of claims, under the Tucker act, without regard to the amount involved, for a report, merely advisory in its character, of facts or conclusions of law.<sup>52</sup>

(4) *Specific Statutory Remedies as Defeating Jurisdiction*.—An act providing that a claim may be adjusted and determined by the secretary of the interior, does not defeat the jurisdiction of the court of claims of a suit by the claimant to recover the amount of the claim.<sup>53</sup>

(5) *Compromise or Settlement as Defeating Jurisdiction*.—See the title COMPROMISE AND SETTLEMENT, vol. 3, p. 992, et seq.

(6) *Loyalty of Claimant*.—The acts of congress giving the court of claims jurisdiction of claims for property taken or destroyed during the war usually make the loyalty of the claimant a jurisdictional fact,<sup>54</sup> and loyalty is not dispensed with, for the purpose of suing in the court of claims, by a pardon from the president for all offenses committed in the rebellion.<sup>55</sup>

(7) *Repeal of Jurisdictional Statute*.—The effect of the passage of an act repealing a statute giving the court of claims jurisdiction is to take away the jurisdiction of the court to proceed further in those cases which were founded upon the act thus repealed, and it is within the power of congress to pass such

**51. Under Bowman act.**—United States *v.* New York, 160 U. S. 598, 615, 40 L. Ed. 551.

**Right to render final judgment.**—In every case, involving a claim of money, transmitted by the head of an executive department to the court of claims under the Bowman act, a final judgment or decree may be rendered when it appears to the satisfaction of the court, upon the facts established, that the case is one of which the court at the time such claim was filed in the department, could have taken jurisdiction, at the voluntary suit of the claimant, for purposes of final adjudication. United States *v.* New York, 160 U. S. 598, 615, 40 L. Ed. 551.

**52. Under Tucker act.**—United States *v.* New York, 160 U. S. 598, 615, 40 L. Ed. 551.

**Effect of findings under Tucker act.**—See post, "Findings," VII, F, 3, g.

**53. Specific remedies as defeating jurisdiction.**—Smithmeyer *v.* United States, 147 U. S. 342, 37 L. Ed. 196 (act relating to claim of architect of congressional library for the plans). Medbury *v.* United States, 173 U. S. 492, 43 L. Ed. 779.

"The act of October 2, 1888, did not repeal, either expressly or by implication, the general jurisdictional act of the court of claims, to the extent of this case. The purport of the act of 1888 seems to have been to provide a method of adjusting the claim, if the claimants so desired, without a suit. The claimants had a right to the additional method, but they could also waive its benefit. The general jurisdiction of the court of claims and the additional method of adjustment can both of them well stand together." Smithmeyer *v.* United States, 147 U. S. 342, 357, 37 L. Ed. 196.

The fact that in the act of June 6, 1880, providing for the recovery back of the excess price paid for land upon the assumption that it is within the limits of a railroad land grant, where it subsequently turns out not to be so situated, there was provision that the secretary of the interior shall cause such excess to be repaid to the purchaser, did not defeat the jurisdiction of the court of claims of a suit brought by the purchaser for the excess. Medbury *v.* United States, 173 U. S. 492, 43 L. Ed. 779.

**Suits to recover back taxes or revenue paid.**—See ante, "Recovery Back of Taxes or Revenue Paid," VII, F, 2, e, (1), (j), bb.

**54. Necessity for claimant to have been loyal.**—Hart *v.* United States, 118 U. S. 62, 30 L. Ed. 96; Austin *v.* United States, 155 U. S. 417, 39 L. Ed. 206.

Where an act of congress authorizing the court of claims to decide upon the right of a person to compensation for property taken from him during the war, provides that it must appear to the satisfaction of the court that neither the claimant nor his representatives gave any aid or comfort to the rebellion, and that they were loyal to the United States throughout the war, actual loyalty during that time is a jurisdictional fact, since the consent to the prosecution of the suit is given upon the condition that that fact is established. Austin *v.* United States, 155 U. S. 417, 39 L. Ed. 206.

**Claims under abandoned and captured property act.**—See the title ABANDONED AND CAPTURED PROPERTY, vol. 1, p. 1.

**55. Pardon as dispensing with loyalty.**—Hart *v.* United States, 118 U. S. 62, 30 L. Ed. 96.

a repealing act, as it has authority to restrict the jurisdiction of the court of claims at will.<sup>56</sup>

(8) *Concurrent Jurisdiction of District and Circuit Courts.*—Prior to the act of March 3, 1887, the United States could not be sued except in the court of claims.<sup>57</sup> By that act district courts are given concurrent jurisdiction with the court of claims where the amount of the claim does not exceed one thousand dollars, and the circuit courts are given concurrent jurisdiction where the amount of the claim exceeds one thousand dollars and does not exceed ten thousand dollars.<sup>58</sup> It is well settled that this provision does not confer upon the circuit and district courts any broader jurisdiction as to subject matter than that which is given to the court of claims.<sup>59</sup>

**56. Repeal of jurisdictional statute.**—In *re Hall*, 167 U. S. 38, 42 L. Ed. 69; *Chorpenning v. United States*, 94 U. S. 397, 24 L. Ed. 126. See, generally, the title *STATUTES*.

In *re Hall*, 167 U. S. 38, 42 L. Ed. 69, it was said: "In this case, however, the record originally before us showed that the petitioner had at one time obtained a judgment for over a thousand dollars against the District of Columbia upon a cause of action not founded upon the act of congress just repealed. This judgment had been vacated. We do not intimate by this decision that the court of claims would not have jurisdiction to entertain and grant a motion on the part of petitioner, if he should be so advised, to reinstate that original judgment. That question is not before us, and we allude to it simply for the purpose of stating that our decision herein should not be taken as an expression of opinion adverse to the granting of a motion such as is above mentioned."

**57. Jurisdiction of court of claims originally exclusive.**—*Railway Co. v. United States*, 101 U. S. 639, 641, 25 L. Ed. 1074; *Case v. Terrell*, 11 Wall. 199, 201, 20 L. Ed. 134; *De Groot v. United States*, 5 Wall. 419, 18 L. Ed. 700; *United States v. Eckford*, 6 Wall. 484, 18 L. Ed. 920; *The Siren*, 7 Wall. 152, 19 L. Ed. 129; *The Davis*, 10 Wall. 15, 19 L. Ed. 875.

**58. Concurrent jurisdiction of district and circuit courts.**—*United States v. Jones*, 131 U. S. 1, 16, 33 L. Ed. 90; *United States v. Drew*, 131 U. S. 21, 33 L. Ed. 93; *United States v. Cornell Steamboat Co.*, 202 U. S. 184, 50 L. Ed. 987; *Dooley v. United States*, 182 U. S. 222, 45 L. Ed. 1074; *Hill v. United States*, 149 U. S. 593, 37 L. Ed. 862; *Belknap v. Schild*, 161 U. S. 10, 17, 40 L. Ed. 599; *Bigby v. United States*, 188 U. S. 400, 47 L. Ed. 519; *Hijo v. United States*, 194 U. S. 315, 48 L. Ed. 994; *Chase v. United States*, 155 U. S. 489, 498, 39 L. Ed. 234.

**Action for taking private property.**—An action against the United States for compensation for taking the property of an individual for public purposes may be maintained in the circuit court as a court of claims. *United States v. Lynah*, 188 U. S. 445, 47 L. Ed. 539. See ante, "Claims for Property Taken for Public Use," VII, F, 2, e, (1), (f).

**Action for recovery back of duties.**—The circuit court, as a court of claims, has cognizance of actions for the recovery back of duties illegally assessed upon goods imported from Porto Rico. *Dooley v. United States*, 182 U. S. 222, 223, 45 L. Ed. 1074.

**Claims for salvage of government property.**—See ante, "Claims for Salvage," VII, F, 2, e, (1), (h).

**The United States district court for Porto Rico** has jurisdiction under the act of March 3, 1887, of all claims against the United States which could have been maintained in any district or circuit courts of the United States; that is, it has concurrent jurisdiction with the court of claims in all cases where any circuit or district court of the United States would have concurrent jurisdiction with the court of claims. *Hijo v. United States*, 194 U. S. 315, 48 L. Ed. 994.

**59. Jurisdiction of subject matter same as court of claims.**—*United States v. Jones*, 131 U. S. 1, 16, 33 L. Ed. 90; *United States v. Drew*, 131 U. S. 21, 33 L. Ed. 93; *Hill v. United States*, 149 U. S. 593, 37 L. Ed. 862; *Bigby v. United States*, 188 U. S. 400, 47 L. Ed. 519.

"The whole effect of the act of March 3, 1887, c. 359, under which this suit was brought, was to give the circuit and district courts of the United States jurisdiction, concurrently with the court of claims, of suits to recover damages against the United States, in cases not sounding in tort. *United States v. Jones*, 131 U. S. 1, 16, 18, 33 L. Ed. 90." *Hill v. United States*, 149 U. S. 593, 598, 37 L. Ed. 862.

**Suit to compel issuance of patent for land.**—Neither the circuit court nor the district court can entertain jurisdiction of a suit to compel the issuance of a patent for public lands, as the subject matter of such a suit would not be cognizable in the court of claims. *United States v. Jones*, 131 U. S. 1, 16, 33 L. Ed. 90; *United States v. Drew*, 131 U. S. 21, 33 L. Ed. 93.

**Suit for personal injuries.**—The United States cannot be sued in the circuit court under the act of March 3, 1887, for an injury to the plaintiff's person due to the fall of an elevator in one of its public buildings. *Bigby v. United States*, 188 U. S. 400, 47 L. Ed. 519.



3. **PROCEDURE**—a. *Parties*—(1) *In General*.—A suit in the court of claims must be brought by one who has a real interest in the subject matter, and a party who has no such interest cannot invoke its jurisdiction.<sup>60</sup>

(2) *Actions for Indian Depredations*.—In an action for depredations by individual members of tribes or bands of Indians in amity with the United States, the tribe or band of which the individuals committing the depredation are members should, if known, be made defendants; but if they are not known the United States may be proceeded against alone.<sup>61</sup>

b. *Pleadings*—(1) *In General*.—The court of claims is not bound by special rules of pleading. The main purpose is to arrive at and adjudicate the justice of alleged claims against the United States.<sup>62</sup> The forms of pleading are not of so strict a character as to require immaterial omissions to be held fatal to the rendition of such judgment as the facts demand.<sup>63</sup>

**60. Parties.**—*Kellogg v. United States*, 7 Wall. 361, 19 L. Ed. 81. See, generally, the title **PARTIES**.

An officer of the United States, under authority of congress, made a contract with D. and S., by which they agreed to furnish bricks to the government. The contract contained a clause that D. and S. should not sublet or assign it. D. and S. having abandoned the contract, it was taken up, with the consent of the officer representing the government, by M. and A., the sureties of D. and S. to the government for its performance. M. and A. then entered into a contract with K., by which he undertook to perform the contract and to receive payment therefor from the United States at the contract price, and to pay over to M. and A. a certain percentage of the amount received, M. and A. constituting him, at the same time, their attorney to furnish the bricks and to receive payment. The government, desiring to abandon their enterprise, proposed to all parties respectively interested on account of their contract, etc., that if they would cancel it, the United States would settle with them "on the principles of justice and equity" all damages, etc., incurred by them. Held, that K. was not a party to, nor interested in the contract. *Kellogg v. United States*, 7 Wall. 361, 19 L. Ed. 81.

**Suits by assignees of claim.**—See the title **UNITED STATES**.

**61. In suits for Indian depredations.**—*United States v. Martinez*, 195 U. S. 469, 49 L. Ed. 282; *United States v. Gorham*, 165 U. S. 316, 42 L. Ed. 779.

"In our view, the act provides for a recovery of depredation claims in two classes of cases: The one where the persons, classes of persons, tribe or tribes or band of Indians cannot be identified, in which event the United States may be held liable upon proof complying with other terms of the act, though failing to identify the particular depredators; the other, where the persons or tribe described in the act can be identified, in which event they must be named in the petition, and the judgment will go against the United States and the tribe committing the wrong, to be satisfied primarily out of the funds

of the Indians." *United States v. Martinez*, 195 U. S. 469, 474, 49 L. Ed. 282.

**Amendment adding tribe as defendant.**—A tribe cannot be added as defendants by an amendment offered when it would be too late to file an original petition. *United States v. Martinez*, 195 U. S. 469, 49 L. Ed. 282.

**62. No special form of pleading.**—*District of Columbia v. Barnes*, 197 U. S. 146, 154, 49 L. Ed. 699; *United States v. Burns*, 12 Wall. 246, 20 L. Ed. 388; *United States v. Behan*, 110 U. S. 338, 28 L. Ed. 168; *District of Columbia v. Talty*, 182 U. S. 510, 513, 45 L. Ed. 1207; *Baird v. United States*, 131 U. S. appx. cvi, 21 L. Ed. 519. See, generally, the title **PLEADING**.

**Necessity of pleading statute of limitations.**—See the title **LIMITATION OF ACTIONS AND ADVERSE POSSESSION**.

**63. Immaterial omissions.**—*Wisconsin Cent. R. Co. v. United States*, 164 U. S. 190, 212, 41 L. Ed. 399; *United States v. Burns*, 12 Wall. 246, 20 L. Ed. 388; *Clark v. United States*, 95 U. S. 539, 24 L. Ed. 518; *United States v. Behan*, 110 U. S. 338, 28 L. Ed. 168; *United States v. Carr*, 132 U. S. 644, 33 L. Ed. 483.

The forms of pleading in the court of claims do not preclude a claimant from recovering what is justly due him upon the facts stated in his petition, although there be no count in the petition as upon an implied contract. *Clark v. United States*, 95 U. S. 539, 24 L. Ed. 518.

Where the claimant sets forth, by way of petition, a plain statement of the facts without technical formality, and prays relief either in a general manner, or in an alternative or cumulative form, the court ought not to hold the claimant to strict technical rules of pleading, but should give to his statement a liberal interpretation, and afford him such relief as he may show himself substantially entitled to if within the fair scope of the claim as exhibited by the facts set forth in the petition. *United States v. Behan*, 110 U. S. 338, 347, 28 L. Ed. 168.

Where the claimant prays judgment for damages arising from loss of profits, and also prays judgment for the amount of his

(2) *Actions for Indian Depredations*.—In an action for Indian depredations, the petition must describe as near as may be the band or tribe of which the individuals committing the depredation are alleged to be members.<sup>64</sup>

c. *Evidence*.—(1) *Ordinary Rules of Evidence Govern*.—Where congress has not provided, and no special reasons demand, a different rule, the rules of evidence, as found in the common law, ought to govern the action of the court of claims.<sup>65</sup>

(2) *Burden of Proof*.—(a) *In General*.—In the court of claims, as at common law, the burden of proof is ordinarily on the claimant.<sup>66</sup>

(b) *Action under Abandoned and Captured Property Act*.—In a proceeding under the captured or abandoned property act, it is incumbent on the claimant to establish by sufficient proof that the property captured or abandoned came into the hands of a treasury agent; that it was sold; that the proceeds of the sale were paid into the treasury of the United States; and that he was the owner of the property, and entitled to the proceeds thereof.<sup>67</sup>

d. *Limitation of Actions*.—See the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION.

e. *Issues*.—Where a claim is referred to the court of claims with directions to inquire to its merits, the determination of that issue embraces all questions, of law or fact, affecting the merits of the claim.<sup>68</sup>

outlay and expenses less the amount realized from the sale of materials on hand, the claim for profits, if not sustained by proof, ought not to preclude a recovery of the claim for losses sustained by outlay and expenses. *United States v. Behan*, 110 U. S. 338, 347, 28 L. Ed. 168.

**64. Pleading in suits for Indian depredations.**—*United States v. Martinez*, 195 U. S. 469, 49 L. Ed. 282.

It is the purpose of the act to require the tribe primarily liable for the injury to be brought before the court, when they can be identified for the purpose of judgment. *United States v. Martinez*, 195 U. S. 469, 49 L. Ed. 282.

**65. Evidence.**—*Moore v. United States*, 91 U. S. 270, 23 L. Ed. 346. See, also, *United States v. Clark*, 96 U. S. 37, 24 L. Ed. 696. See, generally, the title EVIDENCE.

The claimants cannot be deprived of reasonable compensation for work because they produce only expert evidence as to the proper amount of such compensation. If they produce the best evidence which is accessible to them, and it enables the court to arrive at a proper conclusion, that is sufficient. *Harvey v. United States*, 113 U. S. 243, 245, 28 L. Ed. 987.

**Competency of interested parties as witnesses.**—See the title WITNESSES.

**66. Burden of proof on claimant.**—*United States v. Ross*, 92 U. S. 281, 23 L. Ed. 707.

**67. Action under abandoned and captured property act.**—*United States v. Ross*, 92 U. S. 281, 23 L. Ed. 707.

Because the claimant's property was captured and sent forward by a military officer and there is an unclaimed fund in the treasury derived from sales of property of the same kind, a court is not authorized to conclude, as matter of law, that the property was delivered by that of-

ficer to a treasury agent, that it was sold by the latter, and that the proceeds were covered into the treasury. *United States v. Ross*, 92 U. S. 281, 23 L. Ed. 707.

The presumption that public officers have done their duty does not supply proof of independent and substantive facts. *United States v. Ross*, 92 U. S. 281, 23 L. Ed. 707.

**68. Issues.**—*Oakes v. United States*, 174 U. S. 778, 786, 43 L. Ed. 1169.

The act of congress of July 28, 1892, c. 313, conferred jurisdiction on the court of claims "to hear and determine what are the just rights in law" of the claimant, as the daughter and heir at law of Hugh Worthington, to compensation for the value of his interest in the steamboat Eastport, alleged to have been taken by the United States in 1862, and converted into a gunboat; and authorized and directed that court, upon her petition, "to inquire into the merits of said claim, and if on a full hearing the court shall find that said claim is just," to render judgment in her favor and against the United States for whatever sum shall be found due. It was held that under this act, the question whether "said claim is just" is the same as the question "what are the just rights in law" of the claimant as Worthington's daughter and heir; and this necessarily depended upon the question what had been his legal right to compensation from the United States for the value of his interest in the vessel; that the act neither recognizes the claim as a valid one, nor undertook to pass upon its validity; but simply empowered the court of claims to hear and determine whether the claim is valid or invalid; and that the determination of that issue embraced not only the questions whether the claimant was the daughter and heir at law of Worthington, whether he was a loyal citizen of the United States, whether he

f. *Variance*.—The allegations and proofs must so far correspond as that the latter shall not wholly depart from the case made in the petition and introduce demands which the government had no notice to meet.<sup>69</sup>

g. *Findings*.—The court of claims may be asked by either party to state whether a particular item of charge or of damage is included in its finding, and, if so, to what amount;<sup>70</sup> but it is not required to set forth the elements of the calculation by which it arrives at its final result.<sup>71</sup> A finding of fact and law made at the request of a head of a department, with the consent of the claimant, and transmitted to such department, is not a judgment, and is not enforceable by any process of execution issuing from the court, nor is it made, by the statute, the final and indisputable basis of action either by the department or by congress.<sup>72</sup>

h. *Reference*.—The court of claims may refer complicated accounts to a commissioner for determination and render judgment on his report.<sup>73</sup>

i. *Rules of Decision*.—In the construction and enforcement of contracts, the court of claims is bound to apply the ordinary principles which govern such contracts between individuals.<sup>74</sup>

j. *Judgment*—(1) *In General*.<sup>75</sup>—An act referring a claim to the court of claims for adjudication according to law, gives power to render a final judgment, which is not subject to revision by congress.<sup>76</sup> In rendering judgment, the

was the owner of three-fifths of the Eastport, and whether the vessel was taken and applied to the use of the United States, but all other questions, of law or of fact, affecting the merits of the claim. *Oakes v. United States*, 174 U. S. 778, 785, 43 L. Ed. 1169.

**Suits by Indian tribes under special act of congress.**—See ante, "Claims by Indian Tribes," VII, F, 2, e, (2), (f).

69. **Variance**.—*Baird v. United States*, 131 U. S. appx. cvi, 21 L. Ed. 519. See, generally, the title **VARIANCE**.

The rule of correspondence to this extent is vital to the substance of the proceedings, and it is necessary to give to the United States the benefit of the principle of res judicata in cases where they ought to have the protection which it affords. *Baird v. United States*, 131 U. S. appx. cvi, 21 L. Ed. 519.

70. **Right of parties to findings**.—*United States v. Smith*, 94 U. S. 214, 24 L. Ed. 115.

71. **Setting forth elements of calculation in suit for damages**.—*United States v. Smith*, 94 U. S. 214, 24 L. Ed. 115.

**Necessity, sufficiency and effect of findings on appeal**.—See the title **APPEAL AND ERROR**, vol. 1, p. 512, et seq.

72. **Effect of finding under Tucker act**.—In re Sanborn, 148 U. S. 222, 226, 37 L. Ed. 429.

73. **Reference**.—*Intermingled Cotton Cases*, 92 U. S. 651, 23 L. Ed. 756. See, generally, the title **REFERENCE**.

While the court of claims cannot delegate its judicial powers, and must itself hear and determine all causes which come before it for adjudication, no reason exists why it may not use such machinery as courts of more general jurisdiction are accustomed to employ under similar circumstances to aid in their investigation. *Intermingled Cotton Cases*, 92 U. S. 651, 23 L. Ed. 756.

Where that court in certain cases before it, in which complicated accounts and facts were to be passed upon, referred them to a special commissioner to state the accounts, marshal the assets, and adjust the losses, "so that equal and exact justice should be done to all;" and upon consideration of his report, and after due deliberation, approved it, held, that the judgments as rendered are the result of the deliberation of the court, and not that of the commissioner alone. *Intermingled Cotton Cases*, 92 U. S. 651, 23 L. Ed. 756.

74. *Smoot's Case*, 15 Wall. 36, 21 L. Ed. 107.

The efforts to construe contracts made with the government by appeals to its power, its magnanimity, and generosity, should be presented to congress alone. The jurisdiction of the court of claims is of contracts express or implied. *Smoot's Case*, 15 Wall. 36, 21 L. Ed. 107; *United States v. Spicer*, 15 Wall. 51, 21 L. Ed. 111.

**Allowance of interest**.—See the title **INTEREST**.

75. **Effect of payment of judgment**.—See the title **JUDGMENTS AND DECREES**.

**Pro forma judgment for purpose of appeal**.—See the title **APPEAL AND ERROR**, vol. 1, p. 927.

76. **Power to render final judgment**.—The act of congress referring to the court of claims, claims for property seized by General Johnson of the Utah Expedition for adjudications according to law, gave to the court of claims jurisdiction to render final judgment which was not subject to revision at the discretion of congress. The force of the phrase "for adjudications according to law" cannot be satisfied by anything less than a formal regulation and final judgment of the judicial tribunal, to which the matter is submitted, acting upon the acknowledged principles of law ap-



court of claims must be guided by the facts as shown by the evidence.<sup>77</sup> The United States cannot deduct a claim owing to them by a judgment creditor from the amount of the judgment recovered by him in the court of claims.<sup>78</sup>

(2) *Actions for Indian Depredations*.—Where it is proved that the claimants' property was destroyed by Indians belonging to a band or tribe in amity with the United States, but the claimant is unable to identify the band or tribe which caused the loss, judgment may be rendered against the United States alone.<sup>79</sup>

k. *New Trials*.—See the title NEW TRIALS.

G. *Court of Private Land Claims*.—See the title PUBLIC LANDS.

H. *Courts Established by Continental Congress*.—Under the Confederation, congress could establish courts of appeals in prize cases, whose decrees were conclusive,<sup>80</sup> and also authorize them to revise and correct the sentences of the state courts of admiralty.<sup>81</sup>

I. *Provisional Courts Established by Military Authorities*.—The president may establish provisional courts in territory occupied by the military forces.<sup>82</sup> And congress may provide for the transfer of causes pending therein,

pliable to the circumstances of the case. *United States v. Irwin*, 127 U. S. 125, 32 L. Ed. 99.

77. *Judgment for claimant of intermingled cotton*.—The court of claims found that cotton in large quantities captured from the respective owners thereof in Mississippi by the military forces of the United States was subsequently intermingled and stored in a common mass, and then sent forward and sold by the treasury agents in the same intermingled condition, and the proceeds thereof paid into the treasury as a common fund; that court further found as a fact that the cotton of each of the claimants in these suits contributed to and formed a part of the mass so intermingled and sold. Having ascertained the amount of that fund remaining in the treasury after deducting payments theretofore made to other claimants, the number of bales sold to create the fund for which payment had not already been made, and the number of bales contributed by each of the plaintiffs to the common mass, the court thereupon gave judgment in favor of the plaintiff in each case for a sum which bore the same proportion to the whole fund still on hand that the number of his bales did to the whole number then represented by the fund. Held, that the judgment was proper. *Intermingled Cotton Cases*, 92 U. S. 651, 23 L. Ed. 756.

78. *Deduction of claim from judgment*.—*United States v. O'Grady*, 22 Wall. 641, 22 L. Ed. 772.

When the government means to set up any counterclaim to the claims of a party suing in the court of claims, as ex. gr., when on a suit under the Captured and Abandoned Property Act, to recover the proceeds of cotton sold under that act, it means to set up a tax, such as what is known as the "cotton tax," it must plead that tax by way of set-off or counterclaim to the suit, as is contemplated by the act of March 3d, 1863; or move for a new trial, under the provisions of the act of June 25th, 1868. It cannot, after judgment

has been given for the amount claimed by the petitioner, irrespective of such counterclaim, and without any motion for a new trial having been made, set up and deduct at the treasury the counterclaim when the amount awarded by the decree of the court is asked for there. *United States v. O'Grady*, 22 Wall. 641, 22 L. Ed. 772.

79. *Judgment under Indian depredation act*.—*United States v. Gorham*, 165 U. S. 316, 322, 42 L. Ed. 779.

80. *Courts established by continental congress*.—*Penhallow v. Doane*, 3 Dall. 54, 1 L. Ed. 507.

81. *United States v. Peters*, 5 Cranch 115, 3 L. Ed. 53; *Penhallow v. Doane*, 3 Dall. 54, 1 L. Ed. 507; *Jennings v. Carson*, 4 Cranch 2, 2 L. Ed. 531.

82. *Power to establish provisional courts*.—*The Grapeshot*, 9 Wall. 129, 19 L. Ed. 651; *Leitensdorfer v. Webb*, 20 How. 176, 15 L. Ed. 891; *Edwards v. Tanneret*, 12 Wall. 446, 20 L. Ed. 415. See, generally, the title MILITARY LAW.

When, during the late civil war, portions of the insurgent territory were occupied by the national forces, it was within the constitutional authority of the president, as commander in chief, to establish therein provisional courts for the hearing and determination of all causes arising under the laws of the state or of the United States, and the provisional court for the state of Louisiana, organized under the proclamation of October 20th, 1862, was, therefore, rightfully authorized to exercise such jurisdiction. *The Grapeshot*, 9 Wall. 129, 19 L. Ed. 651.

When New Mexico was conquered by the United States, the executive authority of the United States properly established a provisional government, which ordained laws and instituted a judicial system; all of which continued in force after the termination of the war, and until modified by the direct legislation of congress, or by the territorial government established by its authority. *Leitensdorfer v. Webb*, 20 How. 176, 15 L. Ed. 891.

upon the dissolution of such court, to the proper federal<sup>82</sup> or territorial court.<sup>84</sup> No case, however, can be transferred to the federal court which could not have been originally brought therein.<sup>85</sup>

**J. State Laws as Rules of Decision in Federal Courts**—1. **STATUTORY PROVISION.**—By § 34 of the judiciary act of September 24, 1789, c. 20 (1 Stat. 92), carried forward into § 721 of the Revised Statutes, it is provided that the laws of the several states except where the constitution, treaties or laws of the United States might otherwise require or provide, should be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.<sup>86</sup>

2. **REASON OF RULE.**—As the law of the respective state courts had been adopted in order to accomplish substantial justice, according to the peculiar and local circumstances of each state, and as the people were content under the operation of those municipal regulations, it was natural to presume, that by

**83. Transfer from provisional to federal courts.**—The *Grapeshot*, 9 Wall. 129, 19 L. Ed. 651; *Edwards v. Tanneret*, 12 Wall. 446, 20 L. Ed. 415; *Burke v. Miltenberger*, 19 Wall. 519, 22 L. Ed. 158.

When, upon the close of the war, and the consequent dissolution of the court thus established, congress, in the exercise of its general authority in relation to the national courts, directed that causes pending in the provisional courts, and judgments, orders, and decrees rendered by it, which, under ordinary circumstances, would have been proper for the jurisdiction of the circuit court of the United States, should be transferred to that court and have effect as if originally brought, or rendered therein, a decree in admiralty rendered in the provisional court, as upon appeal from the district court, became at once, upon transfer, the decree of the circuit court; and an appeal was properly taken from it to this court. *The Grapeshot*, 9 Wall. 129, 19 L. Ed. 651.

The provisional court of Louisiana, established by President Lincoln on October 20, 1862, did not cease to exist until July 28th, 1866, when congress by statute of that day provided for the transfer of cases pending in it, and of its judgments and decrees, to the proper courts of the United States. *Burke v. Miltenberger*, 19 Wall. 519, 22 L. Ed. 158.

**84. Transfer from provisional to territorial courts.**—*Leitensdorfer v. Webb*, 20 How. 176, 15 L. Ed. 891.

A suit brought in a court established by the provisional government was properly transferred to a court created by the act of congress establishing the territory of New Mexico, the jurisdiction of which was fixed by a territorial statute. *Leitensdorfer v. Webb*, 20 How. 176, 15 L. Ed. 891.

**85. Transfer to federal court dependent on whether case a federal one.**—*Edwards v. Tanneret*, 12 Wall. 446, 20 L. Ed. 415.

A dismissal of a case for want of jurisdiction was held to have been rightly made from the circuit court of Louisiana, as being a proceeding which, under the

act of congress of July 28th, 1866, was to remain in the district court of the United States for that district; the case being one that had been begun in the "provisional court of Louisiana," on pleadings which showed that both parties were citizens of the state named. The jurisdiction of the circuit court was held not to have been helped by a suggestion made there on transferring the case, that the defendant was an alien; the fact being denied in the subsequent pleadings, and no proof of it in any way made. *Edwards v. Tanneret*, 12 Wall. 446, 20 L. Ed. 415.

**86. Laws of states rules of decision when applicable.**—*Robinson v. Campbell*, 3 Wheat. 212, 221, 4 L. Ed. 372; *Bucher v. Cheshire R. Co.*, 125 U. S. 555, 582, 31 L. Ed. 795; *Fenn v. Holme*, 21 How. 481, 485, 16 L. Ed. 198; *Campbell v. Haverhill*, 155 U. S. 610, 614, 39 L. Ed. 280; *Metcalf v. Watertown*, 153 U. S. 671, 673, 38 L. Ed. 861; *Balkam v. Woodstock Iron Co.*, 154 U. S. 177, 187, 38 L. Ed. 953; *Bauserman v. Blunt*, 147 U. S. 647, 652, 37 L. Ed. 316; *Logan v. United States*, 144 U. S. 263, 300, 36 L. Ed. 429; *Cooke v. Avery*, 147 U. S. 375, 386, 37 L. Ed. 209; *South Ottawa v. Perkins*, 94 U. S. 260, 267, 24 L. Ed. 154; *Railroad Co. v. National Bank*, 102 U. S. 14, 52, 26 L. Ed. 61; *Ex parte Fisk*, 113 U. S. 713, 719, 28 L. Ed. 1117; *United States v. Thompson*, 98 U. S. 486, 490, 25 L. Ed. 194; *Wayman v. Southard*, 10 Wheat. 1, 22, 6 L. Ed. 253; *Baltimore, etc., R. Co. v. Joy*, 173 U. S. 226, 230, 43 L. Ed. 677.

The relation in which the United States courts stand to the states in which they respectively sit and act is precisely that of their own courts; especially when adjudicating on cases where state lands or state statutes come under adjudication. Where the United States courts find principles distinctly settled by adjudications and known and acted upon as the law of the land, they have no more right to question them, or deviate from them, than could be correctly exercised by their own tribunals. *Livingston v. Moore*, 7 Pet. 469, 541, 8 L. Ed. 751.

adopting the same rule for the federal courts, the same salutary effect would be produced.<sup>87</sup>

3. **RULE NOT DEPENDENT ON STATUTE.**—The laws of the states would be regarded as rules of decision in courts of the United States independent of the 34th section of the judiciary act.<sup>88</sup>

4. **RULE COMPARED WITH RULE OF STARE DECISIS.**—The rule of the 34th section of the judiciary act making the laws of the states rules of decision in trials of common law has grown up and been held with constant reference to the rule of stare decisis, and it is only so far and in such case that this latter rule can operate that the other has any effect.<sup>89</sup>

5. **IN WHAT PROCEEDINGS STATE LAWS APPLY**—a. "*Trials at Common Law*"—(1) *In General.*—The act of congress making the state laws applicable to proceedings in the federal courts provides that they shall be applicable as rules of decision in trials at common law.<sup>90</sup>

(2) *Meaning of Phrase "Trials at Common Law."*—The phrase "trials at common law" presents to the mind the idea of litigation in court and the laws of the state do not apply to proceedings subsequent to the judgment, such as proceedings to enforce the judgment by execution.<sup>91</sup>

b. *Proceedings in Admiralty.*—The act of congress making the state laws rules of decision in the federal courts in trials at common law are not applicable to proceedings in admiralty.<sup>92</sup> Thus a state rule of decision that a mortgage takes precedence of a lien for supplies afterwards furnished to a vessel in her home

**87. Reasons for following state laws.**—*Brown v. Van Braam*, 3 Dall. 344, 350, 1 L. Ed. 629.

The object of the law of congress was to make the rules of decision of the courts of the United States the same with those of the states; taking care to preserve the rights of the United States, by the exceptions contained in the section of the judiciary act; justice to the citizens of the United States required this to be done; and the natural import of the words used in the act of congress, includes the laws in relation to evidence, as well as the laws in relation to property. *McNiel v. Holbrook*, 12 Pet. 84, 9 L. Ed. 1009.

**88. Rule not dependent on statute.**—*Bank v. Dudley*, 2 Pet. 492, 7 L. Ed. 496.

**89. Compared with rule of stare decisis.**—*Carroll v. Carroll*, 16 How. 275, 286, 14 L. Ed. 936. See, generally, the title STARE DECISIS.

**90. Trials at common law.**—Rev. Stat. sec. 721; *Bucher v. Cheshire R. Co.*, 125 U. S. 555, 31 L. Ed. 795; *Wayman v. Southard*, 10 Wheat. 1, 25, 6 L. Ed. 253; *Wright v. Bales*, 2 Black 535, 537, 17 L. Ed. 264.

**91. Meaning of "trials at common law."**—*Wayman v. Southard*, 10 Wheat. 1, 25, 6 L. Ed. 253; *Wright v. Bales*, 2 Black 535, 537, 17 L. Ed. 264.

The word "trials," means matters of controversy, and not executions and the mode of executing them. *Wright v. Bales*, 2 Black 535, 537, 17 L. Ed. 264; *Wayman v. Southard*, 10 Wheat. 1, 6 L. Ed. 253.

"This section has never, so far as is recollected, received a construction in this court; but it has, we believe, been generally considered by gentlemen of the pro-

fession, as furnishing a rule to guide the court in the formation of its judgment; not one for carrying that judgment into execution. It is 'a rule of decision,' and the proceedings after judgment are merely ministerial. It is, too, 'a rule of decision in trials at common law;' a phrase which presents clearly to the mind the idea of litigation in court, and could never occur to a person intending to describe an execution, or proceedings after judgment, or the effect of those proceedings. It is true, that if, after the service of an execution, a question respecting the legality of the proceeding should be brought before the court by a regular suit, there would be a trial at common law; and it may be said, that the case provided for by the section would then occur, and that the law of the state would furnish the rule for its decision." *Wayman v. Southard*, 10 Wheat. 1, 25, 6 L. Ed. 253.

The words "trials at common law" in the later statute "are to receive the construction which had been judicially given to the same words in the earlier statute relating to the same subject. The *Abbotsford*, 98 U. S. 440, 25 L. Ed. 168; *United States v. Mooney*, 116 U. S. 104, 29 L. Ed. 550; *In re Louisville Underwriters*, 134 U. S. 488, 33 L. Ed. 991." *Logan v. United States*, 144 U. S. 263, 301, 36 L. Ed. 429.

**92. Proceedings in admiralty.**—*Bucher v. Cheshire R. Co.*, 125 U. S. 555, 31 L. Ed. 795; *The J. E. Rumbell*, 148 U. S. 1, 17, 37 L. Ed. 345; *Workman v. New York City*, 179 U. S. 552, 557, 45 L. Ed. 314; *Steamboat New York v. Rea*, 18 How. 223, 225, 15 L. Ed. 359; *Liverpool, etc., Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 32 L. Ed. 788; *Andrews v. Hovey*, 124 U. S. 694, 31 L. Ed. 557.



port, under a statute of the state, does not govern the federal courts when exercising the admiralty and maritime jurisdiction.<sup>93</sup>

c. *Proceedings in Equity*.—State laws are not to be applied by the United States courts, when sitting as courts in equity, as rules of decision.<sup>94</sup>

d. *In Criminal Cases*.—The criminal laws of the states are not applicable to criminal prosecutions in the United States courts by the virtue of the act of congress making the state laws rules of decisions in trials at common law in courts of the United States.<sup>95</sup>

6. WHAT ARE "LAWS" OF STATES.—The "laws" of the states which are made rules of decision in the federal courts embrace the rules and enactments promulgated by the legislature, or long established local customs having the force of law.<sup>96</sup> Ordinarily, the decisions of the state courts are not to be regarded as laws of the state within the meaning of the act of congress.<sup>97</sup> But where a

**93. Priority of mortgage over maritime lien.**—The *J. E. Rumbell*, 148 U. S. 1, 17, 37 L. Ed. 345. See, generally, the title MARITIME LIENS.

**94. Proceedings in equity.**—*Bucher v. Cheshire R. Co.*, 125 U. S. 555, 31 L. Ed. 795.

Generally, as to the rule of decisions in federal courts in proceedings in equity, see the title EQUITY.

**95. Criminal cases.**—*United States v. Reid*, 12 How. 361, 13 L. Ed. 1023; *Logan v. United States*, 144 U. S. 263, 301, 36 L. Ed. 429; *United States v. Stafford*, 154 U. S. 590, 21 L. Ed. 117; *Bucher v. Cheshire R. Co.*, 125 U. S. 555, 582, 31 L. Ed. 795; *Tennessee v. Davis*, 100 U. S. 257, 298, 25 L. Ed. 648; *Commonwealth v. Schaffer*, 4 Dall. appx. xxvi, xxxi, 1 L. Ed. 926.

"Although that section stood between two sections clearly applicable to criminal cases, it was adjudged by this court at December term, 1851, upon a certificate of division of opinion in the circuit court, directly presenting the question, that the section did not include criminal trials, or leave to the states the power to prescribe and change from time to time the rules of evidence in trials in the courts of the United States for offenses against the United States." *Logan v. United States*, 144 U. S. 263, 300, 36 L. Ed. 429, citing *United States v. Reid*, 12 How. 361, 13 L. Ed. 1023.

State rules of evidence or of procedure, adopted since the passage of the act of congress organizing the federal courts, do not apply in criminal cases where the indictment is found in the circuit courts. *Tennessee v. Davis*, 100 U. S. 257, 298, 25 L. Ed. 648.

One sentenced to imprisonment and fine for violation of the laws of the United States is not entitled to the benefits of the state laws as to discharge upon taking the oath of insolvency as provided by the state laws. *United States v. Stafford*, 154 U. S. 590, 21 L. Ed. 117; *McNutt v. Bland*, 2 How. 9, 11 L. Ed. 159.

Although in ordinary cases it would be well to accommodate the practice of the United States courts with that of the state in the trial of criminal cases, yet the

judiciary of the United States should not be fettered and controlled in its operations by a strict adherence to state regulations and practice. *United States v. The Insurgents*, 2 Dall. 335, 1 L. Ed. 404. See the title JURY.

**Evidence in criminal cases.**—See post, "Evidence," VII, J, 13, c, (21).

**Qualification and impeachment of juries.**—See post, "Juries," VII, J, 13, c, (30).

**96. Meaning of "laws."**—*Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865; *Railroad Co. v. National Bank*, 102 U. S. 14, 29, 26 L. Ed. 61; *Baltimore, etc., R. Co. v. Baugh*, 149 U. S. 368, 371, 37 L. Ed. 772.

"In all the various cases which have hitherto come before us for decision this court have uniformly supposed that the true interpretation of the thirty fourth section limited its application to state laws strictly local; that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character." *Railroad Co. v. National Bank*, 102 U. S. 14, 29, 26 L. Ed. 61; *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865; *Baltimore, etc., Co. v. Baugh*, 149 U. S. 368, 371, 37 L. Ed. 772.

**97. Decisions of state courts as "laws."**—*Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865; *Railroad Co. v. National Bank*, 102 U. S. 14, 29, 26 L. Ed. 61; *Baltimore, etc., R. Co. v. Baugh*, 149 U. S. 368, 371, 37 L. Ed. 772.

In *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865, the contention was that this court was obliged to follow the decisions of the state courts in all cases where they apply. But this court said: "In order to maintain the argument, it is essential, therefore, to hold that the word 'laws' in this section includes within the scope of its meaning the decisions of the local tribunals. In the ordinary use of language it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not of themselves laws. They are often re-examined, reversed, and

course of decisions, whether founded upon statutes or not, have become rules of property as laid down by the highest courts of the state, they are to be treated as laws of the state by the federal courts.<sup>98</sup>

7. STATE LAWS INTERFERING WITH OR RESTRICTING FEDERAL JURISDICTION.—See ante, "Power of States to Extend or Restrict Jurisdiction," VII, A, 4, c.

8. CHARACTER OF DECISIONS WHICH ARE BINDING ON FEDERAL COURTS—  
a. *Necessity for Decision to Be on Same Point.*—In order for decisions of a state to be binding on the federal courts, they must be on the same point.<sup>99</sup>

b. *Variation in State Decisions.*—The federal courts will not necessarily follow decisions which may prove but oscillations in the course of the judicial settlement of the questions involved.<sup>1</sup>

c. *Decision of Court Other than One of Last Resort.*—A decision of a state court other than the one of last resort construing a state statute, which decision was appealed from, but further proceedings prevented by accident, is not binding on the federal courts.<sup>2</sup>

d. *Questions Discussed, but Not Involved or Decided.*—Upon questions discussed in the opinion of the state court and not necessary to the judgment, or not considered at all, the case cannot be regarded as a decision and consequently is not binding on the federal courts. There must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties.<sup>3</sup>

e. *Decision Distinguishing Earlier Decisions.*—Where the highest court of a state has delivered two opinions construing a state statute, both must be considered as correct interpretations of the law, and it is not the province of the federal courts to pronounce one more decisive than the other, or to pronounce a contradiction between them, which the court which delivered both of them declared did not exist.<sup>4</sup>

f. *Decision Rendered by Divided Court.*—The fact that a decision of the highest state court as to the conformity of a state law with the state constitution was rendered by a divided court, although the division was a close one,

qualified by the courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect." Railroad Co. v. National Bank, 102 U. S. 14, 29, 26 L. Ed. 61; Baltimore, etc., R. Co. v. Baugh, 149 U. S. 368, 371, 37 L. Ed. 772.

98. *Decisions constituting rule of property.*—Buchner v. Cheshire R. Co., 125 U. S. 555, 31 L. Ed. 795; Olcott v. Bynum, 17 Wall. 44, 21 L. Ed. 570; Chicago v. Robbins, 2 Black 418, 17 L. Ed. 298; Burgess v. Seligman, 107 U. S. 20, 27 L. Ed. 359; Baltimore, etc., R. Co. v. Baugh, 149 U. S. 368, 37 L. Ed. 772; Bacon v. Northwestern, etc., R. Co., 131 U. S. 258, 33 L. Ed. 128. See post, "Particular Question or Matters," VII, J, 13, c.

99. *Decision must be on same point.*—Mutual Assur. Society v. Watts, 1 Wheat. 279, 4 L. Ed. 91; Roberts v. Bolles, 101 U. S. 119, 120, 25 L. Ed. 880. See, also, Ober v. Gallagher, 93 U. S. 199, 207, 23 L. Ed. 829.

1. *Variation in state decisions.*—Gelpcke v. Dubuque, 1 Wall. 175, 176, 17 L. Ed. 520.

2. *Decision of court other than one of last resort.*—Beals v. Hale, 4 How. 37, 54, 11 L. Ed. 865.

3. *Questions discussed but not decided.*—St. Louis, etc., R. Co. v. Terre Haute,

etc., R. Co., 145 U. S. 393, 403, 36 L. Ed. 738; Carroll v. Carroll, 16 How. 275, 14 L. Ed. 936; Central R., etc., Co. v. Wright, 164 U. S. 327, 41 L. Ed. 454. See, also, Ober v. Gallagher, 93 U. S. 199, 207, 23 L. Ed. 829.

"If the construction put by the court of a state upon one of its statutes was not a matter in judgment, if it might have been decided either way without affecting any right brought into question, then, according to the principles of the common law, an opinion on such a question is not a decision. To make it so, there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties and decide to whom the property in contestation belongs. And therefore this court and other courts organized under the common law, has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties." Carroll v. Carroll, 16 How. 275, 286, 14 L. Ed. 936; Pollock v. Farmers' Loan, etc., Co., 157 U. S. 429, 575, 39 L. Ed. 759.

4. *Decision distinguishing earlier decision on same statute.*—Cahen v. Brewster, 203 U. S. 543, 544, 51 L. Ed. 310.

does not prevent the opinion of the majority from becoming the decision of the court, and as such conclusive on the federal courts.<sup>5</sup>

g. *Presumption That State Decision Embodies Judgment of Court.*—The federal courts are bound to presume that when the question involved in a decision of the highest court of a state arose in the state court it was thoroughly considered by that tribunal, and that the decision rendered embodies its deliberate judgment thereon.<sup>6</sup>

h. *Decision as to Construction of Statutes Must Present Clear Case of Construction.*—In order for state decisions to be binding on the federal courts upon the ground that they construe state statutes, they must, in fact, present a case of statutory construction, and must not be confined to the decision of questions, which are, in effect, questions of general law.<sup>7</sup>

i. *Headnote Not Supported by Opinion.*—Where the headnote of a case decided by the highest court of the state is supported by the opinion of only one of the three judges, the other two merely concurring in the result, the headnote is not binding on the federal courts as a rule of decision.<sup>8</sup>

j. *Decision of Recently Admitted State as Binding on Appeal from Territory.*—The decision of the highest court of the state upon a question upon which the local decisions are entitled to controlling effect in the federal courts, is binding on the supreme court of the United States on appeal from the highest court of the territory, the territory having been subsequently admitted as a state.<sup>9</sup>

9. **RIGHT OF FEDERAL COURT TO EXERCISE INDEPENDENT JUDGMENT**—a. *In Absence of Decision by State Court*—(1) *In General.*—If the state courts have not passed upon a question on which their decision would be binding upon the federal courts the latter properly claim the right to adopt their own interpretation of the law applicable to the case.<sup>10</sup> Thus the federal courts in interpreting

5. **Decision rendered by divided court.**—*Williams v. Eggleston*, 170 U. S. 304, 311, 42 L. Ed. 1047.

6. **Presumption that state decision embodies deliberate judgment of state court.**—*Cross v. Allen*, 141 U. S. 528, 538, 35 L. Ed. 843 (wherein a contention that the federal court was not bound by the state decisions, because they were rendered on the mistaken assumption that the question involved had been previously decided the same way, by the highest state court, was declared to be without merit); *Cahen v. Brewster*, 203 U. S. 543, 544, 51 L. Ed. 310; *Adams Express Co. v. Ohio*, 165 U. S. 194, 219, 41 L. Ed. 683; *American Express Co. v. Indiana*, 165 U. S. 255, 41 L. Ed. 707.

"It is suggested that the decision of the supreme court of Ohio should not be followed because the case in which it was announced did not involve a genuine controversy but was prepared for the purpose of obtaining an adjudication, and, under the circumstances, ought not to have been considered by that court. But it was for that tribunal to pass on this question, and, as it entertained jurisdiction and delivered a considered opinion which appears in the official reports of the court as its judgment of the validity of the Nichols law under the constitution of the state of Ohio, it is not within our province to review its determination in that regard." *Adams Express Co. v. Ohio*, 165 U. S. 194, 219, 41 L. Ed. 683; *American Express Co. v. Indiana*, 165 U. S. 255, 41 L. Ed. 707.

7. *Venice v. Murdock*, 92 U. S. 494, 501,

23 L. Ed. 583; *Thompson v. Perrine*, 103 U. S. 806, 817, 26 L. Ed. 612; *Tulane Irrig. Dist. v. Shepard*, 185 U. S. 1, 11, 46 L. Ed. 773; *Genoa v. Woodruff*, 92 U. S. 502, 23 L. Ed. 586; *Banholzer v. New York Life Ins. Co.*, 178 U. S. 402, 408, 44 L. Ed. 1124.

The question as to the construction of a statute must be finally at rest in the state courts in order for the federal courts to be bound by their decisions. *Thompson v. Perrine*, 103 U. S. 806, 817, 26 L. Ed. 612.

8. **Headnote not supported by opinion.**—*Central R., etc., Co. v. Wright*, 164 U. S. 327, 41 L. Ed. 454.

9. **Decision of recently admitted state as binding on appeal from territory.**—*Stutsman County v. Wallace*, 142 U. S. 293, 35 L. Ed. 1018.

But a judgment of a territorial court, in mere matters of procedure, is not subject to reversal, because of decisions made by the courts of the state in subsequent cases after the admission of the territory into the Union as a state, while the former cases were pending on appeal in this court. *Ankeny v. Clark*, 148 U. S. 345, 354, 37 L. Ed. 475, distinguishing *Stutsman County v. Wallace*, 142 U. S. 293, 35 L. Ed. 1018.

10. **State law not settled.**—*Stanley County v. Coler*, 190 U. S. 437, 444, 47 L. Ed. 1126; *Burgess v. Seligman*, 107 U. S. 20, 27 L. Ed. 359; *Sioux City Term. R., etc., Co. v. Trust Co.*, 173 U. S. 99, 107, 43 L. Ed. 628; *Nobles v. Georgia*, 168 U. S. 398, 42 L. Ed. 515; *Morley v. Lake Shore, etc., R. Co.*, 146 U. S. 162, 36 L. Ed. 925; *Pleasant Township v. Aetna Life*



a state statute will form an independent judgment, as to the meaning of the state law, when there is no binding construction of such state statute by the court of last resort of the state,<sup>11</sup> but only when the case imperatively demands it.<sup>12</sup> Where a point is first raised in a court of the United States the federal court may exercise its own judgment, even though before the decision by the federal courts is rendered, the state court has rendered a decision the other way.<sup>13</sup>

*Ins. Co.*, 138 U. S. 67, 73, 34 L. Ed. 864; *Aberdeen Bank v. Chehalis County*, 166 U. S. 440, 41 L. Ed. 1069; *Carroll County v. Smith*, 111 U. S. 556, 28 L. Ed. 517; *Scott v. Sandford*, 19 How. 393, 563, 15 L. Ed. 691; *Great Southern, etc., Hotel Co. v. Jones*, 193 U. S. 532, 544, 48 L. Ed. 778; *Brunswick Term. Co. v. National Bank*, 192 U. S. 386, 48 L. Ed. 491; *Freeport Water Co. v. Freeport City*, 180 U. S. 587, 45 L. Ed. 679; *Danville Water Co. v. Danville*, 180 U. S. 619, 45 L. Ed. 696.

"As, however, the very object of giving to the national courts jurisdiction to administer the laws of the states in controversies between citizens of different states was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication." *Burgess v. Seligman*, 107 U. S. 20, 34, 27 L. Ed. 359; *Pleasant Township v. Etna Life Ins. Co.*, 138 U. S. 67, 73, 34 L. Ed. 864.

In *Carroll County v. Smith*, 111 U. S. 556, 28 L. Ed. 517, the principal question was as to the validity, under the constitution of Mississippi, of certain proceedings taken under a railroad charter. The supreme court of that state having passed on the question, it was contended that its judgment was binding on the courts of the United States. The supreme court, speaking by Mr. Justice Matthews, said: "It was not a rule previously established, so as to have become recognized as settled law, and which, of course, all parties to transactions afterwards entered into would be presumed to know and to conform to. When, therefore, it is presented for application by the courts of the United States, in a litigation growing out of the same facts, of which they have jurisdiction by reason of the citizenship of the parties, the plaintiff has a right, under the constitution of the United States, to the independent judgment of those courts, to determine for themselves what is the law of the state, by which his rights are fixed and governed. It was to the very end that the constitution granted to citizens of one state, suing in another, the choice of resorting to a federal tribunal." *Great Southern, etc., Hotel Co. v. Jones*, 193 U. S. 532, 544, 48 L. Ed. 778; *Burgess v. Seligman*, 107 U. S. 20, 27 L. Ed. 359.

#### Question left open by state court.—

Where the opinion of the highest court of a state contains language showing that the construction of a charter of a bank in-

volved in the case was intended by the court to be left open for review in later cases, the federal courts are not bound by the decision, especially where the cases in the federal court arose prior to the decision of the state court. *Brunswick Term. Co. v. National Bank*, 192 U. S. 386, 48 L. Ed. 491.

**11. When federal courts will exercise independent judgment.**—*Sioux City Term. R., etc., Co. v. Trust Co.*, 173 U. S. 99, 107, 43 L. Ed. 628; *Nobles v. Georgia*, 168 U. S. 398, 42 L. Ed. 515; *Aberdeen Bank v. Chehalis County*, 166 U. S. 440, 41 L. Ed. 1069; *Morley v. Lake Shore, etc., R. Co.*, 146 U. S. 162, 36 L. Ed. 925; *Pelton v. National Bank*, 101 U. S. 143, 144, 25 L. Ed. 901; *Sohn v. Waterson*, 17 Wall. 596, 21 L. Ed. 737; *Coulter v. Louisville, etc., R. Co.*, 196 U. S. 599, 49 L. Ed. 615; *Michigan Cent. R. Co. v. Powers*, 201 U. S. 245, 291, 50 L. Ed. 744.

**12. Necessity of construction must be imperative.**—*Pelton v. National Bank*, 101 U. S. 143, 144, 25 L. Ed. 901; *Michigan Cent. R. Co. v. Powers*, 201 U. S. 245, 291, 50 L. Ed. 744; *Coulter v. Louisville, etc., R. Co.*, 196 U. S. 599, 49 L. Ed. 615.

"Undoubtedly a federal court has the jurisdiction, and when the question is properly presented it may often become its duty to pass upon an alleged conflict between a statute and the state constitution, even before the question has been considered by the state tribunals. All objections to the validity of the act, whether springing out of the state or of the federal constitution, may be presented in a single suit and call for consideration and determination. At the same time the federal courts will be reluctant to adjudge a state statute to be in conflict with the state constitution before that question has been considered by the state tribunals. Especially is this true when the statute is one affecting the revenues of the state, and therefore of general public interest. *Coulter v. Louisville, etc., R. Co.*, 196 U. S. 599, 49 L. Ed. 615. And this reluctance becomes more imperative when the statute has been before the highest court of the state and a decision rendered upon the assumption that it is valid, and this, although the direct question of validity was not presented nor determined." *Michigan Cent. R. Co. v. Powers*, 201 U. S. 245, 291, 50 L. Ed. 744.

**13. Decision by state court pending decision by federal court.**—*Pease v. Peck*, 18 How. 595, 599, 15 L. Ed. 518; *Morgan v. Curtenius*, 20 How. 1, 15 L. Ed. 823; *Roberts v. Bolles*, 101 U. S. 119, 128, 25 L. Ed. 880.

(2) *Effect of Subsequent Contrary Decision by State Court.*—When the supreme court of the United States has first decided a question arising under state laws, it is not bound to surrender its convictions on account of a contrary subsequent decision of a state court,<sup>14</sup> though they will usually do so in cases involving property rights and dependent on the construction of local statutes.<sup>15</sup>

b. *Accrual of Rights before Decision by State Court.*—In deciding upon rights which have accrued under a state statute before a decision by the highest court of the state construing the statute is rendered, federal courts are not bound by the construction given to the statute by the state court.<sup>16</sup>

10. CHANGE OF DECISION BY STATE COURT—*a. General Rule.*—As a general rule, if the highest judicial tribunal of a state adopts new views as to a question upon which the decision is controlling on the federal courts and reverses its former decisions, the federal courts will follow the latest settled adjudications unless contract rights have accrued under the prior decisions which would be impaired by the change of view.<sup>17</sup>

14. *Effect of subsequent contrary decision by state court.*—Pease *v.* Peck, 18 How. 595, 598, 15 L. Ed. 518; Rowan *v.* Runnels, 5 How. 134, 139, 12 L. Ed. 85; Roberts *v.* Bolles, 101 U. S. 119, 128, 25 L. Ed. 880.

"The question presented in the present case is one in which the interests of citizens of other states come directly in conflict with those of the citizens of Michigan. The territorial law in question had been received and acted upon for thirty years, in the words of the published statute. It had received a settled construction by the courts of the United States as well as those of the state. It had entered as an element into the contracts and business of men. On a sudden, a manuscript statute differing from the known public law, is disinterred from the lumber room of obsolete documents; a new law is promulgated by judicial construction, which, by retroaction, destroys vested rights of property of citizens of other states, while it protects the citizens of Michigan from the payment of admitted debts. We think that such a case peculiarly calls upon us not to surrender our clear convictions and unbiassed judgments to the authority of the new state decision, and to render a judgment in favor of the plaintiff, which we do by affirming the judgment of the circuit court." Pease *v.* Peck, 18 How. 595, 599, 15 L. Ed. 518.

15. *Cases involving property rights under local statutes.*—Roberts *v.* Lewis, 153 U. S. 367, 38 L. Ed. 747; Supervisors *v.* United States, 18 Wall. 71, 82, 21 L. Ed. 771; Green *v.* Neal, 6 Pet. 291, 8 L. Ed. 402; Suydam *v.* Williamson, 24 How. 427, 16 L. Ed. 742; Leffingwell *v.* Warren, 2 Black 599, 17 L. Ed. 261.

When the construction of a state law has been settled by a series of decisions of the highest court, differently from that given to the statute by an earlier decision of this court, the construction given by the state courts will be adopted by us. Supervisors *v.* United States, 18 Wall. 71, 82, 21 L. Ed. 771.

16. *Where rights have accrued under*

*statute before decision by state court.*—Folsom *v.* Ninety Six, 159 U. S. 611, 40 L. Ed. 278; Burgess *v.* Seligman, 107 U. S. 20, 27 L. Ed. 359; Stanley County *v.* Coler, 190 U. S. 437, 445, 47 L. Ed. 1126; Pleasant Township *v.* Ætna Life Ins. Co., 138 U. S. 67, 34 L. Ed. 864; Great Southern, etc., Hotel Co. *v.* Jones, 193 U. S. 532, 545, 48 L. Ed. 778; Anderson *v.* Santa Anna, 116 U. S. 356, 29 L. Ed. 633; Barnum *v.* Okolona, 148 U. S. 393, 37 L. Ed. 495; Julian *v.* Central Trust Co., 193 U. S. 93, 103, 48 L. Ed. 629; Morgan *v.* Curtenius, 20 How. 1, 15 L. Ed. 823; Flash *v.* Conn, 109 U. S. 371, 378, 27 L. Ed. 966; Enfield *v.* Jordon, 119 U. S. 680, 30 L. Ed. 523; Bolles *v.* Brimfield, 120 U. S. 759, 30 L. Ed. 786; Knox County *v.* Ninth Nat. Bank, 147 U. S. 91, 99, 37 L. Ed. 93; Cass County *v.* Johnston, 95 U. S. 360, 24 L. Ed. 416; Daviess County *v.* Huidekoper, 98 U. S. 98, 25 L. Ed. 112; Douglass *v.* Pike County, 101 U. S. 677, 25 L. Ed. 968; Carroll County *v.* Smith, 111 U. S. 556, 28 L. Ed. 517; Freeport Water Co. *v.* Freeport City, 180 U. S. 587, 45 L. Ed. 679; Danville Water Co. *v.* Danville, 180 U. S. 619, 45 L. Ed. 696.

"We do not consider ourselves bound to follow the decisions of the state court in this case. When the transactions in controversy occurred, and when the case was under the consideration of the circuit court, no construction of the statute had been given by the state tribunals contrary to that given by the circuit court. The federal courts have an independent jurisdiction in the administration of state laws, co-ordinate with, and not subordinate to, that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference." Burgess *v.* Seligman, 107 U. S. 20, 33, 27 L. Ed. 359.

17. *Change of decision by state court.*—*In general.*—Leffingwell *v.* Warren, 2 Black 599, 603, 17 L. Ed. 261; United



b. *Where Rights Have Accrued under Prior Decisions.*—Where different constructions have been given to the same statute at different times, the federal courts have never felt themselves bound to follow the latest decisions, if thereby contract rights which have accrued under earlier rulings will be injuriously affected.<sup>18</sup> In other words, while the federal courts will always feel itself bound

*States v. Morrison*, 4 Pet. 124, 7 L. Ed. 804; *Green v. Neal*, 6 Pet. 291, 8 L. Ed. 402; *Fairfield v. Gallatin County*, 100 U. S. 47, 55, 25 L. Ed. 544; *Balkam v. Woodstock Iron Co.*, 154 U. S. 177, 188, 38 L. Ed. 953; *Bauserman v. Blunt*, 147 U. S. 647, 653, 37 L. Ed. 316; *Wade v. Travis County*, 174 U. S. 499, 43 L. Ed. 1060; *Scott v. Sandford*, 19 How. 393, 563, 15 L. Ed. 691.

**Change of decision as to construction of statute of limitations.**—"In *Patton v. Easton*, 1 Wheat. 476, 482, 4 L. Ed. 139, and again in *Powell v. Harman*, 2 Pet. 241, 7 L. Ed. 411, this court had construed a Tennessee statute of limitations of real actions in accordance with decisions of the supreme court of the state, made since the first of those cases was certified up to this court, and supposed to have settled the construction of the statute. Yet in *Green v. Neal*, 6 Pet. 291, 8 L. Ed. 402, a judgment of the circuit court of the United States, which had held itself bound by those cases in this court, was reversed, because of more recent decisions of the state court, establishing the opposite construction." *Bauserman v. Blunt*, 147 U. S. 647, 653, 37 L. Ed. 316; *Supervisors v. United States*, 18 Wall. 71, 82, 21 L. Ed. 771.

In *United States v. Morrison*, 4 Pet. 124, 7 L. Ed. 804, the United States recovered judgment against *Morrison*, upon which a *fi. fa.* was issued, goods taken in execution and restored to the debtor under a forthcoming bond. This bond having been forfeited, an execution was awarded thereon by the judgment of the district court, rendered April, 1822, which it was asserted created a lien upon the lands, and overreached certain conveyances under which the defendants claimed, dated February and March, 1823. The circuit court was of opinion that the lien did not overreach these conveyances. The highest court of the state having subsequently decided that the lien of a judgment continued pending proceedings on a writ of *fi. fa.*, the supreme court of the United States adopted this subsequent construction by such court, and reversed the decree of the circuit court. *Wade v. Travis County*, 174 U. S. 499, 508, 43 L. Ed. 1060.

**18. Where rights have accrued under state decisions.**—*Burgess v. Seligman*, 107 U. S. 20, 27 L. Ed. 359; *Stanly County v. Coler*, 190 U. S. 437, 444, 47 L. Ed. 1126; *Anderson v. Santa Anna*, 116 U. S. 356, 365, 29 L. Ed. 633; *Douglass v. Pike County*, 101 U. S. 677, 686, 25 L. Ed. 968; *Darlington v. Jackson County note*, 101 U. S. 688, 25 L. Ed. 972; *Foot v. Pike County note*, 101 U. S. 688, 25 L. Ed. 972;

*Security Trust Co. v. Black River Nat. Bank*, 187 U. S. 211, 226, 47 L. Ed. 147; *Carroll County v. Smith*, 111 U. S. 556, 28 L. Ed. 517; *Elmwood v. Marcy*, 92 U. S. 289, 294, 23 L. Ed. 710; *Rowan v. Runnels*, 5 How. 134, 12 L. Ed. 85; *Fairfield v. Gallatin County*, 100 U. S. 47, 52, 25 L. Ed. 544; *Bacon v. Texas*, 163 U. S. 207, 41 L. Ed. 132; *Gelpcke v. Dubuque*, 1 Wall. 175, 176, 17 L. Ed. 520; *Lee County v. Rogers*, 7 Wall. 181, 19 L. Ed. 160; *Stutsman County v. Wallace*, 142 U. S. 293, 35 L. Ed. 1018; *Ankeny v. Clark*, 148 U. S. 345, 354, 37 L. Ed. 475; *Morgan v. Curtin*, 20 How. 1, 15 L. Ed. 823; *Wade v. Travis County*, 174 U. S. 499, 509, 43 L. Ed. 1060; *Havemeyer v. Iowa County*, 3 Wall. 294, 18 L. Ed. 38; *Olcott v. The Supervisors*, 16 Wall. 678, 21 L. Ed. 382; *Riggs v. Johnson County*, 6 Wall. 166, 18 L. Ed. 768; *Pease v. Peck*, 18 How. 595, 599, 15 L. Ed. 518; *Great Southern, etc., Hotel Co. v. Jones*, 193 U. S. 532, 544, 48 L. Ed. 778; *Pleasant Township v. Aetna Life Ins. Co.*, 138 U. S. 67, 34 L. Ed. 864; *Folsom v. Ninety Six*, 159 U. S. 611, 40 L. Ed. 278; *Barnum v. Okolona*, 148 U. S. 393, 37 L. Ed. 495; *Julian v. Central Trust Co.*, 193 U. S. 93, 103, 48 L. Ed. 629; *Dallas County v. McKenzie*, 110 U. S. 686, 687, 28 L. Ed. 285; *Ralls County v. Douglass*, 105 U. S. 728, 26 L. Ed. 957; *Green County v. Conness*, 109 U. S. 104, 105, 27 L. Ed. 872; *Mitchell v. Burlington*, 4 Wall. 270, 18 L. Ed. 350; *Larned v. Burlington*, 4 Wall. 275, 18 L. Ed. 353; *Ohio Life Ins., etc., Co. v. Debolt*, 16 How. 416, 432, 14 L. Ed. 997; *Taylor v. Ypsilanti*, 105 U. S. 60, 26 L. Ed. 1008; *Louisiana v. Pilsbury*, 105 U. S. 278, 295, 26 L. Ed. 1090; *Los Angeles v. Los Angeles, etc., Water Co.*, 177 U. S. 558, 575, 44 L. Ed. 886; *Muhlker v. New York, etc., R. Co.*, 197 U. S. 544, 49 L. Ed. 872; *Loeb v. Columbia Township Trustees*, 179 U. S. 472, 492, 45 L. Ed. 280; *Anthony v. Jasper County*, 101 U. S. 693, 695, 25 L. Ed. 1005; *Freeport Water Co. v. Freeport City*, 180 U. S. 587, 45 L. Ed. 679; *Danville Water Co. v. Danville*, 180 U. S. 619, 45 L. Ed. 696; *East Alabama R. Co. v. Doe*, 114 U. S. 340, 353, 29 L. Ed. 136; *Buncombe County Comm'rs v. Tommey*, 115 U. S. 122, 127, 29 L. Ed. 305; *Warburton v. White*, 176 U. S. 484, 495, 44 L. Ed. 555; *Havemeyer v. Iowa County*, 3 Wall. 294, 18 L. Ed. 38; *Olcott v. The Supervisors*, 16 Wall. 678, 690, 21 L. Ed. 382; *Ohio Life Ins., etc., Co. v. Debolt*, 16 How. 416, 432, 14 L. Ed. 997.

"We have always followed the highest court of the state in its construction of its own constitution and laws. It is only where they have been construed differently



to respect the decisions of the state courts, and, from the time they are made, regard them as conclusive in all cases upon the construction of their own laws, they will not give them a retroactive effect, and allow them to render invalid contracts entered into with citizens of other states which were lawfully made.<sup>19</sup> But the supreme court of the United States has no jurisdiction, because a state court changes its view in regard to the proper construction of its state statute, although the effect of such judgment may be to impair the value of what the state court had before that held to be a valid contract.<sup>20</sup>

c. *Change after Decision by Circuit Court.*—Where the United States circuit court adopts the construction of a state statute which was placed upon it by the supreme court of the state, the fact that a different construction of the statute is subsequently placed upon it by the supreme court of the state will not authorize a reversal.<sup>21</sup>

11. *DEPARTURE OF FEDERAL COURT FROM UNKNOWN STATE RULES.*—If the attention of the supreme court of the United States is not called to the fact that the state courts have already construed a statute involved in a case before it, and it renders a decision construing it differently from the state court, the federal courts, in subsequent cases will follow the construction of the same statute, will adopt the construction placed upon the statute by the state court, where interpretation establishes a rule of property and has been adhered to by the state court.<sup>22</sup>

at different times, that, in cases like this, we have adopted as a rule of action the first decision, and rejected the last. This has been done on the ground that rights acquired on the strength of the former decision ought not to be lost by a change of opinion in the court, but, where the construction has been fixed by an unbroken series of decisions, the courts of the United States accept and apply it in cases before them. If a different rule was observed, it is not difficult to see that great mischief would ensue." *Elmwood v. Marcy*, 92 U. S. 289, 294, 23 L. Ed. 710.

Cases may be found where a decision made by a state supreme court, even in exposition of state statutes, after the institution of litigation in a federal court, wherein this court has refused to follow such a decision, if in it the state court has departed from its previous decisions, which were in force and relied upon by the federal suitor. *Security Trust Co. v. Black River Nat. Bank*, 187 U. S. 211, 226, 47 L. Ed. 147; *Burgess v. Seligman*, 107 U. S. 20, 27 L. Ed. 359; *Carroll County v. Smith*, 111 U. S. 556, 28 L. Ed. 517.

Where the highest state court has decided that the state may, under its constitution and laws, grant special franchise to persons and corporations, and this decision enters into and constitutes a part of a contract, a subsequent decision by the state court to the contrary is not binding on the federal courts as to rights vested under the former state decision. *Los Angeles v. Los Angeles, etc., Water Co.*, 177 U. S. 558, 575, 44 L. Ed. 886.

The property and franchises of the A railroad company were sold on foreclosures in the federal courts to the B railroad company. Subsequently the highest court of the state held that such a sale did not discharge the property from debts

of the A company accruing after the purchase. Held, that the decision was not conclusive on the federal courts. *Julian v. Central Trust Co.*, 193 U. S. 93, 48 L. Ed. 629.

Where it is asserted that a contract has been entered into on the faith of the state laws, existing at the time when it was made, the construction of such laws, which was settled at the time of the making of the contract, by the court of last resort of the state, will be adopted and applied by this court in considering the nature of the contract right relied upon. *Warburton v. White*, 176 U. S. 484, 495, 44 L. Ed. 555.

19. *Retroactive effect denied to subsequent state statutes.*—*Rowan v. Runnels*, 5 How. 134, 12 L. Ed. 85; *Douglass v. Pike County*, 101 U. S. 677, 25 L. Ed. 968; *Darlington v. Jackson County note*, 101 U. S. 688, 25 L. Ed. 972; *Foot v. Pike County note*, 101 U. S. 688, 25 L. Ed. 972; *Ohio Life Ins., etc., Co. v. Debolt*, 16 How. 416, 432, 14 L. Ed. 997; *Taylor v. Ypsilanti*, 105 U. S. 60, 71, 26 L. Ed. 1008; *Louisiana v. Pilsbury*, 105 U. S. 278, 295, 26 L. Ed. 1090.

20. *Review of judgment of state court.*—*Bacon v. Texas*, 163 U. S. 207, 221, 41 L. Ed. 132. See, generally, the title APPEAL AND ERROR, vol. 1, p. 333.

21. *Change after decision by circuit court.*—*Morgan v. Curtenius*, 20 How. 1, 15 L. Ed. 823. See, also, *Wade v. Travis County*, 174 U. S. 499, 509, 43 L. Ed. 1060.

22. *Departure by federal court from unknown state rules.*—*Fairfield v. Gallatin County*, 100 U. S. 47, 55, 25 L. Ed. 544.

"Chicago, etc., R. Co. v. Pickney, 74 Ill. 277, was decided before, but not reported until after, the ruling in *Concord v. Portsmouth Sav. Bank*, 92 U. S. 625, 23 L. Ed. 628, involving the construction of that

12. **LEANING OF FEDERAL COURTS TOWARDS AGREEMENT WITH STATE DECISIONS.**—Even in cases where the federal court exercises an independent judgment for the sake of harmony and to avoid confusion, they will lean to an agreement of views with the state courts if the question seems to be balanced with doubt.<sup>23</sup>

13. **UPON WHAT QUESTIONS OR MATTERS STATE LAWS AND DECISIONS GOVERN**—a. *Questions of General Law.*—Upon questions, not depending on any statute or local usage but on principles of universal jurisprudence, the federal courts are not bound by state decisions.<sup>24</sup> Thus the decision of a state court, in a case which involves only the general principles of equity, and is not controlled by local law or usage, is not binding as authority upon the federal courts.<sup>25</sup>

b. *Questions of Local Law.*—It may be said generally that whenever the de-

section, and the attention of this court was not called to it; but as it established in Illinois a rule of property which has been since maintained, the latter case, so far as it conflicts therewith, is overruled." *Fairfield v. Gallatin County*, 100 U. S. 47, 48, 25 L. Ed. 544.

23. **Leaning towards agreement with state court.**—*Anderson v. Santa Anna*, 116 U. S. 356, 362, 29 L. Ed. 633; *Burgess v. Seligman*, 107 U. S. 20, 27 L. Ed. 359; *Great Southern, etc., Hotel Co. v. Jones*, 193 U. S. 532, 548, 48 L. Ed. 778; *Barnum v. Okolona*, 148 U. S. 393, 396, 37 L. Ed. 495; *Pleasant Township v. Ætna Life Ins. Co.*, 138 U. S. 67, 73, 34 L. Ed. 864; *Yazoo, etc., R. Co. v. Adams*, 181 U. S. 580, 583, 45 L. Ed. 1011; *Clark v. Bever*, 139 U. S. 96, 35 L. Ed. 88; *New Orleans v. Louisiana*, 179 U. S. 622, 45 L. Ed. 347; *Stanly County v. Coler*, 190 U. S. 437, 445, 47 L. Ed. 1126; *Commissioners v. Bancroft*, 203 U. S. 112, 118, 51 L. Ed. 112; *Copper Queen Consol. Min. Co. v. Territorial Board*, 206 U. S. 474, 479, 51 L. Ed. 1143; *Sweeney v. Lomme*, 22 Wall. 208, 22 L. Ed. 727; *Northern Pac. R. Co. v. Hamby*, 154 U. S. 349, 38 L. Ed. 1009; *Fox v. Haarstick*, 156 U. S. 674, 39 L. Ed. 576; *Flash v. Conn*, 109 U. S. 371, 378, 27 L. Ed. 966; *Bolles v. Brimfield*, 120 U. S. 759, 30 L. Ed. 786; *Freeport Water Co. v. Freeport City*, 180 U. S. 587, 45 L. Ed. 679; *Danville Water Co. v. Danville*, 180 U. S. 619, 45 L. Ed. 696.

"Any reasonable doubt will be resolved in favor of that construction of the state statute which has been adopted by the court of last resort in that state." *Yazoo, etc., R. Co. v. Adams*, 181 U. S. 580, 583, 45 L. Ed. 1011; *Burgess v. Seligman*, 107 U. S. 20, 27 L. Ed. 359; *Flash v. Conn*, 109 U. S. 371, 27 L. Ed. 966; *Clark v. Bever*, 139 U. S. 96, 35 L. Ed. 88; *New Orleans v. Louisiana*, 179 U. S. 622, 45 L. Ed. 347.

"Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well considered decisions of the state courts." *Burgess v. Seligman*, 107 U. S. 20, 34, 27 L. Ed. 359; *Pleasant Township*

*v. Ætna Life Ins. Co.*, 138 U. S. 67, 73, 34 L. Ed. 864.

In all cases, it is the duty of the federal court to lean to an agreement with the state court, where the issue relates to matters depending upon the construction of the constitution or laws of the state. *Great Southern, etc., Hotel Co. v. Jones*, 193 U. S. 532, 548, 48 L. Ed. 778.

24. **Questions of general law.**—*Baltimore, etc., R. Co. v. Baugh*, 149 U. S. 368, 373, 37 L. Ed. 772; *Boyce v. Tabb*, 18 Wall. 546, 21 L. Ed. 757; *Watson v. Tarpley*, 18 How. 517, 520, 15 L. Ed. 509; *Delmas v. Insurance Co.*, 14 Wall. 661, 20 L. Ed. 757; *Bucher v. Cheshire R. Co.*, 125 U. S. 555, 583, 31 L. Ed. 795; *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865; *Stanly County v. Coler*, 190 U. S. 437, 444, 47 L. Ed. 1126; *Burgess v. Seligman*, 107 U. S. 20, 27 L. Ed. 359; *Pleasant Township v. Ætna Life Ins. Co.*, 138 U. S. 67, 73, 34 L. Ed. 864; *Scott v. Sandford*, 19 How. 393, 603, 15 L. Ed. 691; *Carpenter v. Providence, etc., Ins. Co.*, 16 Pet. 495, 10 L. Ed. 1044; *Foxcroft v. Mallett*, 4 How. 353, 11 L. Ed. 1008; *Rowan v. Runnels*, 5 How. 134, 12 L. Ed. 85; *Manhattan Life Ins. Co. v. Broughton*, 109 U. S. 121, 125, 27 L. Ed. 878; *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627; *Myrick v. Michigan Cent. R. Co.*, 107 U. S. 102, 27 L. Ed. 325; *Burgess v. Seligman*, 107 U. S. 20, 27 L. Ed. 359.

"No one would go that far in asserting the binding force of state decisions upon the courts of the United States when the latter are required, in the discharge of their judicial functions, to consider questions of general law, arising in suits to which their jurisdiction extends. To so hold would be to defeat one of the objects for which those courts were established, and introduce infinite confusion in their decisions of such questions." *Railroad Co. v. National Bank*, 102 U. S. 14, 32, 26 L. Ed. 61.

As to what are questions of general law, see post, "Particular Questions or Matters," VII, J, 13, c.

25. **Case involving general principles of equity.**—*Neves v. Scott*, 13 How. 268, 14 L. Ed. 140; *Russell v. Southard*, 12 How. 139, 13 L. Ed. 92; *Noonan v. Lee*, 2 Black 499, 509, 17 L. Ed. 278.

cisions of the state courts relate to some law of a local character, which may have become established by those courts, or has always been a part of the law of the state, that the decisions upon the subject are usually conclusive, and always entitled to the highest respect of the federal courts.<sup>26</sup>

c. *Particular Questions or Matters*—(1) *Actions*—(a) *In General*.—The decision of a state court or as to when a cause of action arises "within the state," within the meaning of a state statute, is binding on the federal courts.<sup>27</sup>

(b) *Right of Action Given by State Laws*—aa. *In General*.—A state law may give a substantial right of such a character that where there is no impediment arising from the residence of the parties, the right may be enforced in the proper federal tribunal whether it be a court of equity, of admiralty, or of common law.<sup>28</sup>

**26. Local laws.**—*Detroit v. Osborne*, 135 U. S. 492, 499, 34 L. Ed. 260; *Bucher v. Cheshire R. Co.*, 125 U. S. 555, 31 L. Ed. 795; *Burgess v. Seligman*, 107 U. S. 20, 27 L. Ed. 359; *Davie v. Briggs*, 97 U. S. 628, 638, 24 L. Ed. 1086; *Suydam v. Williamson*, 24 How. 427, 16 L. Ed. 742; *Supervisors v. United States*, 18 Wall. 71, 82, 21 L. Ed. 771; *Olcott v. The Supervisors*, 16 Wall. 678, 689, 21 L. Ed. 382; *McPherson v. Blacker*, 146 U. S. 1, 23, 36 L. Ed. 869; *DeSaussure v. Gaillard*, 127 U. S. 216, 32 L. Ed. 125; *Lamborn v. County Comm'rs*, 97 U. S. 181, 186, 24 L. Ed. 926; *Gardner v. Michigan Cent. R. Co.*, 150 U. S. 349, 357, 37 L. Ed. 1107.

"An adherence by the federal courts to the exposition of the local law, as given by the courts of the state, will greatly tend to preserve harmony in the exercise of the judicial power in the state and federal tribunals." *Davie v. Briggs*, 97 U. S. 628, 638, 24 L. Ed. 1086; *Bell v. Morrison*, 1 Pet. 351, 7 L. Ed. 174; *Slaughter v. Glenn*, 98 U. S. 242, 244, 25 L. Ed. 122; *Olcott v. Bynum*, 17 Wall. 44, 21 L. Ed. 570.

The lease laws of a state furnish rules to ascertain the rights of the parties where the jurisdiction is vested by the laws of the United States. *Steamboat Orleans v. Phœbus*, 11 Pet. 175, 9 L. Ed. 677.

"This court uniformly acts under the influence of a desire to conform its decisions to those of the state courts on these local laws." *Mutual Assur. Society v. Watts*, 1 Wheat. 279, 4 L. Ed. 91.

Where a local law or custom has been established by repeated decisions of the highest courts of a state, it is the law governing the courts of the United States sitting in that state. *Detroit v. Osborne*, 135 U. S. 492, 499, 34 L. Ed. 260; *Bucher v. Cheshire R. Co.*, 125 U. S. 555, 31 L. Ed. 795; *Gardner v. Michigan Cent. R. Co.*, 150 U. S. 349, 357, 37 L. Ed. 1107.

**27. When cause of action arises "within the state."**—*Anglo-American Prov. Co. v. Davis Prov. Co. (No. 1)*, 191 U. S. 373, 48 L. Ed. 225.

The decision of the highest court of the state that a cause of action arose "within the state" within the meaning of the statute providing that an action against a foreign corporation might be maintained

by another foreign corporation, or by a nonresident, where the cause of action arose within the state, is binding upon the federal court. *Anglo-American Prov. Co. v. Davis Prov. Co.*, 191 U. S. 373, 48 L. Ed. 225.

**28. Right of action given by state statute.**—*Ex parte McNiel*, 13 Wall. 236, 243, 20 L. Ed. 624; *Reynolds v. Crawfordsville First Nat. Bank*, 112 U. S. 405, 28 L. Ed. 733; *Clafin v. Houseman*, 93 U. S. 130, 136, 23 L. Ed. 833; *Cowley v. Northern Pac. R. Co.*, 159 U. S. 569, 583, 40 L. Ed. 263; *Cates v. Allen*, 149 U. S. 451, 37 L. Ed. 804; *Davis v. Gray*, 16 Wall. 203, 21 L. Ed. 447; *United States v. Wilson*, 118 U. S. 86, 89, 30 L. Ed. 110; *Chapman v. Brewer*, 114 U. S. 158, 171, 29 L. Ed. 83; *Smith v. Railroad Co.*, 99 U. S. 398, 401, 25 L. Ed. 437; *Clark v. Smith*, 13 Pet. 195, 10 L. Ed. 123; *The J. E. Rumbell*, 148 U. S. 1, 12, 37 L. Ed. 345; *Holland v. Challen*, 110 U. S. 15, 28 L. Ed. 52; *Ex parte Schollenberger*, 96 U. S. 369, 377, 24 L. Ed. 853; *Robinson v. Campbell*, 3 Wheat. 212, 4 L. Ed. 372.

"A party by going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the state courts. The wise policy of the constitution gives him a choice of tribunals." *Davis v. Gray*, 16 Wall. 203, 231, 21 L. Ed. 447; *Cowley v. Northern Pac. R. Co.*, 159 U. S. 569, 583, 40 L. Ed. 263.

Where, by the statutes of a state, a title, which would otherwise be deemed merely equitable is recognized as a legal title, or a title which would be valid at law, is, under circumstances of an equitable nature, declared void, the right of the parties in such case may be as fully considered in a suit at law in the courts of the United States, as in any state court. *Robinson v. Campbell*, 3 Wheat. 212, 4 L. Ed. 372.

Where according to the state practice liens for the enforcement of which no special statutory remedy is provided are enforceable in equity, the federal court recognizes this rule as expressive of the local law. *Knapp v. McCaffrey*, 177 U. S. 638, 645, 44 L. Ed. 921 (suit to enforce possessory lien for towage).

Where a statute of a state created a new



bb. *Rights of Equitable Nature*.—As to jurisdiction of federal courts to enforce rights of an equitable nature given by state statute, see the title EQUITY and cross references there given.

cc. *Rights Enforceable in Admiralty*.—As to the enforcement in admiralty of rights given by state statute which give rise to a maritime lien, see the titles ADMIRALTY, vol. 1, p. 119; MARITIME LIENS.

dd. *Ejectment on Equitable Title*.—An action of ejectment will not lie in the federal courts on equitable title, notwithstanding the state legislature may have provided otherwise by statute.<sup>29</sup>

ee. *Powers of Court Giving Effect to State Remedies*.—In giving effect to statutory remedies under state laws, the United States courts are limited in their powers by the express terms of the act.<sup>30</sup>

(c) *Demand as Prerequisite to Action*.—The question as to the necessity for, and sufficiency of, a demand before action brought, under a state statute, is one of local law, upon which the federal courts will follow those of the state.<sup>31</sup>

(d) *Equitable Defenses*.—Whether an equitable title can be set up in bar of the action at law in the state courts brought by the holder of the legal title, to recover possession, is a question of state law upon which the judgment of the state court is conclusive.<sup>32</sup>

(e) *Abatement of Suits or Actions*.—See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 21.

(2) *Administration of Decedent's Estates*.—The administration laws of a state are not merely rules of practice for the courts, but laws limiting the rights of parties, and will be observed by the federal courts in the enforcement of individual rights.<sup>33</sup> Thus the federal courts where they have jurisdiction will

right or provided a new remedy, the federal courts will enforce that right either on the common-law or equity side of its dockets, as the nature of the new right or new remedy requires. *Cummings v. National Bank*, 101 U. S. 153, 157, 25 L. Ed. 903; *Van Norden v. Morton*, 99 U. S. 378, 25 L. Ed. 453.

**29. Ejectment on equitable title.**—*Hooper v. Sheimer*, 23 How. 235, 16 L. Ed. 452; *Foster v. Mora*, 98 U. S. 425, 25 L. Ed. 191; *Langdon v. Sherwood*, 124 U. S. 74, 83, 31 L. Ed. 344; *Bagnell v. Broderick*, 13 Pet. 436, 10 L. Ed. 235; *Fenn v. Holme*, 21 How. 481, 482, 16 L. Ed. 198; *Sheirburn v. Cordova*, 24 How. 423, 16 L. Ed. 741.

An action of ejectment will not lie in the federal courts by one who holds the usual duplicate receipts of the receiver of a land office, although a state statute provides for recovery in such case. *Langdon v. Sherwood*, 124 U. S. 74, 31 L. Ed. 344 (construing § 411 of the Nebraska Code of Civil Procedure).

"By a statute of Texas, actions of ejectment, trespass to try title, etc., can be maintained upon certificates for head rights or other equitable titles. But this court has decided that, in the courts of the United States, suits for the recovery of lands can only be maintained upon a legal title. A plaintiff in the court below, who had nothing more than an incipient equity, could not therefore maintain his action." *Sheirburn v. Cordova*, 24 How. 423, 16 L. Ed. 741.

**30. Enforcing state statutory remedies.**—*East Tennessee, etc., R. Co. v. Southern Tel. Co.*, 112 U. S. 306, 310, 28 L. Ed.

746; *Thatcher v. Powell*, 6 Wheat. 119, 5 L. Ed. 221.

In summary proceedings, where a court exercises an extraordinary power, under a special statute, which prescribes its course, that course ought to be strictly pursued, and the facts which give jurisdiction ought to appear on the face of the record; otherwise, the proceedings are not merely voidable, but absolutely void, as being coram non iudice. *Thatcher v. Powell*, 6 Wheat. 119, 5 L. Ed. 221.

**31. Demand before commencement of action.**—*Iowa Life Ins. Co. v. Lewis*, 187 U. S. 335, 336, 47 L. Ed. 204. See, generally, the title ACTIONS, vol. 1, p. 110.

**32. Right to set up equitable defense in state court.**—*Chouteau v. Gibson*, 111 U. S. 200, 201, 28 L. Ed. 400.

**33. Administration laws as rules of decision.**—*Yonley v. Lavender*, 21 Wall. 276, 280, 22 L. Ed. 536; *Rio Grande R. Co. v. Vinet*, 132 U. S. 565, 33 L. Ed. 438; *Byers v. McAuley*, 149 U. S. 608, 37 L. Ed. 867; *Security Trust Co. v. Black River Nat. Bank*, 187 U. S. 211, 229, 47 L. Ed. 147; *Walker v. Walker*, 9 Wall. 743, 19 L. Ed. 814. See, also, *Kittredge v. Race*, 92 U. S. 116, 121, 23 L. Ed. 488; *McLearn v. Wallace*, 10 Pet. 625, 9 L. Ed. 559. See, generally, the title EXECUTORS AND ADMINISTRATORS.

The several states of the Union necessarily have full control over the estates of deceased persons within their respective limits. *Yonley v. Lavender*, 21 Wall. 276, 279, 22 L. Ed. 536; *Rio Grande R. Co. v. Vinet*, 132 U. S. 565, 33 L. Ed. 438.

**Right to execution against decedent's estate on federal judgment.**—Where a stat-

enforce, for the furtherance of justice, the same rules in the adjustment of claims against executors or administrators that the local courts would do in favor of their own citizens,<sup>34</sup> will require a devisee to give security to refund in case a debt should afterwards be proved against the testator where this would be required by the state courts,<sup>35</sup> and are governed by the state rules as to the order of subjecting a decedent's estate for his debts or liabilities.<sup>36</sup> The construction of state administration laws by the highest courts of the state is likewise conclusive upon the federal courts.<sup>37</sup>

(3) *Assignments*.—The decision of the state courts as to what rights pass as an incident of a debt upon an assignment thereof is binding on the federal courts.<sup>38</sup>

ute of a state places the whole estate, real and personal, of a decedent within the custody of the probate court of the county, so that the assets may be fairly and equally distributed among creditors, without distinction as to whether resident or nonresident, a nonresident creditor may get a judgment in a federal court against the resident executor or administrator, and come in on the estate according to the law of the estate for such payment as that law, marshaling the rights of creditors, awards to debtors of his class. But he cannot because he has obtained a judgment in the federal court, issue execution and take precedent of other creditors who have no right to sue in the federal courts; and if he do issue execution and sell lands, the sale is void. *Yonley v. Lavender*, 21 Wall. 276, 22 L. Ed. 536; *Security Trust Co. v. Black River Nat. Bank*, 187 U. S. 211, 228, 47 L. Ed. 147.

A foreign creditor may establish his debt in the courts of the United States against the personal representative of a decedent, notwithstanding the fact that the laws of the state relative to the administration and settlement of decedents' estates do in terms limit the right to establish such demands to a proceeding in the probate courts of the state. *Security Trust Co. v. Black River Nat. Bank*, 187 U. S. 211, 227, 47 L. Ed. 147; *Union Bank v. Jolly*, 18 How. 503, 15 L. Ed. 472; *Lawrence v. Nelson*, 143 U. S. 215, 36 L. Ed. 130; *Byers v. McAuley*, 149 U. S. 608, 37 L. Ed. 867.

**34. Claims against ancillary executors.**—*Walker v. Walker*, 9 Wall. 743, 744, 19 L. Ed. 814; *Security Trust Co. v. Black River Nat. Bank*, 187 U. S. 211, 227, 47 L. Ed. 147; *Aspden v. Nixon*, 4 How. 467, 11 L. Ed. 1059.

"The circuit courts of the United States, with full equity powers, have jurisdiction over executors and administrators, where the parties are citizens of different states, and will enforce the same rules in the adjustment of claims against them that the local courts administer in favor of their own citizens." *Security Trust Co. v. Black River Nat. Bank*, 187 U. S. 211, 228, 47 L. Ed. 147; *Walker v. Walker*, 9 Wall. 743, 19 L. Ed. 814.

**35. Requiring refunding bond on payment of devise.**—*Aspden v. Nixon*, 4 How. 467, 11 L. Ed. 1059.

**36. Order of subjecting decedent's estate to debts.**—*McLearn v. Wallace*, 10 Pet. 625, 9 L. Ed. 559. See, generally, the title MARSHALING ASSETS AND SECURITIES.

**37. Construction of state administration laws.**—*Maxwell v. Moore*, 22 How. 185, 191, 16 L. Ed. 251; *Beauregard v. New Orleans*, 18 How. 497, 15 L. Ed. 469; *Manley v. Park*, 187 U. S. 547, 551, 47 L. Ed. 296; *Nichols v. Levy*, 5 Wall. 433, 18 L. Ed. 596.

The decision of the state courts that the special act of assembly authorized an administrator to make a valid deed, and divest the title of the heirs is conclusive on the federal courts. *Maxwell v. Moore*, 22 How. 185, 191, 16 L. Ed. 251.

Where the supreme court of Louisiana has decided questions relating to the jurisdiction of the district court of the first judicial district of the state, over the succession of a debtor who was enjoying a respite from the claims of his creditors, for a certain time and died before the time expired; to the mode in which that jurisdiction should be exercised; to the propriety of collaterally attacking a sale made by its authority; to the point whether or not the death of the party transferred the proceedings to the court of probate, and to the mode in which the court of probate should exercise its jurisdiction; the supreme court of the United States will adopt these decisions, and especially where many of them concur with its judgments upon the same or similar points. *Beauregard v. New Orleans*, 18 How. 497, 15 L. Ed. 469.

"We must accept then as undeniable the ruling of the highest court of Kansas, that under the constitution and statutes of Kansas real estate situated in that state, the title to which was vested in a nonresident executor, to whom letters testamentary had been issued by a court of another jurisdiction, might be attached and sold, in an action of debt against the nonresident executor." *Manley v. Park*, 187 U. S. 547, 551, 47 L. Ed. 296.

**38. Assignments—Rights passing as incidents.**—*Ober v. Gallagher*, 93 U. S. 199, 207, 23 L. Ed. 829.

The decision of the highest court of a state as to whether a lien to secure the payment of purchase money, expressly reserved by the vendor in his deed, passes



(4) *Assignments for Benefit of Creditors.*—The question of the construction and effect of a statute of a state, regulating assignments for the benefit of creditors, is a question upon which the decisions of the highest court of the state, establishing a rule of property, are of controlling authority in the courts of the United States.<sup>39</sup> The validity of an assignment for the benefit of creditors which is attacked upon the ground that it contains a provision that the preferred creditors shall accept their dividends in full satisfaction and discharge of their respective claims, is to be determined by the law of the state.<sup>40</sup> So, when the highest court of a state affirms that a conveyance, made by a debtor to a trustee for the benefit of creditors, is valid under the statutes of that state, the federal courts should ordinarily, in any case involving the validity of such conveyance, follow that ruling, even though that statute was common to many states, and in others a different ruling had obtained.<sup>41</sup>

(5) *Attachment and Garnishment.*—The construction by the highest state court of an attachment statute is binding on the federal courts.<sup>42</sup> Thus state decisions as to the bond required as a prerequisite to the issuance of an attachment,<sup>43</sup> or as to liability for counsel fees in a suit on such bond,<sup>44</sup> are conclusive on the federal courts.

by an assignment of the debt is rule of property binding on federal courts. *Ober v. Gallagher*, 93 U. S. 199, 207, 23 L. Ed. 829.

**39. Assignments for creditors.**—*South Branch Lumber Co. v. Ott*, 142 U. S. 622, 35 L. Ed. 1136; *Brashear v. West*, 7 Pet. 608, 8 L. Ed. 801; *Allen v. Massey*, 17 Wall. 351, 21 L. Ed. 542; *Lloyd v. Fulton*, 91 U. S. 479, 23 L. Ed. 363; *Sumner v. Hicks*, 2 Black 532, 17 L. Ed. 355; *Jaffray v. McGehee*, 107 U. S. 361, 27 L. Ed. 495; *Peters v. Bain*, 133 U. S. 670, 33 L. Ed. 696; *Randolph v. Quidnick Co.*, 135 U. S. 457, 34 L. Ed. 200; *Union Bank v. Kansas City Bank*, 136 U. S. 223, 34 L. Ed. 341; *Smith Middlings Purifier Co. v. McGroarty*, 136 U. S. 237, 241, 34 L. Ed. 346; *Robinson v. Belt*, 187 U. S. 41, 46, 47 L. Ed. 65; *Bamberger v. Schoolfield*, 160 U. S. 149, 159, 40 L. Ed. 374; *White v. Cotzhausen*, 129 U. S. 329, 32 L. Ed. 677. See, generally, the title ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 2, p. 599.

**Unlawful preferences.**—"In the recent case of *Rouse v. Merchants' Bank*, 46 O. St. 493, that court, upon a similar state of facts, adjudged that mortgages made by a trading corporation after it had become insolvent, and had ceased to do business, to prefer some of its creditors, were invalid and ineffectual against its creditors generally, without regard to the question whether the mortgages were or were not parts of the same transaction as an assignment under the statute. That decision, it is true, proceeded in part upon a theory that the property of an insolvent incorporation is a trust fund for its creditors in a wider and more general sense than could be maintained upon general principles of equity jurisprudence. *Graham v. Railroad Co.*, 102 U. S. 148, 26 L. Ed. 106; *Wabash, etc., R. Co. v. Ham*, 114 U. S. 587, 29 L. Ed. 235; *Richardson v. Green*, 133 U. S. 30, 33 L. Ed. 516; *Fogg v. Blair*, 133 U. S. 534, 33 L. Ed. 721; *Peters v.*

*Bain*, 133 U. S. 670, 33 L. Ed. 696. But it also proceeded in large part, as the opinion clearly shows, upon the constitution of Ohio, and the laws and policy of that state as declared in previous decisions of its highest court, and should therefore be accepted by this court as decisive of the law of Ohio upon the subject." *Smith Middlings Purifier Co. v. McGroarty*, 136 U. S. 237, 241, 34 L. Ed. 346.

**40.** *Robinson v. Belt*, 187 U. S. 41, 47 L. Ed. 65, citing *Brashear v. West*, 7 Pet. 608, 8 L. Ed. 801.

**41.** *Randolph v. Quidnick Co.*, 135 U. S. 457, 463, 34 L. Ed. 200.

**42. Construction of attachment statute.**—*Beach v. Viles*, 2 Pet. 675, 7 L. Ed. 559; *Fleitas v. Cockrem*, 101 U. S. 301, 304, 25 L. Ed. 954; *Fidelity, etc., Co. v. Bucki*, 189 U. S. 135, 137, 47 L. Ed. 744. See, generally, the title ATTACHMENT AND GARNISHMENT, vol. 2, p. 660.

In *Beach v. Viles*, 2 Pet. 675, 7 L. Ed. 559, it is said: "This being a suit upon a local statute, giving a particular remedy, in the nature of a foreign attachment, against garnishees, who possess goods, effects or credits of the principal debtor; the decisions which have been made on the construction of that statute, by the state court of Massachusetts, are entitled to great respect; and ought, in conformity to the uniform practice of this court, to govern its decision."

**43.** *Fleitas v. Cockrem*, 101 U. S. 301, 304, 25 L. Ed. 954.

The Louisiana statute as to attachments provides that the creditor shall execute and deliver a bond "for a sum exceeding one-half that which he claims." The Louisiana supreme court construed the provision as meaning a bond "for a sum exceeding by one-half that which he claims." Held, the construction is binding on the federal courts. *Fleitas v. Cockrem*, 101 U. S. 301, 304, 25 L. Ed. 954.

**44. Liability for counsel fees in suit on**



(6) *Attorneys*.—It is for the highest court of a state to construe a statute of the state relating to the admission of attorneys and to determine whether the word "person" as therein used is confined to males, or whether women may be admitted to practice law in the state.<sup>45</sup>

(7) *Bills, Notes and Checks*.—Where any controversy arises as to the liability of a party to a bill of exchange, promissory note, or other negotiable paper, in one of the federal courts, which is not determined by the positive words of a state statute, or its meaning as construed by the state courts, the federal courts will apply to its solution the general principles of the law merchant, regardless of any local decision.<sup>46</sup> Thus the question whether one taking commercial paper in payment of, or as collateral security for, a pre-existing debt is a holder in due course of trade,<sup>47</sup> or as to the rights of an indorsee of a bill or note as affected by usury in the transfer,<sup>48</sup> or as to the rights of the holder of municipal or county bonds negotiable in form,<sup>49</sup> are questions of general law, upon which

**attachment bond.**—*Fidelity, etc., Co. v. Bucki*, 189 U. S. 135, 137, 47 L. Ed. 744.

"Liability for these counsel fees being, as declared by its highest court, a part of the obligation assumed by the obligor in an attachment bond given in the courts of Florida, should be enforced in every court in which an action on such a bond is brought. This action was commenced in a circuit court of the state, and if it had proceeded there to judgment unquestionably a liability for counsel fees would have been sustained, and it cannot be that by removing the case to the federal court such liability has been taken away." *Fidelity, etc., Co. v. Bucki*, 189 U. S. 135, 137, 47 L. Ed. 744.

**45. Admission of attorneys at law.**—*In re Lockwood*, 154 U. S. 116, 118, 38 L. Ed. 929; *Bradwell v. Illinois*, 16 Wall. 130, 21 L. Ed. 442. See, generally, the title ATTORNEY AND CLIENT, vol. 2, p. 703.

**46. Commercial paper.**—*Railroad Co. v. National Bank*, 102 U. S. 14, 26 L. Ed. 61; *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865; *Oates v. National Bank*, 100 U. S. 239, 25 L. Ed. 580; *Pana v. Bowler*, 107 U. S. 529, 541, 27 L. Ed. 424; *Pine Grove Township v. Talcott*, 19 Wall. 666, 22 L. Ed. 227; *Mercer County v. Hackett*, 1 Wall. 83, 96, 17 L. Ed. 548. See, also, *United States Bank v. Daniel*, 12 Pet. 32, 9 L. Ed. 989.

"The law respecting negotiable instruments may be truly declared, in the language of Cicero, adopted by Lord Mansfield in *Luke v. Lyde*, 2 Burr. 883, 887, to be in a great measure not the law of a single country only, but of the commercial world." *Watson v. Tarpley*, 18 How. 517, 520, 15 L. Ed. 509; *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865.

"We have already seen that the statutes of Alabama placed under the protection of the commercial law promissory notes payable in money at a certain designated place; but how far the rights of parties here are affected by the rules and doctrines of that law is for the federal courts to determine, upon their own judgment as to what these rules and doctrines are."

*Oates v. National Bank*, 100 U. S. 239, 25 L. Ed. 580. See, also, *Railroad Co. v. National Bank*, 102 U. S. 14, 31, 26 L. Ed. 61.

**47. Who are bona fide holders.**—*Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865; *Railroad Co. v. National Bank*, 102 U. S. 14, 26 L. Ed. 61; *Oates v. National Bank*, 100 U. S. 239, 25 L. Ed. 580 (in all of these cases it was held that a person taking commercial paper in payment of or as collateral security for, a pre-existing debt were bona fide holders for value, regardless of the state rule on the subject).

**48. Right of indorsee taking paper for usurious discount.**—Upon a question as to whether the indorsee of commercial paper to whom it has been transferred at a usurious discount can recover against the indorser, the federal courts adopt their own views. *Nichols v. Fearson*, 7 Pet. 103, 8 L. Ed. 624.

**49. Rights of holder of municipal or county bonds.**—*Pana v. Bowler*, 107 U. S. 529, 541, 27 L. Ed. 424; *Pine Grove Township v. Talcott*, 19 Wall. 666, 22 L. Ed. 227.

"We are not bound to accept the inference drawn by the supreme court of Illinois, that in consequence of such irregularity in the election the bonds issued in pursuance of it by the officers of the township, which recite on their face that the election was held in accordance with the statute, are void in the hands of bona fide holders. This latter proposition is one which falls among the general principles and doctrines of commercial jurisprudence, upon which it is our duty to form an independent judgment, and in respect of which we are under no obligation to follow implicitly the conclusions of any other court, however learned or able it may be." *Pana v. Bowler*, 107 U. S. 529, 541, 27 L. Ed. 424.

The decisions of the highest court of the state will not be respected, when such decisions are not satisfactory to the minds of the judges, and when the matter in question is bonds issued in negotiable form by a township, and now in the hands of a citizen of another state or a foreigner,

the federal courts exercise an independent judgment. Indeed, it has been held that a state statute curtailing the right of the holder of a bill to recourse on the drawee upon nonacceptance is not binding on the federal courts.<sup>50</sup> But however that may be, the federal courts are governed by the state statutes as to the time within which a demand note becomes overdue.<sup>51</sup>

(8) *Carriers*—(a) *In General*.—The subject of carriers is one of general law, and decisions of the state courts upon this question are not binding on the federal courts.<sup>52</sup>

(b) *What Constitutes a Contract for Through Carriage*.—What constitutes a through contract of carriage is not a question of local law, upon which the decision of a state court must control, but is a matter of general law, upon which the federal court will exercise its own judgment.<sup>53</sup>

(c) *Exemptions from Liability for Negligence*.—A decision of state courts as to the validity of a stipulation by a carrier for exemption from the consequences of his own or his servant's negligence is not binding upon federal courts. Such a contract must be held to be void in the courts of the United States, without regard to the decisions of the courts of the state in which the question arises.<sup>54</sup>

bona fide and for value paid. *Pine Grove Township v. Talcott*, 19 Wall. 666, 22 L. Ed. 227.

#### 50. State statute cutting off recourse of holder against drawer upon nonacceptance.

—By the general rules of commercial law, the payee or indorsee of a bill, upon its presentment and upon refusal by the drawee to accept, has the right to immediate recourse against the drawer. He is not bound to wait to see whether or not the bill will be paid at maturity. A statute of a state, which forbids a suit from being brought in such a case until after the maturity of the bill, can have no effect upon suits brought in the courts of the United States. So, also, if the statute seeks to make the right of recovery in a suit brought in case of nonacceptance dependent upon proof of subsequent presentment, protest, and notice for nonpayment. *Watson v. Tarpley*, 18 How. 517, 15 L. Ed. 509.

51. *When demand note overdue*.—*Paine v. Central, etc., R. Co.*, 118 U. S. 152, 30 L. Ed. 193.

52. *Carriers—In general*.—*Liverpool, etc., Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 443, 32 L. Ed. 788; *Hartford Fire Ins. Co. v. Chicago, etc., R. Co.*, 175 U. S. 91, 42 L. Ed. 84; *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627; *Myrick v. Michigan Cent. R. Co.*, 107 U. S. 102, 27 L. Ed. 325; *Smith v. Alabama*, 124 U. S. 465, 31 L. Ed. 508; *Lake Shore, etc., R. Co. v. Prentice*, 147 U. S. 101, 37 L. Ed. 97; *Baltimore, etc., R. Co. v. Baugh*, 149 U. S. 368, 37 L. Ed. 772; *Paine v. Central, etc., R. Co.*, 118 U. S. 152, 30 L. Ed. 193; *Chicago, etc., R. Co. v. Solan*, 169 U. S. 133, 136, 42 L. Ed. 688.

53. *What constitutes contract for through carriage*.—*Myrick v. Michigan Cent. R. Co.*, 107 U. S. 102, 109, 27 L. Ed. 325. See, generally, the title CARRIERS, vol. 3, p. 556.

In *Myrick v. Michigan Cent. R. Co.*, 107 U. S. 102, 108, 27 L. Ed. 325, the question

was whether a bill of lading, issued by a railroad company, whereby the company agreed to carry cattle beyond its own line to the place named for final delivery, was a through contract. The ticket or bill of lading was issued in Illinois, and the rulings of the supreme court of that state, as to the effect of such a ticket or bill of lading, were claimed to be conclusive; but this court declined to follow them, and in the exercise of its own judgment placed a different construction upon the contract. *Baltimore, etc., R. Co. v. Baugh*, 149 U. S. 368, 375, 37 L. Ed. 772.

54. *Exemptions from liability for negligence*.—*Railroad Co. v. Lockwood*, 17 Wall. 357, 363, 21 L. Ed. 627; *Chicago, etc., R. Co. v. Solan*, 169 U. S. 133, 136, 42 L. Ed. 688; *Lake Shore, etc., R. Co. v. Prentice*, 147 U. S. 101, 106, 37 L. Ed. 97; *Baltimore, etc., R. Co. v. Baugh*, 149 U. S. 368, 375, 37 L. Ed. 772; *Hartford Fire Ins. Co. v. Chicago, etc., R. Co.*, 175 U. S. 91, 97, 42 L. Ed. 84; *Liverpool, etc., Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 32 L. Ed. 788; *Smith v. Alabama*, 124 U. S. 465, 31 L. Ed. 508. See, generally, the title CARRIERS, vol. 3, p. 556.

"The question of the right of a railroad corporation to contract for exemption from liability for its own negligence is, indeed, like other questions affecting its liability as a common carrier of goods or passengers, one of those questions not of merely local law, but of commercial law or general jurisprudence, upon which this court, in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the courts of the state in which the cause of action arises. But the law to be applied is none the less the law of the state; and may be changed by its legislature, except so far as restrained by the constitution of the state or by the constitution or law of the United States. *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627; *Hough v. Railway Co.*, 100

(d) *Liability for Punitive or Exemplary Damages.*—Whether a railroad corporation can be charged with punitive or exemplary damages for the illegal, wanton and oppressive conduct of a conductor of one of its trains towards a passenger, is a question, not of local law, but of general jurisprudence, upon which the federal courts, in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the courts of the several states.<sup>55</sup>

(e) *Regulation of Rates.*—A decision of the highest court of the state that under a state statute providing for regulating railroad rates by a corporation commission, the decision of the commission is final and conclusive, and not subject to judicial investigation, is binding on the federal courts.<sup>56</sup>

(f) *At What Stations Trains Must Stop.*—Where the highest court of a state holds that the statute not only required every train to stop at every county seat at which it arrived, but that every train passing through a certain city must go to and stop at the station in that city, the construction is binding on the federal courts.<sup>57</sup>

(g) *Commercial Law.*—The courts of the United States are not controlled by the decisions of state courts on questions of general commercial law.<sup>58</sup> Commercial law is a phrase employed to denote the branch of the law which relates to the rights of property and the relations of persons engaged in commerce. Persons engaged in commercial adventures, wherever they may have their domicile, have business relations throughout the civilized world, from which it results that

U. S. 213, 25 L. Ed. 612; *Burgess v. Seligman*, 107 U. S. 20, 27 L. Ed. 359; *Myrick v. Michigan Cent. R. Co.*, 107 U. S. 102, 109, 27 L. Ed. 325; *Smith v. Alabama*, 124 U. S. 465, 31 L. Ed. 508; *Lake Shore, etc., R. Co. v. Prentice*, 147 U. S. 101, 37 L. Ed. 97; *Baltimore, etc., R. Co. v. Baugh*, 149 U. S. 368, 369, 37 L. Ed. 772; *Paine v. Central, etc., R. Co.*, 118 U. S. 152, 30 L. Ed. 193." *Chicago, etc., R. Co. v. Solan*, 169 U. S. 133, 136, 42 L. Ed. 688.

"In *Railroad Co. v. Lockwood*, 17 Wall. 357, 368, 21 L. Ed. 627, the question was as to the extent to which a common carrier could stipulate for exemption from responsibility for the negligence of himself or his servants, and notwithstanding there were decisions of the courts of New York thereon, the state in which the cause of action arose, this court held that it was not bound by them, and that in a case involving a matter of such importance to the whole country it was its duty to proceed in the exercise of an independent judgment." *Baltimore, etc., R. Co. v. Baugh*, 149 U. S. 368, 374, 37 L. Ed. 772.

**55. Liability for punitive damages.**—*Lake Shore, etc., R. Co. v. Prentice*, 147 U. S. 101, 106, 37 L. Ed. 97; *Baltimore, etc., R. Co. v. Baugh*, 149 U. S. 368, 375, 37 L. Ed. 772. See, generally, the title EXEMPLARY DAMAGES.

**56. Regulation of rates.**—*Chicago, etc., R. Co. v. Minnesota*, 134 U. S. 418, 456, 33 L. Ed. 970. See, generally, the title CARRIERS, vol. 3, p. 556.

**57. At what stations trains must stop.**—*Illinois Cent. R. Co. v. Illinois*, 163 U. S. 142, 152, 41 L. Ed. 107. See, generally, the title CARRIERS, vol. 3, p. 556.

**58. Railroad Co. v. National Bank**, 102 U. S. 14, 26 L. Ed. 61; *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865; *Oates v. National Bank*, 100 U. S. 239, 25 L. Ed. 580; *Wallace v. McConnell*, 13 Pet. 136, 150, 10 L. Ed. 95; *Carpenter v. Providence, etc., Ins. Co.*, 16 Pet. 495, 10 L. Ed. 1044; *Stutsman County v. Wallace*, 142 U. S. 293, 35 L. Ed. 1018; *Stanly County v. Coler*, 190 U. S. 437, 444, 47 L. Ed. 1126; *Burgess v. Seligman*, 107 U. S. 20, 27 L. Ed. 359; *Pleasant Township v. Aetna Life Ins. Co.*, 138 U. S. 67, 73, 34 L. Ed. 864.

It is of the utmost importance that all rules relating to commercial law should be stable and uniform. They are adopted for practical purposes, to regulate the course of business in commercial transactions; and the rule here established is well calculated for the convenience and safety of all parties. *Wallace v. McConnell*, 13 Pet. 136, 150, 10 L. Ed. 95.

"It never has been supposed by us, that this section did apply, or was intended to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation; as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves; that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract, or what is the just rule furnished by the principles of commercial law to govern the case." *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865; *Watson v. Tarpley*, 18 How. 517, 520, 15 L. Ed. 509.



commercial law is less local and more international than any other system of law, except the law of nations.<sup>59</sup>

(10) *Courts*—(a) *Organization and Constitution*.—The decisions of the highest courts of the state are controlling upon the question as to the proper constitution of a state court under the state constitution and laws.<sup>60</sup>

(b) *Jurisdiction*.—Decisions of the state court as to the jurisdiction and functions of its own courts,<sup>61</sup> or as to the existence of facts which give it jurisdiction under a state statute,<sup>62</sup> are binding on the federal courts.

(11) *Common Law*.—The adoption of the state laws by the act of congress extends as well to the unwritten as to the written law—to the law arising from established usage and judicial determinations, as well as to the law created by positive acts of the legislature.<sup>63</sup> But the interpretation of the common law of the state by the state courts, is not binding on the federal courts in cases where no rule of property has been established by the state decisions.<sup>64</sup>

(12) *Construction of State Constitution or Laws*—(a) *In General*.—Upon the construction of the constitution and laws of a state, the federal courts as a general rule, follow the decision of the highest court of the state, unless they conflict with or impair the efficacy of some provision of the federal constitution, or of a federal statute, or a rule of general commercial law.<sup>65</sup> And this is true,

**59. Meaning of "commercial law."**—*Railroad Co. v. National Bank*, 102 U. S. 14, 55, 26 L. Ed. 61.

**60. Constitution of state court.**—*Meriwether v. Muhlenburg County Court*, 120 U. S. 354, 30 L. Ed. 653; *Bullitt County v. Washer*, 130 U. S. 142, 151, 32 L. Ed. 885.

Thus the holdings of the supreme court of Kentucky that the justices of the peace are no part of the county court, when levying a tax to pay judgments against the county, and that the court may be held by county judge alone, are binding on the federal courts. *Meriwether v. Muhlenburg County Court*, 120 U. S. 354, 30 L. Ed. 653. See, also, *Bullitt County v. Washer*, 130 U. S. 142, 151, 32 L. Ed. 885.

As to the organization or composition of a tribunal established by the fundamental law of the state, the decisions of the state are at least entitled to great weight. *Meriwether v. Muhlenburg County Court*, 120 U. S. 354, 357, 30 L. Ed. 653.

**61. Jurisdiction of state courts.**—*Freeport Water Co. v. Freeport City*, 180 U. S. 587, 45 L. Ed. 679; *Danville Water Co. v. Danville*, 180 U. S. 619, 45 L. Ed. 696; *Chicago, etc., R. Co. v. Minnesota*, 134 U. S. 418, 452, 33 L. Ed. 970; *Jeter v. Hewitt*, 22 How. 352, 16 L. Ed. 345; *Mechanics', etc., Bank v. Union Bank*, 22 Wall. 276, 22 L. Ed. 871.

With what functions state courts are invested is a matter of construction in which the federal courts follow state decisions. *Freeport Water Co. v. Freeport City*, 180 U. S. 587, 601, 45 L. Ed. 679; *Danville Water Co. v. Danville*, 180 U. S. 619, 45 L. Ed. 696.

A mortgage of land and slaves, in Louisiana, was made to the Bank of Louisiana, and the property sold in the manner pointed out by the charter of the bank. The purchasers applied to the district court (state court), under a statute of

Louisiana, for a monition, citing all persons who objected to sale to make their objection known. That court decided that the sale was null and void, but the supreme court reversed the judgment as to the widow, and those claiming under her. Held, this judgment cuts off all the objections that apply to the manner of conducting the sale, and to the form of the judgment in the court below; the supreme court of the state having decided that the courts below had jurisdiction of the case, that decision is binding upon the federal court. *Jeter v. Hewitt*, 22 How. 352, 16 L. Ed. 345.

**Construction of statute as to jurisdiction of state courts binding on federal courts.**—*Chicago, etc., R. Co. v. Minnesota*, 134 U. S. 418, 452, 33 L. Ed. 970.

**62. Existence of facts giving state court jurisdiction.**—*Grignon v. Astor*, 2 How. 319, 11 L. Ed. 283.

By a law of Michigan, passed in 1818, the county courts had power, under certain circumstances, to order the sale of the real estate of a deceased person for the payment of debts and legacies. Held, that it was for that court to decide upon the existence of the facts which gave jurisdiction; and the exercise of the jurisdiction warrants the presumption that the facts which were necessary to be proved were proved. *Grignon v. Astor*, 2 How. 319, 11 L. Ed. 283.

**63. Common law.**—*Brown v. Van Braam*, 3 Dall. 344, 352, 1 L. Ed. 629.

**64. Interpretation of common law not binding.**—*Smith v. Alabama*, 124 U. S. 465, 31 L. Ed. 508; *Western Union Tel. Co. v. Call Pub. Co.*, 181 U. S. 92, 100, 45 L. Ed. 765; *Chicago v. Robbins*, 2 Black 418, 17 L. Ed. 298.

**65. Construction of state statutes followed.**—*Supreme Lodge Knights of Pythias v. Meyer*, 198 U. S. 508, 49 L. Ed. 1146; *Bacon v. Texas*, 163 U. S. 207, 221,

although the federal court may be of the opinion that the construction given by the state court is improper.<sup>66</sup> It is immaterial whether such construction has

41 L. Ed. 132; *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. Ed. 520; *Hammond v. Hastings*, 134 U. S. 401, 404, 33 L. Ed. 960; *Amy v. Watertown* (No. 1), 130 U. S. 301, 32 L. Ed. 946; *Enfield v. Jordan*, 119 U. S. 680, 30 L. Ed. 523; *Hall v. DeCuir*, 95 U. S. 485, 500, 24 L. Ed. 547; *Provident Institution v. Massachusetts*, 6 Wall. 611, 18 L. Ed. 907; *Randall v. Brigham*, 7 Wall. 523, 19 L. Ed. 285; *Gut v. The State*, 9 Wall. 35, 19 L. Ed. 573; *Stutsman County v. Wallace*, 142 U. S. 293, 306, 35 L. Ed. 1018; *First Nat. Bank v. Ayers*, 160 U. S. 660, 664, 40 L. Ed. 573; *Luther v. Borden*, 7 How. 1, 58, 12 L. Ed. 581; *Louisiana v. Pilsbury*, 105 U. S. 278, 295, 26 L. Ed. 1090; *Taylor v. Beckham*, 178 U. S. 548, 572, 44 L. Ed. 1187; *Wilson v. North Carolina*, 169 U. S. 586, 592, 42 L. Ed. 865; *Gormley v. Clark*, 134 U. S. 338, 348, 33 L. Ed. 909; *Norton v. Shelby County*, 118 U. S. 425, 30 L. Ed. 178; *Pollard v. Dwight*, 4 Cranch 421, 429, 2 L. Ed. 666; *Porterfield v. Clark*, 2 How. 76, 125, 11 L. Ed. 185; *Miller v. Cornwall R. Co.*, 168 U. S. 131, 134, 42 L. Ed. 409; *Porter v. Foley*, 24 How. 415, 16 L. Ed. 740; *Kipley v. Illinois*, 170 U. S. 182, 186, 42 L. Ed. 998; *Galpin v. Page*, 18 Wall. 350, 21 L. Ed. 959; *Carroll v. Safford*, 3 How. 441, 460, 11 L. Ed. 671; *Russell v. Ely*, 2 Black 575, 576, 17 L. Ed. 258; *New York Cent. R. Co. v. Miller*, 202 U. S. 584, 595, 50 L. Ed. 1155; *Commissioners v. Bancroft*, 203 U. S. 112, 118, 51 L. Ed. 112; *Oakes v. Mase*, 165 U. S. 363, 364, 41 L. Ed. 746; *Forsyth v. Hammond*, 166 U. S. 506, 518, 41 L. Ed. 1095; *O'Connor v. Texas*, 202 U. S. 501, 509, 50 L. Ed. 1120; *Mercer County v. Hackett*, 1 Wall. 83, 17 L. Ed. 548; *Marshall v. Ladd*, 131 U. S. appx. lxxxix, 19 L. Ed. 153; *Cook County v. Calumet, etc., Co.*, 138 U. S. 635, 34 L. Ed. 1110; *Saunders v. Gould*, 4 Pet. 392, 7 L. Ed. 897; *Beals v. Hale*, 4 How. 37, 54, 11 L. Ed. 865; *Smith v. Kernochen*, 7 How. 198, 219, 12 L. Ed. 660; *Moore v. Brown*, 11 How. 414, 435, 13 L. Ed. 751; *Andreae v. Redfield*, 98 U. S. 225, 235, 25 L. Ed. 158; *Lambert v. Barrett*, 159 U. S. 660, 40 L. Ed. 296; *Union Nat. Bank v. Louisville, etc., R. Co.*, 163 U. S. 325, 331, 41 L. Ed. 177; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 688, 41 L. Ed. 1165; *Fleitas v. Cockrem*, 101 U. S. 301, 25 L. Ed. 954; *Shoshone Min. Co. v. Rutter*, 177 U. S. 505, 508, 44 L. Ed. 864; *Adams Express Co. v. Ohio*, 165 U. S. 194, 219, 41 L. Ed. 683; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. Ed. 569; *West v. Louisiana*, 194 U. S. 258, 261, 48 L. Ed. 965; *Henry County v. Nicolay*, 95 U. S. 619, 24 L. Ed. 394.

When the construction of the constitution or the statutes of a state has been fixed by an unbroken series of decisions of its highest court, the courts of the United States accept and apply it in cases

before them. *Elmwood v. Marcy*, 92 U. S. 289, 23 L. Ed. 710.

"This court respects the decisions of the state courts upon their local statutes, in the same manner as the state courts are bound by the decisions of this court in construing the constitution, laws and treaties of the union." *Elmendorf v. Taylor*, 10 Wheat. 152, 6 L. Ed. 289.

The power to determine the meaning of a statute carries with it the power to prescribe its extent and limitations as well as the method by which they shall be determined. *Smiley v. Kansas*, 196 U. S. 447, 455, 49 L. Ed. 546.

"When a case is brought in the United States court, comity generally requires of this court that in matters relating to the proper construction of the laws and constitution of its own state, this court should follow the decisions of the state court; yet in exceptional cases, such as *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. Ed. 520, it is seen that this court has refused to be bound by such rule, and has refused to follow the later decisions of the state court." *Bacon v. Texas*, 163 U. S. 207, 221, 41 L. Ed. 132.

If a statute as construed by the state court is constitutional the federal courts follow its construction. *Soper v. Lawrence*, 201 U. S. 359, 370, 50 L. Ed. 788; *Tampa Waterworks Co. v. Tampa*, 199 U. S. 241, 50 L. Ed. 170; *Strickley v. Highland Boy Gold Min. Co.*, 200 U. S. 527, 530, 50 L. Ed. 581.

Whether the legislature of a state has authority under the constitution of the state to pass a particular statute, what is the true interpretation of any statute passed by it for a purpose specified, and what acts will be justified under the statute, are matters which lie exclusively within the determination of the highest court of the state. *Aicardi v. The State*, 19 Wall. 635, 22 L. Ed. 215.

In a great majority of the causes brought before the federal tribunals, they are called on to enforce the laws of the states; the rights of parties are determined under these laws, and it would be a strange perversion of principle, if the judicial exposition of these laws by the state tribunals should be disregarded. These expositions constitute the law, and fix the rule of property; rights are acquired under this rule, and it regulates all the transactions which come within its scope. *Green v. Neal*, 6 Pet. 291, 8 L. Ed. 402.

**66. Where federal does not agree with state court as to correctness of construction.**—*Supervisors v. United States*, 18 Wall. 71, 82, 21 L. Ed. 771; *McKeen v. Delancy*, 5 Cranch 22, 3 L. Ed. 25; *Forsyth v. Hammond*, 166 U. S. 506, 518, 41 L. Ed. 1095; *Iowa Cent. R. Co. v. Iowa*, 160 U. S. 389, 40 L. Ed. 467.

"The construction by the courts of a



been established by long usage or a judicial decision.<sup>67</sup>

(b) *Construction Considered as Part of Statute.*—The construction given to a statute of a state by the highest judicial tribunal of such state is regarded as a part of the statute, and is as binding upon the courts of the United States as the text.<sup>68</sup>

(c) *Consistency of Statute with State Constitution.*—The federal courts are bound by the decision of the highest court of a state that a statute violates no provision of the constitution of the state, and that it is a valid statute so far as that instrument was concerned.<sup>69</sup>

state of its constitution and statutes is, as a general rule, binding on the federal courts. We may think that the supreme court of a state has misconstrued its constitution or its statutes, but we are not at liberty to therefore set aside its judgments. That court is the final arbiter as to such questions." Forsyth v. Hammond, 166 U. S. 506, 518, 41 L. Ed. 1095.

**67. Construction by usage.**—Carroll v. Safford, 3 How. 441, 460, 11 L. Ed. 671.

**68. Construction regarded as part of statute.**—Leffingwell v. Warren, 2 Black 599, 603, 17 L. Ed. 261; Shelby v. Guy, 11 Wheat. 361, 6 L. Ed. 495; McClung v. Silliman, 3 Pet. 270, 7 L. Ed. 676; Green v. Neal, 6 Pet. 291, 8 L. Ed. 402; Ross v. Duval, 13 Pet. 45, 10 L. Ed. 51; Massingill v. Downs, 7 How. 760, 767, 12 L. Ed. 903; Nesmith v. Sheldon, 7 How. 812, 12 L. Ed. 925; Van Rensselaer v. Kearney, 11 How. 297, 13 L. Ed. 703; Webster v. Cooper, 14 How. 488, 504, 14 L. Ed. 510; Machine Co. v. Gage, 100 U. S. 676, 677, 25 L. Ed. 754; Bauserman v. Blunt, 147 U. S. 647, 654, 37 L. Ed. 316; Hamilton Co. v. Massachusetts, 6 Wall. 632, 641, 18 L. Ed. 904; Tayloe v. Thomson, 5 Pet. 358, 8 L. Ed. 154; Bucher v. Cheshire R. Co., 125 U. S. 555, 582, 31 L. Ed. 795; Morley v. Lake Shore, etc., R. Co., 146 U. S. 162, 36 L. Ed. 925; Randall v. Brigham, 7 Wall. 523, 19 L. Ed. 285; Provident Institution v. Massachusetts, 6 Wall. 611, 18 L. Ed. 907; Douglass v. Pike County, 101 U. S. 677, 25 L. Ed. 968; Weightman v. Clark, 103 U. S. 256, 26 L. Ed. 392; Louisiana v. Pilsbury, 105 U. S. 278, 295, 26 L. Ed. 1090; Gelpcke v. Dubuque, 1 Wall. 175, 17 L. Ed. 520; Havemeyer v. Iowa County, 3 Wall. 294, 18 L. Ed. 38; Thompson v. Lee County, 3 Wall. 327, 18 L. Ed. 177; Lee County v. Rogers, 7 Wall. 181, 19 L. Ed. 160; Chicago v. Sheldon, 9 Wall. 50, 19 L. Ed. 594; Olcott v. The Supervisors, 16 Wall. 678, 21 L. Ed. 382; Fairfield v. Galatin County, 100 U. S. 47, 25 L. Ed. 544.

"That the statute laws of the states," says Mr. Justice Johnson, in delivering the opinion of this court in Shelby v. Guy, 11 Wheat. 361, 367, 6 L. Ed. 495, "must furnish the rule of decision of this court, so far as they comport with the constitution of the United States, in all cases arising within the respective states, is a position that no one doubts. Nor is it questionable that a fixed and received con-

struction of their respective statute laws, in their own courts, makes, in fact, a part of the statute law of the country, however we may doubt the propriety of that construction. It is obvious that this admission may at times involve us in seeming inconsistencies—as where states have adopted the same statutes, and their courts differ in the construction. Yet that course is necessarily indicated by the duty imposed upon us, to administer, as between certain individuals, the laws of the respective states, according to the best lights we possess of what those laws are." Christy v. Pridgeon, 4 Wall. 196, 203, 18 L. Ed. 322.

**69. Consistency of state statute with state constitution.**—Jack v. Kansas, 199 U. S. 372, 379, 50 L. Ed. 234; Smiley v. Kansas, 196 U. S. 447, 49 L. Ed. 546; Merchants', etc., Bank v. Pennsylvania, 167 U. S. 461, 42 L. Ed. 236; Michigan Cent. R. Co. v. Powers, 201 U. S. 245, 50 L. Ed. 744; State Railroad Tax Cases, 92 U. S. 575, 576, 23 L. Ed. 663; Pittsburg, etc., R. Co. v. Backus, 154 U. S. 421, 425, 31 L. Ed. 1031; Withers v. Buckley, 20 How. 84, 89, 15 L. Ed. 816; Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 688, 41 L. Ed. 1165; League v. Texas, 184 U. S. 156, 159, 46 L. Ed. 478; Mason v. Missouri, 179 U. S. 328, 334, 45 L. Ed. 214; Adams Express Co. v. Ohio, 165 U. S. 194, 219, 41 L. Ed. 683; Carstaris v. Cochran, 193 U. S. 10, 16, 48 L. Ed. 596; Merchants', etc., Bank v. Pennsylvania, 167 U. S. 461, 42 L. Ed. 236; Backus v. Fort St. Union Depot Co., 169 U. S. 557, 42 L. Ed. 853; Rasmussen v. Idaho, 181 U. S. 198, 45 L. Ed. 820; Lincoln County v. Luning, 133 U. S. 529, 532, 33 L. Ed. 766; Giozza v. Tiernan, 148 U. S. 657, 661, 37 L. Ed. 599; Gut v. The State, 9 Wall. 35, 19 L. Ed. 573; Brown v. New Jersey, 175 U. S. 172, 174, 44 L. Ed. 119; Louisiana v. Pilsbury, 105 U. S. 278, 26 L. Ed. 1090; Hallinger v. Davis, 146 U. S. 314, 36 L. Ed. 986; Forsyth v. Hammond, 166 U. S. 506, 41 L. Ed. 1095; Orr v. Gilman, 183 U. S. 278, 283, 46 L. Ed. 196; Montana v. Rice, 204 U. S. 291, 301, 51 L. Ed. 490; Randall v. Brigham, 7 Wall. 523, 541, 19 L. Ed. 285; Provident Institution v. Massachusetts, 6 Wall. 611, 630, 18 L. Ed. 907; Aicardi v. The State, 19 Wall. 635, 22 L. Ed. 215; Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 112, 154, 41 L. Ed. 369; Montana



(d) *Construction of State Constitution*—aa. *In General*.—There is no sound distinction between the construction of a law enacted by the legislature of a state, and the construction of the organic law, ordained by the people themselves. The exposition of both belongs to the judicial department of the government of the state, and its decision is final, and binding upon all other departments of that government, and upon the people themselves, until they see fit to change their constitution; and the federal courts receive such a settled construction as part of the fundamental law of the state.<sup>70</sup>

bb. *Validity of Constitution*.—Where two opposing state governments are set up, and the courts of the state decide in favor of one, the courts of the United States adopt and follow the decisions of the state courts upon such a question.<sup>71</sup>

cc. *Whether Constitutional Provisions Are Self-Executing*.—A decision of the highest court of a state involving the question whether a provision of the state constitution is self-executing or not is binding on the federal courts.<sup>72</sup>

(e) *What Constitutes "Construction" of a State Law*.—The decision of the state court that a state statute governs a particular case is a construction of the state statute and is binding upon the federal courts.<sup>73</sup>

(f) *Decisions as to What Are Laws of State*—aa. *In General*.—As a matter of propriety and right, the decisions of the state courts on the question as to what are the laws of the state is binding upon those of the United States.<sup>74</sup>

*Co. v. St. Louis Min., etc., Co.*, 152 U. S. 160, 165, 38 L. Ed. 398; *Riney v. Texas*, 193 U. S. 504, 509, 48 L. Ed. 767; *East Hartford v. Hartford Bridge Co.*, 10 How. 511, 13 L. Ed. 518.

If conflict with the state constitution is the sole ground of attack, the supreme court of the state is the final authority. *Merchants', etc., Bank v. Pennsylvania*, 167 U. S. 461, 42 L. Ed. 236; *Michigan Cent. R. Co. v. Powers*, 201 U. S. 245, 50 L. Ed. 744.

**70. Construction placed on state constitution**.—*Webster v. Cooper*, 14 How. 488, 504, 14 L. Ed. 510.

**71. Validity of state government**.—*Luther v. Borden*, 7 How. 1, 12 L. Ed. 581.

**72. Whether constitutional provisions self-executing**.—*Middleton Nat. Bank v. Toledo, etc., R. Co.*, 197 U. S. 394, 404, 49 L. Ed. 803. See, generally, the title CONSTITUTIONAL LAW, ante, p. 1.

**73. What constitutes "construction" of statute**.—*Williams v. Gaylord*, 186 U. S. 157, 46 L. Ed. 1102.

In a case in which it was contended that federal courts are not bound by the application of a state statute by state courts, but only by its construction, the supreme court said: "We are unable to accept the distinction. To accept it would deprive the state courts of the power to declare the implications of state statutes, and confine interpretation to the mere letter. The supreme court of California declared the effect of the act of 1880 as deduced from the language and purpose of the act, and this was necessarily an exercise of construction. The very essence of construction is the extension of the meaning of a statute beyond its letter, and it can seldom be done without applying some principle of law general in some branch of jurisprudence, and if whenever such application occurs the authority of the state

courts to interpret the statute ceases, the federal tribunals, instead of following, could lead those courts in declaring the meaning of the legislation of the states." *Williams v. Gaylord*, 186 U. S. 157, 163, 46 L. Ed. 1102.

**74. Decision as to what are state laws binding on United States courts**.—*Wilkes County v. Coler*, 180 U. S. 506, 520, 45 L. Ed. 642; *South Ottawa v. Perkins*, 94 U. S. 260, 24 L. Ed. 154; *Post v. Supervisors*, 105 U. S. 667, 26 L. Ed. 1204; *Field v. Clark*, 143 U. S. 649, 36 L. Ed. 294; *Talton v. Mayes*, 163 U. S. 376, 385, 41 L. Ed. 496. But see *Pease v. Peck*, 18 How. 595, 15 L. Ed. 518.

"In *Pease v. Peck*, 18 How. 595, 15 L. Ed. 518, it was because the statute of limitations of Michigan, as published by authority of the legislature and acted on by the people for thirty years, contained an exemption of 'beyond seas,' that this court declined to treat those words as not part of the act, although it was shown that they were not in the original manuscript preserved in the public archives, and that they had therefore been recently adjudged by the supreme court of the state to be no part of the act. The question there was not of the construction of the text of the statute, but what the true text was; and we are not now required to consider whether that decision can be reconciled with later cases, in which this court has held that an act of the legislature of a state, which has been held by its highest court not to be a statute of the state, because not duly enacted, cannot be held by the courts of the United States, upon the same evidence, to be a law of the state." *Bauserman v. Blunt*, 147 U. S. 647, 653, 37 L. Ed. 316, citing *South Ottawa v. Perkins*, 94 U. S. 260, 24 L. Ed. 154; *Post v. Supervisors*, 105 U. S. 667, 26 L. Ed. 1204; *Norton v. Shelby County*, 118 U. S. 425, 30 L. Ed. 178.

bb. *Legality of Enactment*.—The judgment of the highest court of a state that a statute has been enacted in accordance with the requirements of the state constitution, is conclusive upon the federal courts.<sup>75</sup>

cc. *Repeal*.—Where a state court has decided the question as to whether a state statute has been repealed by the provision of a subsequent state statute, the decision is binding on the federal courts.<sup>76</sup>

**75. State decisions as to enactment binding in federal courts.**—*Knights Templars, etc., Co. v. Jarman*, 187 U. S. 197, 41 L. Ed. 139; *Leavenworth County v. Barnes*, 94 U. S. 70, 24 L. Ed. 63; *Turner v. Wilkes County Comm'rs*, 173 U. S. 461, 43 L. Ed. 768; *In re Duncan*, 139 U. S. 449, 455, 35 L. Ed. 219; *Railroad Co. v. Georgia*, 98 U. S. 359, 25 L. Ed. 185; *Pennsylvania College Cases*, 13 Wall. 190, 20 L. Ed. 550; *Wilkes County v. Coler*, 180 U. S. 506, 524, 45 L. Ed. 642; *South Ottawa v. Perkins*, 94 U. S. 260, 24 L. Ed. 154; *Stanley County v. Coler*, 190 U. S. 437, 442, 47 L. Ed. 1126; *Wilkes County v. Coler*, 190 U. S. 107, 47 L. Ed. 971; *Smith v. Jennings*, 206 U. S. 276, 278, 51 L. Ed. 1061; *Burt v. Smith*, 203 U. S. 129, 51 L. Ed. 121; *Montana v. Rice*, 204 U. S. 291, 51 L. Ed. 490; *Leeper v. Texas*, 139 U. S. 462, 467, 35 L. Ed. 225; *Post v. Supervisors*, 165 U. S. 667, 26 L. Ed. 1204; *Norton v. Shelby County*, 118 U. S. 425, 30 L. Ed. 178; *Baldwin v. Kansas*, 129 U. S. 52, 32 L. Ed. 640; *Wade v. Travis County*, 174 U. S. 499, 508, 43 L. Ed. 1060; *Lyons v. Woods*, 153 U. S. 649, 663, 38 L. Ed. 854; *Davis v. Texas*, 139 U. S. 651, 652, 35 L. Ed. 300; *Bauserman v. Blunt*, 147 U. S. 647, 37 L. Ed. 316; *Great Southern, etc., Hotel Co. v. Jones*, 193 U. S. 532, 546, 48 L. Ed. 778.

An act of the legislature of a state, which has been held by its highest court not to be a statute of the state, because never passed as its constitution requires, cannot be held by the courts of the United States, upon the same evidence, to be a law of the state. *Post v. Supervisors*, 105 U. S. 667, 669, 26 L. Ed. 1204; *Norton v. Shelby County*, 118 U. S. 425, 30 L. Ed. 178.

A decision of a state court that bonds issued by a county in aid of a railroad are void because the acts under which they were issued were not passed in the manner directed by the constitution of the state is binding upon the federal courts. *Turner v. Wilkes County Comm'rs*, 173 U. S. 461, 43 L. Ed. 768; *South Ottawa v. Perkins*, 94 U. S. 260, 261, 24 L. Ed. 154.

A decision of a state court that a state statute was not passed in accordance with the constitutional provisions requiring the yeas and nays to be entered on the journals of both houses, is binding on the federal courts. *Stanley County v. Coler*, 190 U. S. 437, 442, 47 L. Ed. 1126; *Wilkes County v. Coler*, 180 U. S. 506, 45 L. Ed. 642; *Wilkes County v. Coler*, 190 U. S. 107, 47 L. Ed. 971.

The supreme court of the United States will adopt the decision of the supreme court of Kansas, affirming the validity

and binding effect of an act of the legislature of that state, approved Feb. 10, 1865, entitled "An act to authorize counties and cities to issue bonds to railroad companies," although the yeas and nays were not called and entered on the journals of the respective houses on the final passage of the bill, and the enrolled bill was not signed by the presiding officer of the senate. *Leavenworth County v. Barnes*, 94 U. S. 70, 24 L. Ed. 63.

**76. Decisions as to repeal of state statute.**—*Talton v. Mayes*, 163 U. S. 376, 385, 41 L. Ed. 196; *Bailey v. Magwire*, 22 Wall. 215, 216, 22 L. Ed. 850; *Peik v. Chicago, etc., R. Co.*, 94 U. S. 164, 24 L. Ed. 97; *Kibbe v. Ditto*, 93 U. S. 674, 23 L. Ed. 1005; *Hanrick v. Patrick*, 119 U. S. 156, 170, 30 L. Ed. 396. See, also, *Bauserman v. Blunt*, 147 U. S. 647, 653, 37 L. Ed. 316; *Moore v. National Bank*, 104 U. S. 625, 629, 26 L. Ed. 870; *Commissioners v. Bancroft*, 203 U. S. 112, 51 L. Ed. 112; *Wisconsin, etc., R. Co. v. Powers*, 191 U. S. 379, 48 L. Ed. 229; *Adams v. Nashville*, 95 U. S. 19, 24 L. Ed. 369.

Whether or not an act prescribing a particular mode for assessing the property of a particular company has been impliedly repealed by a general revenue act, not in terms repealing it, is a matter peculiarly within the province of the highest courts of the state, whose acts are the subjects of the question, to decide. And when such courts have decided the question, their decision is controlling. *Bailey v. Magwire*, 22 Wall. 215, 216, 22 L. Ed. 850.

"Upon the question how far a saving clause as to married women in a statute of limitations is affected by a subsequent statute of the state enlarging the rights of married women, this court, in two comparatively recent cases, has come to differing conclusions by following in each case a single decision made by the highest court of the state since the case was brought to this court from the circuit court of the United States." *Bauserman v. Blunt*, 147 U. S. 647, 655, 37 L. Ed. 316, citing *Kibbe v. Ditto*, 93 U. S. 674, 23 L. Ed. 1005; *Moore v. National Bank*, 104 U. S. 625, 26 L. Ed. 870.

**Whether an exemption from taxation has been in fact repealed** by a subsequent state statute is a question of state law in which the decisions of the highest courts of the state, in the absence of a contract, are binding. *Commissioners v. Bancroft*, 203 U. S. 112, 118, 51 L. Ed. 112; *Gulf, etc., R. Co. v. Hewes*, 183 U. S. 66, 46 L. Ed. 86; *Northern Cent. R. Co. v. Maryland*, 187 U. S. 258, 47 L. Ed. 167; *Wisconsin,*

(g) *Decision as to Nature, Operation and Effect of State Laws*—aa. *Whether Public or Private*.—The decision of the highest court of a state that a state law is a general or public law and not a private act is conclusive on the federal courts.<sup>77</sup>

bb. *Whether Mandatory or Permissive*.—A decision of the highest court of a state that a state statute is mandatory, and not merely permissive, is binding on the federal courts.<sup>78</sup>

cc. *Whether Statute a Revenue Measure*.—Whether a statute of a state is or is not a revenue measure depends upon the construction of that statute and the decision of the state court on that question is conclusive on the federal courts.<sup>79</sup>

dd. *Whether Statute of a Penal Nature*.—The decision of the highest court of a state that a state statute is of a penal nature, and, therefore, is to be construed strictly, is binding on the federal courts.<sup>80</sup>

ee. *That Several Statutes Are in Pari Materia*.—The decision of the highest court of a state that several statutes are in *pari materia*, and are to be read together, is conclusive upon the federal courts.<sup>81</sup>

etc., *R. Co. v. Powers*, 191 U. S. 379, 48 L. Ed. 229.

The supreme court of Tennessee having decided that the act of the legislature of that state, requiring that all personal property of every kind and nature shall be listed and assessed for taxation, overrides and repeals the previous ordinance of the city of Nashville exempting from municipal taxation certain city bonds, and brings them within the scope of general taxation, that decision is binding upon the supreme court of the United States. *Adams v. Nashville*, 95 U. S. 19, 24 L. Ed. 369.

It is only where the exemption is irrepealable, thus constituting a contract, that it becomes the duty of the court of the United States to decide for itself whether the subsequent act did or did not impair the obligation of the contract. *Commissioners v. Bancroft*, 203 U. S. 112, 118, 51 L. Ed. 112.

**Whether statute of Cherokee nation repealed.**—"The question whether a statute of the Cherokee nation which was not repugnant to the constitution of the United States or in conflict with any treaty or law of the United States had been repealed by another statute of that nation, and the determination of what was the existing law of the Cherokee nation as to the constitution of the grand jury, were solely matters within the jurisdiction of the courts of that nation, and the decision of such a question in itself necessarily involves no infraction of the constitution of the United States. Such has been the decision of this court with reference to similar contentions arising upon an indictment and conviction in a state court." *Talton v. Mayes*, 163 U. S. 376, 385, 41 L. Ed. 196; *In re Duncan*, 139 U. S. 449, 35 L. Ed. 219.

**77. Decision as to character of statute—Whether private or public.**—*Hammond v. Hastings*, 134 U. S. 401, 404, 33 L. Ed. 960; *Havemeyer v. Iowa County*, 3 Wall. 294, 302, 18 L. Ed. 38.

**78. Whether statute mandatory or permissive.**—*Amy v. Watertown* (No. 1), 130 U. S. 301, 32 L. Ed. 946; *Post v. Super-*

*visors*, 105 U. S. 667, 26 L. Ed. 1204.

The decision of a state court that a state statute providing for the mode of service of process on municipal corporations is peremptory is binding on the federal courts. *Amy v. Watertown* (No. 1), 130 U. S. 301, 32 L. Ed. 946.

The decision of the highest court of the state that a statutory requirement as to an enactment of law is mandatory and not merely directory is binding on the federal courts. *Post v. Supervisors*, 105 U. S. 667, 26 L. Ed. 1204.

**79. Whether statute a revenue measure.**—*Flanigan v. Sierra County*, 196 U. S. 553, 562, 49 L. Ed. 597; *Wheeler v. Plumas County*, 196 U. S. 562, 49 L. Ed. 599.

**80. Whether statute is penal or remedial.**—*Chase v. Curtis*, 113 U. S. 452, 458, 28 L. Ed. 1038; *Flash v. Conn.*, 109 U. S. 371, 27 L. Ed. 966; *Steam-Engine Co. v. Hubbard*, 101 U. S. 188, 25 L. Ed. 786.

Thus where the state courts hold that a statute making trustees of a corporation individually liable for the debts of the corporation, in certain cases, is of a penal nature and to be construed strictly, the federal courts are concluded upon this point. *Chase v. Curtis*, 113 U. S. 452, 458, 28 L. Ed. 1038; *Flash v. Conn.*, 109 U. S. 371, 27 L. Ed. 966; *Steam-Engine Co. v. Hubbard*, 101 U. S. 188, 25 L. Ed. 786.

**81. That statutes are in pari materia.**—*Phalen v. Virginia*, 8 How. 163, 169, 12 L. Ed. 1030; *Aberdeen Bank v. Chehalis County*, 166 U. S. 440, 444, 41 L. Ed. 1069. See, also, *Nobles v. Georgia*, 168 U. S. 398, 404, 42 L. Ed. 515.

"The courts of Virginia have very properly decided, that 'this dormant right to draw the lottery which was revived by the act of March 1834, must be taken as subordinate to and limited by, the act of the 25th of the previous month; that those statutes must be taken in *pari materia*, and receive the same construction as if embodied in one act; that there is nothing repugnant in the provisions of the one to those of the other, where the first is taken as limiting the time within which the



ff. *Whether Statute Retroactive.*—The decision of the highest court of a state as to whether or not a state statute is retroactive in effect is binding on the federal courts.<sup>82</sup>

gg. *Separability of Legal from Illegal Parts of Statute.*—Whether illegal parts of a state statute are separable from the parts which are legal so as to permit of the legal parts taking effect is a question of local law for the state courts, and their decision is conclusive upon the federal courts.<sup>83</sup>

hh. *Time of Taking Effect.*—The decision of the highest court of a state as to the time when a state law took effect is binding on the federal courts.<sup>84</sup>

(i) *Effect Where Several State Courts Differ in Construing Similar Statutes.*—The federal courts accept the construction of state statutes by the highest court of a state, although they may have already accepted and adopted a different construction of a similar statute of another state, in deference to the supreme court of that state.<sup>85</sup>

right under the second is to be exercised.” This construction of their statutes by the courts of Virginia is not only just and correct, but is conclusive on this court and on the case, as it estops the plaintiff in error from averring against the constitutionality of the limitation under which he claims his privilege.” *Phalen v. Virginia*, 8 How. 163, 169, 12 L. Ed. 1030.

**82. Whether statute retroactive.**—*Bucher v. Cheshire R. Co.*, 125 U. S. 555, 31 L. Ed. 795; *Murray v. Gibson*, 15 How. 421, 14 L. Ed. 755; *Barnitz v. Beverly*, 163 U. S. 118, 122, 41 L. Ed. 93.

Thus a decision of the highest court of Massachusetts that the act of May 15, 1877, providing that the statute prohibiting travel upon Sunday should not bar a recovery for injuries sustained while traveling on Sunday, was not retroactive, is binding upon the federal courts. *Bucher v. Cheshire R. Co.*, 125 U. S. 555, 31 L. Ed. 795.

In so far as a state court construes a statute to be applicable to prior contracts, the federal courts are, of course, bound by the decision. *Barnitz v. Beverly*, 163 U. S. 118, 122, 41 L. Ed. 93.

**83. Separability of legal from illegal clause of statute.**—*Olsen v. Smith*, 195 U. S. 332, 342, 49 L. Ed. 224; *Gatewood v. North Carolina*, 203 U. S. 531, 51 L. Ed. 305; *Cargill Co. v. Minnesota*, 180 U. S. 452, 466, 45 L. Ed. 619; *Tullis v. Lake Erie, etc., R. Co.*, 175 U. S. 348, 44 L. Ed. 192; *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 43, 44 L. Ed. 657.

The decision of the highest court of a state that the provisions of a state statute, prohibiting the purchase of stocks upon a margin are separable from a part of the same statute which prohibits the carrying on of the business of running a bucket ship, and that, consequently, one may be convicted under the latter clause of the act although the former may be void because in contravention of the constitution, is conclusive upon the federal courts. *Gatewood v. North Carolina*, 203 U. S. 531, 51 L. Ed. 305.

Whether the illegal clauses granting discriminatory exemptions could be eliminated without destroying the other pro-

visions of the state laws regulating pilotage, is a state and not a federal question. For the purpose of determining the validity of the statutes in their federal aspect this court accepts the interpretation given to the statutes by the state court and tests their validity accordingly. *Olsen v. Smith*, 195 U. S. 332, 342, 49 L. Ed. 224; *Cargill Co. v. Minnesota*, 180 U. S. 452, 45 L. Ed. 619.

“In *Tullis v. Lake Erie, etc., R. Co.*, 175 U. S. 348, 353, 44 L. Ed. 192, the question was as to the constitutionality of a statute of Indiana relating to railroads and other corporations, except municipal corporations. The supreme court of that state held that the statute was capable of severance, and that its provisions as to railroads were not so connected in substance with the provisions relating to other corporations that their validity could not be separately determined. This court followed that view, declaring it to be an elementary rule that it should adopt ‘the interpretation of a statute of a state affixed to it by the court of last resort thereof. See, also, *Missouri Pac. R. Co. v. Nebraska*, 164 U. S. 403, 41 L. Ed. 489; *Chicago, etc., R. Co. v. Minnesota*, 134 U. S. 418, 33 L. Ed. 970; *St. Louis, etc., R. Co. v. Paul*, 173 U. S. 404, 43 L. Ed. 746.” *Cargill Co. v. Minnesota*, 180 U. S. 452, 45 L. Ed. 619.

“What they say the statutes of that state mean we must accept them to mean whether it is declared by limiting the objects of their general language or by separating their provisions into valid and invalid parts.” *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 43, 44 L. Ed. 657, citing *Tullis v. Lake Erie, etc., R. Co.*, 175 U. S. 348, 44 L. Ed. 192; *St. Louis, etc., R. Co. v. Paul*, 173 U. S. 404, 43 L. Ed. 746.

**84. Time of taking effect.**—*Wade v. Walnut*, 105 U. S. 1, 26 L. Ed. 1027.

**85. Different construction of same statute by different state courts.**—*Christy v. Pridgeon*, 4 Wall. 196, 18 L. Ed. 322; *Shelby v. Guy*, 11 Wheat. 361, 6 L. Ed. 495; *Louisiana v. Pilsbury*, 105 U. S. 278, 294, 26 L. Ed. 1090; *May v. Tenney*, 148 U. S. 60, 64, 37 L. Ed. 368; *Detroit v. Osborne*, 135 U. S. 492, 34 L. Ed. 260;

(i) *Statute Adopted by State from Act of Congress*.—Indeed where parts of the interstate commerce act are adopted by a state and embodied in its constitution, the construction placed upon the provision by the highest court of the state is conclusive on the federal courts, although different from that placed on the interstate commerce act by the federal courts.<sup>86</sup>

(j) *Statute Claimed to Be in Conflict with Federal Constitution*—aa. *In General*.—Where, in a federal court, it is claimed that a state law or constitution is in conflict with the federal constitution, the construction placed upon the law by the highest court of a state is conclusive on the federal courts. The only question before the federal courts, in such case, is whether the law, as construed, is valid.<sup>87</sup>

bb. *Statute Claimed to Be a Regulation of Interstate Commerce*.—If it is claimed that a state statute is void because a regulation of interstate commerce, the federal courts are bound by the construction placed upon it by the highest courts of the state.<sup>88</sup> Thus, if the state court holds that a statute imposing conditions or

Randolph v. Quidnick Co., 135 U. S. 457, 34 L. Ed. 200; Union Bank v. Kansas City Bank, 136 U. S. 223, 34 L. Ed. 341; Erie R. Co. v. Pennsylvania, 21 Wall. 492, 497, 22 L. Ed. 595; Randall v. Brigham, 7 Wall. 523, 530, 19 L. Ed. 285; Williams v. Kirtland, 13 Wall. 306, 20 L. Ed. 683; Tioga Railroad v. Blossburg, etc., Railroad, 20 Wall. 137, 22 L. Ed. 331.

If different interpretations are given in different states to a similar law, that law, in effect, becomes, by the interpretations, so far as it is a rule for action by this court, a different law in one state from what it is in the other. Christy v. Pidgeon, 4 Wall. 196, 18 L. Ed. 322; May v. Tenney, 148 U. S. 60, 64, 37 L. Ed. 368; Detroit v. Osborne, 135 U. S. 492, 34 L. Ed. 260.

"The exposition given by the highest tribunal of the state must be taken as correct so far as contracts made under the act are concerned. Their validity and obligation cannot be impaired by any subsequent decision altering the construction. This doctrine applies as well to the construction of a provision of the organic law, as to the construction of a statute. The construction, so far as contract obligations incurred under it are concerned, constitutes a part of the law as much as if embodied in it. So far does this doctrine extend, that when a statute of two states, expressed in the same terms, is construed differently by the highest courts, they are treated by us as different laws, each embodying the particular construction of its own state, and enforced in accordance with it in all cases arising under it." Louisiana v. Pillsbury, 105 U. S. 278, 294, 26 L. Ed. 1090; Christy v. Pidgeon, 4 Wall. 196, 18 L. Ed. 322; Shelby v. Guy, 11 Wheat. 361, 6 L. Ed. 495.

86. *Adoption and construction by state of part of interstate commerce act*.—Louisville, etc., R. Co. v. Kentucky, 183 U. S. 503, 46 L. Ed. 298.

87. *Where it is claimed that state law is in conflict with federal constitution*.—Hall v. DeCuir, 95 U. S. 485, 24 L. Ed. 547; Louisville, etc., R. Co. v. Mississippi, 133 U. S. 587, 33 L. Ed. 784; Plessy v.

Ferguson, 163 U. S. 537, 41 L. Ed. 256; Geer v. Connecticut, 161 U. S. 519, 40 L. Ed. 793; Kidd v. Pearson, 128 U. S. 1, 32 L. Ed. 346; Stockard v. Morgan, 185 U. S. 27, 30, 46 L. Ed. 785; Machine Co. v. Gage, 100 U. S. 676, 25 L. Ed. 754; Kehrer v. Stewart, 197 U. S. 60, 49 L. Ed. 663; Osborne v. Florida, 164 U. S. 650, 656, 41 L. Ed. 586; Wabash, etc., R. Co. v. Illinois, 118 U. S. 557, 567, 30 L. Ed. 244; Armour, Packing Co. v. Lacy, 200 U. S. 226, 50 L. Ed. 451; Jacobson v. Massachusetts, 197 U. S. 11, 24, 49 L. Ed. 643; McElvaine v. Brush, 142 U. S. 155, 35 L. Ed. 971; Cargill Co. v. Minnesota, 180 U. S. 452, 45 L. Ed. 619.

The decision of the highest court of a state that a state statute requiring vaccination as applied to adults requires all adults to be vaccinated, whether fit subjects for vaccination or not, is binding on the federal court. Jacobson v. Massachusetts, 197 U. S. 11, 24, 49 L. Ed. 643.

The construction by the highest state court of a statute as requiring a railroad company to grant a right to erect an elevator upon its right of way at a station, on the same terms and conditions on which it had already granted to other persons rights to erect two elevators thereon, must be accepted by the federal courts in judging whether the statute conforms to the constitution of the United States. Missouri Pac. R. Co. v. Nebraska, 164 U. S. 403, 414, 41 L. Ed. 489; Chicago, etc., R. Co. v. Minnesota, 134 U. S. 418, 33 L. Ed. 970; Illinois Cent. R. Co. v. Illinois, 163 U. S. 142, 41 L. Ed. 107.

88. *Acceptance of construction of highest state court*.—Hall v. De Cuir, 95 U. S. 485, 24 L. Ed. 547; Louisville, etc., R. Co. v. Mississippi, 133 U. S. 587, 33 L. Ed. 784; Plessy v. Ferguson, 163 U. S. 537, 41 L. Ed. 256; Geer v. Connecticut, 161 U. S. 519, 40 L. Ed. 793; Kidd v. Pearson, 128 U. S. 1, 32 L. Ed. 346; Stockard v. Morgan, 185 U. S. 27, 30, 46 L. Ed. 785; Machine Co. v. Gage, 100 U. S. 676, 25 L. Ed. 754; Kehrer v. Stewart, 197 U. S. 60, 49 L. Ed. 663; Osborne v. Florida, 164

regulating the transaction of business, does not apply to interstate commerce, the federal courts are bound by the decision.<sup>89</sup> And upon a like principle, a decision by the highest court of a state that a state statute applies to interstate as well as domestic commerce is conclusive on the federal courts.<sup>90</sup>

(k) *Effect of Repeal of Statute.*—The effect which the repeal of a state statute has on proceedings thereunder is a question to be determined by the state courts.<sup>91</sup>

(l) *State Construction Contrary to General Constitutional Law.*—The federal courts will not run counter to the decisions of the highest state court upon ques-

U. S. 650, 653, 41 L. Ed. 586; *Wabash, etc., R. Co. v. Illinois*, 118 U. S. 557, 565, 30 L. Ed. 244; *Armour Packing Co. v. Lacy*, 200 U. S. 226, 50 L. Ed. 451.

"We are bound to give the same meaning to the state statute that was given to it by the supreme court of the state, and the question which remains for us to decide is, whether as so construed the statute violates any provision of the federal constitution." *Stockard v. Morgan*, 185 U. S. 27, 30, 46 L. Ed. 785.

89. **Decisions holding statute not applicable to interstate business.**—*Louisville, etc., R. Co. v. Mississippi*, 133 U. S. 587, 33 L. Ed. 784; *Kehrer v. Stewart*, 197 U. S. 60, 49 L. Ed. 663; *Osborne v. Florida*, 164 U. S. 650, 41 L. Ed. 586; *Armour Packing Co. v. Lacy*, 200 U. S. 226, 50 L. Ed. 451; *Machine Co. v. Gage*, 100 U. S. 676, 25 L. Ed. 754.

Where state statute as settled by the construction of the highest court of the state affects only domestic commerce the federal supreme courts will follow the construction. *Louisville, etc., R. Co. v. Mississippi*, 133 U. S. 587, 635, 33 L. Ed. 784.

A decision that a taxation statute does not apply to interstate commerce is binding on the federal courts. *Kehrer v. Stewart*, 197 U. S. 60, 49 L. Ed. 663; *Armour Packing Co. v. Lacy*, 200 U. S. 226, 50 L. Ed. 451; *Osborne v. Florida*, 164 U. S. 650, 41 L. Ed. 586; *Machine Co. v. Gage*, 100 U. S. 676, 25 L. Ed. 754.

Where a state imposed a tax on the business of nonresident meat packing houses selling meat within the state, and the highest courts of the state held that it was not intended to impose a tax on the interstate business of the company, but only on that done entirely within the state, it was held that the construction of the statute was binding on the federal courts, in the absence of a showing that the domestic business done by the company was a mere incident to the interstate business. *Kehrer v. Stewart*, 197 U. S. 60, 49 L. Ed. 663; *Armour Packing Co. v. Lacy*, 200 U. S. 226, 50 L. Ed. 451. See, generally, the title INTERSTATE AND FOREIGN COMMERCE.

"It may be here assumed that if the statute of Florida requiring express companies to take out a license and pay a tax as a condition precedent to their doing business in the state, applied to the express company in relation to its interstate business, it would be void as an

attempted interference with or regulation of interstate commerce. The particular construction to be given to this state statute is a question for the state court to deal with, and in such a case as this we follow the construction given by the state court to the statutes of its own state." *Osborne v. Florida*, 164 U. S. 650, 653, 41 L. Ed. 586.

The supreme court of Tennessee decided that the law of that state imposing an annual tax upon "all peddlers of sewing machines and selling by sample," levies such "tax upon all peddlers of sewing machines, without regard to the place of growth or produce of material or of manufacture." Held that the construction is binding on the federal courts, and that the law, so construed, is not in violation of the constitution of the United States. *Machine Co. v. Gage*, 100 U. S. 676, 25 L. Ed. 754.

90. **Holding that statute applies to interstate commerce.**—*Wabash, etc., R. Co. v. Illinois*, 118 U. S. 557, 565, 30 L. Ed. 244; *Hall v. DeCuir*, 95 U. S. 485, 24 L. Ed. 547.

Where the highest court of a state construes a statute prohibiting a greater charge by a railroad for a short than for a long haul, as being applicable to interstate traffic, the decision is binding on the federal courts, and the law invalid. *Wabash, etc., R. Co. v. Illinois*, 118 U. S. 557, 565, 30 L. Ed. 244.

91. **Effect of repeal of statute.**—*Flanigan v. Sierra County*, 196 U. S. 553, 590, 49 L. Ed. 597; *Wheeler v. Plumas County*, 196 U. S. 562, 49 L. Ed. 599. See, generally, the title STATUTES.

The general rule is that powers derived wholly from a statute are extinguished by its repeal. *Sutherland on Statutory Construction*, § 165. And it follows that no proceedings can be pursued under the repealed statute, though begun before the repeal, unless such proceedings be authorized under a special clause in the repealing act. 9 *Bacon's Abridgment*, 226. This doctrine is oftenest illustrated in the repeal of penal provisions of statutes. It has, however, been applied by the supreme court of the state of California to the repeal of the power of counties to enact ordinances for revenue, and this is binding on federal courts. *Flanigan v. Sierra County*, 196 U. S. 553, 560, 49 L. Ed. 597; *Wheeler v. Plumas County*, 196 U. S. 562, 49 L. Ed. 599.



tions involving the construction of state statutes or constitutions, on any alleged ground that such decisions are in conflict with sound principles of general constitutional law.<sup>92</sup>

(m) *Construction of Municipal Ordinances.*—The decision of the state court construing municipal ordinances,<sup>93</sup> or holding them to be consistent with the state constitution and laws,<sup>94</sup> is binding on the federal court. But the consistency of an ordinance with the federal constitution or laws is a subject for the independent judgment of the federal courts.<sup>95</sup>

(13) *Contracts*—(a) *Consideration.*—The validity of a contract based on the consideration of a sale of slaves is one of general law, upon which the decision of the state court is not conclusive on the federal courts.<sup>96</sup> But the question as to the validity of a contract as dependent upon questions of public policy is one of local law, upon which the federal courts are governed by the state laws.<sup>97</sup> Thus the question as to the validity of a clause in a contract exempting a corporation from liability for fires caused by negligence is one for the state courts to decide, and their decision is binding on the federal courts.<sup>98</sup>

(b) *Construction and Operation.*—The true effect of contracts or other instruments of a commercial nature are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence.<sup>99</sup>

**92. State construction contrary to general constitutional law.**—*Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112, 155, 41 L. Ed. 369, distinguishing *Loan Ass'n v. Topeka*, 20 Wall. 655, 22 L. Ed. 455.

**93. Construction of municipal ordinances.**—*Meade v. Portland*, 200 U. S. 148, 163, 50 L. Ed. 413; *Miller v. Ammon*, 145 U. S. 421, 36 L. Ed. 759; *Yick Wo v. Hopkins*, 118 U. S. 356, 365, 30 L. Ed. 220; *Flanigan v. Sierra County*, 196 U. S. 553, 49 L. Ed. 597. See, generally, the title ORDINANCES.

**94. Consistency with state laws and constitution.**—*Miller v. Ammon*, 145 U. S. 421, 36 L. Ed. 759; *Yick Wo v. Hopkins*, 118 U. S. 356, 365, 30 L. Ed. 220; *Flanigan v. Sierra County*, 196 U. S. 553, 49 L. Ed. 597; *Lombard v. West Chicago Park Comm'rs*, 181 U. S. 33, 43, 45 L. Ed. 731; *Crowley v. Christensen*, 137 U. S. 86, 88, 34 L. Ed. 620.

The federal courts will follow the decision of the highest court of the state holding an ordinance which provides that "no person, firm or corporation shall sell or offer for sale any spirituous or vinous liquors in quantities of one gallon or more at a time within the city of Chicago, without having first obtained a license therefor from the city of Chicago, under a penalty of not less than \$50 or more than \$200 for each offense," to be valid under the state laws and constitution. *Miller v. Ammon*, 145 U. S. 421, 36 L. Ed. 759.

**95. Consistency with federal laws or constitution.**—*Yick Wo v. Hopkins*, 118 U. S. 356, 366, 30 L. Ed. 220.

**96. Contract based on consideration of sale of slaves.**—*Boyce v. Tabb*, 18 Wall. 546, 21 L. Ed. 757.

**97. Validity of contract as dependent upon questions of public policy.**—*Hartford Fire Ins. Co. v. Chicago, etc., R. Co.*, 175 U. S. 91, 100, 42 L. Ed. 84.

"Questions of public policy, as affecting

the liability for acts done, or upon contracts made and to be performed, within one of the states of the Union—when not controlled by the constitution, laws or treaties of the United States, or by the principles of the commercial or mercantile law or of general jurisprudence, of national or universal application—are governed by the law of the state, as expressed in its own constitution and statutes, or declared by its highest court. *Elmendorf v. Taylor*, 10 Wheat. 152, 6 L. Ed. 289; *Bank v. Earle*, 13 Pet. 519, 10 L. Ed. 274; *Vidal v. Girard*, 2 How. 126, 127, 11 L. Ed. 205; *Bucher v. Cheshire R. Co.*, 125 U. S. 555, 31 L. Ed. 795; *Detroit v. Osborne*, 135 U. S. 492, 34 L. Ed. 260; *Union Bank v. Kansas City Bank*, 136 U. S. 223, 34 L. Ed. 341; *Etheridge v. Sperry*, 139 U. S. 266, 35 L. Ed. 171; *Gardner v. Michigan Cent. R. Co.*, 150 U. S. 349, 37 L. Ed. 1107; *Bamberger v. Schoolfield*, 160 U. S. 149, 40 L. Ed. 374; *Missouri, etc., Trust Co. v. Krumseig*, 172 U. S. 351, 43 L. Ed. 474; *Sioux City, etc., Warehouse Co. v. Trust Co.*, 173 U. S. 99, 43 L. Ed. 628." *Hartford Fire Ins. Co. v. Chicago, etc., R. Co.*, 175 U. S. 91, 100, 42 L. Ed. 84.

**98. Exemption from liability for fires caused by negligence.**—*Hartford Fire Ins. Co. v. Chicago, etc., R. Co.*, 175 U. S. 91, 108, 42 L. Ed. 84. See, generally, the title FIRES.

Thus where a railroad company leased a part of its property adjoining its right of way by a contract exempting it from liability for fires, whether caused by its negligence or not, it was held that the validity of the contract was a question of local law. *Hartford Fire Ins. Co. v. Chicago, etc., R. Co.*, 175 U. S. 91, 108, 42 L. Ed. 84.

**99. Construction and effect of contracts.**—*Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865; *Bank v. Earle*, 13 Pet. 519, 520, 10 L. Ed.

(14) *Corporations*—(a) *Creation and Existence*.—When the question is whether, under the constitution and laws of a particular state, a company professing to be a corporation is legally so, the federal courts will receive as conclusive of the question, the decision of the highest court of the state deciding, in a case identical in principle, in favor of the corporate existence.<sup>1</sup>

(b) *Powers*.—The decision of the highest court of a state as to the powers of a corporation under the state law under which it was created is binding on the federal courts.<sup>2</sup>

(c) *Construction of Charter*.—The construction of a charter of a corporation

274; *Butz v. Muscatine*, 8 Wall. 575, 584, 19 L. Ed. 490; *United States v. Burlington*, 154 U. S. 568, 19 L. Ed. 495.

Where the policy of a state is manifest, the courts of the United States are bound to notice it, as a part of its code of laws, and to declare all contracts in the state, repugnant to it, to be illegal and void. *Bank v. Earle*, 13 Pet. 519, 520, 10 L. Ed. 274.

This court construes all contracts brought before it for consideration and in doing so its action is independent of that of the state courts, which may have exercised their judgment upon the same subject. *Butz v. Muscatine*, 8 Wall. 575, 584, 19 L. Ed. 490; *United States v. Burlington*, 154 U. S. 568, 19 L. Ed. 495.

As to determination of question as to existence of contract, where it is claimed that state law impairs obligation, see the title APPEAL AND ERROR, vol. 1, pp. 715, 720.

1. *Creation and existence of corporation*.—*Secombe v. Railroad Co.*, 23 Wall. 108, 23 L. Ed. 67; *Amey v. Allegheny City*, 24 How. 364, 16 L. Ed. 614; *Nesmith v. Sheldon*, 7 How. 812, 12 L. Ed. 925; *Railroad Co. v. Vance*, 96 U. S. 450, 24 L. Ed. 752; *Thomas v. Board of Trustees*, 195 U. S. 207, 217, 49 L. Ed. 160.

Federal courts adopt the judgment of the state courts deciding that an act incorporating a railroad is not inconsistent with the state constitution. *Amey v. Allegheny City*, 24 How. 364, 16 L. Ed. 614; *Hancock v. Louisville, etc., R. Co.*, 145 U. S. 409, 415, 36 L. Ed. 755.

By the second section of the twelfth article of the constitution of Michigan forbidding the legislature from passing any act of incorporation unless with the assent of at least two-thirds of each house," the judgment of the legislature is required to be exercised upon the propriety of creating each particular corporation, and two-thirds of each house must sanction and approve each individual charter. The legislature of Michigan passed an act on March 15th, 1837, entitled "An act to organize and regulate banking associations," and on the 30th of December 1837, an act to amend the former act. By the first, any persons were allowed to form associations for the purposes of banking upon the terms specified in the law; and by the second, the stockholders were made liable, in their individual character, under certain circum-

stances, for the debts of the association. The supreme court of Michigan held that associations formed under these acts are corporations within the meaning of the constitution of Michigan, and acts are unconstitutional and void. Held, the decision of the Michigan court is binding on the federal courts. *Nesmith v. Sheldon*, 7 How. 812, 12 L. Ed. 925.

Whether or not a statute providing that a designated foreign corporation, leasing and operating a railroad within the state, shall be possessed of corporate powers and decreed a corporation under the laws of the state, is a violation of a state constitutional provision forbidding the creation of corporations by special statute except in certain cases, is a question for the supreme court of the state whose decision will be followed by the federal supreme court. *Railroad Co. v. Vance*, 96 U. S. 450, 459, 24 L. Ed. 752; *Thomas v. Board of Trustees*, 195 U. S. 207, 49 L. Ed. 160.

2. *Corporate powers*.—*Smith v. Kernochen*, 7 How. 198, 12 L. Ed. 660; *Williams v. Gaylord*, 186 U. S. 157, 46 L. Ed. 1102; *Miller v. Swann*, 150 U. S. 132, 136, 37 L. Ed. 1028.

The supreme court of California in construing the California act of April 23, 1880 to protect stockholders in mining companies, which provides in effect that the company shall not sell or encumber any of its mining ground, or purchase additional mining ground, without the consent of the holders of two-thirds of the capital stock, held that it was applicable to foreign corporations doing business in this state, and that the judgment creditor might take advantage of the act. It was held that this decision was binding upon the federal courts. *Williams v. Gaylord*, 186 U. S. 157, 46 L. Ed. 1102.

In a suit to enjoin a corporation from acting as such upon the ground that their charter is void, where the question is one of law, whether the business which was confessedly conducted by the corporation was or was not a lawful one under the laws of the state, and where the state court refused to hear evidence that the defendant's officers in good faith believed they were acting lawfully, the questions are questions of local law and the decision of the state court is conclusive. *New Orleans Debenture, etc., Co. v. Louisiana*, 180 U. S. 320, 331, 45 L. Ed. 550.

by the highest court of the state by which it was granted is binding upon the federal courts.<sup>3</sup> Thus the decision of the highest court of a state that a corporate charter is, under its constitution and statutes, subject to repeal, is binding on the federal courts.<sup>4</sup>

(d) *Statute Limiting Debts of Corporation*.—The decision of the highest court of a state that an act of a corporation in contracting a debt in excess of the statutory limit is not void but voidable merely, and that for this reason the corporation, or those holding under it, cannot assail the act in question, is binding upon the federal courts.<sup>5</sup>

(e) *Foreign Corporations*.—Where the highest court of a state has held that any act in the exercise of corporate functions is forbidden to a foreign corporation which has not complied with its constitution and statutes, and that the contracts hence resulting are illegal and cannot be enforced in the courts, the federal courts should follow it.<sup>6</sup>

(f) *Corporate Stock as Realty or Personality*.—Where the state under whose laws a corporation came into existence declares that corporate stock is personal property, this is a rule the United States courts for that state will enforce as part of the law of that state in respect to corporations created by it.<sup>7</sup>

(g) *Statutory Liability of Stockholders*.—In suits in the federal courts to enforce the statutory liability of stockholders in corporations created under the state laws, federal courts are bound by the construction placed upon the state statutes by the highest court of the state.<sup>8</sup> Thus the decision that a corporation is not within an exception of a state statute, which excepts certain corporations from the operation of the statute providing for the personal liability of stockholders,<sup>9</sup> or as to the nature and character of the liability created by the stat-

**3. Construction of charter.**—*Powell v. Brunswick County*, 150 U. S. 433, 37 L. Ed. 1134; *Stone v. Wisconsin*, 94 U. S. 181, 24 L. Ed. 102.

**4. Decision as to repealability of charter.**—*Stone v. Wisconsin*, 94 U. S. 181, 24 L. Ed. 102; *People v. Cook*, 148 U. S. 397, 411, 37 L. Ed. 498.

As giving a construction to the state constitution and statute, the supreme court of the United States accepts the decision of the supreme court of Wisconsin, that the charter of the Milwaukee and Waukesha Railroad Company, granted by the territory, is subject to repeal or alteration, inasmuch as it was not accepted, nor was the company organized, until after the admission of the state into the Union, under a constitution which continued that act in force, and provided that all laws for the creation of corporations might be altered or repealed by the legislature at any time after their passage. *Stone v. Wisconsin*, 94 U. S. 181, 24 L. Ed. 102.

Where the highest court of a state construes a state statute or constitution reserving to the legislature the power to alter or repeal a corporate charter, as giving the state the right to levy a tax upon the corporate franchise, the decision is binding on the federal courts. *People v. Cook*, 148 U. S. 397, 411, 37 L. Ed. 498.

**5. Statute limiting debts of corporation.**—*Sioux City, etc., Warehouse Co. v. Trust Co.*, 173 U. S. 99, 43 L. Ed. 628.

**6. Foreign corporations.**—*Chattanooga Nat. Bldg., etc., Ass'n v. Denson*, 189 U.

S. 408, 414, 47 L. Ed. 870. See, generally, the title FOREIGN CORPORATIONS.

**7. Corporate stock as personality or realty.**—*Citizens' Sav., etc., Co. v. Illinois Cent. R. Co.*, 205 U. S. 46, 57, 51 L. Ed. 703; *Jellenik v. Huron Copper Min. Co.*, 177 U. S. 1, 44 L. Ed. 647. See, generally, the title STOCK AND STOCKHOLDERS.

**8. Statutory liability of stockholders.**—*Bernheimer v. Converse*, 206 U. S. 516, 524, 51 L. Ed. 1163; *Flash v. Conn.*, 109 U. S. 371, 27 L. Ed. 966; *Chase v. Curtis*, 113 U. S. 452, 458, 28 L. Ed. 1038; *Park Bank v. Remsen*, 158 U. S. 337, 39 L. Ed. 1008; *Fourth Nat. Bank v. Franklyn*, 120 U. S. 747, 758, 30 L. Ed. 825; *Evans v. Nellis*, 187 U. S. 271, 47 L. Ed. 173; *Clark v. Bever*, 139 U. S. 96, 35 L. Ed. 88.

**9. That corporation is not within exception as to stockholders' liability.**—*Bernheimer v. Converse*, 206 U. S. 516, 524, 51 L. Ed. 1163.

"We find no reason to disagree with the judgment of the supreme court of Minnesota in holding the Minnesota Thresher Manufacturing Company to be a corporation organized for other than the purpose of carrying on any kind of manufacturing or mechanical business, and therefore not within the exception as to stockholders' liability in favor of corporations of that kind." *Bernheimer v. Converse*, 206 U. S. 516, 524, 51 L. Ed. 1163.

In *Burgess v. Seligman*, 107 U. S. 20, 27 L. Ed. 359, a statute providing for stockholders' liability exempted persons holding stock as collateral security, but provided that the persons who pledged



ute,<sup>10</sup> or as to what is a "debt" within the meaning of a statute providing for statutory liability of trustees for the debts of a corporation,<sup>11</sup> or as to the mode of proceeding to enforce the statutory liability,<sup>12</sup> is binding on the federal courts.

(15) *Criminal Law*.—The construction of state criminal statutes by the highest court of the state is binding on the federal courts.<sup>13</sup> Thus, the construc-

the stock should be considered as holding the same and be liable. The highest court of the state held that the exemption of the statute did not extend to persons receiving from the corporation itself stock as collateral security. Held, that the federal courts are not bound to follow this decision, the question being one of commercial law and general jurisprudence. See, also, *Stanly County v. Coler*, 190 U. S. 437, 444, 47 L. Ed. 1126.

**10. Nature and character of liability.**—*Flash v. Conn*, 109 U. S. 371, 27 L. Ed. 966; *Chase v. Curtis*, 113 U. S. 452, 458, 28 L. Ed. 1038.

The decision of a state court that a state statute providing that stockholders and corporations shall be liable to the creditors of the corporation to an amount equal to their stock, creates a liability in contract, is binding upon the United States courts even in cases arising in other states. *Flash v. Conn*, 109 U. S. 371, 27 L. Ed. 966.

A decision of the highest state court that a state statute making the trustees of a corporation individually liable for its debts, upon failure to file reports of its assets and liabilities at certain times, is a penal statute and to be construed strictly, is binding on the federal courts. *Chase v. Curtis*, 113 U. S. 452, 458, 28 L. Ed. 1038, citing *Flash v. Conn*, 109 U. S. 371, 27 L. Ed. 966; *Steam-Engine Co. v. Hubbard*, 101 U. S. 188, 25 L. Ed. 786.

"We are asked to enforce a statute of a state penal in its character, so far at least as the trustee is concerned, and, therefore, to be strictly construed, in a case in which its highest court rules that it ought not to be enforced. To the question as thus stated it would seem that there should be but one answer, and that the rulings of the highest court of a state as to liability under such a statute ought to be recognized in every court as at least most persuasive." *Park Bank v. Remsen*, 158 U. S. 337, 343, 39 L. Ed. 1008.

**11. Decision as to what is a debt enforceable against trustee.**—*Park Bank v. Remsen*, 158 U. S. 337, 39 L. Ed. 1008.

Where a state statute imposes a liability upon the trustees of a corporation for its debts, and the highest court of the state, in construing the statute, decides that an accommodation indorsement made by the corporation is not a debt within the meaning of the statute, the federal courts are bound by the decision. *Park Bank v. Remsen*, 158 U. S. 337, 39 L. Ed. 1008.

**12. Proceedings to enforce liability.**—*Chase v. Curtis*, 113 U. S. 452, 460, 28 L.

Ed. 1038; *Park Bank v. Remsen*, 158 U. S. 337, 39 L. Ed. 1008; *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 758, 30 L. Ed. 825; *Evans v. Nellis*, 187 U. S. 271, 47 L. Ed. 173.

**Whether remedy at law or in equity.**—The question whether the remedy in the federal courts should be by action at law or by suit in equity depends upon the nature of the remedy given by the statutes of the state. *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 756, 30 L. Ed. 825; *Mills v. Scott*, 99 U. S. 25, 25 L. Ed. 294; *Terry v. Little*, 101 U. S. 216, 25 L. Ed. 864; *Patterson v. Lynde*, 106 U. S. 519, 27 L. Ed. 265; *Flash v. Conn*, 109 U. S. 371, 27 L. Ed. 966; *Blair v. Gray*, 104 U. S. 769, 26 L. Ed. 922; *Chase v. Curtis*, 113 U. S. 452, 28 L. Ed. 1038.

**Condition precedent to suit to enforce liability.**—Where the highest court of a state has decided that under the state statute a proceeding to enforce the statutory liability of a stockholder in a corporation can be collected only by the receiver after he has brought suit against the corporation and all of its stockholders in order to ascertain the amount of the indebtedness, a receiver cannot sue an individual stockholder on his statutory liability without first complying with the rule laid down by the state courts. *Evans v. Nellis*, 187 U. S. 271, 47 L. Ed. 173.

"In all the diversity of opinion in the courts of the different states, upon the question how far a liability, imposed upon stockholders in a corporation by the law of the state which creates it, can be pursued in a court held beyond the limits of that state, no case has been found, in which such a liability has been enforced by any court, without a compliance with the conditions applicable to it under the legislative acts and judicial decisions of the state which creates the corporation and imposes the liability. To hold that it could be enforced without such compliance would be to subject stockholders residing out of the state to a greater burden than domestic stockholders." *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 758, 30 L. Ed. 825.

The courts of the United States, in a special statutory proceeding, will give to a judgment of a state court no other or greater effect, either as a matter of evidence, or as ground of action, than must be lawfully given to it in the courts of the state, whose laws are invoked to enforce it. *Chase v. Curtis*, 113 U. S. 452, 460, 28 L. Ed. 1038.

**13. Criminal laws.**—*Gut v. The State*, 9 Wall. 35, 19 L. Ed. 573; *Tinsley v. Ander-*

tion of a state statute as to contempts,<sup>14</sup> or as to reprieve and new sentence of accused in capital cases,<sup>15</sup> as to the effect of supervening insanity of accused,<sup>16</sup> or as to change of place of trial,<sup>17</sup> is conclusive on the federal courts.

(16) *Damages*.—When the matter of damages has been regulated by statute in a state and the statute is interpreted by its highest court, the regulation of the statute will be followed in the courts of the United States.<sup>18</sup>

(17) *Death by Wrongful Act*.—A state statute giving a remedy for death by wrongful act is binding upon the federal courts as a rule of decision, in cases where the federal courts have jurisdiction of the cause of action, although the state statute provides that the action shall be brought in some court established by the constitution and laws of the state.<sup>19</sup>

(18) *Descent and Distribution*.—The construction put upon a state statute of descents by the highest court of the state is binding on the federal courts.<sup>20</sup> Thus the decision of a state as to the right of an alien to inherit,<sup>21</sup> or that first cousins

son, 171 U. S. 101, 107, 43 L. Ed. 91; *Lambert v. Barrett*, 159 U. S. 660, 40 L. Ed. 296; *Nobles v. Georgia*, 168 U. S. 398, 404, 42 L. Ed. 515.

14. *Contempts*.—*Tinsley v. Anderson*, 171 U. S. 101, 107, 43 L. Ed. 91. See, generally, the title CONTEMPT, ante, p. 531.

15. *Reprieve and new sentence in capital cases*.—The construction by the highest court of a state, of the state laws as to reprieve of persons under sentence of death, and relating to a new warrant for their execution, after the expiration of the reprieve, is binding on the federal courts. *Lambert v. Barrett*, 159 U. S. 660, 40 L. Ed. 296.

16. *Statute as to supervening insanity of accused*.—Where the state court construes a state statute as to the procedure in case of the supervening insanity of the accused in criminal cases as embracing all cases where the alleged insanity begins at any time after the rendition of the verdict of guilty, the construction is conclusive on the federal courts. *Nobles v. Georgia*, 168 U. S. 398, 404, 42 L. Ed. 515.

17. *Statute changing place of trial*.—The decision of the highest court of the state that a state statute changed the place of trial of a criminal case from one county to another county in the same district, or to a different district from that where the event was committed or the indictment found is not contrary to a provision in the state constitution providing that "the accused shall enjoy the right to a speedy and public trial by an impartial jury of the county or district wherein the crime shall have been committed, which county or district shall have been previously ascertained by law," is binding upon the federal courts. *Gut v. The State*, 9 Wall. 35, 19 L. Ed. 573.

18. *Damages*.—*New York, etc., R. Co. v. Estill*, 147 U. S. 591, 37 L. Ed. 292. See, generally, the title DAMAGES.

19. *Death by wrongful act*.—*Railway Co. v. Whitton*, 13 Wall. 270, 271, 20 L. Ed. 571. See, generally, the title DEATH BY WRONGFUL ACT.

A statute of Wisconsin provides that "whenever the death of a person shall be caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured; provided, that such action shall be brought for a death caused in this state, and in some court established by the constitution and laws of the same." Held, that the proviso requiring the action to be brought in a court of the state does not prevent a non-resident plaintiff from removing the action, under the act of congress of March 2d, 1867, to a federal court and maintaining it there. *Railway Co. v. Whitton*, 13 Wall. 270, 271, 20 L. Ed. 571.

20. *Descent and distribution*.—*Hanrick v. Patrick*, 119 U. S. 156, 30 L. Ed. 396; *Middleton v. McGrew*, 23 How. 45, 16 L. Ed. 403; *Byers v. McAuley*, 149 U. S. 608, 621, 37 L. Ed. 867; *Levy v. McCartee*, 6 Pet. 102, 109, 8 L. Ed. 334; *Gardner v. Collins*, 2 Pet. 58, 7 L. Ed. 347.

21. *Right of aliens to inherit*.—*Hanrick v. Patrick*, 119 U. S. 156, 30 L. Ed. 396; *Middleton v. McGrew*, 23 How. 45, 16 L. Ed. 403; *Levy v. McCartee*, 6 Pet. 102, 109, 8 L. Ed. 334.

The alien heirs of a colonist in Texas, who died intestate in 1835, cannot inherit his landed property there. The courts of Texas have so decided, and the supreme court of the United States adopts their decision. *Middleton v. McGrew*, 23 How. 45, 16 L. Ed. 403.

"We understand these decisions to declare a law of descent applicable to the landed property of Texas generally, and not to lands in a particular colony, or settled under a particular act of colonization." *Middleton v. McGrew*, 23 How. 45, 49, 16 L. Ed. 403.

are entitled to take the estate to the exclusion of the second cousin,<sup>22</sup> under the state statutes of descent, are conclusive on the federal courts.

(19) *Eminent Domain*.—The decisions of the state courts in regard to general justice or equitable considerations in the taking of private property are binding on the federal courts.<sup>23</sup> And the same is true of state decisions construing state statutes as to eminent domain,<sup>24</sup> or holding them to be consistent with the state constitution.<sup>25</sup> Thus a decision of a state court that an eminent domain statute requires notice to the landowner,<sup>26</sup> or that it fails to give the landowner the right to institute condemnation proceedings under it to have his compensation determined and does not make adequate provision for the compensation of the owners,<sup>27</sup> or that it is competent for the court to try and determine in a condemnation proceeding, an adverse claim of the plaintiff therein to an interest in property sought to be condemned,<sup>28</sup> or as to the refunding of money paid to the landowner where the second appraisal is less than the first,<sup>29</sup> is conclusive on the federal courts. But a state decision as to what constitutes a public use, although entitled to the highest respect, is not binding on the federal courts, where the due process of law clause of the federal constitution is invoked.<sup>30</sup>

(20) *Elections*.—The consistency of state election or registration laws with the state constitution is a question for the decision of the state courts, and their decision is conclusive on the courts of the United States.<sup>31</sup>

(21) *Evidence*.—(a) *In Civil Cases*.—aa. *In Absence of Legislation by Congress*.—(aa) *General Rule*.—In the absence of legislation by congress, the rules of evidence prescribed by the laws of a state are rules of decision for the United States courts, while sitting within the limits of such state, under the 34th section of the judiciary act.<sup>32</sup>

**22. That first cousins take to the exclusion of second cousins.**—Byers v. McAuley, 149 U. S. 608, 621, 37 L. Ed. 867.

**23. Decision as to general justice or equitable considerations.**—Hooker v. Los Angeles, 188 U. S. 314, 320, 47 L. Ed. 487; Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369. See, generally, the title EMINENT DOMAIN.

The supreme court cannot reverse the decisions of state courts in regard to questions of general justice and equitable considerations in the taking of property. Hooker v. Los Angeles, 188 U. S. 314, 320, 47 L. Ed. 487; Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369.

**24. Decisions construing statutes.**—Backus v. Fort St. Union Depot Co., 169 U. S. 557, 42 L. Ed. 853.

**25. Consistency of eminent domain statute with state constitution.**—Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 41 L. Ed. 1165.

**26. That state statute requires notice to landowner.**—Baltimore Traction Co. v. Baltimore Belt R. Co., 151 U. S. 137, 138, 38 L. Ed. 102; Lent v. Tillson, 140 U. S. 316, 328, 35 L. Ed. 419.

**27. That state statute does not provide for compensation.**—Kaukauna Co. v. Green Bay, etc., Canal Co., 142 U. S. 254, 277, 35 L. Ed. 1004.

**28. Trial of adverse claim in condemnation proceedings.**—Hooker v. Los Angeles, 188 U. S. 314, 319, 47 L. Ed. 487.

**29. Refunding money where second appraisal is less than first.**—A state statute provided that if upon the second appraisal of the damages for lands taken for public

purposes the amount given in the first case was diminished "the difference shall be refunded to the company by the party to whom the same may have been paid, and judgment therefor and for all costs of the appeal shall be rendered against the party so appealing." It was held that the federal court was bound by the construction placed upon it by the state court, that its meaning was that if the last appraisal was less than the first and the amount of the first had been paid, the company was entitled to recover the difference from the party to whom it had been paid. Backus v. Fort St. Union Depot Co., 169 U. S. 557, 42 L. Ed. 853.

**30. What constitutes public use.**—Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 112, 160, 41 L. Ed. 369 (irrigation held to be public use).

**31. Election or registration laws.**—Mason v. Missouri, 179 U. S. 328, 334, 45 L. Ed. 214.

The state supreme court of Missouri has decided that the provision of the state constitution respecting the enactment of registration laws does not limit the power of the general assembly to create more than one class composed by cities having a population in excess of one hundred thousand inhabitants, and hence that the Nesbit registration law was not repugnant to the state constitution. This conclusion must be accepted by the supreme court of the United States. Mason v. Missouri, 179 U. S. 328, 334, 45 L. Ed. 214.

**32. State rules of evidence as governing in federal courts.**—Ryan v. Bindley, 1 Wall. 66, 67, 17 L. Ed. 559; Campbell v.



(bb) *In What Cases State Rules Obtain*—aaa. *Where Federal Jurisdiction Exclusive*.—There is no sound distinction in principle between cases where the jurisdiction of the federal courts is concurrent with those of the state and those where it is exclusive in the federal courts. The section itself neither contains nor suggests such a distinction. The language of the section is general that the laws of the several states shall be regarded as rules of decision in every case to which they apply.<sup>33</sup> Accordingly, the state rules of evidence are obligatory upon the federal courts in patent cases.<sup>34</sup>

bbb. *Cases Involving Questions of General Law*.—The state rules of evidence govern in the federal courts in cases involving questions of general or commercial law, as well as in others.<sup>35</sup>

(cc) *In What Respect State Rules Obtain*—aaa. *Admissibility*—(aaa) *General Rule*.—The question of the admissibility of evidence in suits of a civil nature in the federal courts, is, in the absence of express legislation by congress, governed by the state laws and decisions,<sup>36</sup> and this is especially true in cases as

Haverhill, 155 U. S. 610, 617, 39 L. Ed. 280; Haussknecht v. Claypool, 1 Black 431, 17 L. Ed. 172; Palmer v. Low, 98 U. S. 1, 25 L. Ed. 60; West v. Louisiana, 194 U. S. 258, 261, 48 L. Ed. 965; Chase v. Curtis, 113 U. S. 452, 460, 28 L. Ed. 1038; Hinde v. Vattier, 5 Pet. 398, 8 L. Ed. 168; Packet Co. v. Clough, 20 Wall. 528, 22 L. Ed. 406; Renaud v. Abbott, 116 U. S. 277, 285, 29 L. Ed. 629; Hanley v. Donoghue, 116 U. S. 1, 29 L. Ed. 535; Potter v. Third Nat. Bank, 102 U. S. 163, 26 L. Ed. 111; Wright v. Bales, 2 Black 535, 17 L. Ed. 264; Sims v. Hundley, 6 How. 1, 12 L. Ed. 319; Nutt v. Knut, 200 U. S. 12, 22, 50 L. Ed. 348; Bucher v. Cheshire R. Co., 125 U. S. 555, 31 L. Ed. 795; Ex parte Fisk, 113 U. S. 713, 28 L. Ed. 1117; McNeil v. Holbrook, 12 Pet. 84, 9 L. Ed. 1009; Connecticut, etc., Ins. Co. v. Union Trust Co., 112 U. S. 250, 28 L. Ed. 708; Vance v. Campbell, 1 Black 427, 17 L. Ed. 168; Wilcox v. Hunt, 13 Pet. 378, 10 L. Ed. 209. See, also, Conrad v. Griffey, 11 How. 480, 491, 13 L. Ed. 779; Hewitt v. Phelps, 105 U. S. 393, 26 L. Ed. 1072; Thompson v. Railroad Companies, 6 Wall. 134, 18 L. Ed. 765.

"It is quite true that the 34th section of the judiciary act of 1879 (1 Stat. at L. 73)—preserved totidem verbis, in § 721 of the present revision of the statutes—has been construed as requiring the federal courts, in all civil cases at common law, not within the exceptions named, to observe, as rules of decision, the rules of evidence prescribed by the laws of the states in which such courts respectively sit. Vance v. Campbell, 1 Black 427, 17 L. Ed. 168; Wright v. Bales, 2 Black 535, 17 L. Ed. 264; McNeil v. Holbrook, 12 Pet. 84, 9 L. Ed. 1009; Sims v. Hundley, 6 How. 1, 12 L. Ed. 319; Ryan v. Bindley, 1 Wall. 66, 17 L. Ed. 559." Potter v. Third Nat. Bank, 102 U. S. 163, 26 L. Ed. 111.

**33. Where federal jurisdiction exclusive**.—Campbell v. Haverhill, 155 U. S. 610, 616, 39 L. Ed. 280.

**34. In patent cases**.—Campbell v. Haverhill, 155 U. S. 610, 617, 39 L. Ed. 280.

"It was held by this court in Vance v.

Campbell, 1 Black 427, 17 L. Ed. 168; Haussknecht v. Claypool, 1 Black 431, 17 L. Ed. 172; and in Wright v. Bales, 2 Black 535, 17 L. Ed. 264, that under § 721, rules of evidence prescribed by the laws of the states were obligatory upon the federal courts in patent cases, and that the plaintiff was a competent witness in his own behalf where, by the law of the state parties may be sworn." Campbell v. Haverhill, 155 U. S. 610, 617, 39 L. Ed. 280.

**35. Evidence in cases on questions of general or commercial law**.—Sims v. Hundley, 6 How. 1, 12 L. Ed. 319; Connecticut, etc., Ins. Co. v. Union Trust Co., 112 U. S. 250, 255, 28 L. Ed. 708; McNeil v. Holbrook, 12 Pet. 84, 9 L. Ed. 1009; Ryan v. Bindley, 1 Wall. 66, 17 L. Ed. 559.

**36. Admissibility**.—Connecticut, etc., Ins. Co. v. Union Trust Co., 112 U. S. 250, 255, 28 L. Ed. 708; Sims v. Hundley, 6 How. 1, 12 L. Ed. 319; McNeil v. Holbrook, 12 Pet. 84, 9 L. Ed. 1009; Wright v. Bales, 2 Black 535, 538, 17 L. Ed. 264; Hinde v. Vattier, 5 Pet. 398, 8 L. Ed. 168.

**A notary's certificate**, inadmissible as evidence under the principles of general law, may be admitted where it is competent by a state statute of Mississippi. Sims v. Hundley, 6 How. 1, 12 L. Ed. 319.

The book called the *Land Laws of Ohio*, published by the authority of a law of that state, is evidence in the circuit court of the United States, of an application made in 1787 for the purchase of a tract of land on the Ohio river, between the mouths of the Great and Little Miami, by John Cleves Symmes and his associates, and of the various acts of congress relative to that application and purchase, and of a patent from the president of the United States, pursuant to an act of congress, granting to Symmes and his associates the land described therein: the production of any other evidence of title in Symmes was unnecessary. Hinde v. Vattier, 5 Pet. 398, 8 L. Ed. 168.

It would be productive of infinite inconvenience to settlers and all persons in-

to the ownership of real estate.<sup>37</sup>

(bbb) *Secondary Evidence*.—Where under the state practice, where a contract, having subscribed witnesses to it, is proved to have been made out of the state, the state courts presume the witnesses reside at the place where the contract was made, and are not subject to process issued out of those courts, and they, therefore, allow secondary evidence to prove the contract, the federal courts are governed by the same rule and may admit evidence of the handwriting of the witnesses to a deed of trust, which had been executed out of the state, to go to the jury.<sup>38</sup>

(ccc) *Depositions*.—The state statutes with respect to depositions, and the construction placed upon them by the state courts, are binding on the federal courts within the state.<sup>39</sup>

(ddd) *Proof of Foreign Laws*.—The federal courts may, under § 721 of the Revised Statutes, declaring that "the laws of the several states," with certain exceptions, "shall be regarded as rules of decision in trials at common law, in the courts of the United States," receive such evidence of the authentication of foreign statutes as the practice of the courts in that state may authorize and justify.<sup>40</sup>

bbb. *Competency of Witness*.—The state rules as to competency of witnesses

interested in the lands embraced on this patent, if its publication among the laws of the state, and the admission of the book of laws as evidence of the grant, after its solemn adoption by the supreme court of Ohio, as a settled rule of property, should be questioned in the courts of the United States. *Hinde v. Vattier*, 5 Pet. 398, 8 L. Ed. 168.

There is no principle better established and more uniformly adhered to in this court, than that the circuit courts, in deciding on titles to real property in the different states, are bound to decide precisely as the state courts ought to do; the rules of property and of evidence, whether derived from the laws or adjudications of the judicial tribunals of the state, furnish the guides and rules of decision in those of the union, in all cases to which they apply, where the constitution, treaties or statutes of the United States do not otherwise provide. *Hinde v. Vattier*, 5 Pet. 398, 8 L. Ed. 168.

**37. Cases involving ownership of realty.**—*Clement v. Packer*, 125 U. S. 309, 322, 31 L. Ed. 721.

The admissibility of the declarations of deceased surveyors in cases of boundaries between private estates is governed by the state law. *Clement v. Packer*, 125 U. S. 309, 322, 31 L. Ed. 721.

"In Pennsylvania a still greater latitude has been allowed in questions of boundary. Here the declarations of a deceased person touching the locality of boundary between adjoining owners have been admitted where the survey was made by the person making the declaration, or where the declaration was made by an adjoining owner, who pointed out the boundary line between the tracts to the witness at the time the declarations were made." *Clement v. Packer*, 125 U. S. 309, 325, 31 L. Ed. 721.

**38. Secondary evidence.**—*Wilcox v. Hunt*, 13 Pet. 378, 10 L. Ed. 209. See,

generally, the title BEST AND SECONDARY EVIDENCE, vol. 3, p. 214.

**39. Depositions.**—*West v. Louisiana*, 194 U. S. 258, 261, 48 L. Ed. 965. See, generally, the title DEPOSITIONS.

"Whether the state court erred in its construction of the state constitution and statutes and the common law on the subject of reading depositions of witnesses, is not a federal question. We are bound by the construction which the state court gives to its own constitution and statutes and to the law which may obtain in the state, under circumstances such as those existing herein. Among many of the cases to that effect, see *Brown v. New Jersey*, 175 U. S. 172, 44 L. Ed. 119." *West v. Louisiana*, 194 U. S. 258, 261, 48 L. Ed. 965.

**40. Proof of foreign laws.**—*Nashua Sav. Bank v. Anglo-American Land, etc., Co.*, 189 U. S. 221, 228, 47 L. Ed. 782. See, generally, the title FOREIGN LAWS.

In a proceeding in the United States circuit court of New Hampshire, the plaintiff, an English corporation, in order to prove its incorporation, as well as the liability and rights of stockholders, read in evidence the deposition of an attorney and solicitor of the supreme court of judicature in England, who was also managing director of the plaintiff company. His testimony showed that the plaintiff was a corporation organized with limited liability under five different acts of parliament, copies of which he produced and delivered to the commissioner stating that these copies were "issued by authority, being printed by Her Majesty's printer, and are as such by law receivable in evidence without further proof." Held, that as the proof was sufficient under the laws of New Hampshire, it was sufficient in the federal courts of that state. *Nashua Sav. Bank v. Anglo-American Land, etc., Co.*, 189 U. S. 221, 227, 47 L. Ed. 782.

obtain in suits of a civil nature in the federal courts, where there is no act of congress touching the subject.<sup>41</sup> Thus the rules of evidence prescribed by the laws of a state must be obeyed even though they violate the ancient laws of evidence so far as to make the parties to the action witnesses in their own cause.<sup>42</sup> And upon a like principle, state statutes regulating the competency of husband and wife as witnesses for or against each other are also controlling on the federal courts.<sup>43</sup>

cc. *Judicial Notice*.—The federal courts can take judicial notice of matters which the state courts can judicially recognize.<sup>44</sup>

ddd. *Privileged Communications*.—The federal courts are bound by a state statute which provides that a person duly authorized to practice physic or surgery, shall not be allowed to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity.<sup>45</sup>

eee. *Surgical Examination of Plaintiff in Personal Injury Cases*.—A state statute authorizing a surgical examination of the plaintiff is binding on the federal courts, in the absence of an act of congress expressly or impliedly forbidding it.<sup>46</sup>

**41. Competency of witnesses.**—*Ryan v. Bindley*, 1 Wall. 66, 17 L. Ed. 559; *Packet Co. v. Clough*, 20 Wall. 528, 22 L. Ed. 406; *Lucas v. Brooks*, 18 Wall. 436, 453, 21 L. Ed. 779; *Haussknecht v. Claypool*, 1 Black 431, 436, 17 L. Ed. 172; *Wright v. Bales*, 2 Black 535, 17 L. Ed. 264; *Connecticut, etc., Ins. Co. v. Union Trust Co.*, 112 U. S. 250, 28 L. Ed. 708.

**42. Parties as witnesses.**—*Ryan v. Bindley*, 1 Wall. 66, 17 L. Ed. 559; *Wright v. Bales*, 2 Black 535, 17 L. Ed. 264; *Vance v. Campbell*, 1 Black 427, 17 L. Ed. 168; *Packet Co. v. Clough*, 20 Wall. 528, 22 L. Ed. 406.

**43. Husband and wife as witnesses for or against each other.**—*Lucas v. Brooks*, 18 Wall. 436, 453, 21 L. Ed. 779; *Packet Co. v. Clough*, 20 Wall. 528, 22 L. Ed. 406.

Under the act of congress of July 6th, 1862, enacting that "the laws of the state in which the court shall be held, shall be the rule of decision as to the competency of witnesses in the courts of the United States," and under the acts of the legislature of Wisconsin, passed in 1863 and 1868, one of which says that "a party to a civil action \* \* \* may be examined as a witness in his or her behalf on the trial; \* \* \* and in case of an action for damages for personal injury to a married woman, this section shall be so construed as to allow such married woman to be a witness on her own behalf, in the same manner as if she was single;" and another of which says that "a party to any civil action \* \* \* may be examined as a witness in his own behalf or in behalf of any other party," a married woman may in the circuit court for Wisconsin, in an action on the case by her husband and herself, for injuries done to her person, be examined as a witness for the plaintiffs. It is unimportant whose will be the damages—whether the husband's or wife's—if recovered. The competency of the witness must be determined by the

statutes. *Packet Co. v. Clough*, 20 Wall. 528, 22 L. Ed. 406.

"In West Virginia it has been expressly enacted that a husband shall not be examined for or against his wife, nor a wife for or against her husband, except in an action or suit between husband and wife. Were there any doubt respecting the question, this statute would solve it, for the act of congress of July 6th, 1862, declares that the laws of the state in which the court shall be held, shall be the rules of decision as to the competency of witnesses in the courts of the United States." *Lucas v. Brooks*, 18 Wall. 436, 453, 21 L. Ed. 779.

**44. Judicial notice.**—*Hanley v. Donoghue*, 116 U. S. 1, 29 L. Ed. 535; *Renaud v. Abbott*, 116 U. S. 277, 285, 29 L. Ed. 629; *Case v. Kelly*, 133 U. S. 21, 27, 33 L. Ed. 513.

"We do not doubt the authority of the legislature of a state to enact that after the passage and publication of one of its private statutes, the courts of the state shall be bound to take judicial notice of it without its being pleaded or proven before them. This rule, thus prescribed for the government of the courts of the states, must be binding in proceedings in federal courts in the same state." *Case v. Kelly*, 133 U. S. 21, 27, 33 L. Ed. 513.

The supreme court, upon writ of error to the highest court of a state, does not take judicial notice of the law of another state, not proved in that court and made part of the record sent up, unless by the local law that court takes judicial notice of it. *Hanley v. Donoghue*, 116 U. S. 1, 29 L. Ed. 535. But it will take judicial notice of such a law, where the state court could notice it. *Renaud v. Abbott*, 116 U. S. 277, 285, 29 L. Ed. 629.

**45. Privileged communications.**—*Connecticut, etc., Ins. Co. v. Union Trust Co.*, 112 U. S. 250, 28 L. Ed. 708.

**46. Surgical examination of plaintiff in personal injury case.**—*Camden, etc., R.*



*fff. Weight and Sufficiency.*—The federal courts are likewise governed by the state laws as to the weight and sufficiency of evidence.<sup>47</sup> Thus the federal courts are governed by a state statute making the assignment or indorsement of a promissory note sufficient evidence thereof, without the necessity of providing the handwriting of the assignor.<sup>48</sup>

*bb. Exclusiveness of Rules Prescribed by Congress*—(aa) *In General.*—The laws of the state are only to be regarded as rules of decision in the courts of the United States where the constitution, treaties, or statutes of the United States have not otherwise provided. When the latter speak, they are controlling, on all subjects on which it is competent for them to speak.<sup>49</sup>

(bb) *Admissibility.*—When the statutes of the United States make special provisions as to the admissibility of evidence, they must be followed in the courts of the United States, and not the laws or the practice of the state in which the court is held, when they are different.<sup>50</sup>

(cc) *Mode of Procuring Evidence*—aaa. *In General.*—If congress has legislated upon the subject of the mode of procuring evidence in trials in the federal courts and prescribed a definite rule for the government of those courts, it is to that extent exclusive of any legislation of the states.<sup>51</sup>

bbb. *Examination of Party before Trial.*—A state statute providing that a party to a suit may be examined at any time before trial is not binding upon the

*Co. v. Stetson*, 177 U. S. 172, 174, 44 L. Ed. 721.

"The statute concerns the evidence which may be given on a trial in New Jersey, and it does not conflict with any statute of the United States upon that subject. It is not a question of a general nature, like the law merchant, but simply one concerning evidence based upon a local statute applicable to actions brought within the state to recover damages for injury to the person. The statute comes within the principle of the decisions of this court holding a law of the state of such a nature binding upon federal courts sitting within the state." *Camden, etc., R. Co. v. Stetson*, 177 U. S. 172, 174, 44 L. Ed. 721.

**47. Weight and sufficiency of evidence.**—*McNiel v. Holbrook*, 12 Pet. 84, 9 L. Ed. 1009. See, also, *Nutt v. Knut*, 200 U. S. 12, 22, 50 L. Ed. 348.

**48. Evidence of transfer of commercial paper.**—*McNiel v. Holbrook*, 12 Pet. 84, 9 L. Ed. 1009.

**49. Exclusiveness of rules prescribed by congress.**—*Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457, 458, 24 L. Ed. 251; *Whitford v. Clark County*, 119 U. S. 522, 525, 30 L. Ed. 500; *Goodwin v. Fox*, 129 U. S. 601, 631, 32 L. Ed. 805; *Potter v. Third Nat. Bank*, 102 U. S. 163, 26 L. Ed. 111.

When the statutes of the United States make special provisions as to the competency or admissibility of testimony, they must be followed in the courts of the United States, and not the laws or the practice of the state in which the court is held when they are different. *Whitford v. Clark County*, 119 U. S. 522, 525, 30 L. Ed. 500.

"There can be no doubt that it is competent for congress to declare the rules of evidence which shall prevail in the courts of the United States, not affecting rights

of property; and where congress has declared the rule, the state law is silent. Now, the competency of parties as witnesses in the federal courts depends on the act of congress in that behalf, passed in 1864, amended in 1865, and codified in the Revised Statutes, § 858." *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457, 458, 24 L. Ed. 251.

**50. Acts regulating admissibility of evidence.**—*Whitford v. Clark County*, 119 U. S. 522, 525, 30 L. Ed. 500; *Potter v. Third Nat. Bank*, 102 U. S. 163, 165, 26 L. Ed. 111; *King v. Worthington*, 104 U. S. 44, 50, 26 L. Ed. 652; *Bradley v. United States*, 104 U. S. 442, 26 L. Ed. 824; *Ex parte Fisk*, 113 U. S. 713, 721, 28 L. Ed. 1117. See, generally, the title EVIDENCE.

**51. Act regulating mode of procuring evidence.**—*Ex parte Fisk*, 113 U. S. 713, 721, 28 L. Ed. 1117; *Hanks Dental Ass'n v. International Tooth Crown Co.*, 194 U. S. 303, 48 L. Ed. 989.

The provision of § 914, by which the practice, pleadings and forms and modes of proceeding in the courts of each state are to be followed in actions at law in the courts of the United States held within the same state, neither restricts nor enlarges the power of these courts to order the examination of parties out of court. *Union Pac. R. Co. v. Botsford*, 141 U. S. 250, 257, 35 L. Ed. 734; *Nudd v. Burrows*, 91 U. S. 426, 23 L. Ed. 286; *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898; *Ex parte Fisk*, 113 U. S. 713, 28 L. Ed. 1117; *Chateaugay, etc., Iron Co. v. Petitioner*, 128 U. S. 544, 32 L. Ed. 508.

The mode of proceeding authorized by state statute for the purpose of procuring evidence is of no force in the courts of the United States when it is in conflict with any law of the United States. *Ex parte Fisk*, 113 U. S. 713, 721, 28 L. Ed. 1117.

federal courts, because in conflict with § 861 of the Revised Statutes, which provides that the mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as therein provided in special cases.<sup>52</sup> And this rule is not affected by the act of March 9, 1892, providing that it shall be lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the state in which the courts are held.<sup>53</sup>

ccc. *Surgical Examination of Plaintiff in Personal Injury Cases.*—A federal court cannot subject the plaintiff's person to examination by a surgeon, without her consent and in advance of the trial even though such a practice is permitted by the state practice, as such a proceeding is not according to the common law, to common usage, or to the statutes of the United States.<sup>54</sup>

(dd) *Competency of Witnesses.*—Where there is a conflict between the act of congress, and a law of a state in regard to the competency of witnesses, the United States courts are bound to follow the act of congress.<sup>55</sup> Thus state laws disqualifying interested parties from testifying are not binding on federal courts, since the act of congress provides, in effect, that interest shall not disqualify a witness otherwise competent.<sup>56</sup>

(b) *In Criminal Cases.*—The provision of § 858 of the Revised Statutes, that "the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty," has no application to criminal trials.<sup>57</sup> The law by which the admissibility of testimony in criminal cases must

**52. Examination of witnesses before trial.**—Ex parte Fisk, 113 U. S. 713, 721, 28 L. Ed. 1117; Hanks Dental Ass'n v. International Tooth Crown Co., 194 U. S. 303, 48 L. Ed. 989. See, also, McDonald v. Smalley, 1 Pet. 620, 7 L. Ed. 287.

Where the federal court sitting in New York sentenced a party to a suit pending therein for contempt, for failure to obey an order of the court as to the giving of testimony before the trial under the New York statute, it was held that as the court had no power to make such order the prisoner would be released on habeas corpus. Ex parte Fisk, 113 U. S. 713, 721, 28 L. Ed. 1117.

**53. Effect of act of March 9, 1892.**—Hanks Dental Ass'n v. International Tooth Crown Co., 194 U. S. 303, 308, 48 L. Ed. 989.

"Mode usually means the manner in which a thing is done, and this act relates to the manner of taking 'depositions and testimony,' which the title treats as equivalent terms, and which may be so regarded so far as the question before us is concerned. But it is contended that the word 'mode' as used in the act has a broader significance and embraces the production of evidence, thereby qualifying § 861, which prescribes the mode of proof. We cannot concur in this view. The act is clear upon its face and does not call for construction, or, at all events, is susceptible of but one construction. It does not purport to repeal in any part, or to modify, § 861, or to create additional exceptions to those specified in the subsequent sections by enlarging the causes or grounds for taking depositions, and as it is applicable alone to the taking of

depositions or testimony in writing, we cannot attribute to it any such effect, nor hold, this being so, that it is supplementary to § 914." Hanks Dental Ass'n v. International Tooth Crown Co., 194 U. S. 303, 308, 48 L. Ed. 989.

"We do not think the words 'mode of taking' were used in this act with the intention of expanding the scope of the section so as to cover the production of testimony through the examination of a party before trial. In short, the courts of the United States are not given discretion to make depositions not authorized by federal law, but, in respect of depositions thereby authorized to be taken, they may follow the federal practice in the manner of taking, or that provided by the state law." Hanks Dental Ass'n v. International Tooth Crown Co., 194 U. S. 303, 308, 48 L. Ed. 989.

**54. Subjecting plaintiff to physical examination before trial.**—Union Pac. R. Co. v. Botsford, 141 U. S. 250, 257, 35 L. Ed. 734; Hanks Dental Ass'n v. International Tooth Crown Co., 194 U. S. 303, 307, 48 L. Ed. 989.

**55. Act regulating competency of witnesses.**—King v. Worthington, 104 U. S. 44, 26 L. Ed. 652; Whitford v. Clark County, 119 U. S. 522, 525, 30 L. Ed. 500; citing Potter v. Third Nat. Bank, 102 U. S. 163, 26 L. Ed. 111; Bradley v. United States, 104 U. S. 442, 26 L. Ed. 824; Ex parte Fisk, 113 U. S. 713, 28 L. Ed. 1117. See, generally, the title WITNESSES.

**56. Interested parties as witnesses.**—King v. Worthington, 104 U. S. 44, 50, 26 L. Ed. 652; Goodwin v. Fox, 129 U. S. 601, 631, 32 L. Ed. 805; Potter v. Third Nat. Bank, 102 U. S. 163, 26 L. Ed. 111.

**57. In criminal cases.**—Logan v. United

be determined is the law of the state, as it was when the courts of the United States were established by the judiciary act of 1789.<sup>58</sup>

(22) *Executions*.—Whether a sale under an execution containing no seal is valid, and whether an amendment adding a seal after the sale can be made under the state practice are questions of state law, upon which a decision of the state courts is binding.<sup>59</sup> A decision of the state court that the right to take out an *elegit* is not suspended, by suing out a writ of *fieri facias*, and consequently, that the lien of the judgment continues, pending the proceedings on that writ, is binding on the federal courts.<sup>60</sup>

(23) *Federal Questions*.—(a) *In General*.—The statute making the laws of the states rules of decision in cases where they apply makes an exception when it is "otherwise provided by the constitution, treaties, or statutes of the United States."<sup>61</sup> Hence, whatever deference may be due to the decisions of the state court of final resort in every case in which it has spoken, and whatever may be the respect to which its decisions upon questions of purely local law established as rules of property may be entitled, they are not authority binding upon the courts of the United States, sitting even in the same state, where the questions involved and decided relate to rights arising under the constitution and laws of the United States.<sup>62</sup>

States, 144 U. S. 263, 302, 36 L. Ed. 429; *United States v. Reid*, 12 How. 361, 13 L. Ed. 1023. See, generally, the title **CRIMINAL LAW**.

58. *Evidence in criminal cases*.—*United States v. Reid*, 12 How. 361, 13 L. Ed. 1023.

"The competency of witnesses in criminal trials in the courts of the United States held within the state of Texas is not governed by a statute of the state which was first enacted in 1858, but, except so far as congress has made specific provisions upon the subject, is governed by the common law, which, as has been seen, was the law of Texas before the passage of that statute and at the time of the admission of Texas into the Union as a state." *Logan v. United States*, 144 U. S. 263, 302, 36 L. Ed. 429.

Where two persons were jointly indicted for an offense committed against the United States, viz, a murder committed upon the high seas, and were tried separately, it was not competent for the person first tried to call the other as a witness in his behalf, although the trial took place in a state where such evidence would have been competent under a law passed in 1849. *United States v. Reid*, 12 How. 361, 13 L. Ed. 1023. See, generally, the title **ACCOMPLICES AND ACCESSORIES**, vol. 1, p. 63.

59. *Execution*.—*McGoon v. Scales*, 9 Wall. 23, 31, 19 L. Ed. 545.

60. *United States v. Morrison*, 4 Pet. 124, 7 L. Ed. 804.

61. *Supremacy of federal laws*.—*Ex parte Fisk*, 113 U. S. 713, 720, 28 L. Ed. 1117; *Amis v. Smith*, 16 Pet. 303, 304, 10 L. Ed. 973; *McNiell v. Holbrook*, 12 Pet. 84, 9 L. Ed. 1009.

It is the duty of the supreme court to preserve the supremacy of the laws of the United States, which they cannot do, without disregarding all state laws, and state decisions, which conflict with the

laws of the United States. *Amis v. Smith*, 16 Pet. 303, 304, 10 L. Ed. 973.

"If the act of the state legislature as construed by its highest court conflicts with the federal constitution or with any valid act of congress, it is the duty of the circuit court and of this court to so decide, and to thus enforce the provisions of the federal constitution. The following are some of the numerous cases in which this principle has been announced and carried into effect: *Shelby v. Guy*, 11 Wheat. 361, 6 L. Ed. 495; *Nesmith v. Sheldon*, 7 How. 812, 12 L. Ed. 925; *Van Rensselaer v. Kearney*, 11 How. 297, 13 L. Ed. 703; *Webster v. Cooper*, 14 How. 488, 14 L. Ed. 510; *Leffingwell v. Warren*, 2 Black 599, 17 L. Ed. 599; *Hagar v. Reclamation District No. 108*, 111 U. S. 701, 28 L. Ed. 569; *Detroit v. Osborne*, 133 U. S. 492, 34 L. Ed. 260." *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112, 154, 41 L. Ed. 369.

62. *Decisions on federal questions*.—*Deposit Bank v. Frankfort*, 191 U. S. 499, 516, 48 L. Ed. 276; *Crescent City Live Stock Co. v. Butchers' Union Slaughterhouse Co.*, 120 U. S. 141, 30 L. Ed. 614; *Sparf v. United States*, 156 U. S. 51, 168, 39 L. Ed. 343; *The J. E. Rumbell*, 148 U. S. 1, 37 L. Ed. 345; *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112, 159, 41 L. Ed. 369; *Ex parte Fisk*, 113 U. S. 713, 720, 28 L. Ed. 1117; *Julian v. Central Trust Co.*, 193 U. S. 93, 114, 48 L. Ed. 629.

Upon constitutional questions, neither decisions of state courts nor rulings of lower courts of the United States can relieve the federal courts from the duty of exercising their own judgment. *Sparf v. United States*, 156 U. S. 51, 168, 39 L. Ed. 343, citing *Liverpool, etc., Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 32 L. Ed. 788; *Andrews v. Hovey*, 124 U. S. 694, 31 L. Ed. 557; *The J. E. Rumbell*, 148 U. S. 1, 37 L. Ed. 345.



(b) *Impairment of Obligation of Contracts*.—As to whether federal courts will follow the decision of the state courts, where the question involved arises under the contract clause of the United States Constitution, see the title *APPEAL AND ERROR*, vol. 1, pp. 715, 720.

(c) *Denial of Due Process of Law*.—The federal courts are no more bound by the state court's construction of a statute when the question is whether the statute provided for the notice required to constitute due process of law, than when the question is whether the statute created a contract, which has been impaired by a subsequent law of the state.<sup>63</sup>

(24) *Fraudulent and Voluntary Conveyances*.—In controversies arising under a state statute as to fraudulent conveyances involving, as they do, the rights of creditors locally, and a rule of property, the federal courts accept and follow the conclusions of the highest judicial tribunal of the state as controlling.<sup>64</sup>

(25) *Interest and Usury*—(a) *Interest*.—State statutes regulating the rate of interest are applicable as rules of decision in the federal courts,<sup>65</sup> and the

**63. Denial of due process of law.**—*Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112, 159, 41 L. Ed. 369; *Scott v. McNeal*, 154 U. S. 34, 45, 38 L. Ed. 896; *Huntington v. Attrill*, 146 U. S. 657, 36 L. Ed. 1123; *Mobile, etc., R. Co. v. Tennessee*, 153 U. S. 486, 38 L. Ed. 793. See the title *APPEAL AND ERROR*, vol. 1, pp. 664, 674. And see, generally, the title *DUE PROCESS OF LAW*.

**64. Fraudulent and voluntary conveyances.**—*Schreyer v. Scott*, 134 U. S. 405, 409, 33 L. Ed. 955; *Peters v. Bain*, 133 U. S. 670, 686, 33 L. Ed. 696; *Lloyd v. Fulton*, 91 U. S. 479, 23 L. Ed. 363; *Allen v. Massey*, 17 Wall. 351, 21 L. Ed. 542; *Bamberger v. Schoolfield*, 160 U. S. 149, 159, 40 L. Ed. 374; *Union Bank v. Kansas City Bank*, 136 U. S. 223, 233, 34 L. Ed. 341; *Crawford v. Neal*, 144 U. S. 585, 595, 36 L. Ed. 552; *Chandler v. Von Roeder*, 24 How. 224, 225, 16 L. Ed. 633; *Sumner v. Hicks*, 2 Black 532, 533, 17 L. Ed. 355. See, generally, the title *FRAUDULENT AND VOLUNTARY CONVEYANCES*.

In determining the rules applicable to such transactions reference should be had not only to the decisions of the supreme court of the United States, but also to those of the courts of New York, where the parties lived and the transactions took place. *Schreyer v. Scott*, 134 U. S. 405, 409, 33 L. Ed. 955.

**Necessity for change of possession on sale of personalty.**—Under the statute of frauds of Missouri, as interpreted by the highest court of that state, an interpretation which the supreme court of the United States will follow, a sale of household furniture in a house occupied jointly by vendor and vendee, both using the furniture alike, and there being no other change of possession than that the vendor, after going around with the vendee and looking at the furniture and agreeing on the price, turned it over to the vendee and executed a bill of sale before a notary, both parties then, after the sale, occupying the house and using the furniture exactly as before, is void as against the vendor's creditors. *Allen v. Massey*, 17 Wall. 351, 21 L. Ed. 542.

**Burden of proof.**—Where, under the state laws, the burden is upon the attacking creditor, but where the fraudulent intent on the grantor's part is made out and the circumstances are suspicious, the purchaser must show that he has paid value, and if he does, it must then appear that the purchaser had notice of the fraud, the federal court accepts the construction given the state statute as controlling. *Crawford v. Neal*, 144 U. S. 585, 595, 36 L. Ed. 552.

**The correctness of instructions as to fraudulent conveyances** depends necessarily upon the law of the state where the transaction took place as interpreted and construed by the supreme court of that state, whose rulings in this regard will be followed by the federal courts. *Bamberger v. Schoolfield*, 160 U. S. 149, 159, 40 L. Ed. 374.

**Liability of creditor of corporations to whom a transfer of stock is made to other creditors**—**Question of general law.**—A railroad corporation which owed a construction company \$70,000, transferred to it \$350,000 worth of its stock in payment of its claim. A state statute provided that the stockholders of any corporation should be liable to the amount of the unpaid installment of the stock owned by them or transferred by them for the purpose of defrauding creditors, and provided that the execution against the company might be levied upon their private property to that extent. The highest court of the state had held that a creditor of a corporation to whom the corporation had transferred its stock in payment of its claim for less than its face value, was liable to the other creditors of the corporation, and the stock was not to be treated as fully paid. It was held that the question was one of general law, and the decision of the state court was not binding upon the federal court, especially as the decision of the state court was rendered after the stock in question in the federal court was acquired. *Clark v. Bever*, 139 U. S. 96, 35 L. Ed. 88.

**65. State statutes regulating rate of interest.**—*Morley v. Lake Shore, etc., R.*

construction placed upon them by the state courts is binding on the federal courts.<sup>66</sup>

(b) *Usury*.—Federal courts in dealing with a question of usury must look to the laws of the state where the transaction took place, and follow the construction put upon such laws by the state courts.<sup>67</sup>

(26) *Intoxicating Liquors*.—Where a state law,<sup>68</sup> or municipal ordinance,<sup>69</sup> in reference to the sale of liquor has been held to be within the legislative power, so far as the state constitution is concerned, that conclusion is binding on the federal courts.

(27) *Insurance*—(a) *Construction of Insurance Policy*.—The construction of a policy of insurance is one of general rather than one of local law, and the federal courts adopt their own views as to such construction, though the courts of the state in which the cause of action arose adopted a different view.<sup>70</sup>

(b) *Construction of Statutes Regulating Insurance*.—The construction placed by the highest court of a state on a state statute regulating foreign insurance companies doing business in the state, is binding on the federal courts.<sup>71</sup>

(28) *Judgments*—(a) *Entry Nunc Pro Tunc*.—The power of the inferior court of a state to make an order, at one term, as of another, is of a character so peculiarly local, a proceeding so necessarily dependent on the judgment of the

Co., 146 U. S. 162, 36 L. Ed. 925; *Ohio v. Frank*, 103 U. S. 697, 26 L. Ed. 531. See, generally, the title INTEREST.

**66. Construction of statute as to interest.**—*Morley v. Lake Shore, etc.*, R. Co., 146 U. S. 162, 36 L. Ed. 925; *Ohio v. Frank*, 103 U. S. 697, 26 L. Ed. 531.

A state statute provided that the rate of interest shall be 6 per cent. but that nothing therein shall be so construed as to in any way affect any contract or obligation made before the passage of the act, was construed by the highest court of the state as not including judgments within the exception although the judgment was obtained before the passage of the act, and although the act reduced the amount of interest. It was held that the construction of the statute by the state court was binding upon the federal court. *Morley v. Lake Shore, etc.*, R. Co., 146 U. S. 162, 36 L. Ed. 925.

A decision of a state court that the rate of interest stipulated for in an instrument is the same after as before maturity, although the legal rate except when a greater rate is contracted for, is less than the rate stipulated for in the contract, is binding on the federal courts. *Ohio v. Frank*, 103 U. S. 697, 26 L. Ed. 531.

**67. Usury.**—*Missouri, etc., Trust Co. v. Krumseig*, 172 U. S. 351, 355, 43 L. Ed. 474, citing *DeWolf v. Johnson*, 10 Wheat. 367, 6 L. Ed. 343; *Scudder v. Union Nat. Bank*, 91 U. S. 406, 23 L. Ed. 245. See, generally, the title USURY.

**68. Statute regulating sale of liquor.**—*Giozza v. Tiernan*, 148 U. S. 657, 661, 37 L. Ed. 599.

**69. Ordinance regulating sale of liquor.**—*Crowley v. Christensen*, 137 U. S. 83, 88, 34 L. Ed. 620.

**70. Construction of policy.**—*The Barnstable*, 181 U. S. 464, 470, 45 L. Ed. 954; *Washburn, etc., Mfg. Co. v. Reliance*

*Marine Ins. Co.*, 179 U. S. 1, 15, 45 L. Ed. 49; *Liverpool, etc., Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 32 L. Ed. 788; *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. 495, 10 L. Ed. 1044; *Railroad Co. v. National Bank*, 102 U. S. 14, 30, 26 L. Ed. 61.

In *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. 495, 10 L. Ed. 1044, the court said: "The questions under our consideration are questions of general commercial law, and depend upon the construction of a contract of insurance which is by no means local in its character, or regulated by any local policy or customs. Whatever respect, therefore, the decisions of state tribunals may have on such a subject, and they certainly are entitled to great respect, they cannot conclude the judgment of this court. On the contrary, we are bound to interpret this instrument according to our own opinion of its true intent and objects, aided by all the lights which can be obtained from all external sources whatsoever; and if the result to which we have arrived differs from these learned state courts, we may regret it, but it cannot be permitted to alter our judgment." *Railroad Co. v. National Bank*, 102 U. S. 14, 30, 26 L. Ed. 61.

**The construction of a policy of marine insurance** depends on questions of general commercial law, in respect of which the courts of the United States are at liberty to exercise their own judgment and are not bound to accept the state decisions as in matters of purely local law. *Washburn, etc., Mfg. Co. v. Reliance Marine Ins. Co.*, 179 U. S. 1, 15, 45 L. Ed. 49. See, also, *The Barnstable*, 181 U. S. 464, 470, 45 L. Ed. 954.

**71. Construction of statutes regulating insurance.**—*New York Life Ins. Co. v. Cravens*, 178 U. S. 389, 395, 44 L. Ed. 1116; *Noble v. Mitchell*, 164 U. S. 367, 372, 41 L. Ed. 472.

revising tribunal, that the judgment of the same is considered authority, and the federal courts conform to it.<sup>72</sup>

(b) *Recording*.—A statute of a state as to the recording of judgments in order to perfect the lien, does not apply so as to avoid the lien of an unrecorded judgment of a federal court rendered before the passage of the act requiring recording.<sup>73</sup>

(c) *Correction or Setting Aside*.—The construction of the statute of a state by the highest state court, and its decision as to the powers of the state courts to correct or set aside its own judgments, upon application within reasonable time, for mistake, irregularity, or fraud, is conclusive upon the federal courts.<sup>74</sup>

(d) *Interest on Judgment*.—A state statute "giving interest on judgments for damages, in certain cases," applies as well to cases depending in the circuit courts of the Union, as to proceedings in similar cases in the state courts.<sup>75</sup>

(e) *Conclusiveness*.—aa. *In General*.—The effect which a judgment of a state court has as res adjudicata when so pleaded in the state courts and no more, is to be given to it when pleaded in the federal courts.<sup>76</sup>

bb. *In Ejectment*.—The effect to be given to a judgment in ejectment is dependent on the state law upon the subject.<sup>77</sup> Thus where, under the state law, a single verdict and judgment in ejectment is not conclusive in the courts of the state, it is not conclusive in the courts of the United States.<sup>78</sup> But where a state statute enacts that a judgment in ejectment—provided the action be brought in a form which gives precision to the parties and land claimed—shall be a bar to any other action between the same parties on the same subject matter, is a rule

**72. Entry nunc pro tunc.**—*Bank v. Dudley*, 2 Pet. 492, 7 L. Ed. 496.

**73. Recording.**—*Massingill v. Downs*, 7 How. 760, 12 L. Ed. 903.

Where a judgment was obtained in the circuit court of the United States for the district of Mississippi in 1839, and in 1841 the state of Mississippi passed a law, requiring judgments to be recorded in a particular way, in order to make them a lien upon property, this statute did not abrogate the lien which had been acquired under the judgment of 1839, although the latter had not been recorded in the manner required by the statute. *Massingill v. Downs*, 7 How. 760, 12 L. Ed. 903.

**74. Construction of state statutes as to power of state courts.**—*Garrison v. New York City*, 21 Wall. 196, 203, 22 L. Ed. 612.

**75. Interest on judgment.**—*Sneed v. Wister*, 8 Wheat. 690, 5 L. Ed. 717.

**76. Conclusiveness.—In general.**—*Union, etc., Bank v. Memphis*, 189 U. S. 71, 75, 47 L. Ed. 713, citing *Cooper v. Newell*, 173 U. S. 555, 43 L. Ed. 808; *Metcalf v. Watertown*, 153 U. S. 671, 38 L. Ed. 861; *Chicago, etc., R. Co. v. Wiggins Ferry Co.*, 108 U. S. 18, 27 L. Ed. 636; *Gunter v. Atlantic, etc., R. Co.*, 200 U. S. 273, 291, 50 L. Ed. 477.

"As the judgment relied on as res adjudicata was not so regarded in *Shelby County v. Union, etc., Bank*, 161 U. S. 149, 40 L. Ed. 650, it could not be properly so regarded in the present case; but, apart from that, it is enough that in *Tennessee* the doctrine of res adjudicata is not applicable to taxes for years other than those under consideration in the particular case, inasmuch as what effect a judgment

of a state court shall have as res adjudicata is a question of state or local law, and the taxes involved in this suit are taxes for years other than those involved in the prior adjudication." *Union, etc., Bank v. Memphis*, 189 U. S. 71, 75, 47 L. Ed. 713; *Phoenix Fire, etc., Ins. Co. v. Tennessee*, 161 U. S. 174, 40 L. Ed. 660.

**77. Governed by state law.**—*Gibson v. Lyon*, 115 U. S. 439, 445, 29 L. Ed. 440; *Blanchard v. Brown*, 3 Wall. 245, 249, 18 L. Ed. 69.

Whatever is conclusive of the title to land in the courts of a state is equally conclusive in the federal courts; that it is, in fact, a rule of property. *Blanchard v. Brown*, 3 Wall. 245, 249, 18 L. Ed. 69.

**78. Where judgment not conclusive under state practice.**—*Barber v. Pittsburg, etc., R. Co.*, 166 U. S. 83, 98, 41 L. Ed. 925; *Equator Co. v. Hall*, 106 U. S. 86, 27 L. Ed. 114; *Britton v. Thornton*, 112 U. S. 526, 28 L. Ed. 816; *Gibson v. Lyon*, 115 U. S. 439, 29 L. Ed. 440; *Smale v. Mitchell*, 143 U. S. 99, 36 L. Ed. 90. See, generally, the titles EJECTMENT; RES ADJUDICATA. And see post, "New Trials in Ejectment," VII, K, 3, j, (15), (b).

"The decision of the supreme court of Pennsylvania, in the former action of ejectment, is certainly not conclusive as an adjudication of the rights of the parties, inasmuch as a single verdict and judgment in ejectment, not being conclusive under the laws and in the courts of the state, is not conclusive in the courts of the United States, and is no bar to a second action of ejectment." *Barber v. Pittsburg, etc., R. Co.*, 166 U. S. 83, 99, 41 L. Ed. 925.



of property as well as of practice, and being conclusive on title in the courts of the state, is conclusive, also, in those of the Union.<sup>79</sup> And federal courts are bound by a state statute providing that two concurring verdicts and judgments in a common-law ejectment between the same parties upon the same bill, concluded the right, as such statute established a rule of property.<sup>80</sup>

cc. *Collateral Attack*.—A state court has the right to place its own construction upon its own judgments, and where it holds that a judgment is not void and that it cannot be attacked collaterally, the supreme court of the United States ought to follow that determination.<sup>81</sup>

(f) *Lien*.—The lien of judgments and decrees in the federal courts arises out of the adoption of the state laws upon that subject, and may be considered as a rule of property under the thirty-fourth section of the judiciary act.<sup>82</sup> Indeed

**79. State statute making judgment conclusive.**—*Miles v. Caldwell*, 2 Wall. 35, 17 L. Ed. 755. See, also, *Sturdy v. Jackaway*, 4 Wall. 174, 18 L. Ed. 387.

**80. Two judgments conclusive.**—*Britton v. Thornton*, 112 U. S. 526, 28 L. Ed. 816; *Blanchard v. Brown*, 3 Wall. 245, 18 L. Ed. 69. See, also, *Hogan v. Kurtz*, 94 U. S. 773, 775, 24 L. Ed. 317.

**81. Collateral attack.**—*Hibben v. Smith*, 191 U. S. 310, 384, 48 L. Ed. 195; *Newport Light Co. v. Newport*, 151 U. S. 527, 38 L. Ed. 259.

Thus, whether a judgment upon an assessment for improvements where two members of a general board created by statute for the purpose of making it, had some interest in some of the property subject to the assessment, was a void or voidable judgment, is a proper question for the state court to decide. *Hibben v. Smith*, 191 U. S. 310, 384, 48 L. Ed. 195.

**82. Lien of judgment.**—*Williams v. Benedict*, 8 How. 107, 111, 12 L. Ed. 1007; *Union Bank v. Jolly*, 18 How. 503, 521, 15 L. Ed. 472; *Ward v. Chamberlain*, 2 Black 430, 440, 17 L. Ed. 319; *Cooke v. Avery*, 147 U. S. 375, 387, 37 L. Ed. 209; *Clements v. Berry*, 11 How. 398, 411, 13 L. Ed. 745; *United States v. Morrison*, 4 Pet. 124, 7 L. Ed. 804; *Ralston v. Bell*, 2 Dall. 158, 1 L. Ed. 330; *Brown v. Pierce*, 7 Wall. 205, 217, 19 L. Ed. 134; *Baker v. Morton*, 12 Wall. 150, 20 L. Ed. 262; *Massingill v. Downs*, 7 How. 760, 765, 12 L. Ed. 903.

Judgments were not liens at common law, but several of the states had passed laws to that effect before the judicial system of the United States was organized, and the decisions of this court have established the doctrine that congress, in adopting the processes of the states, also adopted the modes of process prevailing at that date in the courts of the several states, in respect to the lien of judgments within the limits of their respective jurisdiction. *Brown v. Pierce*, 7 Wall. 205, 217, 19 L. Ed. 134; *Williams v. Benedict*, 8 How. 107, 111, 12 L. Ed. 1007; *Ward v. Chamberlain*, 2 Black 430, 438, 17 L. Ed. 319; *Bayard v. Lombard*, 9 How. 530, 13 L. Ed. 245; *Riggs v. Johnson County*, 6 Wall. 166, 18 L. Ed. 768.

"Repeated decisions of this court also have established the doctrine, that the lien of judgments and decrees in the fed-

eral courts arise out of the adoption of the state laws upon that subject, and that the lien may be considered as a rule of property under the 34th section of the judiciary act (of Sept. 24, 1789, ch. 20, 1 Stat. at L. 73). *Clements v. Berry*, 11 How. 398, 411, 13 L. Ed. 745; *United States v. Morrison*, 4 Pet. 124, 7 L. Ed. 804; *Ralston v. Bell*, 2 Dall. 158, 1 L. Ed. 330." *Ward v. Chamberlain*, 2 Black 430, 17 L. Ed. 319.

The process act of 1828, passed by congress, refers to state laws for the creation and effect of liens; but the preparatory steps by which they are created depend upon the rules adopted by the United States courts. *Clements v. Berry*, 11 How. 398, 13 L. Ed. 745.

**Judgment against decedent's estate.**—The effect of the judgment, its lien or other operation upon the assets of the deceased, must be absolutely controlled by the local law; otherwise the conflict of jurisdictions would be irreconcilable and disastrous. And such, it is believed, is the well established doctrine of this and all other courts. *Union Bank v. Jolly*, 18 How. 503, 521, 15 L. Ed. 472. See, generally, the title EXECUTORS AND ADMINISTRATORS.

"In those states where the judgment on the execution of a state court creates a lien only within the county in which the judgment is entered, it has not been doubted that a similar proceeding in the circuit court of the United States would create a lien to the extent of its jurisdiction. This has been the practical construction of the power of the courts of the United States, whether the lien was held to be created by the issuing of process or by express statute. Any other construction would materially affect, and in some degree subvert, the judicial power of the Union. It would place suitors in the state courts in a much better condition than in the federal courts." *Massingill v. Downs*, 7 How. 760, 765, 12 L. Ed. 903.

The process, both mesne and final, in the district and circuit courts of the United States, being conformed to those of the different states in which they have jurisdiction, the lien of judgments on property within the limits of that jurisdiction depends, also, upon the state law, where

this effect is expressly given to judgments of the United States courts by an act of congress.<sup>83</sup>

(g) *Operation as Conveyance*.—A statute providing that when any judgment or decree shall be rendered for a conveyance in any court of the state, which is not complied with within the time fixed in the judgment, the judgment or decree shall operate as a conveyance, applies to a judgment of the circuit court of the United States respecting real estate.<sup>84</sup>

(29) *Judicial Sales*.—The title to the property sold under judicial process of a federal court is not warranted by the party obtaining the judgment of the court and any different rule prevailing on this subject in any state by statute cannot change the position of the United States with respect to judicial sales in proceedings instituted by them.<sup>85</sup>

(30) *Juries*.—A decision of the highest court of a state that a statute of a state providing a method of selecting jurors is not in conflict with the constitution of the state is binding upon the federal courts.<sup>86</sup>

(31) *Limitation of Actions and Adverse Possession*—(a) *Effect of State Statutes on Proceedings in Federal Court*—aa. *In Absence of Limitations Provided by Act of Congress*—(aa) *In General*.—No laws of the several states have been more steadfastly or more often recognized, from the beginning, as rules of decision in the courts of the United States, than statutes of limitations

congress has not legislated on the subject. *Williams v. Benedict*, 8 How. 107, 111, 12 L. Ed. 1007.

In 1831, there was no statute in Maryland which declared a judgment to be a lien on real estate, before execution issued and levied, but by an act of parliament of 5th Geo. II, c. 7, lands in the colonies were subject to execution as chattels in favor of British merchants, and this statute had been adopted in the Maryland practice and construed to apply to all judgment creditors. It was held that the statute and its construction were binding upon the federal courts as a rule of decision. *Taylor v. Thomson*, 5 Pet. 358, 8 L. Ed. 154.

**Lien of judgments in admiralty**.—See the title ADMIRALTY, vol. 1, p. 178.

**83. Act of congress giving United States judgments same effect as judgments of state courts**.—*Cooke v. Avery*, 147 U. S. 375, 387, 37 L. Ed. 209.

"There was no law of congress, however, prior to August 1, 1888, which expressly gave a lien to the judgments of the courts of the United States or regulated the same, but on that day an act was approved, which made such judgments liens on property throughout the state in which the federal courts sat, in the same manner and to the same extent and under the same conditions only as if rendered by the state courts." 25 Stat. 357, c. 729. *Cooke v. Avery*, 147 U. S. 375, 387, 37 L. Ed. 209.

By § 967, taken from the fourth section of the act of July 4, 1840 (5 Stat. 392, 393, c. 43), the judgments and decrees rendered in a circuit or district court within any state cease to be liens on real estate in the same manner and at like periods as the judgments and decrees of the courts of such state cease by law to be liens thereon. *Cooke v. Avery*, 147 U. S. 375, 387, 37 L. Ed. 209.

"Under this legislation, judgments recovered in the federal courts were undoubtedly liens in all cases where they were such by the laws of the states. *Baker v. Morton*, 12 Wall. 150, 158, 20 L. Ed. 262; *Ward v. Chamberlain*, 2 Black 430, 17 L. Ed. 319; *Massingill v. Downs*, 7 How. 760, 12 L. Ed. 903. But no right in the states to regulate the operation of federal judgments was thereby recognized, and the lien of such judgments depended upon the acts of congress and the rules of the federal courts." *Cooke v. Avery*, 147 U. S. 375, 387, 37 L. Ed. 209.

**84. Operation of judgment directing conveyance as a conveyance**.—*Langdon v. Sherwood*, 124 U. S. 74, 31 L. Ed. 344 (construing § 429 of the Nebraska Code of Civil Procedure).

**85. Judicial sales—No warranty**.—*Waples v. United States*, 110 U. S. 630, 633, 28 L. Ed. 272.

**86. Juries**.—*Brown v. New Jersey*, 175 U. S. 172, 44 L. Ed. 119, reaffirmed in *Day v. Conley*, 179 U. S. 679, 45 L. Ed. 383; *Huber v. Jennings-Heywood Oil Syndicate*, 201 U. S. 641, 50 L. Ed. 901; *Clifford v. Reumpler*, 177 U. S. 693, 44 L. Ed. 945; *Clifford v. Reumpler*, 175 U. S. 723, 44 L. Ed. 337; *Bissert v. Hagan*, 183 U. S. 694, 46 L. Ed. 393; *Dobbs v. Kansas*, 184 U. S. 697, 51 L. Ed. 764; *Hall v. Johnson*, 186 U. S. 480, 46 L. Ed. 1259. See, generally, the title JURY.

"That the statutory provisions for a struck jury are not in conflict with the constitution of New Jersey is for this court foreclosed by the decision of the highest court of the state." *Brown v. New Jersey*, 175 U. S. 172, 174, 44 L. Ed. 119.

The number of jurors of which the panel should consist is not governed by state laws. *United States v. The Insurgents*, 2 Dall. 335, 1 L. Ed. 404.



of actions, real and personal, as enacted by the legislature of a state, and it is well settled that in the absence of any act of congress fixing a limitation, the state statute of limitation governs in proceedings in the federal courts.<sup>87</sup>

(bb) *Actions for Recovery of Real Estate*.—State statutes of limitations with respect to the time within which an action for the recovery of real estate may be brought are binding on such actions brought in the federal courts of that state.<sup>88</sup>

(cc) *Enforcement of Judgments*.—The act of a state legislature limiting actions and executions on judgments rendered in the state courts, is applicable to judgments obtained in the courts of the United States.<sup>89</sup>

(dd) *Suits to Enforce Statutory Liability of Stockholders*—aaa. *In General*.—Suits, either at law or in equity, in the circuit court, by creditors of a corporation, to enforce the liability of stockholders under a state statute, are governed by the statute of limitations of the state.<sup>90</sup>

bbb. *Stockholders in National Banks*.—An action to enforce the statutory li-

**87. Effect of state statute of limitations in federal courts.**—*Balkam v. Woodstock Iron Co.*, 154 U. S. 177, 187, 38 L. Ed. 953; *Higginson v. Mein*, 4 Cranch 415, 2 L. Ed. 664; *Shelby v. Guy*, 11 Wheat. 361, 6 L. Ed. 495; *Bell v. Morrison*, 1 Pet. 351, 7 L. Ed. 174; *Henderson v. Griffin*, 5 Pet. 151, 8 L. Ed. 79; *Green v. Neal*, 6 Pet. 291, 8 L. Ed. 402; *McElmoyle v. Cohen*, 13 Pet. 312, 10 L. Ed. 177; *Harpending v. Dutch Church*, 16 Pet. 455, 10 L. Ed. 1029; *Lef-fingwell v. Warren*, 2 Black 599, 17 L. Ed. 599; *Sohn v. Waterson*, 17 Wall. 596, 21 L. Ed. 737; *Tioga Railroad v. Blossburg, etc., Railroad*, 20 Wall. 137, 22 L. Ed. 331; *Kibbe v. Ditto*, 93 U. S. 674, 23 L. Ed. 1005; *Davie v. Briggs*, 97 U. S. 628, 24 L. Ed. 1036; *Amy v. Dubuque*, 98 U. S. 470, 25 L. Ed. 228; *Mills v. Scott*, 99 U. S. 25, 25 L. Ed. 294; *Moore v. National Bank*, 104 U. S. 625, 26 L. Ed. 870; *Michigan Ins. Bank v. Eldred*, 130 U. S. 693, 32 L. Ed. 1080; *Penfield v. Chesapeake, etc., R. Co.*, 134 U. S. 351, 33 L. Ed. 940; *Barney v. Oelrichs*, 138 U. S. 529, 34 L. Ed. 1037; *Morgan v. Hamlet*, 113 U. S. 449, 28 L. Ed. 1043; *Lawrence v. Nelson*, 143 U. S. 215, 224, 36 L. Ed. 130; *McCluny v. Silliman*, 3 Pet. 270, 7 L. Ed. 676; *Bank v. Dalton*, 9 How. 522, 527, 13 L. Ed. 242; *Dulles v. Jones*, 9 How. 520, 13 L. Ed. 245; *Sanger v. Nightingale*, 122 U. S. 176, 185, 30 L. Ed. 1105; *Bauserman v. Blunt*, 147 U. S. 647, 37 L. Ed. 316; *Metcalf v. Watertown*, 153 U. S. 671, 38 L. Ed. 861; *Campbell v. Haverhill*, 155 U. S. 610, 614, 39 L. Ed. 280; *Boone County v. Burlington, etc., R. Co.*, 139 U. S. 684, 35 L. Ed. 319; *Terry v. Tubman*, 92 U. S. 156, 23 L. Ed. 537; *Carrol v. Green*, 92 U. S. 509, 23 L. Ed. 738; *Terry v. Anderson*, 95 U. S. 628, 24 L. Ed. 365; *Fourth Nat. Bank v. Fracklyn*, 120 U. S. 747, 756, 30 L. Ed. 825; *Murray v. Baker*, 3 Wheat. 541, 4 L. Ed. 454; *Ross v. Duval*, 13 Pet. 45, 10 L. Ed. 51; *Pease v. Peck*, 18 How. 595, 15 L. Ed. 518; *Security Trust Co. v. Black River Nat. Bank*, 187 U. S. 211, 227, 47 L. Ed. 147; *Harrison v. Myer*, 92 U. S. 111, 116, 23 L. Ed. 606; *Barrett v. Holmes*, 102 U. S. 651, 655, 26 L. Ed. 291; *McClaine v. Rankin*, 197 U. S. 154, 49 L. Ed. 702; *Bacon v. Howard*, 20

How. 22, 15 L. Ed. 811; *Hanger v. Abbott*, 6 Wall. 532, 18 L. Ed. 939; *United States Bank v. Daniel*, 12 Pet. 32, 9 L. Ed. 989; *Great Western Tel. Co. v. Purdy*, 162 U. S. 329, 339, 40 L. Ed. 986; *Dibble v. Bellingham Bay Land Co.*, 163 U. S. 63, 41 L. Ed. 72.

Acts of limitation are of daily cognizance in the courts of the United States; and in fixing the rights of parties, they must be regarded as well in the federal as in the state courts. *Ross v. Duval*, 13 Pet. 45, 10 L. Ed. 51.

The courts of the United States, in the absence of legislation upon the subject by congress, recognize the statutes of limitations of the several states, and give them the same construction and effect which are given by the local tribunals. They are a rule of decision under the 34th section of the judicial act of 1789. *Lef-fingwell v. Warren*, 2 Black 599, 603, 17 L. Ed. 599.

**88. Actions for recovery of real estate.**—*Patton v. Easton*, 1 Wheat. 476, 4 L. Ed. 139; *Powell v. Harman*, 2 Pet. 241, 7 L. Ed. 411; *Green v. Neal*, 6 Pet. 291, 8 L. Ed. 402; *Lef-fingwell v. Warren*, 2 Black 599, 17 L. Ed. 599; *Balkam v. Woodstock Iron Co.*, 154 U. S. 177, 188, 38 L. Ed. 953; *Dibble v. Bellingham Bay Land Co.*, 163 U. S. 63, 41 L. Ed. 72.

**89. Enforcement of judgments.**—*Ross v. Duval*, 13 Pet. 45, 10 L. Ed. 51.

The act of the legislature of Virginia, of 1792, to regulate proceedings on judgments, is substantially and technically a limitation on judgments; and is not, therefore, an act to regulate process; it is a limitation law, and is a rule of property; and under the 34th section of the judiciary act, is a rule of decision for the courts of the United States. *Ross v. Duval*, 13 Pet. 45, 10 L. Ed. 51.

**90. Suits to enforce statutory liability of stockholders—In general.**—*Fourth Nat. Bank v. Fracklyn*, 120 U. S. 747, 756, 30 L. Ed. 825; *Terry v. Tubman*, 92 U. S. 156, 23 L. Ed. 537; *Carrol v. Green*, 92 U. S. 509, 23 L. Ed. 738; *Terry v. Anderson*, 95 U. S. 628, 24 L. Ed. 365.



ability of a stockholder in a national bank is governed by the statute of limitations of the state, congress having fixed no limitation in regard thereto.<sup>91</sup>

(ce) *Suits for Infringement of Patents*.—In the absence of any legislation by congress with respect thereto, suits in the federal courts for the infringement of patents are governed by the state statute of limitations.<sup>92</sup>

(ff) *Claims against Decedents' Estates*.—Where, under the state law, a suit against an administrator of an estate cannot be brought in the courts of that state, after the expiration of the period limited by the order of the probate court, in which creditors may present claims against the deceased for examination and allowance, and after an allowance of the administrator's final account, and a final decree of distribution, such suit cannot be maintained in a federal court by a nonresident owner of a claim against the estate of a decedent.<sup>93</sup>

(gg) *Actions by United States*.—The United States, whether named in a state statute of limitations or not, is not bound thereby; and when it sues in one of its own courts, such a statute is not within the provisions of the judiciary act of 1789, which declare that the laws of the states, in trials at common law, shall be regarded as rules of decision in the courts of the United States in cases where they apply.<sup>94</sup>

bb. *Exclusiveness of Limitations Provided by Act of Congress*—(aa) *In General*.—Where congress has legislated upon the question of the limitation of actions, such legislation, of course, is exclusive of the laws of the several states.<sup>95</sup>

(bb) *Action for Recovery Back of Duties*.—An action to recover back duties illegally exacted by the collector is governed by the statute of limitations fixed by the act of congress, and not by the limitation laws of the state in which the suit is brought.<sup>96</sup>

(b) *Effect of State Decisions Construing Statute of Limitations*—aa. *In General*.—The construction placed upon a state statute of limitations by the highest court of the state is binding on the federal courts.<sup>97</sup>

**91. Actions to enforce statutory liability of shareholder in national bank.**—McClaine v. Rankin, 197 U. S. 154, 49 L. Ed. 702. See, generally, the title BANKS AND BANKING, vol. 3, p. 1.

**92. Suits for infringement of patents.**—Campbell v. Haverhill, 155 U. S. 610, 611, 39 L. Ed. 280. See, generally, the title PATENTS.

**93. Claims against decedents' estates.**—Security Trust Co. v. Black River Nat. Bank, 187 U. S. 211, 230, 47 L. Ed. 147; Security Trust Co. v. Dent, 187 U. S. 237, 47 L. Ed. 158. See, generally, the title EXECUTORS AND ADMINISTRATORS.

A foreign creditor who delays proceedings in the federal court until after the time fixed by the order of the probate court for the presentment of claims had expired and after the final distribution of the estate had been effected, and after the final account of the administrator had been allowed and his office had become functus officio, and after all claims of local creditors had thus been precluded, cannot use the federal process to devolve a new responsibility upon the person who had acted as administrator, and to interfere with the rights of other parties, creditors or distributees, which had become vested under the regular and orderly administration of the estate under the laws of the state. Security Trust Co. v. Black River Nat. Bank, 187 U. S. 211, 230, 47 L.

Ed. 147; Security Trust Co. v. Dent, 187 U. S. 237, 47 L. Ed. 158.

**94. Actions by United States.**—United States v. Thompson, 98 U. S. 486, 25 L. Ed. 194.

**95. Exclusiveness of limitation provided by act of congress.**—Arnson v. Murphy, 109 U. S. 238, 27 L. Ed. 920; Goldenberg v. Murphy, 108 U. S. 162, 27 L. Ed. 686; United States v. Snyder, 149 U. S. 210, 37 L. Ed. 705.

**96. Recovery back of duties.**—Arnson v. Murphy, 109 U. S. 238, 27 L. Ed. 920; Goldenberg v. Murphy, 108 U. S. 162, 27 L. Ed. 686.

**97. Construction of statutes of limitations.**—In general.—Sanger v. Nightingale, 122 U. S. 176, 185, 30 L. Ed. 1105; Balkam v. Woodstock Iron Co., 154 U. S. 177, 189, 38 L. Ed. 953; Patton v. Easton, 1 Wheat. 476, 4 L. Ed. 139; Powell v. Harman, 2 Pet. 241, 7 L. Ed. 411; Campbell v. Haverhill, 155 U. S. 610, 615, 39 L. Ed. 280; McClaine v. Rankin, 197 U. S. 154, 49 L. Ed. 702; Metcalf v. Watertown, 153 U. S. 671, 673, 38 L. Ed. 861; Fairfield v. County of Gallatin, 100 U. S. 47, 25 L. Ed. 544; Moores v. National Bank, 104 U. S. 625, 629, 26 L. Ed. 870; Pease v. Peck, 18 How. 595, 15 L. Ed. 518; Levy v. Stewart, 11 Wall. 244, 20 L. Ed. 86; Union Bank v. Kansas City Bank, 136 U. S. 223, 34 L. Ed. 341. Bauserman v. Blunt, 147 U. S. 647, 652, 37 L. Ed. 316; Higginson v. Mein, 4 Cranch 415, 2 L. Ed. 664; Shelby v. Guy,

bb. *Decisions as to When Statute Applies.*—Decisions of the highest court of a state as to when the state statutes of limitations is applicable are binding on the federal courts.<sup>98</sup>

cc. *Decisions as to When Statute Begins to Run.*—A decision of the highest court of a state as to when the bar of the statute of limitations, under the laws and decisions of the state begins to be operative or when the cause of action accrues, is binding on the federal courts.<sup>99</sup>

dd. *Decisions as to Who May Raise Defense.*—Where the highest court of a state construing the statutes of limitations of the state, decides that a foreign corporation cannot avail itself of them, and this, notwithstanding such corporation was the lessee of a railroad in the state, and had property within the state, and a managing agent residing and keeping an office of the company, these decisions, upon the construction of the statutes, are binding upon the federal courts, whatever they may think of their soundness on general principles.<sup>1</sup>

ee. *Decisions Construing Exception as to Persons "Beyond the Seas."*—The construction by the highest court of a state of the term "beyond the seas," in a saving clause of the statute of limitations, is binding on the federal courts.<sup>2</sup>

11 Wheat. 361, 6 L. Ed. 495; Bell v. Morrison, 1 Pet. 351, 7 L. Ed. 174; Henderson v. Griffin, 5 Pet. 151, 8 L. Ed. 79; Green v. Neal, 6 Pet. 291, 8 L. Ed. 402; McElmoyle v. Cohen, 13 Pet. 312, 10 L. Ed. 177; Harpending v. Dutch Church, 16 Pet. 455, 10 L. Ed. 1029; Leffingwell v. Warren, 2 Black 599, 17 L. Ed. 599; Sohn v. Water-son, 17 Wall. 596, 21 L. Ed. 737; Tioga Railroad v. Blossburg, etc., Railroad, 20 Wall. 137, 22 L. Ed. 331; Kibbe v. Ditto, 93 U. S. 674, 23 L. Ed. 1005; Davie v. Briggs, 97 U. S. 628, 24 L. Ed. 1086; Amy v. Dubuque, 98 U. S. 470, 25 L. Ed. 228; Mills v. Scott, 99 U. S. 25, 25 L. Ed. 294; Michigan Ins. Bank v. Eldred, 130 U. S. 693, 32 L. Ed. 1080; Penfield v. Chesapeake, etc., R. Co., 134 U. S. 351, 33 L. Ed. 940; Barney v. Oelrichs, 138 U. S. 529, 34 L. Ed. 1037. Christy v. Pridgeon, 4 Wall. 196, 18 L. Ed. 322; Security Trust Co. v. Black River Nat Bank, 187 U. S. 211, 230, 47 L. Ed. 147; Harrison v. Myer, 92 U. S. 111, 116, 23 L. Ed. 606; Barrett v. Holmes, 102 U. S. 651, 655, 26 L. Ed. 291; Seneca Nation v. Christy, 162 U. S. 283, 289, 40 L. Ed. 970; Great Western Tel. Co. v. Purdy, 162 U. S. 239, 339, 40 L. Ed. 986; Dibble v. Bellingham Bay Land Co., 163 U. S. 63, 41 L. Ed. 72.

"It is quite clear that it was competent for the supreme court of the state to construe and apply the statute of limitations enacted by the state legislature, and that their decision in that regard is not subject to re-examination here under a writ of error to a state court." Harrison v. Myer, 92 U. S. 111, 116, 23 L. Ed. 606; Andree v. Redfield, 98 U. S. 225, 235, 25 L. Ed. 158.

98. *When statute applies.*—Barrett v. Holmes, 102 U. S. 651, 655, 26 L. Ed. 291.

Thus where the state court has construed a statute of limitations for the recovery of real estate to apply as well to actions brought by one claiming under a tax deed, as to one brought by the original owner of the land, this decision is binding on the federal courts. Barrett v. Holmes, 102 U. S. 651, 655, 26 L. Ed. 291.

The New York Code of Civil Procedure provides in effect that where a nonresident is sued in its courts, the action shall be governed by the statute of limitations of the defendant's own state, except where plaintiff is a resident of the state of New York at the time of the accrual of the cause of action or becomes such before the expiration of the statute of limitations of the defendant's residence. It was held that the decision of the New York courts to the effect that residence meant actual residence, and established abode, were binding upon the federal courts, and one who himself had not actually removed to the state of New York was not a resident although his family had been sent there from another state and were residing there with intention to remain. Penfield v. Chesapeake, etc., R. Co., 134 U. S. 351, 33 L. Ed. 940.

99. *When statute begins to run.*—Balkam v. Woodstock Iron Co., 154 U. S. 177, 189, 38 L. Ed. 953; Mills v. Scott, 99 U. S. 25, 25 L. Ed. 294; Great Western Tel. Co. v. Purdy, 162 U. S. 239, 339, 40 L. Ed. 986.

"Necessarily the determination of when the parties had a right to sue was a question concerning the construction when the prescription commenced to run, or when they were obliged to bring their action, whether legal or equitable. Those questions were purely within the province of the supreme court of Alabama. In deciding them it passed upon its own statutes of limitations or the doctrines of prescription as applied by it, and we are obliged to apply and enforce their conclusions." Balkam v. Woodstock Iron Co., 154 U. S. 177, 189, 38 L. Ed. 953.

1. *Parties entitled to raise defense of statute of limitations.*—Tioga Railroad v. Blossburg, etc., Railroad, 20 Wall. 137, 22 L. Ed. 331; Bauserman v. Blunt, 147 U. S. 647, 654, 37 L. Ed. 316.

2. *Meaning of exception "beyond the seas."*—Davie v. Briggs, 97 U. S. 628, 24 L. Ed. 1086 (where it was held to mean



ff. *Decisions as to What Will Arrest, or Stop Running of, Statute.*—What action will arrest or stop the running of the statute of limitations is a question of local law upon which the decisions of the state courts are binding on the federal courts.<sup>3</sup> Thus the state laws govern in proceedings in federal courts upon the question as to what constitutes a commencement of a suit which will arrest the running of the statute of limitations even though the limitation in question is imposed by act of congress.<sup>4</sup>

gg. *Decisions as to Revival of Right of Action by New Promises.*—Decisions of a state evincing a strong disposition of the courts of the state to restrict, within very close limits, any attempt to revive debts, by implied promises, resulting from acknowledgments, or other confessions by parol, are binding on the federal courts.<sup>5</sup>

hh. *Decisions as to Necessity of Pleading Statute.*—Decisions of the highest court of a state that a state statute is an ordinary statute of limitations, giving a debtor a personal privilege, which to be effective as a bar, must be pleaded, is binding on the federal courts.<sup>6</sup>

(c) *Adverse Possession.*—The federal courts will follow the decisions of the state courts on the question of obtaining title by adverse possession.<sup>7</sup> Thus if a

without the United States); *Green v. Neal*, 6 Pet. 291, 300, 8 L. Ed. 402.

"In several of the states, the English statute of limitations has been adopted, with various modifications; but in the saving clause, the expression 'beyond the seas,' is retained. These words, in some of the states, are construed to mean 'out of the state,' and in others, a literal construction has been given to them. In the case of *Murray v. Baker*, 3 Wheat. 541, 4 L. Ed. 454, this court decided, that the expressions 'beyond the seas,' and 'out of the state,' are analogous; and are to have the same construction. But suppose, the same question should be brought before this court from a state where the construction of the same words had been long settled to mean literally beyond seas, would not this court conform to it?" *Green v. Neal*, 6 Pet. 291, 300, 8 L. Ed. 402. See *Davie v. Briggs*, 97 U. S. 628, 24 L. Ed. 1086.

3. *Arrest of statute.*—*Henderson v. Griffin*, 5 Pet. 151, 8 L. Ed. 79; *Goldenberg v. Murphy*, 108 U. S. 162, 27 L. Ed. 686.

4. *Arrest of statute by commencement of suit.*—*Goldenberg v. Murphy*, 108 U. S. 162, 27 L. Ed. 686.

The supreme court of the state of South Carolina have decided, that the act of the legislature of that state of 1744, relative to the commencement, within two years, of actions of ejectment, after nonsuit, discontinuance, etc., is a part of the limitation act of 1812, and that a suit, commenced within the time prescribed, arrests the limitation; and this being the decision of the highest judicial tribunal on the construction of a state law relating to titles and real property must be regarded by this court as the rule to bind its judgment. *Henderson v. Griffin*, 5 Pet. 151, 8 L. Ed. 79.

5. *Revival of debts by new promises.*—*Bell v. Morrison*, 1 Pet. 351, 352, 7 L. Ed. 174.

6. *Necessity of pleading statute as defense.*—*Sanger v. Nightingale*, 122 U. S. 176, 185, 30 L. Ed. 1105.

"It is said in the argument in this case, but not much insisted upon by the plaintiffs, that this is a peremptory discharge of the debt, and is not a mere statute of limitations, which, to be available, must be pleaded as is the case with other limitation acts. The proposition is, that the statute in effect destroys the right of action, but this doctrine has been overruled repeatedly by the supreme court of Georgia, in which it has been held to be an ordinary statute of limitations. See *George v. Gardner*, 49 Geo. 441; *Harris v. Gray*, 49 Geo. 585. In *Parker v. Irvin*, 47 Geo. 405, it was decided that the pleading of the statute was only a personal privilege of the debtor, and that to avail himself of the statute he must plead it." *Sanger v. Nightingale*, 122 U. S. 176, 185, 30 L. Ed. 1105.

7. *Adverse possession.*—*Dibble v. Bellingham Bay Land Co.*, 163 U. S. 63, 41 L. Ed. 72; *Powell v. Harman*, 2 Pet. 241, 7 L. Ed. 411; *Green v. Neal*, 6 Pet. 291, 8 L. Ed. 402; *Harpending v. Dutch Church*, 16 Pet. 455, 10 L. Ed. 1029; *Barrett v. Holmes*, 102 U. S. 657, 655, 26 L. Ed. 291; *Texas & Pac. R. Co. v. Smith*, 159 U. S. 66, 71, 40 L. Ed. 77; *Waring v. Jackson*, 1 Pet. 570, 7 L. Ed. 266. See, also, *Polk v. Wendall*, 9 Cranch 87, 98, 3 L. Ed. 665; *Robinson v. Campbell*, 3 Wheat. 212, 4 L. Ed. 372. See, generally, the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION.

No distinction is made by the courts of the state of New York between a religious corporation, claiming to hold under the statute of limitations of the state, in regard to capacity to hold by force of the statute; therefore, none can be taken by the supreme court of the United States. *Harpending v. Dutch Church*, 16 Pet. 455, 10 L. Ed. 1029.

Adverse possession taken and held



claim under color of title is not required by the laws of the state, it will not be required in a federal court for that state.<sup>8</sup>

(32) *Master and Servant*.—The questions, in an action by a servant against his master for injuries, in the absence of statutory regulations by the state in which the cause of action arose, depend upon principles of general law, and in their determination the federal courts are not required to follow the decisions of the state courts.<sup>9</sup> Thus the federal courts in some states hold a different rule as to the doctrine of fellow servants from that administered in the state courts.<sup>10</sup> But wherever the subject is regulated by statute, of course the statute is applied by the federal courts as a "law" of the state,<sup>11</sup> and the construction placed upon such statutes by the state courts is binding on the federal courts.<sup>12</sup>

(33) *Municipal Corporations and Counties*.—(a) *Construction of Statutes*.—The construction by the state courts of state statutes relating to municipal corporations is binding on the courts of the United States.<sup>13</sup> Thus federal courts

under a sheriff's sale, by virtue of judgments and executions against one holding under a defeasible title, which was so defeated by his death, will not, according to the decisions of the courts of New York, prevent the operation of a devise, by another, in whom the title to the estate was vested by the death of the defendant in the executions. It has been the uniform course of this court, with respect to titles to real property, to apply the same rule that is applied by the state tribunals in like cases. *Waring v. Jackson*, 1 Pet. 570, 7 L. Ed. 266.

8. *Color of title*.—*Dibble v. Bellingham Bay Land Co.*, 163 U. S. 63, 41 L. Ed. 72.

9. *Master and servant*.—*Hough v. Railway Co.*, 100 U. S. 213, 226, 25 L. Ed. 612; *Alabama, etc., R. Co. v. Thompson*, 200 U. S. 206, 220, 50 L. Ed. 441; *Northern Pac. R. Co. v. Hambly*, 154 U. S. 349, 361, 38 L. Ed. 1009; *Gardner v. Michigan Cent. R. Co.*, 150 U. S. 349, 358, 37 L. Ed. 1107; *Baltimore, etc., R. Co. v. Baugh*, 149 U. S. 368, 37 L. Ed. 772; *Wabash R. Co. v. McDaniels*, 107 U. S. 454, 27 L. Ed. 605; *Randall v. Baltimore, etc., R. Co.*, 109 U. S. 478, 27 L. Ed. 1003; *Chicago, etc., R. Co. v. Ross*, 112 U. S. 377, 28 L. Ed. 787; *Lake Shore, etc., R. Co. v. Prentice*, 147 U. S. 101, 106, 37 L. Ed. 97. See, generally, the title MASTER AND SERVANT.

"In the cases of *Wabash R. Co. v. McDaniels*, 107 U. S. 454, 27 L. Ed. 605, a case arising in the state of Indiana; *Randall v. Baltimore, etc., R. Co.*, 109 U. S. 478, 27 L. Ed. 1003, arising in West Virginia; and *Chicago, etc., R. Co. v. Ross*, 112 U. S. 377, 28 L. Ed. 787, coming from Minnesota—all three cases being actions by employees to recover damages against railroad companies for personal injuries—the question of the liability of the company was discussed as one of general law, and no reference made to the decisions of the state in which the injuries took place. And, in the last case, the instruction given by the circuit judge, which was sustained by this court, was in direct opposition to the rulings of the supreme court of Minnesota." *Baltimore, etc., R. Co. v. Baugh*, 149 U. S. 368, 375, 37 L. Ed. 772.

10. *Fellow servants*.—*Alabama, etc., R. Co. v. Thompson*, 200 U. S. 206, 220, 50 L. Ed. 441; *Lake Shore, etc., R. Co. v. Prentice*, 147 U. S. 101, 106, 37 L. Ed. 97; *Baltimore, etc., R. Co. v. Baugh*, 149 U. S. 368, 375, 37 L. Ed. 772. See, generally, the title FELLOW SERVANTS.

11. *When matter regulated by statute*.—*Minnesota Iron Co. v. Kline*, 199 U. S. 593, 597, 50 L. Ed. 322; *Northern Pac. R. Co. v. Hambly*, 154 U. S. 349, 361, 38 L. Ed. 1009.

12. *Construction of statutes as to fellow servants*.—*Minnesota Iron Co. v. Kline*, 199 U. S. 593, 597, 50 L. Ed. 322; *Oakes v. Mase*, 165 U. S. 363, 364, 41 L. Ed. 746.

"If a statute abolishing the fellow-servant rule in certain cases as interpreted by the state court is not within the prohibitions of the fourteenth amendment, we do not interfere with the construction adopted by the state court." *Minnesota Iron Co. v. Kline*, 199 U. S. 593, 597, 50 L. Ed. 322.

It was held that the statute in relation to fellow servants was void under the constitution of the state because it applied only to domestic corporations, and therefore operated a discrimination against such corporations. *Crisswell v. Montana Central R. Co.*, 44 Pac. Rep. 525. And this ruling of the court of last resort of the state of Montana, interpreting the constitution and laws of that state, is binding here. *Oakes v. Mase*, 165 U. S. 363, 364, 41 L. Ed. 746.

While the construction given a fellow-servant statute by supreme court of a territory is not obligatory upon the United States supreme court, it is certainly entitled to respectful consideration, and in a doubtful case might well be accepted as turning the scale in favor of the doctrine there announced. *Northern Pac. R. Co. v. Hambly*, 154 U. S. 349, 361, 38 L. Ed. 1009.

13. *Construction of statutes relating to municipal corporations*.—*Amey v. Allegheny City*, 24 How. 364, 16 L. Ed. 614; *Mead v. Portland*, 200 U. S. 148, 164, 50 L. Ed. 413; *Goszler v. Georgetown*, 6 Wheat. 593, 5 L. Ed. 339; *Wabash R. Co. v. Defiance*, 167 U. S. 88, 42 L. Ed. 87.

adopt the decision of state courts that a state statute limiting the amount of the indebtedness of a city is not in contravention of the state constitution.<sup>14</sup>

(b) *Powers*.—It is undoubtedly a question of local policy with each state, what shall be the extent and character of the powers which its various political and municipal organizations shall possess; and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States; for it is a question that relates to the internal constitution of the body politic of the state.<sup>15</sup> Where the highest court of a state has decided that the corporate authorities of a city had authority under the charter of the city to make an order for the destruction of all liquors in the city and to give a pledge for payment, and they are responsible for the value of liquors destroyed under that order, the decision is binding on the federal courts.<sup>16</sup>

(c) *Liabilities*.—The liability, under state statutes, of a municipal corporation for property destroyed to prevent the spread of a fire, is a question of local law, upon which the federal courts follow the decisions of the state courts.<sup>17</sup> The measure of the liability of a municipal corporation for injuries due to defective streets, under state statutes, is to be determined by the judgment of the highest court of the state, and not by what the opinions of the United States courts may be as to the proper construction of those statutes.<sup>18</sup>

(d) *Legislative Control*.—When the state court decides that municipal corporations within the territorial limits of the state are subject to the control of the state legislature, and that its act in creating for certain purposes a new corporation, and merging therein five separate towns, was valid, the federal courts cannot hold that the state court was mistaken in its construction of the state constitution or in its declaration as to the extent of the power of the legislature over municipal corporations.<sup>19</sup>

**14. Statute limiting municipal indebtedness.**—*Amey v. Allegheny City*, 24 How. 364, 16 L. Ed. 614.

**15. Power of political organization of state.**—*Claiborne County v. Brooks*, 111 U. S. 400, 28 L. Ed. 470; *Detroit v. Osborne*, 135 U. S. 492, 34 L. Ed. 260; *Baltimore, etc., R. Co. v. Baugh*, 149 U. S. 368, 374, 37 L. Ed. 772; *Forsyth v. Hammond*, 166 U. S. 506, 519, 41 L. Ed. 1095; *Norton v. Shelby County*, 118 U. S. 425, 440, 30 L. Ed. 178; *Meriwether v. Muhlenburg County Court*, 120 U. S. 354, 357, 30 L. Ed. 653. See, also, *Rich v. Mentz*, 134 U. S. 632, 33 L. Ed. 1074.

Decisions of state courts as to the power of its counties or townships to issue commercial paper are binding upon the federal courts. *Claiborne County v. Brooks*, 111 U. S. 400, 28 L. Ed. 470.

**16. Power to destroy liquors and bind city for payment.**—*Richmond v. Smith*, 15 Wall. 429, 438, 21 L. Ed. 200.

**17. Liability for property destroyed to prevent spread of fire.**—*Bowditch v. Boston*, 101 U. S. 16, 19, 25 L. Ed. 980.

Whether such statutes are to be construed strictly, as being in derogation of common law, or liberally, as being remedial in character, are points within the exclusive cognizance of the state tribunals. *Bowditch v. Boston*, 101 U. S. 16, 19, 25 L. Ed. 980.

**18. Statutory liability.**—*Detroit v. Osborne*, 135 U. S. 492, 499, 34 L. Ed. 260. See, also, *Manchester v. Ericsson*, 105 U. S. 347, 26 L. Ed. 1099. See, generally, the title **STREETS AND HIGHWAYS**.

In *Detroit v. Osborne*, 135 U. S. 492, 499, 34 L. Ed. 260, the plaintiff was injured while walking in one of the streets of Detroit, through a defect in the sidewalk. The supreme court of Michigan had held that the duty resting upon the city of keeping its streets in repair was a duty to the public, and not to private individuals, the mere neglect of which was a non-feasance only, for which no private action for damages arose. The supreme court of the United States followed that ruling, although conceding that it was not in harmony with the general opinion, nor in accordance with views of its own, and this was done on the ground that the question was one of a purely local nature. *Baltimore, etc., R. Co. v. Baugh*, 149 U. S. 368, 373, 37 L. Ed. 772.

In *Chicago v. Robbins*, 2 Black 418, 17 L. Ed. 298, it was held that an action by a city to recover from an abutting owner the amount of a judgment recovered by a third person against the city for injuries due to the negligence of the abutting owner, or his servants, was governed by the general and not the legal law.

**19. Legislative control of municipal corporations.**—*Williams v. Eggleston*, 170 U. S. 304, 311, 42 L. Ed. 1047. See, also, *Phinney v. Sheppard, etc., Hospital Trustees*, 177 U. S. 170, 44 L. Ed. 720.

"Whatever may have been the practice of the state in the past it cannot be doubted that the power of the legislature over all local municipal corporations is unlimited save by the restrictions of the state and federal constitutions; and that



(e) *Boundaries and Limits*.—The matter of the territorial boundaries or limits of a municipal corporation or county is local in its nature, and, as a rule to be finally and absolutely determined by the authorities of the state.<sup>20</sup>

(f) *Aid to Railroads*.—The question of the power of municipalities to lend their credit to, or subscribe to the stock of, a railroad, generally arises in an action on bonds issued for this purpose, and such cases are treated in another section of this title.<sup>21</sup> Whether or not the construction and maintenance of a railroad owned by a corporation, and constructed and maintained under a statute of a state authorizing such construction and maintenance, is a matter in which the public has an interest of such a nature as to warrant taxation by a municipal division of the state in aid of it, is a question of general law.<sup>22</sup>

(g) *Bonds and Securities*.—aa. *Decision of State Court Rendered before Issuance of Bonds*.—(aa) *General Rule*.—In general, the decision of the highest court of a state as to municipal or county bonds is binding on the federal courts as a rule of decision.<sup>23</sup>

(bb) *Constitutionality of Statutes*.—The federal courts follow the state courts upon a decision that an act authorizing a city to subscribe to the stock of a railroad company is<sup>24</sup> or is not,<sup>25</sup> in contravention of the state constitution.

these acts in no way violate any provision of the state constitution is settled by the decision of the state supreme court. *Backus v. Fort St. Union Depot*, 169 U. S. 557, 42 L. Ed. 853, and cases cited. It is true there was a division of opinion between the members of the state supreme court, but such division, although a close one, does not prevent the opinion of the majority from becoming the decision of the court, and as such conclusive upon us." *Williams v. Eggleston*, 170 U. S. 304, 311, 42 L. Ed. 1047.

**20. Boundaries of municipal corporations.**—*Forsyth v. Hammond*, 166 U. S. 506, 518, 41 L. Ed. 1095; *Patterson v. Jenks*, 2 Pet. 216, 7 L. Ed. 402.

Where a state has practically settled the limits of one of its counties, such settlement ought to be conclusive on the circuit court of the United States. *Patterson v. Jenks*, 2 Pet. 216, 7 L. Ed. 402.

"It is for the state to determine its political subdivisions, the number and size of its municipal corporations and their territorial extent. These are matters of a local nature, in which the nation, as a whole, is not interested, and in which, by the very nature of things, the determination of the state authorities should be accepted as authoritative and controlling." *Forsyth v. Hammond*, 166 U. S. 506, 518, 41 L. Ed. 1095.

**21. Municipal aid to railroads.**—See post, "Bonds and Securities," VII, J, 13, c, (33), (g).

**22. Interest of public in railroad—Municipal aid.**—*Olcott v. Supervisors*, 16 Wall. 678, 21 L. Ed. 382. See, generally, the title MUNICIPAL, COUNTY, STATE AND FEDERAL AID.

The doctrine of the courts of a state that it is not competent for municipalities to devote money or lands or pledge their credit to promote the construction and maintenance of railroads, because the latter are not public in their character, is not applicable to the case where the trans-

action was not a donation or a pledge of credit requiring the exercise of the taxing power but was in fact a sale for a valuable and adequate consideration, nor is it applicable to the case of a donation to a railroad corporation of a public character whose road is a highway and post road for national uses and to subserve interstate commerce. *Roberts v. Northern Pac. R. Co.*, 158 U. S. 1, 24, 39 L. Ed. 873.

**23. Municipal or county bonds—General rule.**—*Wade v. Travis County*, 174 U. S. 499, 43 L. Ed. 1060; *Rich v. Mentz*, 134 U. S. 632, 644, 33 L. Ed. 1074; *Amey v. Allegheny City*, 24 How. 364, 16 L. Ed. 614; *Zane v. Hamilton County*, 189 U. S. 370, 47 L. Ed. 858; *Scipio v. Wright*, 101 U. S. 665, 25 L. Ed. 1037; *Weightman v. Clark*, 103 U. S. 256, 26 L. Ed. 392; *East Oakland v. Skinner*, 94 U. S. 255, 257, 24 L. Ed. 125; *Powell v. Brunswick County*, 150 U. S. 433, 37 L. Ed. 1134; *Pana v. Bowler*, 107 U. S. 529, 541, 27 L. Ed. 424; *County of Ralls v. Douglass*, 105 U. S. 728, 731, 26 L. Ed. 957; *Railroad Companies v. Schutte*, 105 U. S. 118, 139, 26 L. Ed. 327; *Post v. Supervisors*, 105 U. S. 667, 26 L. Ed. 1204; *Chambers County v. Clews*, 21 Wall. 317, 324, 22 L. Ed. 517; *German Sav. Bank v. Franklin County*, 128 U. S. 526, 538, 32 L. Ed. 519. See, generally, the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

**24. Holding that statute is unconstitutional.**—*Weightman v. Clark*, 103 U. S. 256, 26 L. Ed. 392; *Montana v. Rice*, 204 U. S. 291, 301, 51 L. Ed. 490.

The decision of the highest court of the state that the laws under which municipal securities were issued were not passed in accordance with the state constitution and that consequently both the laws and bonds are void, is binding on the federal courts. *Post v. Supervisors*, 105 U. S. 667, 26 L. Ed. 1204.

**25. Holding that statute is not unconstitutional.**—*Amey v. Allegheny City*, 24



(cc) *Construction of Statutes.*—The construction by the highest court of a state statute provided for the municipal or county aid to railroads is binding upon federal courts.<sup>26</sup>

(dd) *Power to Issue.*—Decisions of the state courts as to the power of a municipality or county to issue bonds, and for what purposes they may be issued, are binding on the federal courts.<sup>27</sup>

How. 364, 16 L. Ed. 614; *Post v. Supervisors*, 105 U. S. 667, 26 L. Ed. 1204; *Lincoln County v. Luning*, 133 U. S. 529, 532, 33 L. Ed. 766; *Zane v. Hamilton County*, 189 U. S. 370, 47 L. Ed. 858.

Where the constitutionality of an act of the legislature authorizing an issue of bonds by a county has been examined by the highest court of the state, and the act has been held to be valid, the decision is binding upon the federal courts. *Chambers County v. Clews*, 21 Wall. 317, 324, 22 L. Ed. 517.

**26. Construction of statutes.**—*Powell v. Brunswick County*, 150 U. S. 433, 37 L. Ed. 1134; *Pana v. Bowler*, 107 U. S. 529, 531, 27 L. Ed. 424; *Fairfield v. Gallatin County*, 100 U. S. 47, 25 L. Ed. 544; *Enfield v. Jordan*, 119 U. S. 680, 30 L. Ed. 523.

**27. Power to issue.**—*Elmwood v. Marcy*, 92 U. S. 289, 23 L. Ed. 710; *County of Ralls v. Douglass*, 105 U. S. 728, 731, 26 L. Ed. 957; *Scotland County v. Hill*, 132 U. S. 107, 117, 33 L. Ed. 261; *Railroad Companies v. Schutte*, 103 U. S. 118, 139, 26 L. Ed. 327; *Enfield v. Jordan*, 119 U. S. 680, 30 L. Ed. 523; *Fairfield v. Gallatin County*, 100 U. S. 47, 25 L. Ed. 544; *County of Henry v. Nicolay*, 95 U. S. 619, 24 L. Ed. 394.

A question as to whether the issuance of orders by a state were authorized is peculiarly within the province of the courts of the state to decide, and we ought not to depart from what they have done, except for imperative reasons. *Railroad Companies v. Schutte*, 103 U. S. 118, 139, 26 L. Ed. 327.

The decision of the supreme court of Missouri that the provision in the state constitution of 1865, art. 11, § 14, prohibiting a county from becoming a stockholder in or loaning its credit to a corporation without a vote of the people, was intended as a limitation on the future legislation only, and did not operate to repeal, enabling acts in existence when the constitution took effect, is binding on the federal courts. *County of Ralls v. Douglass*, 105 U. S. 728, 731, 26 L. Ed. 957; *County of Callaway v. Foster*, 93 U. S. 567, 23 L. Ed. 911; *County of Scotland v. Thomas*, 94 U. S. 682, 24 L. Ed. 219; *County of Henry v. Nicolay*, 95 U. S. 619, 24 L. Ed. 394; *County of Cass v. Gillett*, 100 U. S. 585, 25 L. Ed. 585; *Scotland County v. Hill*, 137 U. S. 107, 112, 33 L. Ed. 261.

The federal courts, conformably to the opinion of the supreme court of Illinois, will hold that bonds issued by the supervisor and town clerk of a township in

that state, by way of payment for an additional subscription of stock of a railroad company, over and above the amount authorized by the original charter of said company, are not binding on the township. *Elmwood v. Marcy*, 92 U. S. 289, 23 L. Ed. 710.

The supreme court of the United States will concur in opinion with the supreme court of Illinois that the fifth section of the act of the general assembly of that state, approved Feb. 18, 1861, conferred no authority upon a municipal corporation to subscribe to the capital stock of the *Paris and Decatur Railroad Company*. The township of East Oakland subscribed to that capital stock without being thereunto authorized, and its bonds, bearing date April 20, 1871, and reciting that they are issued in payment of such subscription, are void. *East Oakland v. Skinner*, 94 U. S. 255, 24 L. Ed. 125.

Authority to "the agent of any corporate body" to subscribe for stock in the railroad company was not intended to include, and did not include, municipal corporations. It meant private and money making, trading or business, corporations. It did not intend to give authority to any township, however remote from the road, to become one of its stockholders. *East Oakland v. Skinner*, 94 U. S. 255, 257, 24 L. Ed. 125.

A clause of the state constitution provided in effect that no municipality should become subscriber to the capital stock of a railroad or private corporation or make donations to or loan its credit in aid of such corporation, provided the clause should not affect "the right of such municipality to make such subscription where the same has been authorized, under existing laws by a vote of the people of such municipality" prior to the adoption of the constitutional provisions. The highest court of the state, in construing the proviso, held that donations as well as subscriptions were embraced within the meaning of the proviso. It was held that the decision of the state court was binding on the federal courts. *Enfield v. Jordan*, 119 U. S. 680, 30 L. Ed. 523; *Fairfield v. Gallatin County*, 100 U. S. 47, 25 L. Ed. 544, overruling *Concord v. Portsmouth Sav. Bank*, 92 U. S. 625, 23 L. Ed. 628, where the supreme court of the United States placed a different construction on the proviso, in the absence of any ruling by the state courts construing it.

Where the charter of a railroad company, granted by Missouri prior to the adoption of the constitution in 1865, made

(ee) *Regularity of Issuance*.—Upon questions as to the compliance with state statutes in issuing bonds in aid of railroads, the decisions of the highest judicial tribunal of a state are entitled to great and ordinarily decisive weight.<sup>28</sup>

(ff) *Power to Ratify by Subsequent Legislation*.—The power of the legislature of a state to validate bonds issued by a municipality or county, is a question upon which the decision of the state courts is binding on the federal courts.<sup>29</sup>

(gg) *Rights of Holders*.—Where the power to issue bonds was fully conferred by law, the question of their validity in the hands of innocent holders, without notice, is a question of commercial law where the state adjudications, although entitled to great respect, do not furnish the rule of decision in the federal court.<sup>30</sup>

bb. *Decisions of State Court Rendered after Issuance of Bonds*—(aa) *Power to Issue and Regularity of Issuance*.—The federal courts are not bound by the decision of the highest court of a state construing its statutes or constitution with respect to the power to issue and the regularity of the issuance of municipal or county bonds, rendered after the bonds were issued and rights thereunder had vested.<sup>31</sup>

it lawful for the county court of any county in which any part of the route of said railroad or of its authorized branches might be, or for any county adjacent thereto, to subscribe to the stock of the company, and to issue bonds of the county in payment therefor, the power of the county court so to subscribe did not become subject to the fourteenth section of art. 11 of that constitution, which requires the assent of two-thirds of the qualified voters of the county to such subscription. The supreme court of that state having decided that the said fourteenth section does not apply to the construction of branch roads authorized by the original charter of a railroad company but undertaken as an independent enterprise under the act of the legislature of March 21, 1868, the decision is binding on the federal courts. *County of Henry v. Nicolay*, 95 U. S. 619, 24 L. Ed. 394.

**28. Regularity of issue.**—*Rich v. Mentz*, 134 U. S. 632, 644, 33 L. Ed. 1074; *Scipio v. Wright*, 101 U. S. 665, 25 L. Ed. 1037; *Pana v. Bowler*, 107 U. S. 529, 531, 27 L. Ed. 424.

A statute of New York authorizing towns to subscribe to the capital stock of railroad companies and issue bonds for the purpose of borrowing money therefor, prescribed the manner in which the power conferred should be exercised. It appeared to be the settled construction given by the courts of that state to this statute, and to other similar statutes, that they did not authorize an exchange of bonds for the shares of stock, and that a purchaser, with notice that such a disposition of the bonds was made by the town officers, could not recover in a suit brought upon them. The federal courts will follow this construction of the state statute. *Scipio v. Wright*, 101 U. S. 665, 25 L. Ed. 1037.

**29. Power to ratify by subsequent legislation.**—*County of Morgan v. Allen*, 103 U. S. 498, 511, 26 L. Ed. 498.

**30. Rights of holders.**—*Supervisors v.*

*Schenck*, 5 Wall. 772, 784; 18 L. Ed. 556; *Pana v. Bowler*, 107 U. S. 529, 541, 27 L. Ed. 424; *Mercer County v. Hackett*, 1 Wall. 83, 17 L. Ed. 548; *Scipio v. Wright*, 101 U. S. 665, 25 L. Ed. 1037; *Thompson v. Perrine*, 103 U. S. 806, 810, 26 L. Ed. 612. See ante, "Bills, Notes and Checks," VII, J, 13, c. (7).

The federal courts are not bound to accept an inference drawn by the highest court of a state that in consequence of an irregularity in the election, bonds issued in pursuance of it by the officers of a municipality, which recite on their face that the election was held in accordance with the statute, are void in the hands of bona fide holders, as this proposition is one which falls among the general principles and doctrine of commercial jurisprudence, upon which it is the duty of the federal courts to form an independent judgment. *Pana v. Bowler*, 107 U. S. 529, 541, 27 L. Ed. 424.

In *Pine Grove v. Talcott*, 19 Wall. 666, 22 L. Ed. 227, it was held that questions relating to bonds issued in a negotiable form, involve questions relating to commercial securities; and whether under the constitution of the state such securities are valid or void belongs to the domain of general jurisprudence.

But the federal courts will follow the state courts that a purchaser of town bonds, having notice that they were exchanged for stock in a railroad company, in violation of a state statute, is not a bona fide holder, and cannot enforce their payment. *Scipio v. Wright*, 101 U. S. 665, 25 L. Ed. 1037; *Thompson v. Perrine*, 103 U. S. 806, 810, 26 L. Ed. 612.

**31. Decision by state court after issuance of bonds.**—*Folsom v. Ninety Six*, 159 U. S. 611, 40 L. Ed. 278; *Stanly County v. Coler*, 190 U. S. 437, 47 L. Ed. 1126; *Carroll County v. Smith*, 111 U. S. 556, 563, 28 L. Ed. 517; *Burgess v. Seligman*, 107 U. S. 20, 27 L. Ed. 359; *New Buffalo v. Iron Co.*, 105 U. S. 73, 75, 26 L. Ed. 1024; *Block v. Commissioners*, 99 U. S. 686, 25



(bb) *Power to Validate Illegal Issue*.—Where at the time of the issuance of bonds by a municipal corporation, without authority of law, there is no decision of the state courts denying the power of the legislature to legalize an unauthorized issue, federal courts are at liberty to adopt their own view as to the legality of an act of the legislature curing the illegality of the bond.<sup>32</sup>

cc. *Decision Rendered after Issuance and before Transfer*.—The fact that the decision was rendered before the party suing thereon in the federal courts had acquired the bonds by indorsement or assignment, is immaterial, where it was rendered after the issuance.<sup>32</sup>

L. Ed. 491; *Commissioners v. Thayer*, 94 U. S. 631, 642, 24 L. Ed. 133; *Pine Grove v. Talcott*, 19 Wall. 666, 22 L. Ed. 227; *Barnum v. Okolona*, 148 U. S. 393, 37 L. Ed. 495; *Enfield v. Jordan*, 119 U. S. 680, 30 L. Ed. 523; *Bolles v. Brimfield*, 120 U. S. 759, 30 L. Ed. 786; *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. Ed. 520; *Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 99, 37 L. Ed. 93; *Cass County v. Johnston*, 95 U. S. 360, 24 L. Ed. 416; *Davies County v. Huidekoper*, 98 U. S. 98, 25 L. Ed. 112; *Douglass v. Pike County*, 101 U. S. 677, 25 L. Ed. 968; *Havemeyer v. Iowa County*, 3 Wall. 294, 18 L. Ed. 38; *Thompson v. Perrine*, 103 U. S. 806, 820, 26 L. Ed. 612.

In *Barnum v. Okolona*, 148 U. S. 393, 37 L. Ed. 495, which involved the validity of certain bonds, and which bonds the highest court of the state had adjudged to be void under a local statute, the court said: "As against a party who became the owner of such bonds before the decision of the supreme court of the state was rendered, which was the case here, we do not consider ourselves bound by such decision unless we regard it as intrinsically sound." *Enfield v. Jordan*, 119 U. S. 680, 30 L. Ed. 523; *Bolles v. Brimfield*, 120 U. S. 759, 30 L. Ed. 786; *Great Southern Hotel Co. v. Jones*, 193 U. S. 532, 545, 48 L. Ed. 778.

A decision of the highest court of the state, as to the validity of county bonds, rendered after the rights of the holders thereof had become fixed, and which is not in harmony with many rulings of the supreme court of the United States, made and repeated through a long series of years, and which is contrary to justice, will not be followed by the federal courts. *Block v. Commissioners*, 99 U. S. 686, 699, 25 L. Ed. 491.

In *Folsom v. Ninety Six*, 159 U. S. 611, 40 L. Ed. 278, bonds had been issued by township to aid in the construction of a railroad, and the power to issue them depended upon several statutes and the constitution of the state. After the bonds were issued the supreme court of the state decided that the statutes authorizing the issue were unconstitutional. There had been no decision to that effect prior to the issuing of the bonds. Held that the decision of the supreme court was not binding.

In *Pleasant Township v. Ætna Life Ins. Co.*, 138 U. S. 67, 72, 34 L. Ed. 864, the

rights of one of the parties depended upon the validity of a statute of Ohio, which statute the supreme court of Ohio had held after the rights of the parties had accrued, under their contract, to be in violation of the constitution of that state. This supreme court, although reaching the same conclusion as that announced by the state court, took care to say that the decision of the state court did not conclude this court, and that concurrence with the views expressed by the state court was the result of the exercise of its independent judgment. Citing *Burgess v. Seligman*, 107 U. S. 20, 27 L. Ed. 359, as having settled the law upon this subject. *Great Southern Hotel Co. v. Jones*, 193 U. S. 532, 545, 48 L. Ed. 778.

Decisions of the highest court of a state made after the issuance of bonds that two-thirds of those actually voting is not sufficient to authorize the issue, and that it must appear that two-thirds of the qualified voters, as ascertained by the registration, assented to the subscription, made after the issue of the bonds, cannot be deemed controlling in the federal courts. *Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 99, 37 L. Ed. 93; *Carroll County v. Smith*, 111 U. S. 556, 561, 28 L. Ed. 517.

Where a railroad has been built as promised and a county and its people have enjoyed the anticipated benefits, federal courts are not bound to follow a subsequent decision of the highest court of the state which releases them from all the corresponding obligations. *Commissioners v. Thayer*, 94 U. S. 631, 642, 24 L. Ed. 133; *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. Ed. 520; *Butz v. Muscatine*, 8 Wall. 575, 19 L. Ed. 490; *Olcott v. Supervisors*, 16 Wall. 678, 21 L. Ed. 382.

The decisions of the highest court of the state to the contrary subsequent to the issue of the securities will not be respected by the supreme court of the United States when such decisions are not satisfactory to the minds of the judges and when the bonds are in the hands of a citizen of another state or a foreigner, bona fide and for value paid. *Pine Grove v. Talcott*, 19 Wall. 666, 22 L. Ed. 227.

**32. Construction of subsequent statutes curing invalidity.**—*Bolles v. Brimfield*, 120 U. S. 759, 30 L. Ed. 786.

**33. Decision by state after issuance and before transfer.**—*New Buffalo v. Iron Co.*, 105 U. S. 73, 75, 26 L. Ed. 1024.

The pendency of a suit as to the valid-



dd. *Change of Decision by State Court*—(aa) *Change before Issuance of Bonds*.—The federal courts will follow the latest decisions of a state court as to municipal or county securities, provided such decision was rendered before the issue of the bonds in question, although both the highest court of the state and the supreme court of the United States had formerly held otherwise.<sup>34</sup>

(bb) *Change after Issuance of Bonds*.—A question arising in a suit in a federal court of the power of a municipal corporation to make negotiable securities is to be determined by the law as judicially declared by the highest court of the state when the securities were issued, and the rights and obligations of parties accruing under such a state of the law are not affected by a different course of judicial decisions subsequently rendered any more than by subsequent legislation.<sup>35</sup>

ity of the bonds at the time the transfer does not affect the rights of the holder. *Enfield v. Jordan*, 119 U. S. 680, 692, 30 L. Ed. 523; *County of Warren v. Marcy*, 97 U. S. 96, 24 L. Ed. 977; *Carroll County v. Smith*, 111 U. S. 556, 28 L. Ed. 517; *Brooklyn v. Insurance Co.*, 99 U. S. 362, 25 L. Ed. 416; *Empire v. Darlington*, 101 U. S. 87, 25 L. Ed. 878; *Pana v. Bowler*, 107 U. S. 529, 27 L. Ed. 424. See, generally, the titles **BILLS, NOTES AND CHECKS**, vol. 3, p. 257; **LIS PENDENS**.

**34. Change before issuance.**—*Cass County v. Johnston*, 95 U. S. 360, 24 L. Ed. 416; *Wade v. Travis County*, 174 U. S. 499, 508, 43 L. Ed. 1060.

The decision of the supreme court of Missouri that the provisions of the act of the general assembly of Missouri, entitled "An act to facilitate the construction of railroads in the state of Missouri," approved March 23, 1868, commonly known as the "township aid act," which authorize a subscription to the capital stock of railway companies by a township, whenever it appears, by the returns of an election duly called for that purpose, "that not less than two-thirds of the qualified voters of the township voting at such election are in favor of such subscription," are not repugnant to § 14, art. 11, of the constitution of that state, adopted in 1865, which ordains that the general assembly shall not authorize any county, city, or town to become a stockholder in, or to loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto, is binding on the federal courts, although the supreme court of the United States had formerly held the act invalid. *Cass County v. Johnston*, 95 U. S. 360, 24 L. Ed. 416. The act was held to be invalid in *Harshman v. Bates County*, 92 U. S. 569, 23 L. Ed. 747.

**35. Change of decision after issuance of bonds.**—*Wilkes County v. Coler*, 180 U. S. 506, 531, 45 L. Ed. 642; *Butz v. Muscatine*, 8 Wall. 575, 585, 19 L. Ed. 490; *Cass County v. Johnston*, 95 U. S. 360, 477, 24 L. Ed. 416; *Dallas County v. McKenzie*, 110 U. S. 686, 687, 28 L. Ed. 285; *Lee County v. Rogers*, 7 Wall. 181, 19 L. Ed.

160; *Mitchell v. Burlington*, 4 Wall. 270, 18 L. Ed. 350; *Larned v. Burlington*, 4 Wall. 275, 18 L. Ed. 353; *Mahomet v. Quackenbush*, 117 U. S. 508, 29 L. Ed. 982; *Gelpcke v. Dubuque*, 1 Wall. 175, 176, 17 L. Ed. 520; *Burgess v. Seligman*, 107 U. S. 20, 27 L. Ed. 359; *Douglass v. Pike County*, 101 U. S. 677, 25 L. Ed. 968; *Bacon v. Texas*, 163 U. S. 207, 221, 41 L. Ed. 132; *Darlington v. Jackson County*, note, 101 U. S. 688, 25 L. Ed. 972; *Foote v. Pike County*, note, 101 U. S. 688, 25 L. Ed. 972; *The City v. Lamson*, 9 Wall. 477, 19 L. Ed. 725; *Loeb v. Columbia Township Trustees*, 179 U. S. 472, 492, 45 L. Ed. 280; *Rowan v. Runnels*, 5 How. 134, 12 L. Ed. 85; *Ohio Life Ins., etc., Co. v. Debolt*, 16 How. 416, 14 L. Ed. 997; *Olcott v. Supervisors*, 16 Wall. 678, 21 L. Ed. 382; *Douglass v. Pike County*, 101 U. S. 677, 25 L. Ed. 968; *Taylor v. Ypsilanti*, 105 U. S. 60, 26 L. Ed. 1008; *County of Ralls v. Douglass*, 105 U. S. 728, 26 L. Ed. 954; *Green County v. Conness*, 109 U. S. 104, 27 L. Ed. 872; *Anderson v. Santa Anna*, 116 U. S. 356, 29 L. Ed. 633; *German Sav. Bank v. Franklin County*, 128 U. S. 526, 32 L. Ed. 519; *Wade v. Travis County*, 174 U. S. 499, 43 L. Ed. 1060.

Bonds, issued by counties, cities, or towns, to railroad companies, for stock in such companies, and which said bodies, at the time the bonds were issued, were held, by the settled adjudications of the highest courts of the state, to possess full power, under its constitution and laws, to issue the same, are ever after valid and binding upon the body issuing them, in the hands of a bona fide holder, although the same courts may subsequently reverse their previous decisions. *Lee County v. Rogers*, 7 Wall. 181, 19 L. Ed. 160; *Mitchell v. Burlington*, 4 Wall. 270, 18 L. Ed. 350; *Larned v. Burlington*, 4 Wall. 275, 18 L. Ed. 353.

In *Burgess v. Seligman*, 107 U. S. 20, 27 L. Ed. 359, the court, after referring to the general rule as to federal courts following subsequent changes in state decisions said: "An exception has been admitted to this rule, where, upon the faith of state decisions affirming the validity of contracts made or bonds issued under a certain statute, other contracts have been made or bonds issued under the same stat-

(34) *Monopolies and Trusts*.—Decisions of the state court construing its anti-trust laws are binding on the federal courts.<sup>36</sup> Thus the decisions of the highest court of a state as to what constitutes a breach of its anti-trust laws is binding on the federal courts.<sup>37</sup>

(35) *Negligence*.—The construction placed upon a statute of a state requiring flagmen or safety gates at crossings, by the highest court of the state, is binding on the federal courts.<sup>38</sup>

(36) *Personalty*.—(a) *Sales or Transfers*.—The courts of the United States regard and follow the policy of the state law which will not permit the owner of personal property to sell it and still continue in possession of it, so as to exempt it from seizure or attachment at the suit of creditors of the vendor.<sup>39</sup>

(b) *Mortgages or Liens*.—Decisions of the state courts as to the validity of chattel mortgages, under the state laws,<sup>40</sup> or as to filing or recording

ute before the prior cases were overruled. Such contracts and bonds have been held to be valid, upon the principle that the holders upon purchasing such bonds and the parties to such contracts were entitled to rely upon the prior decisions as settling the law of the state. To have held otherwise would enable the state to set a trap for its creditors by inducing them to subscribe to bonds and then withdrawing their own security. *Wade v. Travis County*, 174 U. S. 499, 509, 43 L. Ed. 1060; *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. Ed. 520; *Havemeyer v. Iowa County*, 3 Wall. 294, 18 L. Ed. 38; *Mitchell v. Burlington*, 4 Wall. 270, 18 L. Ed. 350; *Riggs v. Johnson County*, 6 Wall. 166, 18 L. Ed. 768; *Lee County v. Rogers*, 7 Wall. 181, 19 L. Ed. 160; *Chicago v. Sheldon*, 9 Wall. 50, 19 L. Ed. 594; *Olcott v. Supervisors*, 16 Wall. 678, 21 L. Ed. 382; *Douglass v. Pike County*, 101 U. S. 677, 25 L. Ed. 968."

Where bonds issued to bona fide holders for value are valid by the judicial decisions of a state when issued, subsequent decisions in the same state cannot destroy the validity in such hands. *The City v. Lamson*, 9 Wall. 477, 19 L. Ed. 725; *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. Ed. 520.

"The court reviews the legislation and judicial decisions of Missouri, whereby the constitutionality of an act of the general assembly, entitled 'An act to facilitate the construction of railroads in the state of Missouri,' approved March 23, 1868, was recognized and affirmed long after the county authorities had issued, pursuant to its provisions, the bonds whereon this suit was brought. The court in this case adheres to its ruling in accordance with those decisions, as announced in *Cass County v. Johnston*, 95 U. S. 360, 24 L. Ed. 416, although the supreme court of Missouri has since declared that act to be in conflict with § 14, art. 11, of the constitution, adopted by that state in 1865." *Dougless v. Pike County*, 101 U. S. 677, 25 L. Ed. 968; *Darlington v. Jackson County*, note, 101 U. S. 688, 25 L. Ed. 972; *Foote v. Pike County*, note, 101 U. S. 688, 25 L. Ed. 972.

36. *Monopolies and trusts*.—*National Cotton Oil Co. v. Texas*, 197 U. S. 115, 131,

49 L. Ed. 689; *Smiley v. Kansas*, 196 U. S. 447, 49 L. Ed. 546. See, generally, the title MONOPOLIES AND CORPORATE TRUSTS.

"In other words, they are tribunals to declare the meaning of the statutes, and if in declaring it they make the statutes discriminatory, then may the statutes become unconstitutional." *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 131, 49 L. Ed. 689; *Olsen v. Smith*, 195 U. S. 332, 49 L. Ed. 224; *Southern Cotton Oil Co. v. Texas*, 197 U. S. 134, 49 L. Ed. 696.

37. *What constitutes a violation of anti-trust laws*.—*Smiley v. Kansas*, 196 U. S. 447, 49 L. Ed. 546.

38. *Negligence — Crossings*.—*Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 36 L. Ed. 485. See, generally, the title CROSSINGS.

39. *Sales or transfers of personalty*.—*Dooley v. Pease*, 180 U. S. 126, 128, 45 L. Ed. 457; *Allen v. Massey*, 17 Wall. 351, 21 L. Ed. 542; *Green v. Van Buskirk*, 7 Wall. 139, 19 L. Ed. 109. See ante, "Fraudulent and Voluntary Conveyances," VII, J, 13, c, (24).

"Any other rule," said this court in *Green v. Van Buskirk*, 7 Wall. 139, 19 L. Ed. 109, 'would destroy all safety in derivative titles and deny to a state the power to regulate its personal property within its limits.' " *Dooley v. Pease*, 180 U. S. 126, 128, 45 L. Ed. 457.

Under the statute of frauds of Missouri, as interpreted by the highest court of that state, an interpretation which this court will follow, a sale of household furniture in a house occupied jointly by vendor and vendee, both using the furniture alike, and there being no other change of possession than that the vendor, after going around with the vendee and looking at the furniture and agreeing on the price, turned it over to the vendee and executed a bill of sale before a notary, both parties then, after the sale, occupying the house and using the furniture exactly as before, is void as against the vendor's creditors. *Allen v. Massey*, 17 Wall. 351, 21 L. Ed. 542.

40. *Validity of chattel mortgages*.—*Etheridge v. Sperry*, 139 U. S. 266, 35 L. Ed. 171; *Thompson v. Fairbanks*, 196 U.



thereof,<sup>41</sup> or as to the extent and validity of a pledge,<sup>42</sup> or as to the existence, nature, extent and duration of a possessory lien of a tug upon a raft for towage,<sup>43</sup> are binding on the federal courts.

(37) *Practice and Procedure*—(a) *In General*.—The 34th section of the judiciary act making the state law rules of decision in federal courts in cases in which they apply does not apply to the process, practice and proceedings unless they have been expressly made applicable to United States courts by act of congress or adopted by them under authority of congress.<sup>44</sup>

(b) *Construction of State Practice Acts*.—The construction placed upon an act in regard to practice or procedure by the highest court of the state is binding on the federal courts.<sup>45</sup> Thus the decision of the highest court of a state as to

S. 516, 522, 49 L. Ed. 577; *Humphrey v. Tatman*, 198 U. S. 91, 49 L. Ed. 956.

Whether and to what extent a chattel mortgage covering after-acquired property is valid is a local question. *Thompson v. Fairbanks*, 196 U. S. 516, 522, 49 L. Ed. 577; *Humphrey v. Tatman*, 198 U. S. 91, 49 L. Ed. 956.

"It would be strange, indeed, if this court should adjudge that there was error on the part of the supreme court of a state in following its own rulings, uniform and undisturbed for a quarter of a century. The matter is not one of purely general commercial law. While chattel mortgages are instruments of general use, each state has a right to determine for itself under what circumstances they may be executed, the extent of the rights conferred thereby, and the conditions of their validity. They are instruments for the transfer of property, and the rules concerning the transfer of property are primarily, at least, a matter of state regulation. We are aware that there is great diversity in the rulings on this question by the courts of the several states; but whatever may be our individual views as to what the law ought to be in respect thereto, there is so much of a local nature entering into chattel mortgages that this court will accept the settled law of each state as decisive in respect to any case arising therein." *Etheridge v. Sperry*, 139 U. S. 266, 276, 35 L. Ed. 171; *Union Bank v. Kansas City Bank*, 136 U. S. 223, 34 L. Ed. 341.

41. *Filing or recording chattel mortgages*.—*Cutler v. Huston*, 158 U. S. 423, 429, 39 L. Ed. 1040. See, generally, the title CHATTEL MORTGAGES, vol. 3, p. 699.

42. *Extent and validity of pledge*.—*Hiscock v. Varick Bank*, 206 U. S. 28, 51 L. Ed. 945, citing *York Mfg. Co. v. Caswell*, 201 U. S. 344, 50 L. Ed. 782; *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. Ed. 577; *Humphrey v. Tatman*, 198 U. S. 91, 49 L. Ed. 956; *Security Warehousing Co. v. Hand*, 206 U. S. 415, 425, 51 L. Ed. 1117. See, generally, the title PLEDGE AND COLLATERAL SECURITY.

43. *Possessory towage liens*.—*Knapp v. McCaffrey*, 177 U. S. 638, 44 L. Ed. 921. See, generally, the title TOWAGE, TUGS AND TOWS.

44. *Practice—In general*.—*United States v. Eckford*, 6 Wall. 484, 490, 18 L. Ed. 920; *Wayman v. Southard*, 10 Wheat. 1, 24, 6 L. Ed. 253; *United States Bank v. Halstead*, 10 Wheat. 51, 62, 6 L. Ed. 264; *Iowa Cent. R. Co. v. Iowa*, 160 U. S. 389, 40 L. Ed. 467; *Railroad Co. v. National Bank*, 102 U. S. 14, 53, 26 L. Ed. 61; *Grand Rapids, etc., R. Co. v. Butler*, 159 U. S. 87, 91, 40 L. Ed. 85. See post, "Forms and Modes of Proceeding," VII, K.

45. *Construction of practice acts*.—*Atlantic & Pac. R. Co. v. Hopkins*, 94 U. S. 11, 13, 24 L. Ed. 48; *Johnson v. Drew*, 171 U. S. 93, 98, 43 L. Ed. 88; *Sweeney v. Lomme*, 22 Wall. 208, 22 L. Ed. 727; *Iowa Cent. R. Co. v. Iowa*, 160 U. S. 389, 393, 40 L. Ed. 467; *Ludeling v. Chaffe*, 143 U. S. 301, 36 L. Ed. 313; *Scranton v. Wheeler*, 179 U. S. 141, 151, 45 L. Ed. 126; *Curran v. Arkansas*, 15 How. 304, 309, 14 L. Ed. 705; *Beach v. Viles*, 2 Pet. 675, 7 L. Ed. 559; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 688, 41 L. Ed. 1165; *Coffee v. Planters' Bank*, 13 How. 183, 189, 14 L. Ed. 105; *Halferty v. Wilmering*, 112 U. S. 713, 28 L. Ed. 858; *Morgan v. Potter*, 157 U. S. 195, 197, 39 L. Ed. 670; *Chandler v. Dix*, 194 U. S. 590, 48 L. Ed. 1129; *Central Nat. Bank v. Stevens*, 169 U. S. 432, 42 L. Ed. 807; *Ross v. Barland*, 1 Pet. 656, 7 L. Ed. 302; *Grand Rapids, etc., R. Co. v. Butler*, 159 U. S. 87, 91, 40 L. Ed. 85; *Duncan v. United States*, 7 Pet. 435, 8 L. Ed. 739. But see *Amis v. Smith*, 16 Pet. 303, 304, 10 L. Ed. 973.

The federal courts are bound to adopt the construction of a state practice act which has been established by the decisions of the highest court of the state. *Halferty v. Wilmering*, 112 U. S. 713, 28 L. Ed. 858.

Decisions of state courts upon questions of practice are binding on federal courts. *Johnson v. Drew*, 171 U. S. 93, 98, 43 L. Ed. 88.

On a question of practice, it would seem, that the decision of the state court as to what the practice is should be conclusive. The practice of the court cannot be better known and established than by its own solemn adjudications on the subject. *Duncan v. United States*, 7 Pet. 435, 8 L. Ed. 739.

"Whether the court of last resort of



the propriety of a particular remedy,<sup>46</sup> as to the competency of parties to sue,<sup>47</sup> or be sued,<sup>48</sup> as to the sufficiency of pleadings,<sup>49</sup> as to the discontinuance of a suit against one or more of several defendants,<sup>50</sup> as to a waiver of a variance between the allegation and proof,<sup>51</sup> as to the mode of trial in ejectment,<sup>52</sup> or as

the state of Iowa properly construed its own constitution and laws in determining that the summary process under those laws was applicable to the matter which it adjudged, was purely the decision of a question of state law, binding upon this court. Mere irregularities in the procedure, if any, were matters solely for the consideration of the judicial tribunal within the state empowered by the laws of the state to review and correct errors committed by its courts. Such errors affect merely matters of state law and practice, in no way depending upon the constitution of the United States or upon any act of congress." *Iowa Cent. R. Co. v. Iowa*, 160 U. S. 389, 393, 40 L. Ed. 467; *Ludeling v. Chaffe*, 143 U. S. 301, 36 L. Ed. 313.

**46. Propriety of remedy.**—*Central Nat. Bank v. Stevens*, 169 U. S. 432, 42 L. Ed. 807; *Scranton v. Wheeler*, 179 U. S. 141, 151, 45 L. Ed. 126. See, also, *Lowndes v. Huntington*, 153 U. S. 1, 38 L. Ed. 615.

**Ejectment.**—Where the state court decides that ejectment is the proper remedy for a riparian owner to secure the removal of a structure which interferes with access by him from his fast land to navigable waters, the decision is binding on the federal courts. *Scranton v. Wheeler*, 179 U. S. 141, 151, 45 L. Ed. 126. See, also, *Lowndes v. Huntington*, 153 U. S. 1, 38 L. Ed. 615.

**Bill of review.**—A state court's decision as to errors for which a bill of review may be filed is binding on federal courts. *Central Nat. Bank v. Stevens*, 169 U. S. 432, 42 L. Ed. 807.

**47. Competency of parties to sue.**—*Morgan v. Potter*, 157 U. S. 195, 197, 39 L. Ed. 670; *Sweeney v. Lomme*, 22 Wall. 208, 22 L. Ed. 727.

In a suit on a replevin bond given to the sheriff, where the question whether the proper party to sue is the sheriff or the party for whose benefit the bond was given depends upon the code of practice of Montana Territory, the supreme court of the United States will not reverse the decision of the supreme court of that territory on the question; that being a question on the construction of their own code. *Sweeney v. Lomme*, 22 Wall. 208, 22 L. Ed. 727.

**The right of a foreign guardian to sue** in the federal courts is dependent on the law of the state in which the suit is brought, and not on that of the state in which the guardian was appointed. *Morgan v. Potter*, 157 U. S. 195, 197, 39 L. Ed. 670.

"The authority of a guardian, like that of an executor or administrator, appointed

by a court of one state, is limited to that state, and he cannot sue in a court, even of the United States, held within any other state, except so far as authorized to do so by its laws. *Hoyt v. Sprague*, 103 U. S. 613, 26 L. Ed. 585; *Lamar v. Micou*, 112 U. S. 452, 28 L. Ed. 751." *Morgan v. Potter*, 157 U. S. 195, 197, 39 L. Ed. 670.

**48. Competency of party to be sued.**—*Curran v. Arkansas*, 15 How. 304, 309, 14 L. Ed. 705.

**That a state is capable of being sued**, is purely a question of local law, depending on the constitution and statutes of the state binding on the federal courts. *Curran v. Arkansas*, 15 How. 304, 309, 14 L. Ed. 705.

**49. Sufficiency of pleadings.**—*Iowa Cent. R. Co. v. Iowa*, 160 U. S. 389, 40 L. Ed. 467; *Grand Rapids, etc., R. Co. v. Butler*, 159 U. S. 87, 91, 40 L. Ed. 85.

A decision of the state court that it could determine from the statements in the pleadings in a case before it that the averments of an answer set up a defense is binding upon the federal court. *Iowa Cent. R. Co. v. Iowa*, 160 U. S. 389, 40 L. Ed. 467; *Grand Rapids, etc., R. Co. v. Butler*, 159 U. S. 87, 91, 40 L. Ed. 85.

**50. Discontinuance as to some of several defendants.**—*Coffee v. Planters' Bank*, 13 How. 183, 189, 14 L. Ed. 105.

The construction placed upon a state statute giving notes the effect of joint and several notes, that a suit against several parties to such an instrument may be discontinued as any one, and prosecuted as to the rest is binding on the federal courts. *Coffee v. Planters' Bank*, 13 How. 183, 189, 14 L. Ed. 105.

**51. Variance—Waiver of objection.**—*Liverpool, etc., Ins. Co. v. Gunther*, 116 U. S. 113, 126, 29 L. Ed. 575.

Where under the state practice a variance between the defendant's pleadings and proof is waived by the admission of evidence, to prove or a motion to direct a verdict based on, the defense which is not properly pleaded, without objection by the plaintiff, the same rule obtains in the federal courts. *Liverpool, etc., Ins. Co. v. Gunther*, 116 U. S. 113, 126, 29 L. Ed. 575.

**52. Mode of trial in ejectment.**—*Ross v. Barland*, 1 Pet. 656, 7 L. Ed. 302; *Bagnell v. Broderick*, 13 Pet. 436, 456, 10 L. Ed. 235.

Where, by the established practice of courts in particular states, the courts, in actions of ejectment, look beyond the grant, and examine the progressive stages of the title, from its incipient state until its consummation; such a practice will form the law of cases decided under the

to the remedy by attachment,<sup>53</sup> are conclusive on the federal courts.

(38) *Public Officers*.—In a controversy relating exclusively to the title to a state office, created by a statute of a state, and to the rights of one who was elected to the office so created, those rights are to be measured by the state statutes and constitution, except in so far as they may be protected by the federal constitution,<sup>54</sup> and the construction placed upon state statutes by the highest court of a state is controlling upon the federal courts.<sup>55</sup> Thus the decision of the state courts on the eligibility, election or appointment of state officers,<sup>56</sup> or as to their removal or suspension,<sup>57</sup> or as to the constitutional existence of a board, such as a board of county commissioners,<sup>58</sup> is binding on the federal courts.

(39) *Real Estate*—(a) *In General*.—Where any rule of real property has been settled in the state courts, the same rule will be applied by federal courts that would be applied by them.<sup>59</sup> The federal courts adopted the local law of real

same, in these states, and the supreme court of the United States regard those rules of decision, in cases brought up from such states, provided that in so doing, they do not suffer the provisions of any statute of the United States to be violated. *Ross v. Barland*, 1 Pet. 656, 7 L. Ed. 302.

**53. Attachment**.—In a suit upon a local statute, giving a particular remedy, in the nature of a foreign attachment, against garnishees, who possess goods, effects or credits of the principal debtor, the decisions which have been made on the construction of that statute, by the state court, are entitled to great respect; and ought, in conformity to the uniform practice, to govern the decision of the federal courts. *Beach v. Viles*, 2 Pet. 675, 7 L. Ed. 559.

**54. Title to state office**.—*Wilson v. North Carolina*, 169 U. S. 586, 593, 42 L. Ed. 865; *Taylor v. Beckham* (No. 1), 178 U. S. 548, 572, 44 L. Ed. 1187; *Allen v. Georgia*, 166 U. S. 138, 41 L. Ed. 949; *See, also, Phinney v. Sheppard, etc., Hospital Trustees*, 177 U. S. 170, 44 L. Ed. 720. *See, generally, the title PUBLIC OFFICERS.*

**55. Construction of state statute as officers**.—*Wilson v. North Carolina*, 169 U. S. 586, 593, 42 L. Ed. 865; *Taylor v. Beckham* (No. 1), 178 U. S. 548, 572, 44 L. Ed. 1187; *Allen v. Georgia*, 166 U. S. 138, 41 L. Ed. 949. *See, also, Phinney v. Sheppard, etc., Hospital Trustees*, 177 U. S. 170, 44 L. Ed. 720.

**56. Eligibility, election or appointment of state officers**.—*Norton v. Shelby County*, 118 U. S. 425, 440, 30 L. Ed. 178.

**57. Removal or suspension of officer**.—*Wilson v. North Carolina*, 169 U. S. 586, 593, 42 L. Ed. 865; *Taylor v. Beckham* (No. 1), 178 U. S. 548, 572, 44 L. Ed. 1187; *Allen v. Georgia*, 166 U. S. 138, 41 L. Ed. 949. *See, also, Phinney v. Sheppard, etc., Hospital Trustees*, 177 U. S. 170, 44 L. Ed. 720.

"What kind and how much of a hearing the officer should have before suspension by the governor was a matter for the state legislature to determine, having regard to the constitution of the state. The procedure provided by a valid state law for the purpose of changing the incumbent of a state office will not in general

involve any question for review by this court. A law of that kind does but provide for the carrying out and enforcement of the policy of a state, with reference to its political and internal administration, and a decision of the state court in regard to its construction and validity will generally be conclusive here. The facts would have to be most rare and exceptional which would give rise in a case of this nature to a federal question." *Wilson v. North Carolina*, 169 U. S. 586, 593, 42 L. Ed. 865, quoted in *Taylor v. Beckham*, (No. 1), 178 U. S. 548, 572, 44 L. Ed. 1187.

**58. Existence of board of county commissioners**.—*Norton v. Shelby County*, 118 U. S. 425, 441, 30 L. Ed. 178.

Thus where the highest court of a state has repeatedly adjudged, after careful and full consideration, that a board of county commissioners never had a lawful existence; that it was an unauthorized and illegal body; that its members were usurpers of the functions and powers of the justices of the peace of the county; and that their action in holding the county court was utterly void, the supreme court of the United States should neither gainsay nor deny the authoritative character of that determination. *Norton v. Shelby County*, 118 U. S. 425, 441, 30 L. Ed. 178.

It would lead to great confusion and disorder if a state tribunal, adjudged by the state supreme court to be an unauthorized and illegal body, should be held by the federal courts, disregarding the decision of the state court, to be an authorized and legal body, and thus make the claims and rights of suitors depend, in many instances, not upon settled law, but upon the contingency of litigation respecting them being before a state or a federal court. Conflicts of this kind should be avoided if possible by leaving the courts of one sovereignty within their legitimate sphere to be independent of those of another, each respecting the adjudications of the other on subjects properly within its jurisdiction. *Norton v. Shelby County*, 118 U. S. 425, 440, 30 L. Ed. 178.

**59. Real property—In general**.—*Railroad Co. v. National Bank*, 102 U. S. 14, 53, 26 L. Ed. 61; *Greekie v. Kirby Carpenter Co.*, 106 U. S. 379, 385, 27 L. Ed.



property, whether the state decisions are grounded on the construction of the statutes of the state,<sup>60</sup> or form a part of the unwritten law of the state, which

157; *Foxcroft v. Mallett*, 4 How. 353, 11 L. Ed. 1008; *Waring v. Jackson*, 1 Pet. 570, 7 L. Ed. 266; *Van Rensselaer v. Kearney*, 11 How. 297, 13 L. Ed. 703; *Morgan v. Curtenius*, 20 How. 1, 15 L. Ed. 823; *Green v. Neal*, 6 Pet. 291, 8 L. Ed. 402; *Barrett v. Holmes*, 102 U. S. 651, 655, 26 L. Ed. 291; *White v. Burnley*, 20 How. 235, 15 L. Ed. 886; *Beals v. Hale*, 4 How. 37, 11 L. Ed. 865; *Arndt v. Griggs*, 134 U. S. 316, 321, 33 L. Ed. 918; *Polk v. Wendall*, 9 Cranch 87, 97, 3 L. Ed. 665; *Polk v. Wendell*, 5 Wheat. 293, 5 L. Ed. 92; *Williams v. Kirtland*, 13 Wall. 306, 20 L. Ed. 683; *Brush v. Ware*, 15 Pet. 93, 105, 10 L. Ed. 672; *Woods v. Freeman*, 1 Wall. 398, 17 L. Ed. 543; *Bondurant v. Watson*, 103 U. S. 281, 26 L. Ed. 447; *Suydam v. Williamson*, 24 How. 427, 16 L. Ed. 742; *Jackson v. Chew*, 12 Wheat. 153, 162, 6 L. Ed. 583; *Beauregard v. New Orleans*, 18 How. 497, 15 L. Ed. 469; *Ridings v. Johnson*, 128 U. S. 212, 224, 32 L. Ed. 401; *Thatcher v. Powell*, 6 Wheat. 119, 5 L. Ed. 221; *Fairfield v. Gallatin County*, 100 U. S. 47, 25 L. Ed. 544; *McKeen v. Delancy*, 5 Cranch 22, 3 L. Ed. 25; *Danforth v. Thomas*, 1 Wheat. 155, 157, 4 L. Ed. 59; *Burgess v. Seligman*, 107 U. S. 20, 27 L. Ed. 359; *Stanly County v. Coler*, 190 U. S. 437, 444, 47 L. Ed. 1126; *Chicago v. Robbins*, 2 Black 418, 419, 17 L. Ed. 298; *Fisher v. Haldeman*, 20 How. 186, 15 L. Ed. 879; *Lowndes v. Huntington*, 153 U. S. 1, 18, 38 L. Ed. 615; *Halsted v. Buster*, 140 U. S. 273, 278, 35 L. Ed. 484; *Williamson v. Berry*, 8 How. 495, 543, 12 L. Ed. 1170; *Williamson v. Suydam*, 6 Wall. 723, 734, 18 L. Ed. 967; *Gardner v. Collins*, 2 Pet. 58, 7 L. Ed. 347; *Swift v. Tyson*, 16 Pet. 1, 24, 10 L. Ed. 865; *Davis v. Mason*, 1 Pet. 503, 7 L. Ed. 239; *Smith v. McCann*, 24 How. 398, 16 L. Ed. 714; *Inglis v. Sailor's Snug Harbour*, 3 Pet. 99, 101, 7 L. Ed. 617; *Bank v. Dudley*, 2 Pet. 492, 506, 7 L. Ed. 496; *Gormley v. Clark*, 134 U. S. 338, 33 L. Ed. 909; *Walker v. State Harbor Comm'rs*, 17 Wall. 648, 651, 21 L. Ed. 744; *Barber v. Pittsburg, etc., R. Co.*, 166 U. S. 83, 99, 41 L. Ed. 925; *Slaughter v. Glenn*, 92 U. S. 242, 25 L. Ed. 122; *Taylor v. Brown*, 5 Cranch 234, 3 L. Ed. 88; *Spindle v. Shreve*, 111 U. S. 542, 546, 28 L. Ed. 512; *Nichols v. Eaton*, 91 U. S. 716, 23 L. Ed. 254; *Preston v. Bowmar*, 6 Wheat. 580, 5 L. Ed. 336; *Clarke v. Clarke*, 178 U. S. 186, 192, 44 L. Ed. 1028; *Kean v. Calumet Canal, etc., Co.*, 190 U. S. 452, 461, 47 L. Ed. 1134; *Rundle v. Delaware, etc., Canal Co.*, 14 How. 80, 14 L. Ed. 335; *Hinde v. Vattier*, 5 Pet. 398, 399, 8 L. Ed. 168; *Hardin v. Shedd*, 190 U. S. 508, 519, 47 L. Ed. 1156.

Decisions of a state court establishing a rule of property are binding on the federal courts. *Bondurant v. Watson*, 103 U. S. 281, 26 L. Ed. 447; *Suydam v. Wil-*

*liamson*, 24 How. 427, 16 L. Ed. 742; *Jackson v. Chew*, 12 Wheat. 153, 162, 6 L. Ed. 583; *Beauregard v. New Orleans*, 18 How. 497, 15 L. Ed. 469.

Where the courts of Pennsylvania decided that by the laws of Pennsylvania before the revolution, a pre-emption right to islands in the Susquehanna river could not be obtained by settlement, the federal courts will adopt their decision. *Fisher v. Haldeman*, 20 How. 186, 15 L. Ed. 879.

In an action of ejectment to recover land in Kentucky, the law of real estate in Kentucky is the law of the federal courts in deciding the rights of the parties. *Davis v. Mason*, 1 Pet. 503, 7 L. Ed. 239. See, also, *Smith v. McCann*, 24 How. 398, 16 L. Ed. 714.

**60. Construction of local statutes as to real estate.**—*Green v. Neal*, 6 Pet. 291, 297, 8 L. Ed. 402; *Thatcher v. Powell*, 6 Wheat. 119, 5 L. Ed. 221; *Gardner v. Collins*, 2 Pet. 58, 7 L. Ed. 347; *Stanly County v. Coler*, 190 U. S. 437, 444, 47 L. Ed. 1126; *Burgess v. Seligman*, 107 U. S. 20, 27 L. Ed. 359.

Where the question upon the construction of the statute of a state, relative to real property, has been settled by any judicial decision in the state, where the land lies, the supreme court of the United States upon the uniform principles adopted by it, would recognize that decision as a part of the local law. *Gardner v. Collins*, 2 Pet. 58, 7 L. Ed. 347.

Infinite mischiefs would result if, in construing state statutes affecting titles to real property, where no federal question is involved, a different rule was adopted by the federal tribunals from that of the state courts. *Walker v. State Harbor Comm'rs*, 17 Wall. 648, 651, 21 L. Ed. 744; *McKeen v. Delancy*, 5 Cranch 22, 32, 3 L. Ed. 25; *Jackson v. Chew*, 12 Wheat. 153, 168, 6 L. Ed. 583.

The Mexican colonization law of August 18th, 1824, though general to the Republic of Mexico, was, so far as it affected lands within the limits of Texas, after the independence of that country, a local law of the new state, as much so as if it had originated in her legislation. The interpretation, therefore, placed on it by the highest court of the state must be accepted as the true interpretation, so far as it applies to titles to lands in that state, whatever may be the opinion of this court of its original soundness. If in courts of other states carved out of territory since acquired from Mexico, a different interpretation has been adopted, the courts of the United States will follow the different ruling, so far as it affects titles in those states. *Christy v. Pridgeon*, 4 Wall. 196, 18 L. Ed. 322.

**Private acts in regard to real estate.**—“We cannot admit that the rule hitherto observed in the court, of recognizing the



has become a fixed rule of property.<sup>61</sup>

(b) *Deeds*—aa. *Acknowledgment*.—The decision of the state courts as to the sufficiency of an acknowledgment of a deed under the state laws is binding on the federal courts.<sup>62</sup>

bb. *Form and Sufficiency*.—The requirements of the state law in respect to the mode in which real property situated within the state may be conveyed or transferred, is binding upon the federal courts.<sup>63</sup>

cc. *Construction and Operation*.—And when the construction of certain words in deeds has become a settled rule of property in a state, that construction is to be followed by the courts of the United States in determining the title to land

judicial decisions of the highest courts of the states upon state statutes relative to real property as a part of local law, comprehends private statutes or statutes giving special jurisdiction to a state court for the alienation of private estates. It has never been extended to private acts relating to particular persons, for the reason, that, whatever a court in a state may do in such a case, its decision is no part of local law. It concerns only those for whose benefit such a law was passed, and because the decision under it is no rule for any other future case. It may from analogy be cited for the interpretation of another private law of a like kind, but then the utmost extension of it would be, that there would be two judgments in two private cases, which only show more plainly that no local law had been made by both." *Williamson v. Berry*, 8 How. 495, 543, 12 L. Ed. 1170.

**61. Decisions on unwritten real estate law of state.**—*Green v. Neal*, 6 Pet. 291, 297, 8 L. Ed. 402; *Jackson v. Chew*, 12 Wheat. 153, 6 L. Ed. 583; *Henderson v. Griffin*, 5 Pet. 151, 8 L. Ed. 79; *Daly v. James*, 8 Wheat. 495, 535, 5 L. Ed. 670; *Railroad Co. v. National Bank*, 102 U. S. 14, 57, 26 L. Ed. 61; *Lowndes v. Huntington*, 153 U. S. 1, 19, 38 L. Ed. 615; *Bondurant v. Watson*, 103 U. S. 281, 26 L. Ed. 447; *Burgess v. Seligman*, 107 U. S. 20, 27 L. Ed. 359; *Gage v. Pumpelly*, 115 U. S. 454, 29 L. Ed. 449; *Hardin v. Jordan*, 140 U. S. 371, 35 L. Ed. 428; *Shively v. Bowlby*, 152 U. S. 1, 19, 38 L. Ed. 331.

Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. *Burgess v. Seligman*, 107 U. S. 20, 33, 27 L. Ed. 359; *Pleasant Township v. Aetna Life Ins. Co.*, 138 U. S. 67, 73, 34 L. Ed. 864.

**62. Acknowledgments.**—*Schley v. Pull-*

*man Car Co.*, 120 U. S. 575, 30 L. Ed. 789; *McKeen v. Delancy*, 5 Cranch 22, 3 L. Ed. 25; *Ross v. McLung*, 6 Pet. 283, 8 L. Ed. 400.

Under the act of Pennsylvania of 1715, which requires a deed to be acknowledged before a justice of the peace of the county where the lands lie, it had been the long-established practice, before the year 1775, to acknowledge deeds before a justice of the supreme court of the province of Pennsylvania; and although the act of 1715 does not authorize such a practice, yet as it has prevailed, it is to be considered as a correct exposition of the statute. *McKeen v. Delancy*, 5 Cranch 22, 3 L. Ed. 25; *Schley v. Pullman Car Co.*, 120 U. S. 575, 580, 30 L. Ed. 789.

**63. Conveyances in general.**—*Schley v. Pullman Car Co.*, 120 U. S. 575, 580, 30 L. Ed. 789; *McGoan v. Scales*, 9 Wall. 23, 19 L. Ed. 545; *Brine v. Insurance Co.*, 96 U. S. 627, 24 L. Ed. 858; *East Cent. Eureka Min. Co. v. Central Eureka Min. Co.*, 204 U. S. 266, 272, 51 L. Ed. 476; *Barber v. Pittsburg, etc., R. Co.*, 166 U. S. 83, 99, 41 L. Ed. 925; *Bucher v. Cheshire R. Co.*, 125 U. S. 555, 583, 31 L. Ed. 795; *Morgan v. Curtenius*, 20 How. 1, 15 L. Ed. 823; *De Vaughn v. Hutchinson*, 165 U. S. 566, 41 L. Ed. 827; *Abraham v. Casey*, 179 U. S. 210, 218, 45 L. Ed. 156; *Clarke v. Clarke*, 178 U. S. 186, 44 L. Ed. 1028.

"The rights of the parties must be governed by the requirements of that law in respect to the mode in which real property situated within the limits of that state may be conveyed or transferred. *United States v. Crosby*, 7 Cranch 115, 3 L. Ed. 287; *Clark v. Graham*, 6 Wheat. 577, 5 L. Ed. 334; *McCormick v. Sullivan*, 10 Wheat. 192, 6 L. Ed. 300; *Suydam v. Williamson*, 24 How. 427, 16 L. Ed. 742; *Brine v. Insurance Co.*, 96 U. S. 627, 24 L. Ed. 858." *Schley v. Pullman Car Co.*, 120 U. S. 575, 580, 30 L. Ed. 789.

The laws of the state in which land is situated control exclusively its descent, alienation, and transfer, and the effect and construction of instruments intended to convey it. *Brine v. Insurance Co.*, 96 U. S. 627, 24 L. Ed. 858; *McGoan v. Scales*, 9 Wall. 23, 19 L. Ed. 545.

**Mode of conveyance by husband and wife.**—*Schley v. Pullman Car Co.*, 120 U. S. 575, 580, 30 L. Ed. 789.

within the state, whether between the same or between other parties.<sup>64</sup> But a decision of a state court upon the construction of a deed, as to matters and language belonging to the common law and not to any local statute, although entitled to high respect, is not conclusive upon the federal courts.<sup>65</sup> The decision of a state court that a subsequently acquired title inures to the grantee under a quitclaim deed is binding on the federal courts.<sup>66</sup>

dd. *Recording*.—The peace of society, and the security of titles require, that the federal courts should conform to the construction of an act as to the registration of deeds which has been made in the courts of the state, if it can discover what that construction is.<sup>67</sup>

(c) *Mortgages*—aa. *In General*.—State laws in existence when a mortgage of a real estate is made, enter into and become a part of such contract, and are binding on the federal courts.<sup>68</sup>

bb. *Validity of Stipulations for Attorney's Fees*.—If a stipulation in a mortgage for attorney's fees on foreclosure is void by the state law, the federal courts, in foreclosure proceedings, are governed by the same rule.<sup>69</sup>

cc. *Transactions Either Mortgages or Sales*.—When the question before a court of equity is, whether a deed which purports upon its face to be an absolute deed, was in reality a deed or a mortgage, extraneous evidence is admissible to show that it was only a mortgage, and upon such a question as this, depending upon the general principles of equity jurisprudence, the federal courts do not hold themselves bound by the decisions of the highest court of the state in which the land in question was, but will be governed by their own view, of those principles.<sup>70</sup>

dd. *Recording*.—The recording acts of a state with respect to mortgages and the construction placed upon them by the highest state courts, are binding on the federal courts as a rule of decision.<sup>71</sup>

**64. Adoption of construction of state courts.**—*Barber v. Pittsburg, etc., R. Co.*, 166 U. S. 83, 99, 41 L. Ed. 925; *Jackson v. Chew*, 12 Wheat. 153, 6 L. Ed. 583; *Henderson v. Griffin*, 5 Pet. 151, 8 L. Ed. 79; *Suydam v. Williamson*, 24 How. 427, 16 L. Ed. 742; *Burgess v. Seligman*, 107 U. S. 20, 27 L. Ed. 359; *East Cent. Eureka Min. Co. v. Central Eureka Min. Co.*, 204 U. S. 266, 272, 51 L. Ed. 476; *Russell v. Ely*, 2 Black 575, 577, 17 L. Ed. 258.

The construction and effect of a conveyance between private parties is a matter as to which we follow the court of the state. *East Cent. Eureka Min. Co. v. Central Eureka Min. Co.*, 204 U. S. 266, 272, 51 L. Ed. 476; *Brine v. Insurance Co.*, 96 U. S. 627, 24 L. Ed. 858; *De Vaughn v. Hutchinson*, 165 U. S. 566, 41 L. Ed. 827.

**65. Common-law construction of deed.**—*Foxcroft v. Mallett*, 4 How. 353, 11 L. Ed. 1008.

**66. After-acquired title inuring to grantee under quitclaim deed.**—*Morgan v. Curteneus*, 20 How. 1, 15 L. Ed. 823. See, generally, the title COVENANTS.

**67. Recording acts.**—*Ridings v. Johnson*, 128 U. S. 212, 32 L. Ed. 401; *Ross v. McLung*, 6 Pet. 283, 8 L. Ed. 400.

**68. Mortgages.**—*Brine v. Insurance Co.*, 96 U. S. 627, 24 L. Ed. 858; *Bacon v. Northwestern, etc., Ins. Co.*, 131 U. S. 258, 264, 33 L. Ed. 128; *Abraham v. Casey*, 179 U. S. 210, 218, 45 L. Ed. 156; *Clarke v. Clarke*, 178 U. S. 186, 44 L. Ed. 1028.

Conclusions of the state court upon an

interpretation of the local law of the state, governing the sale, the record of title to real estate, and the nature under the local law of the rights of a mortgage creditor, are binding on the federal courts. *Abraham v. Casey*, 179 U. S. 210, 218, 45 L. Ed. 156; *Clarke v. Clarke*, 178 U. S. 186, 44 L. Ed. 1028.

**69. Validity of stipulations for attorneys' fees.**—*Bendey v. Townsend*, 109 U. S. 665, 27 L. Ed. 1065; *Dodge v. Tulleys*, 144 U. S. 451, 457, 36 L. Ed. 501.

**70. Whether instrument is deed or mortgage.**—*Russell v. Southard*, 12 How. 139, 13 L. Ed. 927. See, generally, the title MORTGAGES AND DEEDS OF TRUST.

**71. Recording.**—*Pickett v. Foster*, 149 U. S. 505, 530, 37 L. Ed. 829; *Bondurant v. Watson*, 103 U. S. 281, 26 L. Ed. 447; *Townsend v. Todd*, 91 U. S. 452, 23 L. Ed. 413; *Abraham v. Casey*, 179 U. S. 210, 218, 45 L. Ed. 156; *Clarke v. Clarke*, 178 U. S. 186, 44 L. Ed. 1028; *Riding v. Johnson*, 128 U. S. 212, 224, 32 L. Ed. 401.

Decisions of the Louisiana state courts that mortgages have no effect as against third persons unless recorded, and that when ten years have elapsed from the date of the original inscription without re-inscription, the mortgage is void as to all persons who are not parties to the mortgage, save in the single case of a minor's mortgage on the property of his tutor, are binding upon the federal courts. *Bondurant v. Watson*, 103 U. S. 281, 26 L.



ee. *Advertisement of Sale*.—Federal courts are bound by the decisions of the state courts as to the sufficiency of an advertisement of a sale under a mortgage of land within the state, under a state statute providing for advertisement.<sup>72</sup>

ff. *Redemption on Foreclosure*—(aa) *Right to Redeem*.—In many of the states the right to redeem within a prescribed time after sale under a decree of foreclosure is given, in certain cases, by statute. This right, when thus given, is a substantial one, to be recognized even in the courts of the United States sitting in equity, because the statute constitutes a rule of property in the state that enacts it.<sup>73</sup>

(bb) *Mode of Securing Right*.—It is not necessary that the form or mode of securing a right of redemption should follow precisely that prescribed by the state statute. If the right is substantially preserved or secured, it may be done by such suitable methods as the flexibility of chancery proceedings will enable the court to adopt, and which are most in conformity with the practice of the court.<sup>74</sup>

(cc) *Remedy upon Failure of Court to Allow Right of Redemption*.—If the federal court fails to allow to the mortgagor the right of redeeming within a certain

Ed. 447; *Pickett v. Foster*, 149 U. S. 505, 530, 37 L. Ed. 829.

The supreme court of the United States is bound to follow the courts of the state of Connecticut in their uniform decisions, in construing the recording acts of that state, that a mortgage must truly describe the debt intended to be secured; and that it is not sufficient that the debt be of such a character that it might have been secured by the mortgage had it been truly described. *Townsend v. Todd*, 91 U. S. 452, 23 L. Ed. 413.

**72. Sufficiency of advertisement of sale under mortgage.**—*Bacon v. Northwestern, etc., Ins. Co.*, 131 U. S. 258, 33 L. Ed. 128 (misnomer of mortgagee).

**73. Allowing redemption on foreclosure.**—*Parker v. Dacres*, 130 U. S. 43, 48, 32 L. Ed. 848; *Brine v. Insurance Co.*, 96 U. S. 627, 24 L. Ed. 858; *Hammock v. Loan & Trust Co.*, 105 U. S. 77, 26 L. Ed. 1111; *Mason v. Northwestern Mut. Ins. Co.*, 106 U. S. 163, 164, 27 L. Ed. 129, 130; *Connecticut Mut. Life Ins. Co. v. Cushman*, 108 U. S. 51, 27 L. Ed. 648. *United States Mortgage Co. v. Sperry*, 138 U. S. 313, 332, 34 L. Ed. 969; *Orvis v. Powell*, 98 U. S. 176, 25 L. Ed. 238; *Allis v. Insurance Co.*, 97 U. S. 144, 146, 24 L. Ed. 1008; *Metropolitan Bank v. Connecticut, etc., Ins. Co.*, 131 U. S. appx. clxii, 24 L. Ed. 1011; *Burley v. Flint*, 105 U. S. 247, 26 L. Ed. 986; *Missouri, etc., Trust Co. v. Krumseig*, 172 U. S. 351, 359, 43 L. Ed. 474; *Swift v. Smith*, 102 U. S. 442, 456, 26 L. Ed. 193.

The state law giving to a mortgagor of real estate the privilege within twelve months after a decree of foreclosure, and to his judgment creditors within three months thereafter, of redeeming the premises, is a substantial right, and constitutes a rule of property to which the circuit court must conform. *Connecticut Mut. Life Ins. Co. v. Cushman*, 108 U. S. 51, 60, 27 L. Ed. 648; *Brine v. Insurance Co.*, 96 U. S. 627, 24 L. Ed. 858.

The statutory right of redemption after a judicial sale, under a decree of fore-

closure of a mortgage, or deed of trust, is a rule of property in Illinois, and it must be accorded in the federal courts equally as in those of the state. *Swift v. Smith*, 102 U. S. 442, 450, 26 L. Ed. 193; *Brine v. Insurance Co.*, 96 U. S. 627, 24 L. Ed. 858; *Orvis v. Powell*, 98 U. S. 176, 25 L. Ed. 238.

**74. Form of securing right of redemption.**—*Connecticut Mut. Life Ins. Co. v. Cushman*, 108 U. S. 51, 60, 27 L. Ed. 648; *Brine v. Insurance Co.*, 96 U. S. 627, 24 L. Ed. 858; *Allis v. Insurance Co.*, 97 U. S. 144, 24 L. Ed. 1008.

The substantial right given by the statute to the purchaser is that the redemption money be secured to him before the benefit of his purchase is taken away, and the substantial right given to the party redeeming is that the redemption become complete and effectual upon payment by him of the required amount. The particular mode in which the money is paid or secured by the latter for the benefit of the former is not of the substance of the rights of either. The mode or manner of payment belongs, so far as the federal court is concerned, to the domain of practice, the power to regulate which, in harmony with the laws of the United States and the rules of this court, as might be necessary and convenient for the administration of justice, is expressly given by statute to the circuit courts. *Rev. Stat.*, § 918; *Connecticut Mut. Life Ins. Co. v. Cushman*, 108 U. S. 51, 62, 27 L. Ed. 648.

Thus the federal courts may provide by rule that redemption money be paid to the holder of the certificate, or to the clerk of the court, although by the state statute, in case of redemption by a judgment creditor, the money must be paid to the officer having the execution. *Connecticut Mut. Life Ins. Co. v. Cushman*, 108 U. S. 51, 61, 27 L. Ed. 648.

The statute of Minnesota declares that, in the foreclosure of a mortgage by a proceeding in court, the debtor, after the confirmation of the sale, shall be allowed



time, as required by the state statute, the mortgagor's remedy is by appeal,<sup>75</sup> and where the court decrees a sale without giving a right of redemption, the defendant cannot, after the expiration of the time allowed by the statute for redemption, file a bill of review to revise the order of sale.<sup>76</sup>

(d) *Order of Subjecting Land Sold in Parcels Subject to Liens.*—Where the rule has been established by the highest court of a state that where land subject to liens is sold in parcels, the parcels first sold should be last subjected to the satisfaction of the liens, the rule is binding on the federal courts as a rule of property.<sup>77</sup>

(e) *Estates.*—Decisions of a state court, as to whether or not a remainder is vested,<sup>78</sup> or construing a statute abolishing estates tail,<sup>79</sup> are binding on the federal courts as rules of property.

(f) *Improvements.*—A state law giving an occupying claimant of land the right to recover for permanent improvements made upon the land while in possession is binding on the federal courts as a rule of decision.<sup>80</sup>

(g) *Vendor's Lien.*—The courts of the United States enforce vendor's liens if in harmony with the jurisprudence of the state in which the action is brought, and the principle upon which such a lien rests has been held to be that one who gets the estate of another ought not in conscience to be allowed to keep it without paying the consideration.<sup>81</sup>

twelve months in which to redeem, by paying the amount bid at the sale with interest. Where, in a foreclosure suit, a decree, passed by a court of the United States sitting in that state, ordered the master, on making the sale, to deliver to the purchaser a certificate that, unless the mortgaged premises were, within twelve months after the sale, redeemed, by payment of the sum bid, with interest, he would be entitled to a deed, and should be let into possession upon producing the master's deed and a certified copy of the order of the court confirming the report of the sale. Held, that the decree gave substantial effect to the equity of redemption secured by the statute. *Allis v. Insurance Co.*, 97 U. S. 144, 24 L. Ed. 1008.

**75. Remedy of mortgagor by appeal.**—*Burley v. Flint*, 105 U. S. 247, 26 L. Ed. 986; *Mason v. Northwestern Ins. Co.*, 106 U. S. 163, 27 L. Ed. 129.

If the appeal is taken within the time allowed by law, it is immaterial that the period within which redemption could be made under the statute has expired. *Mason v. Northwestern Ins. Co.*, 106 U. S. 163, 27 L. Ed. 129.

**76. Right of mortgagor to file bill to reverse order of sale.**—*Burley v. Flint*, 105 U. S. 247, 26 L. Ed. 986.

**77. Order of subjecting land sold in parcels subject to liens.**—*Orvis v. Powell*, 98 U. S. 176, 25 L. Ed. 238. See, generally, the title **MARSHALING ASSETS AND SECURITIES**.

**78. Whether remainder vested.**—*Doe v. Considine*, 6 Wall. 458, 477, 18 L. Ed. 869. See, generally, the title **REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS**.

**79. Construction of statute abolishing estates tail.**—*Van Rensselaer v. Kearney*, 11 How. 297, 13 L. Ed. 703.

In 1786 the legislature of New York passed a law declaring that "all estates tail shall be, and hereby are, abolished;" and if any person should thereafter become seized in fee tail of any lands, tenements, or hereditaments by virtue of any devise, etc., he should be deemed to have become seized in fee simple absolute. This included an estate tail in remainder, as well as one in possession. The courts in New York have so decided, and this court adopts their construction. *Van Rensselaer v. Kearney*, 11 How. 297, 13 L. Ed. 703.

**80. Improvements.**—*Bank v. Dudley*, 2 Pet. 492, 526, 7 L. Ed. 496.

The inability of the courts of the United States to proceed in suits at common law, in the mode prescribed by the occupant law of Ohio, does not deprive the occupant of the benefit intended him; the modes of proceeding which belong to courts of chancery, are adapted to the execution of the law; and to the equity side of the court he may apply for relief; sitting in chancery, it can appoint commissioners to estimate improvements, as well as rents and profits, and can enjoin the execution of the judgment at law, until its decree shall be complied with. If any part of the act be unconstitutional, the provisions of that part may be disregarded; while full effect will be given to such as are not repugnant to the constitution of the state, or the ordinance of 1787; the question whether any of its provisions be of this description, will properly arise in the suit brought to carry them into effect. *Bank v. Dudley*, 2 Pet. 492, 493, 7 L. Ed. 496.

**81. Vendor's liens.**—*Slide & Spur Gold Mines v. Seymour*, 153 U. S. 509, 516, 38 L. Ed. 802; *Fisher v. Shropshire*, 147 U. S. 133, 139, 37 L. Ed. 109; *Chilton v. Braiden*, 2 Black 458, 17 L. Ed. 304.

(h) *Sale of Land for Taxes*.—See post, "Sale of Land for Taxes," VII, J, 13, c, (45), (a), bb, (kk).

(i) *Grants of Public Lands*—aa. *Grants by State*.—Upon the questions as to the validity,<sup>82</sup> construction,<sup>83</sup> or operation and effect<sup>84</sup> of a grant of public lands by the state, the decisions of the highest state courts are conclusive on the federal courts. Upon a like principle, the federal courts are bound by the state court's construction of statutes affirming,<sup>85</sup> or avoiding,<sup>86</sup> grants of public land. So when the courts of a state have decided that under their statutes declaring an elder grant founded on a younger entry to be void, the priority of entries is examinable at law, and that a junior patent founded on a prior entry shall prevail in ejectment, against a senior patent founded on a junior entry, the decisions are binding on the federal courts.<sup>87</sup>

**82. Validity of public land grants.**—Polk v. Wendell, 5 Wheat. 293, 5 L. Ed. 92; Polk v. Wendell, 9 Cranch 87, 97, 3 L. Ed. 665; League v. Egery, 24 How. 264, 16 L. Ed. 655; Foote v. Egery, 24 How. 267, 16 L. Ed. 656; Porterfield v. Clark, 2 How. 76, 77, 11 L. Ed. 185; Emigrant Co. v. Adams County, 100 U. S. 61, 25 L. Ed. 563. See, also, Herron v. Dater, 120 U. S. 464, 30 L. Ed. 748; Mobile Transp. Co. v. Mobile, 187 U. S. 479, 491, 47 L. Ed. 266. See, generally, the title PUBLIC LANDS.

Where the supreme court of Texas has repeatedly decided that by the colonization laws of Mexico passed in 1824 and 1828, the consent of the federal executive of Mexico was essential to the validity of a grant of lands within ten leagues of the coast, the decision is binding on the federal courts. League v. Egery, 24 How. 264, 16 L. Ed. 655; Foote v. Egery, 24 How. 267, 16 L. Ed. 656.

The decision of the state court that under a statute a county may devote its swamp land to certain public purposes specified in the act, and that in such case it is not limited in price by a provision of the statute that the same shall not be sold for less than a certain price per acre, is binding upon the federal courts. Emigrant Co. v. Adams County, 100 U. S. 61, 25 L. Ed. 563.

**83. Construction of public land grant.**—Preston v. Bowmar, 6 Wheat. 580, 5 L. Ed. 336; Porterfield v. Clark, 2 How. 76, 77, 11 L. Ed. 185; Heath v. Wallace, 138 U. S. 573, 587, 34 L. Ed. 1063; United States v. Roselius, 15 How. 31, 14 L. Ed. 587.

Whether or not a survey made by an officer of the state is a segregation survey, as defined by the act of the state legislature, is one on which the federal courts will follow the decision of the state court. It is in reality a construction of a state statute. Heath v. Wallace, 138 U. S. 573, 587, 34 L. Ed. 1063.

In case, of doubtful construction of a patent to land, the claim of the party in actual possession ought to be maintained, especially where it has been upheld by the decision of state tribunals. Preston v. Bowmar, 6 Wheat. 580, 5 L. Ed. 336.

**84. Operation and effect of public grants of land.**—Brush v. Ware, 15 Pet. 93, 10 L. Ed. 672.

"Whatever doubts, on common-law principles, might have existed, on the question, whether the court can go behind a patent for lands, and examine the equity asserted in a bill claiming the land against the patent, in Ohio and Kentucky, this question has been long judicially settled; and this court, following the decisions of those states, have also decided it. The cases of Bodley v. Taylor, 5 Cranch 191, 196, 3 L. Ed. 75; Polk v. Wendell, 9 Cranch 87, 93, 3 L. Ed. 665; Polk v. Wendall, 5 Wheat. 293, 5 L. Ed. 92; Miller v. Kerr, 7 Wheat. 1, 5 L. Ed. 381; Hoofnagle v. Anderson, 7 Wheat. 212, 5 L. Ed. 437." Brust v. Ware, 15 Pet. 93, 10 L. Ed. 672.

The decision of the highest court of a state that a statute declaring that entries for land shall become void if not surveyed before a certain time, and which contains a proviso allowing infants and married women two years after their disability is removed to complete their surveys and entries, that a case of two or more joint owners, one of whom is under disability, is within the proviso, is binding upon the federal courts as a rule of property. Shipp v. Miller, 2 Wheat. 316, 4 L. Ed. 248.

**85. Construction of statutes affirming land grants.**—A decision of the supreme court of California that an act of the legislature of that state is not intended to amount to an affirmation of the grant of land made by the alcalde of the pueblo of San Francisco, is binding upon the supreme court of the United States. Walker v. State Harbor Comm'rs, 17 Wall. 648, 21 L. Ed. 744.

**86. Construction of statutes avoiding land grants.**—Danforth v. Thomas, 1 Wheat. 155, 4 L. Ed. 59.

The construction by state courts of a state statute avoiding entries, surveys or grants of lands set apart for Indians is binding on federal courts. Danforth v. Thomas, 1 Wheat. 155, 4 L. Ed. 59.

**87. Priority as between several patents.**—Polk v. Wendall, 9 Cranch 87, 98, 3 L. Ed. 665; Robinson v. Campbell, 3 Wheat. 212, 4 L. Ed. 372.

Although the state courts of Tennessee



bb. *Grants by General Government.*—The federal courts will construe grants of the general government without reference to the rules of construction adopted by the states for their grants.<sup>88</sup>

(j) *Riparian Rights.*—Rights in and incident to navigable waters or the land under them are to be determined solely with reference to the law of the state in which such navigable waters were situated, and the decisions of the state courts upon such questions are controlling on the federal courts as a rule of property.<sup>89</sup> Thus, the rule applies to the nature and extent of the riparian owner's rights as to the use of the water of a stream,<sup>90</sup> or in soil below high-water mark,<sup>91</sup> or

have decided, that, under their statutes declaring an elder grant, founded on a junior entry, to be void, a junior patent, founded on a prior entry, will prevail, at law, against a senior patent, founded on a junior entry—this doctrine has never been extended beyond cases within the express purview of the statute of Tennessee and cannot apply to a case of titles deriving all their validity from the laws of Virginia, and confirmed by the compact between the two states. *Robinson v. Campbell*, 3 Wheat. 212, 4 L. Ed. 372.

88. *Grants by federal government.*—*Northern Pac. R. Co. v. Townsend*, 190 U. S. 267, 270, 47 L. Ed. 1044; *Packer v. Bird*, 137 U. S. 661, 34 L. Ed. 819. See, generally, the title PUBLIC LANDS.

*Grants from crown.*—The decision of the state court upon the letters patent by which the province was originally granted by the king of the Great Britain, is unquestionably entitled to great weight. If the words of the letters patent had been more doubtful, quære? if the decision of a state court on their construction, made with great deliberation and research, ought to be regarded as conclusive? *Martin v. Waddell*, 16 Pet. 367, 369, 10 L. Ed. 997.

Quære? Whether, on a question which depends not upon the meaning of instruments formed by the people of a state, or by their authority, but upon the letters patent granted by the British crown, under which certain rights are claimed by the state, on one hand, and by private individuals, on the other, if the supreme court of the state of New Jersey had been of opinion, that upon the face of the charter, the question was clearly in favor of the state, and that the proprietors holding under the letters patent had been deprived of their just rights by the erroneous judgment of the state court, it could be maintained, that the decision of the court of the state on the construction of the letters patent bound the supreme court of the United States. *Martin v. Waddell*, 16 Pet. 367, 369, 10 L. Ed. 997.

89. *Riparian rights in general.*—*Kean v. Calumet Canal, etc., Co.*, 190 U. S. 452, 482, 47 L. Ed. 1134; *Barney v. Keokuk*, 94 U. S. 324, 24 L. Ed. 224; *St. Louis v. Myers*, 113 U. S. 566, 28 L. Ed. 1131; *Packer v. Bird*, 137 U. S. 661, 34 L. Ed. 819; *St. Louis v. Rutz*, 138 U. S. 226, 34 L. Ed. 941; *Shively v. Bowlby*, 152 U. S. 1, 38 L. Ed. 331; *Grand Rapids, etc., R. Co. v. Butler*, 159 U. S. 87, 40 L. Ed. 85;

*St. Anthony Falls Water Power Co. v. St. Paul Water Comm'rs*, 168 U. S. 349, 42 L. Ed. 497; *Hardin v. Jordan*, 140 U. S. 371, 35 L. Ed. 423; *Walker v. State Harbor Comm'rs*, 17 Wall. 648, 651, 21 L. Ed. 744; *Kaukauna Co. v. Green Bay, etc., Canal Co.*, 142 U. S. 254, 272, 35 L. Ed. 1004; *Rundle v. Delaware, etc., Canal Co.*, 14 How. 80, 14 L. Ed. 335; *Conway v. Taylor*, 1 Black 603, 17 L. Ed. 191; *Whitaker v. McBride*, 197 U. S. 510, 512, 49 L. Ed. 857; *Lowndes v. Huntington*, 153 U. S. 1, 38 L. Ed. 615; *Scranton v. Wheeler*, 179 U. S. 141, 166, 45 L. Ed. 126; *Morris v. United States*, 174 U. S. 196, 43 L. Ed. 946; *Mann v. Tacoma Land Co.*, 153 U. S. 273, 38 L. Ed. 714; *Hardin v. Shedd*, 190 U. S. 508, 519, 47 L. Ed. 1156.

With respect to riparian rights the law of the state, as declared by its supreme court is controlling as a rule of property. *Kaukauna Co. v. Green Bay, etc., Canal Co.*, 142 U. S. 254, 272, 35 L. Ed. 1004.

Where the riparian rights of a citizen of Kentucky, in which state the owner of a ferry must be a riparian owner, have been repeatedly held sufficient to sustain the grant of a ferry franchise by the highest legal tribunal of the state, the same question is no longer open; the adjudications of the state courts are a rule of property and a rule of decision which this court is bound to recognize. *Conway v. Taylor*, 1 Black 603, 17 L. Ed. 191.

Where the supreme court of California had construed the terms "tide lands," as used in a statute of that state, as applying only to lands covered and uncovered by the tides, and as not including lands permanently submerged by the waters of the bay of San Francisco, this decision is binding on the federal courts. *Walker v. State Harbor Comm'rs*, 17 Wall. 648, 21 L. Ed. 744.

90. *Use of water.*—*Rundle v. Delaware, etc., Canal Co.*, 14 How. 80, 14 L. Ed. 335; *Conway v. Taylor*, 1 Black 603, 17 L. Ed. 191; *St. Anthony Falls Water Power Co. v. St. Paul Water Comm'rs*, 168 U. S. 349, 42 L. Ed. 497 (right of city to use waters of a lake, without compensating persons injured by use).

91. *Right in soil below high-water mark.*—*Hardin v. Shedd*, 190 U. S. 508, 519, 47 L. Ed. 1156, citing *Scranton v. Wheeler*, 179 U. S. 141, 166, 45 L. Ed. 126; *Shively v. Bowlby*, 152 U. S. 1, 38 L. Ed. 331; *Mann v. Tacoma Land Co.*, 153 U. S. 273,



as to whether his ownership of the fee extends to the middle thread of the stream, or only to the water's edge.<sup>92</sup> Indeed grants of the general government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the state in which the land lies.<sup>93</sup>

(k) *Dedication*.—The question as to what constitutes a common-law dedication of land to the public use, is one of general law upon which the decisions of the state courts are not conclusive on the federal courts.<sup>94</sup>

(l) *Sale of Lands of Persons under Disability*.—The decision of the highest court of a state that the failure to take a bond of a guardian upon the sale of infants' lands, as required by the statute, does not render the sale void, but only erroneous, is binding on the federal courts.<sup>95</sup>

(40) *State*—(a) *Powers of States*—aa. *To Grant Franchise*.—The federal courts follow the decision of the highest state courts that authority to grant a franchise of establishing and maintaining a toll bridge over a river where it

38 L. Ed. 714; *St. Anthony Falls Water Power Co. v. St. Paul Water Comm'rs*, 168 U. S. 349, 42 L. Ed. 497; *Morris v. United States*, 174 U. S. 196, 43 L. Ed. 946.

"The law of Illinois has been settled since *Hardin v. Jordan*, 140 U. S. 371, 35 L. Ed. 428, and it now is clear, by the decision in this case and later, that conveyances of the upland do not carry adjoining land below the water line. *Fuller v. Shedd*, 161 Illinois 462; *Hardin v. Shedd*, 177 Illinois 123; *Hammond v. Shepard*, 186 Illinois 235. Following these decisions, we must hold that the title set up by the plaintiffs in error fails." *Hardin v. Shedd*, 190 U. S. 508, 519, 47 L. Ed. 1156.

**92. Extent of riparian owner's rights in bed of stream.**—*St. Louis v. Rutz*, 138 U. S. 226, 242, 34 L. Ed. 941; *Barney v. Keokuk*, 94 U. S. 324, 24 L. Ed. 224; *St. Louis v. Myers*, 113 U. S. 566, 28 L. Ed. 1131; *Packer v. Bird*, 137 U. S. 661, 34 L. Ed. 819.

"We accept the view of the supreme court of California in its opinion as expressing the law of that state, that the Sacramento River being navigable in fact, the title of the plaintiff extends no farther than the edge of the stream." *Packer v. Bird*, 137 U. S. 661, 669, 34 L. Ed. 819.

**93. Grants by general government of land on streams or rivers.**—*Whitaker v. McBride*, 194 U. S. 510, 512, 49 L. Ed. 857; *Lowndes v. Huntington*, 153 U. S. 1, 38 L. Ed. 615; *Packer v. Bird*, 137 U. S. 661, 669, 34 L. Ed. 819.

The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the states for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the states, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee. As an incident of such ownership the

right of a riparian owner, where the waters are above the influence of the tide, will be limited according to the law of the state, either to low or high-water mark, or will extend to the middle of the stream. *Packer v. Bird*, 137 U. S. 661, 669, 34 L. Ed. 819.

"When land is conveyed by the United States bounded on a non-navigable lake belonging to it, the grounds for the decision must be quite different from the considerations affecting a conveyance of land bounded on navigable water. In the latter case the land under the water does not belong to the United States, but has passed to the state by its admission to the Union. Nevertheless it has become established almost without argument that in the former case as in the latter the effect of the grant on the title to adjoining submerged land will be determined by the law of the state where the land lies. In the case of land bounded on a non-navigable lake the United States assumes the position of a private owner subject to the general law of the state, so far as its conveyances are concerned." *Hardin v. Shedd*, 190 U. S. 508, 519, 47 L. Ed. 1156, citing *Harding v. Jordan*, 140 U. S. 371, 35 L. Ed. 428; *Shively v. Bowlby*, 152 U. S. 1, 38 L. Ed. 331; *Grand Rapids, etc., R. Co. v. Butler*, 159 U. S. 87, 40 L. Ed. 85; *St. Anthony Falls Water Power Co. v. St. Paul Water Comm'rs*, 168 U. S. 349, 42 L. Ed. 497.

**94. Dedication.**—*Yates v. Milwaukee*, 10 Wall. 497, 19 L. Ed. 984. See, generally, the title *DEDICATION*.

**95. Sale of infants' lands.**—*Arrowsmith v. Gleason*, 129 U. S. 86, 97, 32 L. Ed. 630. See, generally, the title *INFANTS*.

In *Mohr v. Manierre*, 101 U. S. 417, 25 L. Ed. 1052, the supreme court of the United States refused to follow a state decision that the publication of notice was essential to jurisdiction to sell a lunatic's real estate, under a state statute, where such decision was in conflict with earlier decisions of the supreme court of the United States.

crosses a public highway in that state, is vested solely in the legislature, and may be exercised by it, or be committed to such agencies as it may select.<sup>96</sup>

bb. *To Create or Supersede State Agencies.*—The constitutional power of the legislature of the state to create a subordinate tribunal of the state and supersede a pre-existing institution, is a subject upon which the federal courts will recognize as authoritative the decision of the state court.<sup>97</sup>

(b) *Compacts between States.*—Where a question arises under a compact between two states, the rule of decision is not to be collected from the decisions of either state, but is one of an international character.<sup>98</sup>

(41) *Separate Estate of Married Women.*—The mode of creating the separate estate of married women,<sup>99</sup> and their powers with respect to it after its creation,<sup>1</sup> are questions of local law upon which the decisions of the highest courts are binding on the federal courts. Thus upon the question as to the power of a married woman to bind her separate property for the payment of her husband's debts, the federal courts follow the state decisions.<sup>2</sup>

(42) *Set-Off, Recoupment and Counterclaim.*—Where, in proceedings in state courts, the laws of a state allow a set-off pleaded to be interposed and tried in the same suit with the claim against which it is pleaded, the same thing may be done when the suit is brought or transferred into the federal courts from them.<sup>3</sup> In suits in the federal courts by the United States, the question of set-off is regulated exclusively by acts of congress, and the state laws in regard thereto are not applicable.<sup>4</sup>

**96. Power of state to grant franchise.**—Wright v. Nagle, 101 U. S. 791, 25 L. Ed. 921.

**97. Existence of inferior state tribunals.**—Norton v. Shelby County, 118 U. S. 425, 440, 30 L. Ed. 178.

**98. Compact between states.**—Marlett v. Silk, 11 Pet. 1, 9 L. Ed. 609; Pollard v. Kibbe, 14 Pet. 353, 413, 10 L. Ed. 490. See, generally, the title STATES.

**99. Mode of creating separate estate.**—Lippincott v. Mitchell, 94 U. S. 767, 24 L. Ed. 315.

A conveyance of lands in Alabama to a married woman, "to have and to hold to the sole and proper use, benefit, and behoof of her, her heirs and assigns forever," vests in her, under the laws of that state, a statutory separate estate. Lippincott v. Mitchell, 94 U. S. 767, 24 L. Ed. 315.

**1. Power of married women over separate property.**—Lippincott v. Mitchell, 94 U. S. 767, 24 L. Ed. 315; Cross v. Allen, 141 U. S. 528, 538, 35 L. Ed. 843; Slaughter v. Glenn, 98 U. S. 242, 25 L. Ed. 122.

During the absence of her husband, when she had the exclusive management of her interests, a married woman owning separate estate in her own right conveyed them to A by deed, which she acknowledged before the proper officer, as if she were a feme sole. She invested the purchase money in another tract, and A sold the lands to B. Some years afterwards, she and her husband brought an action to recover them. B filed his bill, praying that the action be enjoined and his title quieted. Held, that, in view of the decisions of the supreme court of Texas as to the effect of such a conveyance, he was entitled to the relief prayed

for. Slaughter v. Glenn, 98 U. S. 242, 25 L. Ed. 122.

**2. Power to bind separate estate for husband's debts.**—Lippincott v. Mitchell, 94 U. S. 767, 24 L. Ed. 315; Cross v. Allen, 141 U. S. 528, 538, 35 L. Ed. 843.

"The only remaining question is, whether, under the constitution and laws of Oregon in force at the time these contracts were made, a married woman could, in any event, bind her separate property for the payment of her husband's debts. Without discussing this question upon the merits, it is sufficient to say that the supreme court of the state has decided it in the affirmative in at least two separate cases, Moore v. Fuller, 6 Oregon 272, and Gray v. Holland, 9 Oregon 512; and it is not our province to question such construction. Being a construction by the highest court of the state of its constitution and laws, we should accept it." Cross v. Allen, 141 U. S. 538, 35 L. Ed. 843.

**3. Set-off.**—Partridge v. Insurance Co., 15 Wall. 573, 21 L. Ed. 229. See, also, West v. Aurora City, 6 Wall. 139, 18 L. Ed. 819; Dushane v. Benedict, 120 U. S. 630, 30 L. Ed. 810. See, generally, the title SET-OFF, RECOUPMENT AND COUNTERCLAIM.

"It would be a most pernicious doctrine to allow a citizen of a distant state to institute in these courts a suit against a citizen of the state where the court is held and escape the liability which the laws of the state have attached to all plaintiffs of allowing just and legal set-offs and counterclaims to be interposed and tried in the same suit and in the same form." Partridge v. Insurance Co., 15 Wall. 573, 580, 21 L. Ed. 229.

**4. Set-Off in actions by United States.**—United States v. Eckford, 6 Wall. 484,



(43) *Status of Persons Domiciled in State*—(a) *In General*.—Every state has an undoubted right to determine the status, or domestic and social condition, of the persons domiciled within its territory, except in so far as the powers of the states in this respect are restrained, or duties and obligations imposed upon them, by the constitution of the United States, and the decisions of the highest courts of the states on this question is conclusive on the federal courts.<sup>5</sup>

(b) *Marriage*.—The ruling of the highest court of a state that, notwithstanding the statutory regulations have not been complied with, a marriage contracted in that state per verba de præsenti is valid, is binding on the federal courts.<sup>6</sup>

(c) *Slaves and Slavery*.—Whether persons domiciled in a state are slaves or not is a question for the state courts, and their decision is binding on the federal courts.<sup>7</sup> The status of a slave who left a state where slavery existed for one where it did not exist and then returned to the slave state, was a question for the state courts.<sup>8</sup> So, a judicial interpretation by the highest court of the state of a statute as to the manumission of slaves, is conclusive on the federal courts.<sup>9</sup>

(44) *Summons and Process*.—In the construction of a state statute, in a matter purely domestic, such as service of process, the federal courts follow the decision of the highest tribunal of the state.<sup>10</sup>

(45) *Taxation and Assessment*—(a) *Taxation*—aa. *In General*.—There can be no class of laws more strictly local in their character, and which more directly concern real property, than laws imposing taxes on lands, and subjecting the lands to sale for unpaid taxes; they constitute a rule of property, and are binding upon the courts of the United States,<sup>11</sup> except where they are contrary to

18 L. Ed. 920; *United States v. Robeson*, 9 Pet. 319, 324, 9 L. Ed. 142; *De Groot v. United States*, 5 Wall. 419, 432, 18 L. Ed. 700. See, generally, the title UNITED STATES.

This is a question which arises exclusively under the acts of congress, and no local law or usage can have any influence upon it. The rule as to set-off in such cases must be uniform in the different states, for it constitutes the law of the courts of the United States in a matter which relates to the federal government. *United States v. Eckford*, 6 Wall. 484, 491, 18 L. Ed. 920; *United States v. Robeson*, 9 Pet. 319, 324, 9 L. Ed. 142.

When the United States is plaintiff and the defendant has pleaded a set-off, which the acts of congress have authorized him to do, no judgment can be rendered against the government, although it may be judicially ascertained that, on striking a balance of just demands, the government is indebted to the defendant in an ascertained amount. *United States v. Eckford*, 6 Wall. 484, 491, 18 L. Ed. 920; *De Groot v. United States*, 5 Wall. 419, 432, 18 L. Ed. 700.

**5. Status of persons domiciled within state.**—*Strader v. Graham*, 10 How. 82, 93, 13 L. Ed. 337; *Scott v. Sandford*, 19 How. 393, 452, 15 L. Ed. 691; *McCutchen v. Marshall*, 8 Pet. 220, 240, 8 L. Ed. 923.

**6. Marriage.**—*Meister v. Moore*, 96 U. S. 76, 24 L. Ed. 826. See, generally, the title MARRIAGE.

**7. Status of persons as slaves.**—*Strader v. Graham*, 10 How. 82, 93, 13 L. Ed. 337; *Scott v. Sandford*, 19 How. 393, 452, 15 L. Ed. 691; *McCutchen v. Marshall*, 8

Pet. 220, 240, 8 L. Ed. 923. See, generally, the title SLAVERY AND INVOLUNTARY SERVITUDE.

**8. Status of slaves returning from free to slave state.**—*Scott v. Sandford*, 19 How. 393, 452, 15 L. Ed. 691; *Strader v. Graham*, 10 How. 82, 13 L. Ed. 337.

**9. Construction of statute as to manumission.**—*McCutchen v. Marshall*, 8 Pet. 220, 240, 8 L. Ed. 923.

**10. Service of process.**—*Amy v. Watertown*, 130 U. S. 301, 318, 32 L. Ed. 946 (service of process on municipal corporation); *Galpin v. Page*, 18 Wall. 350, 21 L. Ed. 959.

Where in suits brought in a state court to settle an alleged copartnership between the plaintiffs and a deceased partner, the supreme court of the state decided that there had been no sufficient service on an infant defendant who had succeeded to an undivided interest in the property of the deceased partner, and consequently that the lower court had had no authority to appoint a guardian ad litem for such infant, and therefore reversed a decree directing a sale of the property of the deceased, such adjudication is the law of the case, and is binding upon the circuit court of the United States in an action brought by a grantee of the heirs of the deceased against a purchaser at a sale under such decree. *Galpin v. Page*, 18 Wall. 350, 21 L. Ed. 959.

**11. Taxation laws in general.**—*Games v. Stiles*, 14 Pet. 322, 10 L. Ed. 476; *Lewis v. Monson*, 151 U. S. 545, 549, 38 L. Ed. 265; *Bardon v. Land, etc., Imp. Co.*, 157 U. S. 327, 331, 39 L. Ed. 719; *Miller v. Anmon*, 145 U. S. 421, 423, 36 L. Ed. 759;



the provisions of the federal constitution as impairing the obligation of contracts or depriving a person of his property without due process of law.<sup>12</sup>

bb. *Construction of State Laws as Binding Federal Courts*—(aa) *In General*.—The construction placed upon state laws in regard to taxation by the highest court of the state constitutes a rule of property binding on the United States courts, and should be followed with equal, if not with greater strictness than any other class of laws.<sup>13</sup>

(bb) *Consistency with State Constitution*.—Where the state court has held that state statutes in relation to taxation do not violate any provision of the state constitution, the federal courts will follow them upon such a question.<sup>14</sup>

Scottish Union, etc., Ins. Co. v. Bowland, 196 U. S. 611, 49 L. Ed. 614.

"No question is more clearly a matter of local law than one arising under the tax laws. Tax proceedings are carried on by the state for the purpose of collecting its revenue, and the various steps which shall be taken in such proceedings, the force and effect to be given to any act of the taxing officers, the results to follow the nonpayment of taxes, and the form and efficacy of the tax deed, are all subjects which the state has power to prescribe, and peculiarly and vitally affecting its well being. The determination of any questions affecting them is a matter primarily belonging to the courts of the state, and the national tribunals universally follow their ruling except in cases where it is claimed that some right protected by the federal constitution has been invaded." *Lewis v. Monson*, 151 U. S. 545, 549, 38 L. Ed. 265; *Bardon v. Land, etc., Imp. Co.*, 157 U. S. 327, 331, 39 L. Ed. 719.

12. *State taxation laws impairing contracts or depriving persons of property without due process*.—*Virginia Coupon Cases*, 114 U. S. 269, 270, 29 L. Ed. 185.

Thus a state law, the object of which was to deprive the taxpayer of his rights to pay his taxes in coupons issued by the state and which provided that they should be recoverable for taxes, abolishing the ordinary remedies for the recovery back of property seized by the tax-collector, and leaving him only the remedy for recovering back of the amount illegally collected from him are not binding on the federal courts as rules of decision, as they impair the obligation of contracts. *Virginia Coupon Cases*, 114 U. S. 269, 270, 29 L. Ed. 185.

13. *Construction of state laws in regard to taxation*—*In general*.—*Games v. Stiles*, 14 Pet. 322, 10 L. Ed. 476; *Stanley v. Supervisors*, 121 U. S. 535, 30 L. Ed. 1000; *Supervisors v. Stanley*, 105 U. S. 305, 26 L. Ed. 1044; *Palmer v. McMahon*, 133 U. S. 660, 665, 33 L. Ed. 772; *Stutsman County v. Wallace*, 142 U. S. 293, 305, 35 L. Ed. 1018; *People v. Weaver*, 100 U. S. 539, 541, 25 L. Ed. 705; *Board of Liquidation v. Louisiana*, 179 U. S. 622, 45 L. Ed. 347.

A statute of Massachusetts which requires corporations having a capital stock

divided into shares, to pay a tax of a certain percentage (one-sixth of one per cent.) upon "the excess of the market value" of all such stock over the value of its real estate and machinery, is, under the settled course of decision in the state of Massachusetts on its constitution and laws, a statute which imposes a franchise tax which decision is binding on the federal courts. *Hamilton Co. v. Massachusetts*, 6 Wall. 632, 18 L. Ed. 904.

The construction of a state revenue law by the highest state court is binding on federal courts. *Litchfield v. County of Webster*, 101 U. S. 773, 25 L. Ed. 925.

14. *Consistency of state laws with constitution*.—*Peoples Nat. Bank v. Marye*, 191 U. S. 272, 276, 48 L. Ed. 180; *Merchants', etc., Bank v. Pennsylvania*, 167 U. S. 461, 42 L. Ed. 236; *Schaefer v. Werling*, 188 U. S. 516, 47 L. Ed. 570; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 21, 35 L. Ed. 613; *State Railroad Tax Cases*, 92 U. S. 575, 23 L. Ed. 663; *Winona, etc., Land Co. v. Minnesota*, 159 U. S. 526, 534, 40 L. Ed. 247; *Carpenter v. Pennsylvania*, 17 How. 456, 15 L. Ed. 127; *Orr v. Gilman*, 183 U. S. 278, 283, 46 L. Ed. 196; *Upshur County v. Rich*, 135 U. S. 467, 477, 34 L. Ed. 196; *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 614, 43 L. Ed. 823; *New York State v. Roberts*, 171 U. S. 658, 661, 43 L. Ed. 323; *In re Tyler*, 149 U. S. 164, 187, 37 L. Ed. 689; *Adams Express Co. v. Ohio*, 165 U. S. 194, 219, 41 L. Ed. 683; *Adams Express Co. v. Indiana*, 165 U. S. 255, 41 L. Ed. 707; *Western Union Tel. Co. v. Missouri*, 190 U. S. 412, 425, 47 L. Ed. 1116; *Bailey v. Magwire*, 22 Wall. 215, 238, 22 L. Ed. 850; *Hodge v. Muscatine County*, 196 U. S. 276, 49 L. Ed. 477.

The decision of the supreme court of the state of Pennsylvania sustaining a statute taxing national banks is conclusive in this court, as to any question of conflict between it and the state constitution. *Merchants', etc., Bank v. Pennsylvania*, 167 U. S. 461, 462, 42 L. Ed. 236; *West River Bridge Co. v. Dix*, 6 How. 507, 12 L. Ed. 535.

"As to the contention that the act is in violation of § 3 of article V of the state constitution, the state supreme court held that this tax, although not a property or ad valorem tax, was controlled, even if the requirement of uniformity were appli-

(cc) *Power to Tax*.—The decision of the state courts as to the power of a municipal corporation to levy a tax, is conclusive on the federal courts.<sup>15</sup>

(dd) *Property Subject to Taxation*.—A decision by the state court as to property taxable under the state laws is binding on the federal courts.<sup>16</sup> This is true of a decision of a state court that a railroad company is doing business in the state within the meaning of a state statute imposing a tax upon all railroads doing business within the state.<sup>17</sup> And so where the supreme court of a state in construing its constitution and statutes decides that they distinguish between stock and credits and authorize only a deduction of debts from credits, and shares of stock are not credits, and neither resident nor non-resident shareholders are entitled to deduct bona fide indebtedness from the value of their shares of stock, this construction of the statute is binding on the federal courts.<sup>18</sup>

(ee) *Exemption from Taxation*.—When the question is whether property is exempt from taxation, and that exemption depends alone on a true construction of a statute of the state, the federal courts follow the construction placed upon the statute by the state courts, and in advance of such construction they should not declare property beyond the scope of the statute and exempt from taxation unless it is clear that such is the fact.<sup>19</sup> The decision of the highest court of a

cable, by the rule that 'a tax is uniform when it is equal upon all persons belonging to the described class upon which it is imposed.' And with that conclusion it is not our province, nor are we disposed, to interfere.' *Armour Packing Co. v. Lacy*, 200 U. S. 226, 236, 50 L. Ed. 451.

**15. Power to tax.**—*Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 614, 43 L. Ed. 823; *Supervisors v. United States*, 18 Wall. 71, 72, 21 L. Ed. 771.

Section 3275 of the Code of Iowa which says: "In case no property is found upon which to levy, which is not exempted by the last section (§ 3274), or if the judgment creditor elect not to issue execution against such corporation (a municipal one), he is entitled to the amount of his judgment and costs in the ordinary evidences of indebtedness issued by that corporation. And if the debtor corporation issues no scrip or evidences of debt, a tax must be levied as early as practicable, sufficient to pay off the judgment with interest and costs"—confers no independent power to levy a specific tax in order to pay a judgment recovered against a municipal corporation on warrants for ordinary county expenditures issued by such corporation since 1863, in which year (as repeatedly since) the supreme court of Iowa decided this to be the true interpretation of the section, and that where the power had not otherwise been conferred it was not given by that section. *Supervisors v. United States*, 18 Wall. 71, 21 L. Ed. 771.

**16. Decision as to property taxable.**—*Commercial Bank v. Chambers*, 182 U. S. 556, 560, 45 L. Ed. 1227; *Erie R. Co. v. Pennsylvania*, 21 Wall. 492, 22 L. Ed. 595.

**17. Meaning of statute imposing tax upon railroad company doing business within state.**—*Erie R. Co. v. Pennsylvania*, 21 Wall. 492, 22 L. Ed. 595.

**18. Deduction of debts from credits.**—*Shares of stock as credits.*—*Commercial*

*Bank v. Chambers*, 182 U. S. 556, 560, 45 L. Ed. 1227.

**19. Exemption of property from taxation.**—*New Orleans v. Stempel*, 175 U. S. 309, 316, 44 L. Ed. 174; *Stutsman County v. Wallace*, 142 U. S. 293, 306, 35 L. Ed. 1018; *Covington v. Kentucky*, 173 U. S. 231, 43 L. Ed. 679; *Commissioners v. Bancroft*, 203 U. S. 112, 118, 51 L. Ed. 112; *Adams v. Nashville*, 95 U. S. 19, 24 L. Ed. 369; *Baltimore Shipbuilding, etc., Co. v. Baltimore*, 195 U. S. 375, 49 L. Ed. 242.

"In other words, they should not release any property within the state from its liability to state taxation unless it is obvious that the statutes of the state warrant such exemption, or unless the mandates of the federal constitution compel it." *New Orleans v. Stempel*, 175 U. S. 309, 316, 44 L. Ed. 174.

The parties are citizens of North Dakota. The litigation proceeded upon the recognition and allowance of the exemption of the lands from taxation under the laws of the United States, and no federal questions were involved. "The case belongs to the class upon which the local decisions are ordinarily given controlling effect, and the adjudication of the highest tribunal of the state in the case cited should be considered in the light of this rule, though the appeal is from the supreme court of the territory, which reached the opposite conclusion." *Stutsman County v. Wallace*, 142 U. S. 293, 306, 35 L. Ed. 1018.

Lands were granted to a company by the United States for the purpose of the erection of a dry dock, the grant providing that the dock might be used by the federal government free of charge, and stipulating that the land was to revert to the government upon failure of the company to maintain a good and sufficient dock. The state levied a tax on the land under its statutes, and the highest court of the state decided that the tax was a lien only on the dock's interest in the land. It was



state construing a statute exempting from taxation public property used for public purposes as exempting that used only for governmental purposes, and as not exempting waterworks property of a city, is binding upon the federal courts.<sup>20</sup> Whether an exemption from taxation has been in fact repealed by a subsequent state statute is a question of state law in which the decisions of the highest courts of the state, in the absence of a contract, are binding.<sup>21</sup>

(ff) *Powers of Boards of Equalization*.—The federal courts are bound by a decision of the state court as to the powers possessed by a board of equalization with respect to the valuation of property.<sup>22</sup>

(gg) *Want of Uniformity or Discrimination*.—A decision by the highest court of a state that a statute imposing a tax is contrary to the state constitution for want of uniformity of the tax,<sup>23</sup> or because it discriminates in favor of personal over real property,<sup>24</sup> is binding on the federal courts.

(hh) *When Taxes Become Due*.—An opinion of a state court as to when, under the general laws of the state, a claim for taxes accrued, and a distinct ruling that such taxes did not accrue until after the consolidation of a corporation, and that, therefore, an exemption was lost, is binding on federal courts.<sup>25</sup>

(ii) *Medium of Payment*.—Where the highest court of a state decides that a state statute requires by legitimate, if not necessary consequence, that the taxes be collected in coin, this construction is binding on the federal courts.<sup>26</sup>

(jj) *Remedy for Collection of Taxes*.—The decision of the highest court of a state that a remedy for the collection of taxes provided by the state laws or that a change of remedies by the legislature was not contrary to the state constitution, is binding on the federal courts.<sup>27</sup>

(kk) *Sale of Land for Taxes*.—Federal courts are bound by decisions of state courts as to the mode in which state officers should exercise the power of selling land for taxes,<sup>28</sup> as to the validity of a sale or deed made in pursuance thereof,<sup>29</sup>

held that the decision was binding on the federal courts. *Baltimore Shipbuilding, etc., Co. v. Baltimore*, 195 U. S. 375, 49 L. Ed. 242.

**20. Exemption of public property.**—*Covington v. Kentucky*, 173 U. S. 231, 43 L. Ed. 679.

**21. Repeal of exemption.**—See ante, "Repeal," VII, J, 13, c, (12), (f), cc.

**22. Powers of board of equalization.**—*Copper Queen Consol. Min. Co. v. Territorial Board of Equalization*, 206 U. S. 474, 475, 51 L. Ed. 1143.

**23. Want of uniformity.**—*Railroad Companies v. Gaines*, 97 U. S. 697, 707, 24 L. Ed. 1091.

"The decision of the supreme court of the state declaring this section to be invalid, so far as it relates to companies not claiming to be exempt from taxation under their charters, because it does not conform to the constitutional requirement of uniformity, is binding upon us as a construction of a state statute by the highest court of the state." *Railroad Companies v. Gaines*, 97 U. S. 697, 709, 24 L. Ed. 1091.

**24. Discrimination in favor of personal over real property.**—*Gilman v. Sheboygan*, 2 Black 510, 17 L. Ed. 305.

**25. Accrual of taxes.**—*Yazoo, etc., R. Co. v. Adams*, 181 U. S. 580, 583, 45 L. Ed. 1011.

**26. Medium of payment.**—*Lane County v. Oregon*, 7 Wall. 71, 19 L. Ed. 101.

**27. Remedy for collection of taxes.**—*League v. Texas*, 184 U. S. 156, 158, 46 L. Ed. 478.

**28. Execution of power to sell land by officers.**—*Thatcher v. Powell*, 6 Wheat. 119, 120, 5 L. Ed. 221.

**29. Validity of tax sale.**—*Bardon v. Land, etc., Imp. Co.*, 157 U. S. 327, 330, 39 L. Ed. 719; *Gage v. Pumpelly*, 115 U. S. 454, 29 L. Ed. 449; *Raymond v. Longworth*, 14 How. 76, 14 L. Ed. 333; *Saranac Land, etc., Co. v. Comptroller*, 177 U. S. 318, 44 L. Ed. 786; *Woods v. Freeman*, 1 Wall. 398, 17 L. Ed. 543.

**Validity of sale illegal in part.**—Where the highest court of a state decides that when a part of the tax for which a sale of real estate is made is illegal, the sale is void, the decision is binding on the federal court. *Gage v. Pumpelly*, 115 U. S. 454, 29 L. Ed. 449.

**Validity of judgment.**—Where the highest court of a state decided that a judgment by default in a tax sale proceeding is not conclusive upon the taxpayer, but may be impeached collaterally, federal courts adopt the same rule. *Gage v. Pumpelly*, 115 U. S. 454, 29 L. Ed. 449.

A decision of a state court that a judgment for taxes is fatally defective if it does not in terms or by some mark indicating money, such as dollars or cents, show the amount, in money, of the tax for which it was rendered, and that numerals merely without some mark indicating that they stand for money, are insufficient, is binding on the federal courts. *Woods v. Freeman*, 1 Wall. 398, 17 L. Ed. 543.

**Sufficiency of deed.**—In the state of Ohio, it is not a sufficient description of



as to the rights of a purchaser,<sup>30</sup> or as to the liability of the county,<sup>31</sup> or county treasurer,<sup>32</sup> for defects in the title to lands sold. And likewise the decisions of a state court that a state statute providing for the conclusiveness of a tax title, unless an action is brought by the owner within one year from the recording of the tax deed to test the validity of the sale, does not apply to an action of ejectment by the person claiming under the tax deed against the owner, is conclusive upon the federal courts.<sup>33</sup>

(II) *Remedy of Taxpayer*.—The decision of the highest court of a state that a taxpayer has a remedy under a statute providing for the recovery of lands sold for taxes is binding on the federal courts.<sup>34</sup>

(b) *Assessments for Street Improvements*.—The construction placed by the highest court of a state upon a statute providing for paving streets and distributing an assessment therefor is conclusive upon the federal courts.<sup>35</sup>

(46) *Statute of Frauds*.—The statute of frauds in force in a state is applicable as a rule of decision in proceedings in the federal courts for that state.<sup>36</sup> The

taxable lands to say, "Cooper, James, 5 acres, § 24, T. 4, F. R. 1." A deed made in consequence of a sale for taxes under such a description is void. The courts of Ohio have so decided, and the supreme court of the United States adopts their decision. *Raymond v. Longworth*, 14 How. 76, 14 L. Ed. 333.

**30. Rights of purchaser.**—The decision of the highest court of the state that an assessor of taxes is the judicial officer, where property is exempt from taxation by class and not by specific description, and that an erroneous decision made by him in the matter of exemption does not deprive the tax proceedings of jurisdiction, and that the rule of caveat emptor applies to a purchaser at the sale, is binding upon the federal courts. *Stutsman County v. Wallace*, 142 U. S. 293, 35 L. Ed. 1018.

**31. Liability of county.**—The decision of the state courts that a county is not liable to a purchaser at a tax sale for a defect in title due to the fact that the land sold was not properly subject to taxation is binding on the federal courts. *Stutsman County v. Wallace*, 142 U. S. 293, 35 L. Ed. 1018.

**32. Liability of treasurer.**—The decision of a state court that a county treasurer acts as a ministerial officer in selling lands for delinquent taxes and that the treasurer is not liable personally for selling land which in fact was exempt from taxation, but which had been placed upon the tax list by the commissioner, is binding on the federal courts. *Stutsman County v. Wallace*, 142 U. S. 293, 35 L. Ed. 1018.

**33. When title becomes conclusive.**—*Williams v. Kirtland*, 13 Wall. 306, 20 L. Ed. 683; *Geekie v. Kirby Carpenter Co.*, 106 U. S. 355, 379, 27 L. Ed. 157.

**34. Remedy for recovery of lands sold for taxes.**—*Saranac Land, etc., Co. v. Comptroller*, 177 U. S. 318, 44 L. Ed. 786; *Turner v. New York*, 168 U. S. 90, 42 L. Ed. 392.

**35. Assessments for street improvements.**—*Hibben v. Smith*, 191 U. S. 310, 321, 48 L. Ed. 195; *Merchants', etc., Bank*

*v. Pennsylvania*, 167 U. S. 461, 42 L. Ed. 236; *Schaefer v. Werling*, 188 U. S. 516, 518, 47 L. Ed. 570; *Forsyth v. Hammond*, 166 U. S. 506, 41 L. Ed. 1095; *Pittsburgh, etc., R. Co. v. Backus*, 154 U. S. 421, 425, 31 L. Ed. 1031.

The question whether an action to foreclose a lien for unpaid assessments for street improvements is in rem, or in personam, under the practice in California, is one upon which the decision of the supreme court is binding, and its ruling that plaintiff, being no party to defendants' suits to foreclose, had a right to show by evidence aliunde the invalidity of the judgments obtained by them, is not a proper subject for review by this court. In no respect does the case present a federal question. *Wood v. Brady*, 150 U. S. 18, 23, 37 L. Ed. 981; *Dougherty v. Nevada Bank*, 160 U. S. 171, 40 L. Ed. 382.

**36. Application of state statute of frauds in federal courts.**—*Moses v. Lawrence County Bank*, 149 U. S. 298, 303, 37 L. Ed. 743; *Grafton v. Cummings*, 99 U. S. 100, 25 L. Ed. 366; *Brashear v. West*, 7 Pet. 608, 8 L. Ed. 801; *DeWolf v. Rabaud*, 1 Pet. 476, 7 L. Ed. 227.

"It was argued on behalf of the original plaintiff that the validity and effect of the guaranty must be governed by the general commercial law, without regard to any statute of Alabama. But there can be no doubt that the statute of frauds, even as applied to commercial instruments, is such a law of the state as has been declared by congress to be a rule of decision in the courts of the United States. Act of September 24, 1789, c. 20, § 34, 1 Stat. 92; Rev. Stat., § 721; *Mandeville v. Riddle*, 1 Cranch 290, 2 L. Ed. 112; *Riddle v. Mandeville*, 5 Cranch 322, 3 L. Ed. 114; *DeWolf v. Rabaud*, 1 Pet. 476, 7 L. Ed. 227; *Kirkman v. Hamilton*, 6 Pet. 20, 8 L. Ed. 305; *Brashear v. West*, 7 Pet. 608, 8 L. Ed. 801; *Paine v. Central Vermont R. Co.*, 118 U. S. 152, 30 L. Ed. 193." *Moses v. Lawrence County Bank*, 149 U. S. 298, 303, 37 L. Ed. 743. See, generally, the title FRAUDS, STATUTE OF.

A state statute providing that a special promise to answer for the debt, default

construction and effect given to the state statute of frauds by the highest court of the state is binding on the federal courts.<sup>37</sup>

(47) *Sunday Laws*.—The decision of the highest court of a state construing its laws in relation to the observance of the Sabbath are binding on the federal courts. Thus the decision of the highest court of a state as to what constitutes a "charity or necessity" within the meaning of an act prohibiting travel on Sunday except for charity or necessity, is binding on the federal courts.<sup>38</sup>

(48) *Treaties*.—The construction given a treaty by a state court is binding on the federal courts, where it has become a rule of property in the state.<sup>39</sup>

(49) *Waters and Watercourses*—(a) *Surface Waters*.—Proceedings in the federal courts with respect to the rights and liabilities of parties as to surface waters, are governed by the law of the state.<sup>40</sup>

(b) *Navigable Waters*.—If there is no federal law in existence, the question whether a boom in a navigable stream was authorized by state law, or conformed to the requirements of a state statute, is a state question; but where the boom is authorized by the state law, and an act of congress provides that such structures may continue, the question whether it is or is not such a structure as is authorized by the state law is for the federal courts.<sup>41</sup>

(50) *Wills*—(a) *Execution*.—The federal courts are bound by decisions of the highest courts of a state as to the sufficiency of the execution of a will under the state statutes.<sup>42</sup>

(b) *Validity of Decree Setting Aside Will*.—Decisions of the highest court of a state that under a state statute a decree setting aside a will is void as

or miscarriage of another is void, unless such agreement, or some note or memorandum thereof, expressing the consideration is in writing, and signed by the party to be charged, is binding as a rule of decision in the federal courts. *Moses v. Lawrence County Bank*, 149 U. S. 298, 303, 37 L. Ed. 743.

**37. Construction of statute of frauds.**—*Robinson & Co. v. Belt*, 187 U. S. 41, 46, 47 L. Ed. 65; *Lloyd v. Fulton*, 91 U. S. 479, 23 L. Ed. 363; *DeWolf v. Rabaud*, 1 Pet. 476, 7 L. Ed. 227; *Moses v. Lawrence County Bank*, 149 U. S. 298, 303, 37 L. Ed. 743; *Grafton v. Cummings*, 99 U. S. 100, 25 L. Ed. 366; *Brashear v. West*, 7 Pet. 608, 8 L. Ed. 801.

**Sufficiency of memorandum** under state statutes of frauds on sale of real estate is governed by the state law. *Grafton v. Cummings*, 99 U. S. 100, 25 L. Ed. 366.

**Part performance.**—Where the state court holds that although the statute of frauds avoids parol contracts for lands, yet the complete execution of the contract by conveying the land prevents the operation of the statute, this construction is binding on the federal courts. *Caldwell v. Carrington*, 9 Pet. 86, 9 L. Ed. 60.

**38. Sunday laws.**—*Bucher v. Cheshire R. Co.*, 125 U. S. 555, 584, 31 L. Ed. 795.

**39. Treaties.**—*Lattimer v. Poteet*, 14 Pet. 4, 18, 10 L. Ed. 328; *Best v. Polk*, 18 Wall. 112, 21 L. Ed. 805; *Francis v. Francis*, 203 U. S. 233, 51 L. Ed. 165; *Patterson v. Jenks*, 2 Pet. 216, 231, 7 L. Ed. 402.

The decision of the state court that a reservation in a treaty with the Indians ceding Indian lands to the United States reserved the fee simple estate to the par-

ties in whose favor the reservation was made, which has become the rule of property in the state, is binding on the federal courts. *Francis v. Francis*, 203 U. S. 233, 51 L. Ed. 165.

The construction given to a state court that a treaty with the Indians ceding Indian lands to the United States, by the highest court of a state, which constitutes a rule of property in the state, is binding on the federal courts. *Best v. Polk*, 18 Wall. 112, 21 L. Ed. 805.

Where a state has construed a treaty with the Indians by subsequent acts, manifesting an understanding of it, the federal court will not hesitate to adopt that construction. *Patterson v. Jenks*, 2 Pet. 216, 7 L. Ed. 402; *Lattimer v. Poteet*, 14 Pet. 4, 18, 10 L. Ed. 328.

**40. Surface waters.**—*Walker v. New Mexico, etc., R. Co.*, 165 U. S. 593, 41 L. Ed. 837. See, generally, the title **WATERS AND WATERCOURSES**.

"If a case came to this court from one of the states in which the doctrine of the civil law obtains, it would become our duty, having respect to this which is a matter of local law, to follow the decisions of that state. And in like manner we should follow the adverse ruling in a case coming from one of the states in which the common-law rule is recognized." *Walker v. New Mexico, etc., R. Co.*, 165 U. S. 593, 604, 41 L. Ed. 837.

**41. Navigation and navigable waters.**—*United States v. Bellingham Bay Boom Co.*, 176 U. S. 211, 44 L. Ed. 437, reaffirmed in *Dones v. Urrutia*, 202 U. S. 614, 50 L. Ed. 1172. See the title **NAVIGABLE WATERS**.

**42. Execution.**—*Davis v. Mason*, 1 Pet.



against all persons in interest who were not parties to the suit in which it was rendered, is binding on the federal courts in a suit involving a will of land in that state.<sup>43</sup>

(c) *Construction*.—When the construction of certain words in wills of real estate has become a settled rule of property in a state, that construction is to be followed by the courts of the United States in determining the title to land within the state, whether between the same or between other parties.<sup>44</sup> But a single decision of the highest court of a state upon the construction of the words of a particular devise is not conclusive evidence of the law of the state, in a case in a court of the United States, involving the construction of the same or like words, between other parties, or even between the same parties or their privies, unless presented under such circumstances as to be an adjudication of their rights.<sup>45</sup>

**K. Forms and Modes of Proceeding**—1. **NATURE OF REMEDIES IN UNITED STATES COURTS**—a. *In General*.—The remedies in the courts of the United States are to be, at common law or in equity, not according to the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles.<sup>46</sup>

503, 7 L. Ed. 239 (number of witnesses required).

**43. Validity of decree setting aside will.**—*McArthur v. Scott*, 113 U. S. 340, 391, 28 L. Ed. 1015. See, generally, the title **WILLS**.

**44. Where construction has become rule of property.**—*Barber v. Pittsburg, etc.*, R. Co., 166 U. S. 83, 99, 41 L. Ed. 925; *Jackson v. Chew*, 12 Wheat. 153, 6 L. Ed. 583; *Henderson v. Griffin*, 5 Pet. 151, 8 L. Ed. 79; *Suydam v. Williamson*, 24 How. 427, 16 L. Ed. 742; *Burgess v. Seligman*, 107 U. S. 20, 27 L. Ed. 359; *Orr v. Gilman*, 183 U. S. 278, 46 L. Ed. 196. See, also, *Inglis v. Sailor's Snug Harbour*, 3 Pet. 99, 101, 7 L. Ed. 617; *Nichols v. Eaton*, 91 U. S. 716, 23 L. Ed. 254.

It is settled law that this court will follow the construction put by the state courts upon wills devising property situated within the state. *Orr v. Gilman*, 183 U. S. 278, 283, 46 L. Ed. 196; *Daly v. James*, 8 Wheat. 495, 535, 5 L. Ed. 670.

**Common law construction.**—Where the state court has decided on the construction of a will, according to their view of the rules of the common law in that state, as a rule of property, the decision is as binding on the federal courts as those which are given on the construction of local statutes. *Henderson v. Griffin*, 5 Pet. 151, 8 L. Ed. 79.

**45. Where decision not settled as rule of property.**—*Barber v. Pittsburg, etc.*, R. Co., 166 U. S. 83, 100, 41 L. Ed. 925; *Lane v. Vick*, 3 How. 464, 11 L. Ed. 681; *Homer v. Brown*, 16 How. 354, 14 L. Ed. 970; *Gibson v. Lyon*, 115 U. S. 439, 29 L. Ed. 440; *Railroad Co. v. National Bank*, 102 U. S. 14, 53, 26 L. Ed. 61.

The mere construction of a will by a state court does not, as the construction of a statute of the state, constitute a rule of decision for the courts of the United States. If such construction by a state court had been long acquiesced in, so as

to become a rule of property, this court would follow. *Lane v. Vick*, 3 How. 464, 11 L. Ed. 681.

"Where, as in the case of *Jackson v. Chew*, 12 Wheat. 153, 167, 6 L. Ed. 583, the construction of a will had been settled by the highest courts of the state, and had long been acquiesced in as a rule of property, this court would follow it, because it had become a rule of property. The construction of a statute by the supreme court of a state is followed, without reference to the interests it may affect, or the parties to the suit in which its construction was involved. But the mere construction of a will by a state court does not, as the construction of a statute of the state, constitute a rule of decision for the courts of the United States. In the case of *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865, the effect of the 34th section of the judiciary act of 1789, and the construction of instruments by the state courts, are considered with greater precision than is found in some of the preceding cases on the same subject." *Lane v. Vick*, 3 How. 464, 476, 11 L. Ed. 681.

Controversies often arise where this court will refuse to adopt a decision of the state court, as in the construction of a will, unless it appears that the decision has become, by acquiescence, a rule of property in the state. *Railroad Co. v. National Bank*, 102 U. S. 14, 53, 26 L. Ed. 61; *Lane v. Vick*, 3 How. 464, 11 L. Ed. 681.

**46. Nature of remedies in federal courts.**—*Robinson v. Campbell*, 3 Wheat. 212, 4 L. Ed. 372; *Pennsylvania v. Wheeling, etc.*, Bridge Co., 13 How. 518, 563, 14 L. Ed. 249; *Fenn v. Holme*, 21 How. 481, 484, 16 L. Ed. 198; *Thompson v. Railroad Companies*, 6 Wall. 134, 137, 18 L. Ed. 765; *Van Norden v. Morton*, 99 U. S. 378, 380, 25 L. Ed. 453; *Scott v. Neely*, 140 U. S. 106, 111, 35 L. Ed. 358; *Waring v. Clarke*, 5 How. 441, 475, 12 L. Ed. 226;



b. *Preservation of Distinction between Law and Equity*.—See the title EQUITY.

2. POWER TO REGULATE PROCEDURE IN UNITED STATES COURTS—*a. Power of Congress*.—Congress has exclusive authority to regulate the proceedings in the courts of the United States.<sup>47</sup>

b. *Power of State*.—The states have no power to regulate or prescribe the forms of practice and procedure in the federal courts, and state laws have no efficacy for this purpose except so far as they are adopted, or except so far as the federal judiciary are directed, by act of congress, to conform the practice and modes of procedure in the federal courts thereto.<sup>48</sup> A state law adopted for the purpose of regulating those matters in federal courts is unconstitutional and void.<sup>49</sup>

3. UNDER PRACTICE CONFORMITY ACT—*a. In General*.—The practice con-

Sheffield Furnace Co. *v.* Witherow, 149 U. S. 574, 579, 37 L. Ed. 853; Hooper *v.* Scheimer, 23 How. 235, 16 L. Ed. 452; Sheirburn *v.* Cordova, 24 How. 423, 16 L. Ed. 741; Whitehead *v.* Shattuck, 138 U. S. 146, 34 L. Ed. 873; Smyth *v.* New Orleans, etc., Banking Co., 141 U. S. 656, 35 L. Ed. 891. See, also, Irvine *v.* Marshall, 20 How. 558, 565, 15 L. Ed. 994.

But where by the statutes of a state, a title, which would otherwise be deemed merely equitable, is recognized as a legal title, or a title which would be good at law, is under circumstances of an equitable nature declared by such statutes to be void; the rights of the parties, in such a case, may be as fully considered in a suit at law in the courts of the United States as they would be in any state court. Robinson *v.* Campbell, 3 Wheat. 212, 222, 4 L. Ed. 372.

47. *Power of congress to regulate procedure in United States courts*.—Wayman *v.* Southard, 10 Wheat. 1, 6 L. Ed. 253; United States Bank *v.* Halstead, 10 Wheat. 51, 6 L. Ed. 264; Beers *v.* Haughton, 9 Pet. 329, 9 L. Ed. 145; Insurance Co. *v.* Morse, 20 Wall. 445, 22 L. Ed. 365; Railway Co. *v.* Whitton, 13 Wall. 270, 286, 20 L. Ed. 571; The Moses Taylor, 4 Wall. 411, 18 L. Ed. 397; Riggs *v.* Johnson County, 6 Wall. 166, 18 L. Ed. 768; Ogden *v.* Saunders, 12 Wheat. 213, 6 L. Ed. 606; Keary *v.* Farmers', etc., Bank, 16 Pet. 88, 89, 10 L. Ed. 897; United States *v.* Eckford, 6 Wall. 484, 490, 18 L. Ed. 920; Clark *v.* Smith, 13 Pet. 195, 10 L. Ed. 123; Amis *v.* Smith, 16 Pet. 303, 10 L. Ed. 973; Bronson *v.* Kinzie, 1 How. 311, 11 L. Ed. 143; Boyle *v.* Zacharie, 6 Pet. 648, 8 L. Ed. 532; Parsons *v.* Bedford, 3 Pet. 433, 7 L. Ed. 732.

48. *Power of state to regulate federal procedure*.—Wayman *v.* Southard, 10 Wheat. 1, 6 L. Ed. 253; United States Bank *v.* Halstead, 10 Wheat. 51, 6 L. Ed. 264; Beers *v.* Haughton, 9 Pet. 329, 9 L. Ed. 145; Payne *v.* Hook, 7 Wall. 425, 19 L. Ed. 260; Insurance Co. *v.* Morse, 20 Wall. 445, 22 L. Ed. 365; Railway Co. *v.* Whitton, 13 Wall. 270, 286, 20 L. Ed. 571; The Moses Taylor, 4 Wall. 411, 18 L. Ed. 397; Riggs *v.* Johnson County, 6 Wall. 166, 187, 18 L. Ed. 768; Ogden *v.* Saunders, 12 Wheat. 213, 6 L. Ed. 606; Keary

*v.* Farmers', etc., Bank, 16 Pet. 88, 89, 10 L. Ed. 897; United States *v.* Eckford, 6 Wall. 484, 490, 18 L. Ed. 920; Boyle *v.* Zacharie, 6 Pet. 648, 8 L. Ed. 532; Clark *v.* Smith, 13 Pet. 195, 10 L. Ed. 123; Amis *v.* Smith, 16 Pet. 303, 10 L. Ed. 973; Bronson *v.* Kinzie, 1 How. 311, 11 L. Ed. 143; Parsons *v.* Bedford, 3 Pet. 433, 7 L. Ed. 732.

Congress has exclusive power to regulate the practice and prescribe the mode of procedure in the federal courts; and that provision of the judiciary act which provides that in actions at common law the proceedings of the federal courts shall conform to the proceedings in the courts of the federal states, is a mere adoption of the state law and form of procedure, and does not confer upon states the right to prescribe what the practice or procedure of the federal court sitting within its limits shall be, nor entitle litigants to demand as of right that the state practice shall be adopted where the judiciary act does not positively prescribe that it shall be adopted in the federal courts. Parsons *v.* Bedford, 3 Pet. 433, 7 L. Ed. 732.

State legislatures have no authority to prescribe the forms or modes of proceeding in the courts of the United States; but having created a right and at the same time prescribed the remedy to enforce it, if such remedy is substantially consistent with the ordinary modes of proceeding on the chancery side of the federal courts, no reason exists why it should not be pursued in the same form as in the state courts. On the contrary, propriety and convenience suggest, that the practice in the state and federal courts should not materially differ when titles to land are the subject of investigation. Clark *v.* Smith, 13 Pet. 195, 10 L. Ed. 123.

49. *State law attempting to regulate is void*.—United States Bank *v.* Halstead, 10 Wheat. 51, 6 L. Ed. 264; The Mayor *v.* Lord, 9 Wall. 409, 19 L. Ed. 704; Keary *v.* Farmers', etc., Bank, 16 Pet. 88, 89, 10 L. Ed. 897.

A state law prescribing rules of practice has no efficacy in the courts of the United States, unless those courts adopt it. The Mayor *v.* Lord, 9 Wall. 409, 19 L. Ed. 704.

formity act provides that "the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceedings existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, anything in the rules of court to the contrary notwithstanding."<sup>50</sup>

b. *Origin and Purpose of Act.*—The statute had its origin in the code enactments of many of the states, and was intended to relieve the legal profession from the burden of studying and of practicing under the two distinct and different systems of the law of procedure in the same locality, one obtaining in the courts of the United States, the other in the courts of the state.<sup>51</sup>

**50. Practice conformity act.**—Rev. Stat., § 914; *Sears v. Eastburn*, 10 How. 187, 13 L. Ed. 381; *Ex parte Fisk*, 113 U. S. 713, 719, 28 L. Ed. 1117; *West v. Smith*, 101 U. S. 263, 264, 25 L. Ed. 809; *Nudd v. Burrows*, 91 U. S. 426, 23 L. Ed. 286; *Perez v. Fernandez*, 202 U. S. 80, 50 L. Ed. 942; *Barnet v. National Bank*, 98 U. S. 555, 558, 25 L. Ed. 212; *Baltimore, etc., R. Co. v. Joy*, 173 U. S. 226, 230, 43 L. Ed. 677; *Fenn v. Holme*, 21 How. 481, 485, 16 L. Ed. 198; *Boogher v. Insurance Co.*, 103 U. S. 90, 26 L. Ed. 310; *Chateaugay, etc., Iron Co., Petitioner*, 128 U. S. 544, 553, 32 L. Ed. 508; *Amy v. Watertown (No. 1)*, 130 U. S. 301, 32 L. Ed. 946; *Robertson v. Perkins*, 129 U. S. 233, 32 L. Ed. 686; *Hudson v. Parker*, 156 U. S. 277, 281, 39 L. Ed. 424; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 209, 36 L. Ed. 943; *Coffey v. United States*, 117 U. S. 233, 29 L. Ed. 890; *Phelps v. Oaks*, 117 U. S. 236, 238, 29 L. Ed. 888; *Sears v. Eastburn*, 10 How. 187, 13 L. Ed. 381; *Lamaster v. Keeler*, 123 U. S. 376, 387, 31 L. Ed. 238.

A party by going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality. The wise policy of the constitution gives him a choice of tribunals. In the former he may hope to escape the local influences which sometimes disturb the even flow of justice. And in the regular course of procedure, if the amount involved be large enough, he may have access to this tribunal as the final arbiter of his rights. *Davis v. Gray*, 16 Wall. 203, 21 L. Ed. 447; *Ex parte McNiel*, 13 Wall. 236, 20 L. Ed. 624.

The policy of congress, as shown by numerous statutes, has been to adopt for the several courts in suits at common law, the processes and modes of proceeding of the state courts in which they are held. *Moncure v. Zunts*, 11 Wall. 416, 20 L. Ed. 181.

**51. Origin and purpose of conformity act.**—*Nudd v. Burrows*, 91 U. S. 426, 441, 23 L. Ed. 286; *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, 300, 23 L. Ed. 898; *Lamaster v. Keeler*, 123 U. S. 376, 388, 31 L. Ed. 238; *Chateaugay, etc., Iron Co., Petitioner*, 128 U. S. 544, 554, 32 L. Ed. 508.

"The purpose of the provision is apparent upon its face. No analysis is

necessary to reach it. It was to bring about uniformity in the law of procedure in the federal and state courts of the same locality. It had its origin in the code enactments of many of the states. While in the federal tribunals the common-law pleadings, forms, and practice were adhered to, in the state courts of the same district the simpler forms of the local code prevailed. This involved the necessity on the part of the bar of studying two distinct systems of remedial law, and of practising according to the wholly dissimilar requirements of both. The inconvenience of such a state of things is obvious. The evil was a serious one. It was the aim of the provision in question to remove it. This was done by bringing about the conformity in the courts of the United States which it prescribes. The remedy was complete. The personal administration by the judge of his duties while sitting upon the bench was not complained of. No one objected, or sought a remedy in that direction." *Nudd v. Burrows*, 91 U. S. 426, 441, 23 L. Ed. 286; *Lamaster v. Keeler*, 123 U. S. 376, 388, 31 L. Ed. 238.

This section is a re-enactment of § 5 of the act of June 1, 1872, "to further the administration of justice" (17 Stat. 196, c. 255), and was intended to assimilate the pleadings and the procedure in common-law cases in the federal courts to the pleadings and procedure used in such cases in the courts of record of the state within which the federal courts are held. Much inconvenience had been previously felt by the profession from the dissimilarity in pleadings, forms, and modes of procedure of the federal courts from those in the courts of the state, consequent upon the general adherence of the former to the common-law forms of actions, pleadings, and modes of procedure; whilst the distinctions in such forms of action and the system of pleading and the modes of procedure peculiar to them had been in many states abrogated by statute. The new codes of procedure did not require an accurate knowledge of the intricacies of common-law pleading; and to obviate the embarrassment following the use of different systems in the two courts the section mentioned of the act of 1872 was adopted. *Lamaster v. Keeler*, 123 U. S. 376, 388, 31 L. Ed. 238.



c. *In What Courts Conformity Required*—(1) *Under Original Act of Congress*.—The original process acts were made applicable only to those states which, at that time, had been admitted into the Union.<sup>52</sup>

(2) *Under Subsequent Acts Extending Conformity Act to States Admitted Prior to 1842*.—This defect was remedied by subsequent statutes so as to apply to all states admitted prior to 1842, when the last general provision on the subject was passed.<sup>53</sup>

(3) *States Admitted Since 1842*.—The practice conformity act of congress is usually made applicable to the new states upon their admission, by the acts admitting them as states.<sup>54</sup>

(4) *United States Courts in Louisiana*.—In Louisiana, by act of congress, the mode of proceeding in civil cases in the courts of the United States must conform to the laws directing the mode of practice in the district courts of the state, and the judges of those courts may make alterations necessary to conform the practice to the organization of the federal courts, though this authority is quite limited.<sup>55</sup>

**52. Original act not applicable to states not admitted.**—*Fullerton v. United States Bank*, 1 Pet. 604, 7 L. Ed. 280; *Bronson v. Kinzie*, 1 How. 311, 11 L. Ed. 143; *United States v. Council of Keokuk*, 6 Wall. 514, 516, 18 L. Ed. 933; *Amy v. Watertown* (No. 1), 130 U. S. 301, 303, 32 L. Ed. 946.

The state of Ohio not having been admitted into the union until 1802, the act of congress passed May 8th, 1792, which is expressly confined in its operations to the day of its passage, in adopting the practice of the state courts into the courts of the United States could have no operation in that state; but the district court of the United States, established in that state, in 1803, was vested with all the powers and jurisdiction of the district court of Kentucky, which exercised full circuit court jurisdiction, with power to create a practice for its own government. The district court of Ohio did not create a system for itself, but finding one established in the state, in the true spirit of the policy pursued by the United States, proceeded to administer justice according to the practice of the state courts, and by a single rule, adopted the state system of practice. When, in 1807, the seventh circuit was established, the judge assigned to that circuit found the practice of the state adopted, in fact, into the circuit court of the United States, and the same has since, so far as it was found practicable and convenient, by a uniform understanding, been pursued, without any positive rule upon the subject. *Fullerton v. United States Bank*, 1 Pet. 604, 7 L. Ed. 280.

**53. Later statutes extended rule to states admitted prior to 1842.**—*McCracken v. Hayward*, 2 How. 608, 615, 11 L. Ed. 397; *United States v. Council of Keokuk*, 6 Wall. 514, 516, 18 L. Ed. 933.

Prior to 1828, congress had passed no process acts applicable to the states admitted into the Union after 1789. To remedy this defect, the act of May, 1828, directed that writs of execution and other final process issued on judgments and decrees, and the proceedings thereupon,

shall be the same in each state as are now used in the courts of such state, etc., thus adopting the same principles which had been established by this court in the construction of the acts of 1789 and 1792. *McCracken v. Hayward*, 2 How. 608, 615, 11 L. Ed. 397.

In 1828 a law was passed adopting for the federal courts in the new states, admitted since 1789, the forms of process, and forms and modes of proceeding of the highest courts of those states respectively, as then existing, subject to alteration by the courts themselves or the supreme court of the United States. 4 Stat. 278. By the act of August 1, 1842, the provisions of the act of 1828 were extended to the states admitted in the intermediate time. *Amy v. Watertown*, 130 U. S. 301, 303, 32 L. Ed. 946; *United States v. Council of Keokuk*, 6 Wall. 514, 516, 18 L. Ed. 933.

**54. Act admitting states making process act applicable to new states.**—The effect of an act of 1861, admitting Kansas into the Union, and providing that "all the laws of the United States, which are not locally inapplicable, shall have the same force and effect within that state as in other states of the Union;" and constituting the state "a judicial district," was to re-enact, as respected Kansas, the provision of the act of 1828. *Smith v. Cockrill*, 6 Wall. 756, 18 L. Ed. 973.

An act of congress passed on the admission of Iowa into the Union in 1845, having provided that the laws of the United States not locally inapplicable should have the same effect within that state as elsewhere—the "Process act" of May 19th, 1828—by which the modes and forms of process in common-law suits were made the same in the circuit courts of the United States as those used in the highest state court of original jurisdiction—became applicable to the federal courts of Iowa. *United States v. Council of Keokuk*, 6 Wall. 514, 18 L. Ed. 933.

**55. In Louisiana.**—*Moncure v. Zunts*, 11 Wall. 416, 421, 20 L. Ed. 181; *Duncan v. United States*, 7 Pet. 435, 440, 8 L. Ed.



(5) *United States Courts for Porto Rico*—(a) *In General*.—The district court of the United States for Porto Rico, which has the jurisdiction of a circuit court of the United States, is governed by the local procedure and practice recognized and established in Porto Rico.<sup>56</sup>

739; *Livingston v. Story*, 9 Pet. 632, 656, 9 L. Ed. 255; *Parsons v. Bedford*, 3 Pet. 433, 7 L. Ed. 732.

On the 26th of May, 1824, congress passed an act entitled "an act to regulate the practice in the courts of the United States for the district of Louisiana; in which it is provided, that the mode of proceeding in civil causes in the courts of the United States, that now are, or hereafter may be, established in the state of Louisiana, shall be conformable to the laws directing the mode of practice in the district courts in the said state; provided, that the judge of any such court of the United States may alter the times limited or allowed for different proceedings in the state courts, and make, by rule, such other provisions as may be necessary to adapt the said laws of procedure to the organization of such court of the United States, and to avoid any discrepancy, if any such exist, between such state laws and the laws of the United States." This section was a virtual repeal, within the state of Louisiana, of all previous acts of congress which regulated the practice of the courts of the United States, and which came within its purview. It adopted the practice of the state courts of Louisiana, subject to such alterations as the district judge of the United States might deem necessary, to conform to the organization of the district court, and avoid any discrepancy with the laws of the Union. *Duncan v. United States*, 7 Pet. 435, 450, 8 L. Ed. 739; *Moncure v. Zunts*, 11 Wall. 416, 421, 20 L. Ed. 181.

The mode of procedure in the courts of Louisiana, conforming very nearly to those of the civil law, and both the code of procedure and the civil code of that state differing so widely from the system of common law adopted in all the other states, was the reason of this special purpose of congress to require the federal courts in that state to conform to the usages of the local law. *Moncure v. Zunts*, 11 Wall. 416, 421, 20 L. Ed. 181; *Livingston v. Story*, 9 Pet. 632, 656, 9 L. Ed. 255.

The act of May 26, 1824 (4 Stat. at Large 62), not only adopts the mode of proceedings then established in the state of Louisiana, but requires the federal courts to conform to such changes as may be made in that state; and limits very materially the power of the federal courts to modify or change those rules, as that power exists in the courts of other districts. *Moncure v. Zunts*, 11 Wall. 416, 20 L. Ed. 181.

The proviso in the act of congress of the 26th of May, 1824, ch. 181, demonstrates that it was not the intention of congress, to give an absolute and imperative force to the state modes of proceed-

ing in civil causes, in Louisiana, in the courts of the United States; for it authorizes the judge to modify them, so as to adapt them to the organization of his own courts; and it further demonstrates, that no absolute repeal was intended to the antecedent modes of proceeding authorized in the United States courts, under former acts of congress; for it leaves the judge at liberty to make rules, by which discrepancy between the state laws and the laws of the United States may be avoided. *Parsons v. Bedford*, 3 Pet. 433, 7 L. Ed. 732.

*In equity causes*.—See, generally, the title EQUITY.

**56. Federal courts for Porto Rico.**—*Perez v. Fernandez*, 202 U. S. 80, 97, 50 L. Ed. 942; *Romeu v. Todd*, 206 U. S. 358, 368, 51 L. Ed. 1093.

The act providing for the district court of the United States for Porto Rico declared, among other things, that that court shall have, "in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizant in the circuit courts of the United States, and shall proceed therein in the same manner as a circuit court." *Romeu v. Todd*, 206 U. S. 358, 369, 51 L. Ed. 1093.

"We think it was the intention of congress in the Porto Rican act to require the district court exercising the jurisdiction of a circuit court, in analogy to the powers of the circuit courts in the states, to adapt themselves, save in the excepted cases in equity and admiralty, to the local procedure and practice in Porto Rico. This conclusion is in accord with the policy of the United States, evidenced in its legislation concerning the islands ceded by Spain, and secures to the people thereof a continuation of the laws and methods of practice and administration familiar to them, which are to be controlling until changed by law." *Perez v. Fernandez*, 202 U. S. 80, 97, 50 L. Ed. 942.

"Congress in providing a government for Porto Rico, evidently intended to preserve to the people of that island the system of local law to which they had been accustomed, nor can we, consistently with this enlightened purpose, assent to the conclusion that the mere provision of the act, by which a court was created to enforce the local law, empowered the court so created to set at naught the local law by disregarding fundamental rules of real property governing in the island, thereby creating confusion and uncertainty, and hence tending to the destruction of the rights of innocent third parties. Especially is this conclusion rendered necessary when a consideration,

(b) *Practice in Attachment Cases.*—The district court of Porto Rico, exercising the jurisdiction of a circuit court in its practice as to the issuing of attachments is to adapt itself to the local practice recognized and established in Porto Rico.<sup>57</sup> The general provisions as to jury trials in civil causes in circuit courts of the United States are not inconsistent with the enforcement of a special statutory proceeding as to the assessment of damages in attachment proceedings, as to which the United States has no special statutory procedure, and enforces in that respect the requirements of the local law.<sup>58</sup> As a common-law action for a wrongful and malicious attachment was unknown to the Porto Rican procedure, the district court for Porto Rico has no jurisdiction of such an action.<sup>59</sup>

(c) *Doctrine of Lis Pendens.*—The local statutory rule of real property, requiring the giving and recording of a cautionary notice of the pending suit in order to affect innocent third parties dealing with the recorded owner, was applicable to a suit brought on the equity side of the United States district court for Porto Rico.<sup>60</sup>

d. *Nature and Extent of Conformity Required.*—The conformity of the federal to the state practice, is required to be as near as may be—not as near as may be possible, or near as may be practicable.<sup>61</sup> This indefiniteness as to conformity required was suggested by a purpose, and devolves upon the judges to be affected the duty of construing and deciding, and gives them power to reject, any subordinate provision in a state statute which, in their judgment, will unwisely encumber the administration of the law, or tend to defeat the ends of justice.<sup>62</sup>

previously adverted to, is again called to mind, that is, that all the local law of Porto Rico is within the legislative control of congress. The considerations which we have thus expounded are illustrated in various other aspects by previous rulings, concerning the construction and import of the Foraker act." *Romeu v. Todd*, 206 U. S. 358, 369, 51 L. Ed. 1093, citing *Crowley v. United States*, 194 U. S. 461, 48 L. Ed. 1075; *Rodriguez v. United States*, 198 U. S. 156, 49 L. Ed. 994; *Serralles' Succession v. Esbri*, 200 U. S. 103, 50 L. Ed. 391; *American R. Co. v. Castro*, 204 U. S. 453, 51 L. Ed. 564.

57. *Practice in attachment cases.*—*Perez v. Fernandez*, 202 U. S. 80, 98, 50 L. Ed. 942. See, generally, the title ATTACHMENT AND GARNISHMENT, vol. 2, p. 660.

58. *Assessment of damages in attachment.*—*Perez v. Fernandez*, 202 U. S. 80, 100, 50 L. Ed. 942.

59. *Action for wrongful attachment.*—*Perez v. Fernandez*, 202 U. S. 80, 101, 50 L. Ed. 942.

60. *Lis pendens.*—*Romeu v. Todd*, 206 U. S. 358, 368, 51 L. Ed. 1093. See, generally, the title LIS PENDENS.

61. *Conformity to be "as near as may be."*—Revised Statutes, § 914; *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898; *Phelps v. Oaks*, 117 U. S. 236, 239, 29 L. Ed. 888; *Stewart v. Dunham*, 115 U. S. 61, 29 L. Ed. 329; *Coffey v. United States*, 117 U. S. 233, 235, 29 L. Ed. 890; *Atlantic & Pac. R. Co. v. Hopkins*, 94 U. S. 11, 13, 24 L. Ed. 48; *Southern Pac. R. Co. v. Denton*, 146 U. S. 202, 209, 36 L. Ed. 943; *McCracken v. Hay-*

*ward*, 2 How. 608, 11 L. Ed. 397; *Shepard v. Adams*, 168 U. S. 618, 626, 42 L. Ed. 602.

"It is obvious that a strict and literal conformity by the United States courts to the state provisions regulating procedure is practically impossible, or, at least, not without overturning and disarranging the settled practice in the federal courts." *Shepard v. Adams*, 168 U. S. 618, 624, 42 L. Ed. 602.

62. *Discretion and power of court in conforming federal to state practice.*—*Southern Pac. R. Co. v. Denton*, 146 U. S. 202, 209, 36 L. Ed. 943; *Phelps v. Oaks*, 117 U. S. 236, 239, 29 L. Ed. 888; *Stewart v. Dunham*, 115 U. S. 61, 29 L. Ed. 329; *Shepard v. Adams*, 168 U. S. 618, 626, 42 L. Ed. 602; *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, 300, 23 L. Ed. 898.

"It must be held," as was said in *Erstein v. Rothschild*, 22 Fed. Rep. 61, 64, "that the body of the local law thus adopted in the general, must be considered in the courts of the United States in the light of their own system of jurisprudence, as defined by their own constitution as tribunals, and of other acts of congress on the same subject. It can hardly be supposed that it was the intent of this legislation to place the courts of the United States in each state, in reference to their own practice and procedure, upon the footing merely of subordinate state courts, required to look from time to time to the supreme court of the state for authoritative rules for their guidance in those details. To do so, would be, in many cases, to trench, in important particulars not easy to foresee,

e. *In What Causes Conformity Required.*—The practice conformity act requires the practice, pleadings, and forms and modes of proceedings in civil causes other than equity or admiralty causes to conform to the practice existing at the time in like causes in courts of the state.<sup>63</sup> A suit in rem for forfeiture for violation of the revenue laws is not governed by the state practice, where there are no like causes under the state practice.<sup>64</sup>

f. *Adoption of State Practice by Rule of Court*—(1) *Power of Court to Adopt State Practice*—(a) *In General.*—Under the original practice acts, making the state practice applicable to proceedings in the federal courts, the federal courts could from time to time alter their process by rule, in such manner as they deemed expedient.<sup>65</sup> But this discretionary power was restricted by the act of May 19, 1828, c. 68, and since that act alterations can only be made so as to conform the federal practice to any change which may be adopted by the legis-

upon substantial rights, protected by the peculiar constitution of the federal judiciary, and which might seriously affect, in cases easily supposed, the proper correlation and independence of the two systems of federal and state judicial tribunals." *Phelps v. Oaks*, 117 U. S. 236, 240, 29 L. Ed. 888.

63. *In what causes conformity required.*—Rev. Stat. § 914; *Ex parte Fisk*, 113 U. S. 713, 719, 28 L. Ed. 1117; *Coffey v. United States*, 117 U. S. 233, 235, 29 L. Ed. 890.

64. *Suits for forfeiture for violation of revenue laws.*—*Coffey v. United States*, 117 U. S. 233, 235, 29 L. Ed. 890.

"Such suits in rem are peculiar in their practice, pleadings, and forms of procedure, and, so long as there is ample scope for the operation of § 914 of the Revised Statutes in regard to civil suits in personam, and no intention is manifest to change the established practice in such suits in rem, and any change in practice is limited to 'like causes,' we must continue to regard the former practice as applicable to the present suit." *Coffey v. United States*, 117 U. S. 233, 235, 29 L. Ed. 890.

Section 914 prescribes a conformity to the practice in the courts of the state only "as near as may be," and only "in like causes." It is a proper construction of this section to hold, that, while the provisions of the Code of Kentucky in regard to pleadings in civil suits in personam apply to like causes in the federal courts in Kentucky, they do not apply to suits in rem by the United States for the forfeiture of property, after its seizure, for the violation of a revenue law, because there are no "like causes" known to the laws of Kentucky. *Coffey v. United States*, 117 U. S. 233, 235, 29 L. Ed. 890.

In *Union Ins. Co. v. United States*, 6 Wall. 759, 764, 18 L. Ed. 879, where land was seized and proceeded against as forfeited to the United States under a confiscation act, it was held, that, while either party had a right to demand a trial by jury, the proceedings were to be "in general conformity to the course in admiralty." A like ruling was made, in a

like case, in *Armstrong's Foundry*, 6 Wall. 766, 769, 18 L. Ed. 882, and in a case of the seizure of personal property on land, in *Morris's Cotton*, 8 Wall. 507, 511, 19 L. Ed. 481. *Coffey v. United States*, 117 U. S. 233, 235, 29 L. Ed. 890.

65. *Power to alter practice by rule, under original act.*—*Fink v. O'Neil*, 106 U. S. 272, 27 L. Ed. 196; *Wayman v. Southard*, 10 Wheat. 1, 6 L. Ed. 253; *United States Bank v. Halstead*, 10 Wheat. 51, 60, 6 L. Ed. 264; *Ex parte Crane*, 5 Pet. 190, 210, 8 L. Ed. 92; *Cooke v. Avery*, 147 U. S. 375, 386, 37 L. Ed. 209.

While it was the purpose of congress to bring about a general uniformity in federal and state proceedings in civil cases, and to confer upon suitors in courts of the United States the advantage of remedies provided by state legislation, yet it was also the intention to reach such uniformity often largely through the discretion of the federal courts, exercised in the form of general rules, adopted from time to time, and so regulating their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings. *Shepard v. Adams*, 168 U. S. 618, 625, 42 L. Ed. 602.

The United States courts were authorized and empowered to change their rules as to executions, so as to conform to state practice, by making them leviable on property not subject to levy at the time of the passage of the act of congress, or by exempting property not then exempt, but since exempted by state law. *Beers v. Haughton*, 9 Pet. 329, 9 L. Ed. 145; *United States Bank v. Halstead*, 10 Wheat. 51, 6 L. Ed. 264; *Fink v. O'Neil*, 106 U. S. 272, 276, 27 L. Ed. 196; *Ward v. Chamberlain*, 2 Black 430, 440, 17 L. Ed. 319.

The laws of the United States authorize the courts of the Union so to alter the form of the process of execution used in the supreme courts of the states in 1789, so as to subject to execution lands and other property not thus subject by the state laws in force at that time. *United States Bank v. Halstead*, 10 Wheat. 51, 6 L. Ed. 264.



latures of the respective states for the state courts.<sup>66</sup> The federal court may adopt by rule of court a state statute providing for a joint action against the makers and indorsers of promissory notes.<sup>67</sup>

(b) *Court to Which Cause Removed*.—Where a case is removed from one circuit court of the United States to another, sitting in another state, the latter is as competent to adopt the practice of the state from which the case was removed as the former.<sup>68</sup>

(c) *District Court or District Court Exercising Circuit Court Powers*.—No rule, under the third section of the act of 1828, which authorizes the courts of the United States to alter final process, so far as to conform it to any changes which may be adopted by state legislation and state adjudications, made by a district judge, will be recognized by the supreme court as binding, except those made by the district courts exercising circuit court powers.<sup>69</sup>

(2) *Necessity for Statutory Change in State Practice to Be Adopted by Rule of Court*.—A state rule of practice enacted after the act of congress is not applicable to proceedings in the federal courts unless adopted by a rule of practice by those courts.<sup>70</sup> This rule has been applied to state statutes as to appearances,<sup>71</sup>

**66. Power to change practice, by rules, under later acts.**—*Fink v. O'Neil*, 106 U. S. 272, 278, 27 L. Ed. 196; *Cooke v. Avery*, 147 U. S. 375, 387, 37 L. Ed. 209.

Since 1792 it has always been within the power of the courts, by general rules, to adapt their practice to the exigencies and conditions of the times. *Amy v. Watertown*, 130 U. S. 301, 303, 32 L. Ed. 946.

**67. Adoption of statute providing for joint action against maker and indorsers.**—*Fullerton v. United States Bank*, 1 Pet. 604, 7 L. Ed. 280.

Although the act of the legislature of Ohio, regulating the mode of proceeding in actions on promissory notes, was passed after the making of the note upon which this action was brought, yet the circuit court of the United States for the district of Ohio having incorporated the action under that statute, with all its incidents, into its course of practice, and having full power by law to adopt it, there does not appear any legal objection to its doing so, in the prosecution of the system under which it has always acted. *Fullerton v. United States Bank*, 1 Pet. 604, 7 L. Ed. 280.

The act of 18th of February, 1820, relative to proceedings against parties to promissory notes, was a very wise and benevolent law, and its salutary effects produced its immediate adoption into the practice of the courts of the United States, and the suits have, in many instances, been prosecuted under it. *Fullerton v. United States Bank*, 1 Pet. 604, 7 L. Ed. 280.

**68. Power of court to which cause removed to adopt state practice.**—*Supervisors v. Rogers*, 7 Wall. 175, 19 L. Ed. 162. See, generally, the title REMOVAL OF CAUSES.

**69. District court or district court when exercising circuit court powers.**—*Amis v. Smith*, 16 Pet. 303, 304, 10 L. Ed. 973.

**70. Necessity for adoption of state procedure by rule of court.**—*Lamaster v.*

*Keeler*, 123 U. S. 376, 387, 31 L. Ed. 238; *Kendall v. United States*, 12 Pet. 524, 9 L. Ed. 1181; *In re Heath*, 144 U. S. 92, 94, 36 L. Ed. 358; *McCracken v. Hayward*, 2 How. 608, 615, 11 L. Ed. 397; *United States Bank v. Halstead*, 10 Wheat. 51, 6 L. Ed. 264, explained in *Bronson v. Kinzie*, 1 How. 311, 324, 11 L. Ed. 143; *Board of Trade v. Hammond Elevator Co.*, 198 U. S. 424, 434, 49 L. Ed. 1111; *Shepard v. Adams*, 168 U. S. 618, 42 L. Ed. 602.

The adoption by congress of the state practice and process has always been considered as referring to the law existing at the time of the adoption, and no subsequent legislation has ever been supposed to affect it. *Kendall v. United States*, 12 Pet. 524, 9 L. Ed. 1181; *In re Heath*, 144 U. S. 92, 94, 36 L. Ed. 358.

No state law passed since May, 1828, can have effect on the proceedings on executions issued from the courts of the United States, unless such laws are adopted by those courts under the proviso in the third section of the act. *McCracken v. Hayward*, 2 How. 608, 615, 11 L. Ed. 397.

Under the resolution passed by congress in 1789, relating to the use of state jails, and the law of Mississippi passed in 1822, a sheriff has no right to discharge a prisoner in custody by process from the circuit court, unless such discharge is sanctioned by an act of congress, or the mode of it adopted as a rule by the circuit court of the United States. *McNutt v. Bland*, 2 How. 1, 11 L. Ed. 159.

**71. State statute as to appearances.**—In *Shepard v. Adams*, 168 U. S. 618, 42 L. Ed. 602, the question was whether Rev. Stat., § 914, assimilating the practice, pleadings, forms and modes of proceedings in civil causes in the federal courts to those obtaining in the state courts, applied to the time within which the defendant was required to appear in obedience to a summons. It was held that, as the rule of the federal court was adopted in conformity with the rules then in force

summons and process,<sup>72</sup> pleadings,<sup>73</sup> and for the enforcement of judgments.<sup>74</sup>

(3) *Form and Sufficiency of Rules Adopting State Practice.*—It is not essential, that any court, in establishing or changing its practice, should do so by the adoption of written rules; its practice may be established by a uniform mode of proceeding for a series of years.<sup>75</sup>

in the state courts, it was not bound to alter its rules every time the state courts saw fit to alter their rules, and that the federal courts were at liberty to continue their rules without subservience to such changes. *Board of Trade v. Hammond Elevator Co.*, 198 U. S. 424, 434, 49 L. Ed. 1111.

**72. State statute as to summons and process.**—In *Shepard v. Adams*, 168 U. S. 618, 627, 42 L. Ed. 602, the general rule, under which was issued the summons by which the plaintiff in error was brought into court, was adopted by the district court of the United States for the district of Colorado on October 10, 1877, and it was in substantial conformity with the statute of Colorado then in force. Several changes in the laws of Colorado, regulating forms of procedure and the times given for defendants to appear to writs of summons, had been since enacted, but the district court had not seen fit to alter its rules, from time to time, in subservieney to such changes. It was held that it would be presumed that the discretion of the district court was legitimately exercised in both adopting and maintaining the rule in question, and its judgment was accordingly affirmed.

**73. State statute as to pleading.**—In the district court of Louisiana, the defendant put in a plea of reconvention, which is authorized by the code of practice of Louisiana; the district court on the motion of the plaintiffs, ordered the plea to be stricken off. The code of practice of Louisiana was adopted therein, by a statute of that state, passed after the act of congress of May 26th, 1824, regulating the practice of the district court of the United States for the eastern district of Louisiana; and the practice, according to that code, had not been adopted as part of the rules of practice of the district court, when the plea was stricken off. Held, that the plea was properly stricken out. *Wilcox v. Hunt*, 13 Pet. 378, 10 L. Ed. 209.

**74. State laws as to enforcement of judgments—Execution laws.**—*Wayman v. Southard*, 10 Wheat. 1, 6 L. Ed. 253; *Ross v. Duval*, 13 Pet. 45, 10 L. Ed. 51; *Lamaster v. Keeler*, 123 U. S. 376, 31 L. Ed. 238; *Cooke v. Avery*, 147 U. S. 375, 385, 37 L. Ed. 209; *McCracken v. Hayward*, 2 How. 608, 615, 11 L. Ed. 397.

In pursuing the remedies for the enforcement of a judgment in a common-law cause, recovered in a federal court, the "forms and modes of proceeding" provided for the enforcement of a like judgment in a state court are not to be followed, unless they were prescribed by

a law of the state, at the time the provisions of the section took effect; or, if subsequently prescribed by such law, until they have been adopted by a general rule of the court. *Lamaster v. Keeler*, 123 U. S. 376, 390, 31 L. Ed. 238.

The proceedings on executions are to be governed by such laws until final satisfaction is obtained, regardless of any subsequent changes by state legislation. *McCracken v. Hayward*, 2 How. 608, 615, 11 L. Ed. 397; *Wayman v. Southard*, 10 Wheat. 1, 20, 6 L. Ed. 253; *United States Bank v. Halstead*, 10 Wheat. 51, 6 L. Ed. 264.

A state law regulating executions, enacted subsequently to September, 1789, is not applicable to executions issuing on judgments rendered by the courts of the United States, unless expressly adopted by the regulations and rules of those courts. *Wayman v. Southard*, 10 Wheat. 1, 6 L. Ed. 253.

**The act of assembly of Kentucky, of December 21, 1821**, which prohibits the sale of property taken under execution for less than three-fourths of its appraised value, without the consent of the owner, does not apply to a venditioni exponas issued out of the circuit court for the district of Kentucky, it never having been adopted by the United States courts by rule. *United States Bank v. Halstead*, 10 Wheat. 51, 6 L. Ed. 264, explained in *Bronson v. Kinzie*, 1 How. 311, 324, 11 L. Ed. 143.

The statutes of Kentucky concerning executions, which require the plaintiff to indorse on the execution, that banknotes of the bank of Kentucky, or notes of the bank of the commonwealth of Kentucky, will be received in payment, and, on his refusal, authorize the defendant to give a replevin bond for the debt, payable in two years, having been passed subsequently to September, 1789, and not having been adopted by rule of court, are not applicable to executions issuing on judgments rendered by the courts of the United States. *Wayman v. Southard*, 10 Wheat. 1, 2, 6 L. Ed. 253.

**The Nebraska act of February 23, 1875**, providing for the stay of money judgments, and determining the liability of sureties upon bonds given for such stay, was not applicable to proceedings in the federal courts prior to December 30, 1876, at which time it was adopted by the federal courts as a rule of procedure. *Lamaster v. Keeler*, 123 U. S. 376, 387, 31 L. Ed. 238.

**75. Form and sufficiency of rules.**—*Duncan v. United States*, 7 Pet. 435, 8 L.

(4) *Extent and Sufficiency of Adoption of State Practice.*—The act giving the courts of the United States discretion as to the adoption of state practice enacted subsequently to the conformity act, authorizes the court to adopt the change so made in full, but not in part, and the federal court cannot alter the practice in any respect.<sup>76</sup>

(5) *Effect of Repeal of State Statute after Adoption by Rule of Court.*—Where a rule of practice or procedure established in a state, by statute, is adopted by the federal court, by rule, its subsequent repeal by the state legislature does not operate to defeat it as a rule of practice in the federal courts.<sup>77</sup>

g. *Federal Jurisdiction Not Affected by State Practice*—(1) *In General.*—The act of congress requiring the federal courts to be governed, as to forms and modes of proceeding, by the state practice, cannot affect the jurisdiction of the courts of the United States, and where conformity to the state practice would oust the jurisdiction of the federal courts, the federal courts are, of course, at liberty to depart from the state practice.<sup>78</sup>

Ed. 739; *Fullerton v. United States Bank*, 1 Pet. 604, 7 L. Ed. 280.

It will not be contended, that the practice of a court can only be sustained by written rules, nor that a party pursuing the course of years is to be surprised and turned out of court, upon a ground which has no bearing upon the merits. Written rules are unquestionably to be preferred, because of their certainty; but there can be no want of certainty, where long acquiescence has established it to be the law of the court, that the state practice shall be their practice, so far as they have the means of carrying it into effect, or until deviated from, by positive rules of their own making. *Fullerton v. United States Bank*, 1 Pet. 604, 7 L. Ed. 280.

**76. Power to partially adopt subsequent changes.**—*McCracken v. Hayward*, 2 How. 608, 615, 11 L. Ed. 397.

Where the circuit court, by a rule, adopts the process pointed out by a state law, there must be no essential variance between them. Such a variance is a new rule, unknown to any act of congress or the state law professedly adopted. *McCracken v. Hayward*, 2 How. 608, 11 L. Ed. 397.

**77. Repeal of state statutes after adoption by rules of federal court.**—*Homer v. Brown*, 16 How. 354, 14 L. Ed. 970; *Riggs v. Johnson County*, 6 Wall. 166, 190, 18 L. Ed. 768.

**Abolition of writ of right.**—The writ of right was abolished by Massachusetts, in 1840, but was previously adopted as a process by the acts of congress of 1789 and 1792. Its repeal by Massachusetts did not repeal it as a process in the circuit court of the United States. *Homer v. Brown*, 16 How. 354, 14 L. Ed. 970.

**78. Federal jurisdiction not affected by state practice.**—*Phelps v. Oaks*, 117 U. S. 236, 239, 29 L. Ed. 888; *Stewart v. Dunham*, 115 U. S. 61, 29 L. Ed. 329; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 209, 36 L. Ed. 943; *Insurance Co. v. Morse*, 20 Wall. 445, 22 L. Ed. 365; *Railway Co. v. Whitton*, 13 Wall. 270, 286, 20 L. Ed. 571; *Payne v. Hook*, 7 Wall. 425, 427, 19 L. Ed. 260; *The Moses Taylor*, 4 Wall.

411, 18 L. Ed. 397; *Fenn v. Holme*, 21 How. 481, 16 L. Ed. 198.

The jurisdiction of the federal courts, under the constitution, depends upon and is regulated by the laws of the United States. State legislation cannot confer jurisdiction upon the federal courts, nor can it limit or restrict the authority given by congress in pursuance of the constitution. *Insurance Co. v. Morse*, 20 Wall. 445, 453, 22 L. Ed. 365; *Railway Co. v. Whitton*, 13 Wall. 270, 286, 20 L. Ed. 571; *Payne v. Hook*, 7 Wall. 425, 427, 19 L. Ed. 260; *The Moses Taylor*, 4 Wall. 411, 18 L. Ed. 397.

The jurisdiction of the circuit courts of the United States has been defined and limited by the acts of congress, and can be neither restricted nor enlarged by the statutes of a state. *Southern Pac. Co. v. Denton*, 146 U. S. 202, 209, 36 L. Ed. 943; *Toland v. Sprague*, 12 Pet. 300, 9 L. Ed. 1093; *Cowles v. Mercer County*, 7 Wall. 118, 19 L. Ed. 86; *Railway Co. v. Whitton*, 13 Wall. 270, 20 L. Ed. 571; *Phelps v. Oaks*, 117 U. S. 236, 29 L. Ed. 888.

The acts of congress, prescribing in what districts suits between citizens or corporations of different states shall be brought, manifest the intention of congress that such suits shall be brought and tried in such a district only, and that no person or corporation shall be compelled to answer to such a suit in any other district. Congress cannot have intended that it should be within the power of a state by its statutes to prevent a defendant, sued in a circuit court of the United States in a district in which congress has said that he shall not be compelled to answer, from obtaining a determination of that matter by that court in the first instance, and by this court on writ of error. To conform to such statutes of a state would "unwisely encumber the administration of the law," as well as "tend to defeat the ends of justice," in the national tribunals. *Southern Pac. Co. v. Denton*, 146 U. S. 202, 209, 36 L. Ed. 943.

A promissory note was drawn by A and B, dated at Pinkneyville, Mississippi, in favor of C, payable twelve months after



(2) *State Statutes Permitting Ejectment on Equitable Title.*—The practice of allowing ejectments to be maintained in state courts upon equitable titles cannot affect the jurisdiction of the courts of the United States.<sup>79</sup>

(3) *State Statute Giving Special Appearance Effect of General Appearance.*—A state statute which gives to a special appearance, made to challenge the court's jurisdiction, the force and effect of a general appearance, so as to confer jurisdiction over the person of the defendant, is not binding upon the federal courts in that state.<sup>80</sup> Thus a state statute making an appearance which is in terms limited to the purpose of objecting to the jurisdiction of the court, a waiver of immunity from the jurisdiction by reason of nonresidence, is not applicable to the proceedings in the federal court.<sup>81</sup>

(4) *State Statute Permitting Landlord to Come in and Defend Suit against Tenant.*—The jurisdiction of the federal courts upon the ground of the diversity of citizenship of the parties, is not ousted by conforming to the state practice, in ejectment, by letting in the landlord to defend, although the latter is a citizen of the same state as the plaintiff. Such proceedings should be treated as incidental to the jurisdiction already acquired, and auxiliary to it.<sup>82</sup>

date, at the Planters' Bank of Natchez, was indorsed by C to the Farmers' Bank of Memphis, Tennessee. Having been protested for nonpayment, the Farmers' Bank of Memphis instituted a suit in the circuit court of Mississippi, against the makers and indorser, alleging that they were citizens of Tennessee, and that the defendants were citizens of Mississippi, the makers and indorser being joined in pursuance of the Mississippi act of 1837, which required that in all actions on bills of exchange and promissory notes, the plaintiff should be compelled to sue the drawers and indorsers, resident in the state in the county where the drawers live, in a joint action. This statute had been adopted by the judge of the district of Mississippi, in the absence of the judge of the supreme court assigned to that circuit, by a rule of court. The defendants pleaded to the jurisdiction of the court, on the ground, that the makers and payee of the note were, when it was made, citizens of Mississippi; and this plea being overruled, on demurrer, the circuit court, on the failure of the makers to plead over, and the failure of C to appear, gave a judgment for the plaintiff. Held, that the action cannot be sustained in the circuit court jointly against the makers and indorser of the note, since the statute of Mississippi is not in force or effect in the courts of the United States, the sole authority to regulate the practice of the courts of the United States being in congress. *Keary v. Farmers'*, etc., Bank, 16 Pet. 88, 10 L. Ed. 897.

79. *State statutes permitting ejectment on equitable title.*—*Fenn v. Holme*, 21 How. 481, 16 L. Ed. 198. See, also, *Strother v. Lucas*, 6 Pet. 763, 769, 8 L. Ed. 573. See, generally, the titles EJECTMENT; EQUITY.

80. *State act giving special appearance effect of general appearance.*—*Galveston*, etc., R. Co. *v. Gonzales*, 151 U. S. 496, 499, 38 L. Ed. 248; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 36 L. Ed. 943;

*Mexican Cent. R. Co. v. Pinkney*, 149 U. S. 194, 37 L. Ed. 699. See, also, *Chappell v. United States*, 160 U. S. 499, 40 L. Ed. 510; *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 111, 42 L. Ed. 964. See, generally, the title APPEARANCES, vol. 2, p. 429.

"These provisions of the federal statutes which confer upon litigants in the federal courts the right to have the jurisdiction of such courts reviewed by this court by appeal or writ of error would be practically destroyed or rendered inoperative and of no effect if state statutes, such as those of Texas, could make an appearance to question the jurisdiction of a federal court a general appearance, so as to bind the person of the defendant. It would be an idle ceremony to bring to this court for review the question of the circuit court's jurisdiction, arising out of a failure to serve the defendant with process, if the defendant's special appearance before the lower court to challenge its jurisdiction should, under state laws, amount to a general appearance which conferred such jurisdiction. The effect of the statutes of a state giving such an operation to an appearance for the sole purpose of objecting to the jurisdiction of the court, would be practically to defeat the provisions of the federal statutes which entitled a party to the right to have this court review the question of the jurisdiction of the circuit court. Under well-settled principles this could not and should not be permitted, for wherever congress has legislated on, or in reference to, a particular subject involving practice or procedure, the state statutes are never held to be controlling." *Mexican Cent. R. Co. v. Pinkney*, 149 U. S. 194, 208, 37 L. Ed. 699.

81. *Special appearance as waiving immunity from suit because of nonresidence.*—*Southern Pac. Co. v. Denton*, 146 U. S. 202, 36 L. Ed. 943.

82. *Statute permitting landlord to defend suit against tenant.*—*Phelps v. Oaks*,

(5) *Equity Jurisdiction*.—The general equity jurisdiction of the circuit court of the United States to administer, as between citizens of different states, the assets of a deceased person within its jurisdiction, cannot be defeated or impaired by laws of a state undertaking to give exclusive jurisdiction to its own courts.<sup>83</sup>

h. *Duty of Federal Courts to Follow State Practice*.—Where the act of congress has made the practice of the state courts the rule for the courts of the United States in a particular state, the district court of the United States in that district is bound to follow the practice of the state, unless that court had adopted a rule superseding the practice.<sup>84</sup>

i. *Exclusiveness of Procedure Established by Constitution or Act of Congress*—(1) *General Rule*.—Whenever congress has legislated upon any matter of practice, pleading or procedure, and prescribed a definite rule for the government of its own courts, it is to that extent exclusive of the legislation of the state upon the same matter.<sup>85</sup>

(2) *Act Forbidding Suits in Equity Where Legal Remedy Adequate*.—The law of a state cannot control the proceedings in the federal courts, so as to do

117 U. S. 236, 240, 29 L. Ed. 888. See the titles EJECTMENT; LANDLORD AND TENANT.

**83. Equity jurisdiction not affected by state laws.**—*Lawrence v. Nelson*, 143 U. S. 215, 223, 36 L. Ed. 130; *Green v. Creighton*, 23 How. 90, 16 L. Ed. 419; *Payne v. Hook*, 7 Wall. 425, 19 L. Ed. 260. See, generally, the title EQUITY.

The equity jurisdiction and remedies conferred by the constitution and statutes of the United States, upon the federal courts, cannot be limited or restrained by state legislation, and are uniform throughout the different states of the Union. *Payne v. Hook*, 7 Wall. 425, 19 L. Ed. 260.

**84. Duty of federal courts to follow state practice.**—*Parsons v. Bedford*, 3 Pet. 433, 7 L. Ed. 732.

**85. Exclusiveness of procedure established by act of congress.**—*Luxton v. North River Bridge Co.*, 147 U. S. 337, 339, 37 L. Ed. 194; *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898; *Chateaugay, etc., Iron Co., Petitioner*, 128 U. S. 544, 32 L. Ed. 508; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 36 L. Ed. 943; *Ex parte Fisk*, 113 U. S. 713, 28 L. Ed. 1117; *Whitford v. Clark County*, 119 U. S. 522, 30 L. Ed. 500; *Potter v. Third Nat. Bank*, 102 U. S. 163, 26 L. Ed. 111; *King v. Worthington*, 104 U. S. 44, 26 L. Ed. 652; *Bradley v. United States*, 104 U. S. 442, 26 L. Ed. 824; *Keary v. Farmers', etc., Bank*, 16 Pet. 88, 10 L. Ed. 897; *Andes v. Slauson*, 130 U. S. 435, 438, 32 L. Ed. 989; *Whitehead v. Shattuck*, 138 U. S. 146, 152, 34 L. Ed. 873; *McNutt v. Blane*, 2 How. 1, 9, 11 L. Ed. 159; *Kelsey v. Forsyth*, 21 How. 85, 16 L. Ed. 32; *Campbell v. Boyreau*, 21 How. 223, 228, 16 L. Ed. 96; *Chappell v. United States*, 160 U. S. 499, 514, 40 L. Ed. 510; *St. Clair v. United States*, 154 U. S. 134, 153, 38 L. Ed. 936; *Mexican Cent. R. Co. v. Duthie*, 189 U. S. 76, 47 L. Ed. 715; *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 111, 42 L. Ed. 964; *Hanks Dental Ass'n v. Inter-*

*national Tooth Crown Co.*, 194 U. S. 303, 48 L. Ed. 989; *Union Pac. R. Co. v. Botsford*, 141 U. S. 250, 35 L. Ed. 734; *Watson v. Tarpley*, 18 How. 517, 520, 15 L. Ed. 509; *McAfee v. Doremus*, 5 How. 53, 63, 12 L. Ed. 46; *Shepard v. Adams*, 168 U. S. 618, 625, 42 L. Ed. 602; *McCracken v. Hayward*, 2 How. 608, 615, 11 L. Ed. 397; *Fleitas v. Richardson (No. 1)*, 147 U. S. 538, 545, 37 L. Ed. 272; *Amy v. Watertown (No. 1)*, 130 U. S. 301, 303, 32 L. Ed. 946; *Gwin v. Breedlove*, 2 How. 29, 11 L. Ed. 167; *Gwin v. Boston*, 6 How. 7, 12 L. Ed. 321.

No court of the United States is authorized to adopt, by rule, any provisions of state laws which are repugnant to, or incompatible with, the positive enactments of congress, upon the jurisdiction, or practice, or proceedings of such courts. *Keary v. Farmers', etc., Bank*, 16 Pet. 88, 89, 10 L. Ed. 897.

The federal courts are bound to deal with the case according to the rules of practice and evidence prescribed by the acts of congress. If the case is properly removed, the party removing it is entitled to any advantage which the practice and jurisprudence of the federal court give him. *King v. Worthington*, 104 U. S. 44, 51, 26 L. Ed. 652.

The statute providing that the proceedings in the circuit court of the United States shall "conform as nearly as may be to the practice in the courts of the state" must, of course, like the corresponding direction as to practice, pleadings and procedure in § 914 of the Revised Statutes, give way whenever to adopt the state practice would be inconsistent with the terms, defeat the purpose, or impair the effect, of any legislation of congress. *Luxton v. North River Bridge Co.*, 147 U. S. 337, 339, 37 L. Ed. 194; *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898; *Chateaugay, etc., Iron Co., Petitioner*, 128 U. S. 544, 32 L. Ed. 508; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 36 L. Ed. 943.

away with the force of the law of congress which provides that suits in equity shall not be sustained in any of the courts of the United States, in any case where a plain, adequate and complete remedy may be had at law.<sup>86</sup>

(3) *Act of Congress in Relation to Amendments*.—A state statute as to amendments which is in conflict with § 954 of the Revised Statutes which provides that the court may at any time permit either party to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion, and by its rules, prescribe, is not binding on the federal courts.<sup>87</sup>

(4) *Acts of Congress in Relation to Evidence*.—See ante, "Evidence," VII, J, 13, c, (21).

(5) *Constitutional Right to Jury Trial*.—A state law cannot control in the federal courts so as to deprive the parties of their constitutional right to a jury trial.<sup>88</sup> Thus a state statute providing for a suit in equity to subject property to the payment of a simple contract debt, in advance of any proceedings at law, either to establish the validity or amount of the debt, or to enforce its collection, cannot be maintained in the United States courts, as it impairs the right to jury trial guaranteed by the constitution.<sup>89</sup>

(6) *Acts of Congress in Relation to Bills of Exceptions*.—In regard to bills of exceptions, courts of the United States are independent of any statute or practice prevailing in the courts of the state in which the trial is had.<sup>90</sup>

**86. Act providing for suits in equity where there is an adequate remedy at law.**—*Whitehead v. Shattuck*, 138 U. S. 146, 152, 34 L. Ed. 873. See, generally, the title EQUITY.

**87. Amendments.**—*Mexican Cent. R. Co. v. Duthie*, 189 U. S. 76, 77, 47 L. Ed. 715. See, generally, the title AMENDMENTS, vol. 1, p. 288.

"If the statutes of Texas forbade such an amendment the law of the United States must govern. *Phelps v. Oaks*, 117 U. S. 236, 29 L. Ed. 888; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 36 L. Ed. 943." *Mexican Cent. R. Co. v. Duthie*, 189 U. S. 76, 77, 47 L. Ed. 715.

**88. Act dispensing with jury trial.**—*Whitehead v. Shattuck*, 138 U. S. 146, 152, 34 L. Ed. 873; *Bank v. Dudley*, 2 Pet. 492, 7 L. Ed. 496; *Scott v. Neely*, 140 U. S. 106, 35 L. Ed. 358. See, also, *Perez v. Fernandez*, 202 U. S. 80, 100, 50 L. Ed. 942. See, generally, the title JURY.

The constitution, in its seventh amendment, declares that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." In the federal courts this right cannot be dispensed with, except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency. Such aid in the federal courts must be sought in separate proceedings, to the end that the right to a trial by jury in the legal action may be preserved intact. *Scott v. Neely*, 140 U. S. 106, 109, 35 L. Ed. 358.

The state legislature cannot radically change the mode of proceeding prescribed for the courts of the United States or direct those courts, in a trial of common law, to appoint commissioners for the decision of questions which a court of com-

mon law must submit to a jury. *Bank v. Dudley*, 2 Pet. 492, 7 L. Ed. 496.

**89. State statute for subjecting property to debt, without judgment.**—*Scott v. Neely*, 140 U. S. 106, 35 L. Ed. 358. See, generally, the title EQUITY.

**90. Bills of exception.**—*Fishburn v. Chicago*, etc., R. Co., 137 U. S. 60, 34 L. Ed. 585; *Missouri Pac. R. Co. v. Chicago*, etc., R. Co., 132 U. S. 191, 33 L. Ed. 309; *Indianapolis*, etc., R. Co. v. *Horst*, 93 U. S. 291, 23 L. Ed. 898; *St. Clair v. United States*, 154 U. S. 134, 147, 38 L. Ed. 936; *Newcomb v. Wood*, 97 U. S. 581, 24 L. Ed. 1085; *Chateaugay*, etc., *Iron Co., Petitioner*, 128 U. S. 544, 32 L. Ed. 508; *Shepard v. Adams*, 168 U. S. 618, 626, 42 L. Ed. 602; *Lincoln v. Power*, 151 U. S. 436, 443, 38 L. Ed. 224; *Andes v. Slau-son*, 130 U. S. 435, 438, 32 L. Ed. 989; *Hudson v. Parker*, 156 U. S. 277, 281, 39 L. Ed. 424; *United States v. Breitling*, 20 How. 252, 15 L. Ed. 900; *Van Stone v. Stillwell*, etc., *Mfg. Co.*, 142 U. S. 128, 35 L. Ed. 961. See, generally, the title EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL.

The manner or the time of taking proceedings as a foundation for the removal of a case by a writ of error from one federal court to another is a matter to be regulated exclusively by acts of congress, or, when they are silent, by methods derived from the common law, from ancient English statutes, or from the rules and practice of the courts of the United States. The only regulation made by congress as to bills of exceptions is that contained in § 953 of the Revised Statutes, which provides that they shall be sufficiently authenticated by the signature of the presiding judge, without any seal. *Chateaugay*, etc., *Iron Co., Petitioner*, 128 U. S. 544, 555, 32 L. Ed. 508.

Exceptions to instructions to the jury



(7) *Acts of Congress in Relation to New Trials.*—In regard to motions for a new trial, the courts of the United States are, as a general rule, independent of any statute or practice prevailing in the courts of the state in which the trial is had.<sup>91</sup> And a state law entitling a party to a second trial in an action to recover the value of personal property does not entitle a party to a second trial in such an action in a federal court.<sup>92</sup>

(8) *Acts of Congress in Relation to Review of Judgment of Circuit Court.*—What is necessary to be done in a circuit court, even in civil cases, in order that its action upon any particular question or matter may be reviewed or revised in the supreme court, depends upon the acts of congress and the rules of practice which the supreme court recognizes as essential in the administration of justice.<sup>93</sup> State statutes or rules of practice cannot give the supreme court of the

must be taken in proceedings in the United States courts, although, under a state statute, it is not required. *St. Clair v. United States*, 154 U. S. 134, 147, 38 L. Ed. 936.

Even where a circuit court of the United States, by a general rule, adopts the practice of the state courts, which is regulated by a statute providing that no bill of exceptions can be signed after the adjournment of the court, unless with the consent of counsel, etc., and the judge holding the circuit court in that state signs a bill of exceptions under special circumstances, after adjournment, and without the consent of counsel, the supreme court will consider the exception as properly before it, as it is in the power of a court to suspend its own rules, or except a particular case from them, to subserve the purposes of justice. *United States v. Brietling*, 20 How. 252, 15 L. Ed. 900.

**91. New trials.**—*Missouri Pac. R. Co. v. Chicago*, etc., R. Co., 132 U. S. 191, 33 L. Ed. 309; *Indianapolis*, etc., R. Co. *v. Horst*, 93 U. S. 291, 23 L. Ed. 898; *Newcomb v. Wood*, 97 U. S. 581, 24 L. Ed. 1085; *Chateaugay*, etc., *Iron Co., Petitioner*, 128 U. S. 544, 32 L. Ed. 508; *Fishburn v. Chicago*, etc., R. Co., 137 U. S. 60, 34 L. Ed. 585; *Coffey v. United States*, 117 U. S. 233, 235, 29 L. Ed. 890. See, generally, the title NEW TRIALS.

"In the courts of the United States motions for a new trial are addressed to their discretion. The decision, whatever it may be, cannot be reviewed here. This is a rule of law established by this court, and not a mere matter of proceeding or practice in the circuit and district courts. *Henderson v. Moore*, 5 Cranch 11, 3 L. Ed. 22; *Doswell v. De La Lanza*, 20 How. 29, 15 L. Ed. 824; *Schuchardt v. Allens*, 1 Wall. 359, 371, 17 L. Ed. 642. It is, therefore, not within the act of congress of June 1, 1872, and cannot be affected by any state law upon the subject." *Indianapolis*, etc., R. Co. *v. Horst*, 93 U. S. 291, 301, 23 L. Ed. 898.

**92. Second trial in action for recovery of personal property.**—*Newcomb v. Wood*, 97 U. S. 581, 584, 24 L. Ed. 1085. See, also, *Coffey v. United States*, 117 U. S. 233, 235, 29 L. Ed. 890. See, generally, the title TROVER AND CONVERSION.

**New trials in ejectment.**—See post, "New Trials in Ejectment," VII, K, 3, j, (15), (b).

**93. Proceedings to review judgment of circuit court.**—*St. Clair v. United States*, 154 U. S. 134, 153, 38 L. Ed. 936; *Nudd v. Burrows*, 91 U. S. 426, 23 L. Ed. 286; *Indianapolis*, etc., R. Co. *v. Horst*, 93 U. S. 291, 23 L. Ed. 898; *Chateaugay*, etc., *Iron Co., Petitioner*, 128 U. S. 544, 32 L. Ed. 508; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 36 L. Ed. 943; *Luxton v. North River Bridge Co.*, 147 U. S. 337, 37 L. Ed. 194; *Lincoln v. Power*, 151 U. S. 436, 38 L. Ed. 224; *Logan v. United States*, 144 U. S. 263, 36 L. Ed. 429; *Andes v. Slauson*, 130 U. S. 435, 438, 32 L. Ed. 989; *Boogher v. Insurance Co.*, 103 U. S. 90, 26 L. Ed. 310; *Lamaster v. Keeler*, 123 U. S. 376, 31 L. Ed. 238; *Bayard v. Lombard*, 9 How. 530, 551, 13 L. Ed. 245; *United States v. King*, 7 How. 833, 12 L. Ed. 934; *Hudson v. Parker*, 156 U. S. 277, 281, 29 L. Ed. 424; *Parks v. Turner*, 12 How. 39, 13 L. Ed. 883; *Amis v. Smith*, 16 Pet. 303, 304, 10 L. Ed. 973; *Graham v. Bayne*, 18 How. 60, 61, 15 L. Ed. 265.

In Louisiana, the supreme court of the state reviews the questions of fact as well as of law which are brought up from the courts below; and when it reverses a judgment upon either ground, it gives the judgment which the inferior court ought to have given. But when a case is brought before this court by a writ of error, it can only review questions of law; and, therefore, where the validity of a verdict of a jury is brought into question, the practice which prevails in the state courts of Louisiana is inapplicable in the courts of the United States. Hence, where the jury found a verdict in general terms for the plaintiff in a suit upon a promissory note, without finding the amount due, which the laws and practice of Louisiana require them to do, and, the court then gave judgment for the amount of the note, this would have been adjudged to be a cause of reversal of the judgment by the supreme court of the state, but cannot be so held by this court. *Parks v. Turner*, 12 How. 39, 13 L. Ed. 883.

The practice and rules of the state court do not apply to proceedings in the circuit court taken for the purpose of reviewing in the supreme court a judgment of the

United States jurisdiction to review a judgment or decree of the circuit court where none is found in the constitution or laws of congress.<sup>94</sup> And a state stat-

circuit court. *Chateaugay, etc., Iron Co., Petitioner*, 128 U. S. 544, 553, 32 L. Ed. 508; *Lincoln v. Power*, 151 U. S. 436, 443, 38 L. Ed. 224.

The review of cases in the supreme court is regulated by acts of congress and not by the laws of the states. *Boogher v. Insurance Co.*, 103 U. S. 90, 26 L. Ed. 310; *United States v. King*, 7 How. 833, 12 L. Ed. 934. See the title APPEAL AND ERROR, vol. 1, p. 333.

"In Louisiana the courts of the United States have been compelled to adopt the forms of pleading and practice peculiar to the civil law and the Code. That system knows no distinction between law and equity. All cases are tried alike, on petition and answer, with or without the intervention of a jury, as the parties may elect. This court having separate jurisdiction, both in equity and law, is compelled to distinguish. They can review cases in common law by writ of error only, and on bills of exceptions presenting questions of law. The circuit courts may adopt the forms of pleading and practice of the state courts, but no state legislation can be applied to the practice of this court, and the mode in which causes shall be brought into it for review. The very numerous cases on this subject (from *Field v. United States*, 9 Pet. 182, 9 L. Ed. 94, to *Arthurs v. Hart*, 17 How. 6, 15 L. Ed. 30), show the difficulties we have had to encounter in reconciling our modes of review to the civil Code of practice as used in the courts of Louisiana." *Graham v. Bayne*, 18 How. 60, 61, 15 L. Ed. 265.

**Taking down testimony of witnesses examined in court.**—Under the laws of Louisiana, on the trial of a cause before a jury, if either party desires it, the verbal evidence is to be taken down in writing, by the clerk, to be sent to the supreme court, to serve as a statement of facts, in case of appeal; and the written evidence produced on the trial is to be filed with the proceedings; this is done to enable the appellate court to exercise the power of granting a new trial, and of reversing the judgment of the inferior court. Held, that the refusal of the judge of the district court of the United States to permit the evidence to be put in writing, could not be assigned for error in this court, the cause having been tried in the court below, and a verdict given on the facts, by a jury; if the same had been put in writing, and been sent up to this court with the record, this court, proceeding under the constitution of the United States, and of the amendment thereto, which declares, "no fact once tried by a jury shall be otherwise re-examinable in any court of the United States, than according to the rules of the common law," is not competent to redress any error, by granting a new trial. *Parsons v. Bedford*, 3 Pet.

433, 7 L. Ed. 732.

No court ought, unless the terms of an act of congress render it unavoidable, to give a construction to the act, which should, however unintentional, involve a violation of the constitution; the terms of the act of 1824, relating to the practice in Louisiana, may well be satisfied, by limiting its operation to modes of practice and proceeding in the courts below, without changing the effect or conclusiveness of the verdict of a jury upon the facts litigated on the trial. The party may bring the facts into review before the appellate court, so far as they bear upon questions of law, by a bill of exceptions; if there be any mistake of the facts, the court below is competent to redress it, by granting a new trial. *Parsons v. Bedford*, 3 Pet. 433, 434, 7 L. Ed. 732.

It was not the intention of congress, by the general language of the act of 1824, to alter the appellate jurisdiction of this court, and to confer on it the power of granting a new trial, by a re-examination of the facts tried by a jury; and to enable it, after trial by jury, to do that, in respect to the courts of the United States sitting in Louisiana, which is denied to such courts sitting in all the other states of the Union. *Parsons v. Bedford*, 3 Pet. 433, 434, 7 L. Ed. 732.

**94. Appellate jurisdiction not enlarged by state practice or rules.**—*Bayard v. Lombard*, 9 How. 530, 551, 13 L. Ed. 245.

Thus although the circuit court of the United States for Pennsylvania has adopted the forms of process in execution of the state courts, and the laws and practice of Pennsylvania, for taking lands on execution and disposing of their proceeds, the modes of reviewing the decisions of the circuit court by the supreme court is not required thereby to be conformed to the laws or practice of the state, for it cannot be pretended that acts of assembly of Pennsylvania can give jurisdiction to this court not to be found in the constitution and acts of congress of the United States. *Bayard v. Lombard*, 9 How. 530, 551, 13 L. Ed. 245.

Where land was sold under an execution, and the money arising therefrom about to be distributed amongst creditors by an order of the circuit court, a controversy between the creditors as to the priority of their respective judgments cannot be brought to the supreme court, either by appeal or writ of error, although the state in which the judgment was given allowed appeals, by statute, in similar cases arising in the courts of the state. It does not follow from the adoption of the forms of process in execution, that the courts of the United States adopted the modes of reviewing the decisions of inferior courts. *Bayard v. Lombard*, 9 How. 530, 13 L. Ed. 245.



ute taking away the right to a writ of error in the case of a forthcoming bond forfeited, can have no influence whatever in regulating writs of error to the circuit courts of the United States, and a rule of court adopting the statutes as a rule of practice is void.<sup>95</sup>

j. *With Respect to What Proceedings Conformity Is Required*—(1) *In General*.—Whatever belongs to the three categories of practice, pleading and forms and modes of proceeding, must conform to the state law and the practice of the state courts, except where congress itself has legislated upon a particular subject and prescribed a rule.<sup>96</sup>

(2) *Practice or Proceedings Which Can Be Executed Only by State Courts*.—A state law, regulating the practice of state courts, and addressed to its judges and magistrates, but which can only be executed by them, or with their aid, is a peculiar municipal regulation, not adopted by the acts of congress, nor applicable to the courts of the United States.<sup>97</sup> Thus a law of a state which requires a mittimus in civil cases before the defendant can be committed to prison, does not apply to the federal courts.<sup>98</sup>

(3) *Appearance, Summons and Process*—(a) *Appearances*.—See ante, "State Statute Giving Special Appearance Effect of General Appearance," VII, K, 3, g, (3).

(b) *Summons and Process*.—The summons to bring a person into court which is used in the state courts is applicable to the federal courts for the state, under the practice conformity act.<sup>99</sup>

95. State statute taking away writ of error.—*Amis v. Smith*, 16 Pet. 303, 304, 10 L. Ed. 973.

96. Practice, proceedings or process within conformity act.—*Amy v. Watertown* (No. 1), 130 U. S. 301, 303, 32 L. Ed. 946.

"Forms and modes of proceeding in suits embraces the whole progress of the suit, and every transaction in it, from its commencement to its termination, which has been already shown not to take place until the judgment shall be satisfied. It may then and ought to be understood as prescribing the conduct of the officer in the execution of process, that being a part of 'the proceedings' in the suit." *Lamaster v. Keeler*, 123 U. S. 376, 389, 31 L. Ed. 238; *Wayman v. Southard*, 10 Wheat. 1, 6 L. Ed. 253; *Beers v. Haughton*, 9 Pet. 329, 9 L. Ed. 145; *Cooke v. Avery*, 147 U. S. 375, 387, 37 L. Ed. 209.

97. State practices which can only be executed by state courts.—*Duncan v. Darst*, 1 How. 301, 306, 11 L. Ed. 139; *McNutt v. Bland*, 2 How. 1, 7, 11 L. Ed. 159; *Palmer v. Allen*, 7 Cranch 550, 563, 3 L. Ed. 436.

Congress, however, did not intend to defeat the execution of judgments rendered in the courts of the United States; but meant they should have full effect by force of the state laws adopted; and therefore all state laws regulating proceedings affecting insolvent persons, or that are addressed to state courts, or magistrates in other respects, which confer peculiar powers on such courts and magistrates, do not bind the federal courts, because they have no power to execute such laws. *Duncan v. Darst*, 1 How. 301, 306, 11 L. Ed. 139; *Palmer v. Allen*, 7 Cranch 550, 563, 3 L. Ed. 436.

98. State law requiring mittimus in civil cases.—In Connecticut the marshal may, upon an attachment for debt, without a mittimus, commit the defendant to prison, for want of bail. The process act does not adopt the law of Connecticut which requires the mittimus in civil cases. This is a peculiar municipal regulation, not having any immediate relation to the progress of a suit, but imposing a restraint upon their state officers, in the execution of the process of their courts, and is altogether inoperative upon the officers of the United States, in the execution of the mandates which issue to them. *Palmer v. Allen*, 7 Cranch 550, 564, 3 L. Ed. 436.

99. Summons and process.—*Arndt v. Griggs*, 134 U. S. 316, 33 L. Ed. 918; *United States v. Eckford*, 6 Wall. 484, 490, 18 L. Ed. 920; *Riggs v. Johnson County*, 6 Wall. 166, 190, 18 L. Ed. 768; *Amy v. Watertown* (No. 1), 130 U. S. 301, 303, 32 L. Ed. 946. See, generally, the title SUMMONS AND PROCESS.

The terms, "modes of process," in the act of 1789, and, "proceedings upon executions, and other final process," in the act of 1828, have the same meaning, and include all the regulations and steps incident to that process, from its commencement to its termination as prescribed by the state laws; so far as they can be made to apply to the federal courts. *Wayman v. Southard*, 10 Wheat. 1, 27, 6 L. Ed. 253; *Beers v. Haughton*, 9 Pet. 329, 9 L. Ed. 145; *United States v. Knight*, 14 Pet. 301, 10 L. Ed. 465; *Amis v. Smith*, 16 Pet. 303, 312, 10 L. Ed. 973; *Duncan v. Darst*, 1 How. 301, 305, 11 L. Ed. 139.

"With regard to the mode of serving mesne process upon corporations and other persons, congress has not laid down any rule; and hence the state law and



(4) *Form of Action*.—Forms of action that obtain in the state courts in actions at law are to be followed in proceedings in the United States courts within that state.<sup>1</sup> This is true in states which have abolished forms of actions and provided that there shall be but one form of action, the plaintiff setting out in his petition or complaint the facts upon which he bases his cause of action, and relief being given according to the facts.<sup>2</sup>

(5) *Parties*—(a) *Parties Plaintiff*.—Where the state law provides that suits shall be brought in the name of the real party in interest, one entitled to maintain a suit in the state court may remain plaintiff on the record upon removal of the case to a federal court.<sup>3</sup> So the state laws as to the right of assignees of choses in action to sue thereon in their own names, governs in such actions in the federal courts within that state,<sup>4</sup> and upon like principle, state practice giving an agent a right to sue in his own name on a contract made on behalf of his principal obtains in the federal courts.<sup>5</sup>

practice must be followed. There can be no doubt, we think, that the mode of service of process is within the categories named in the act. It is part of the practice and mode of proceeding in a suit." *Amy v. Watertown* (No. 1), 130 U. S. 301, 304, 32 L. Ed. 946.

Where, under the state practice, service on nonresidents in suits to quiet title may be made by publication, a like rule obtains in the federal courts. *Arndt v. Griggs*, 134 U. S. 316, 33 L. Ed. 918.

Were it not for the process act the circuit courts themselves could prescribe, by general rule, the mode of serving process on corporations as well as on other persons. *Amy v. Watertown* (No. 1), 130 U. S. 301, 303, 32 L. Ed. 946.

**1. Forms of action.**—*Lowndes v. Huntington*, 153 U. S. 1, 18, 38 L. Ed. 615; *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, 300, 23 L. Ed. 898; *Vance v. Vandercook Co.* (No. 1), 170 U. S. 438, 472, 42 U. S. 1100; *Bond v. Dustin*, 112 U. S. 604, 28 L. Ed. 835; *Glenn v. Summer*, 132 U. S. 152, 156, 33 L. Ed. 301.

In states where the practice is to permit the plaintiff in replevin to proceed as in trover and recover the value of the property in case an officer fails to find it the state procedure governs in suits in the federal courts. *Vance v. Vandercook* (No. 1), 170 U. S. 438, 473, 42 L. Ed. 1100 (construing South Carolina statutes).

But where, under the state practice, proceedings for the enforcement of a bail bond are required to be by civil action against the bail, a judgment rendered on a bail bond in a federal court in a proceeding by scire facias is not subject to collateral attack, whether the remedy by scire facias was proper or not. *Insley v. United States*, 150 U. S. 512, 37 L. Ed. 1163.

**2. Abolition of forms of action.**—*Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, 300, 23 L. Ed. 898; *Lowndes v. Huntington*, 153 U. S. 1, 18, 38 L. Ed. 615.

**Form of action for recovery of real estate.**—Where a state passes an act to abolish fictitious proceedings in ejectment, and to substitute in their place the

action of trespass for the purpose of trying the title to lands and recovering their possession, the circuit court of the United States must conform in its mode of proceeding, to the law of the state, and the judgment of the circuit court, dismissing an action of trespass so brought, upon the ground that the law of the state was not in force in the circuit court, is erroneous. *Sears v. Eastburn*, 10 How. 187, 13 L. Ed. 381.

**3. Right of plaintiff in state court to remain such after removal to federal court.**—*Thompson v. Railroad Companies*, 6 Wall. 134, 18 L. Ed. 765.

A plaintiff in the state court may remain plaintiff on the record in a federal court, and prosecute his suit in that court as he is authorized by state laws to prosecute it in the state courts. *Thompson v. Railroad Companies*, 6 Wall. 134, 18 L. Ed. 765. See, generally, the title PARTIES.

**4. Actions by assignees.**—*Delaware County Comm'rs v. Diebold Safe, etc., Co.*, 133 U. S. 473, 488, 33 L. Ed. 674. See, generally, the title ASSIGNMENTS, vol. 2, p. 549.

By the law of Indiana, the assignee by a valid assignment of an entire contract, not negotiable at common law, may maintain an action thereon in his own name against the original debtor; and the assignee by valid assignment of part of a contract may sue thereon jointly with his assignor, or may maintain an action alone if no objection is taken by demurrer or answer to the nonjoinder of the assignor. These rules govern the practice and pleadings in actions at law in the federal courts held within the state. *Delaware County Comm'rs v. Diebold Safe, etc., Co.*, 133 U. S. 473, 488, 33 L. Ed. 674; *Thompson v. Railroad Companies*, 6 Wall. 134, 18 L. Ed. 765; *Albany, etc., Co. v. Lundberg*, 121 U. S. 451, 30 L. Ed. 982; *Arkansas Valley Smelting Co. v. Belden Min. Co.*, 127 U. S. 379, 32 L. Ed. 346.

**5. Right of agent to sue on contract made for principal.**—*Albany, etc., Co. v. Lundberg*, 121 U. S. 451, 30 L. Ed. 982.

(b) *Parties Defendant*—aa. *Right of Landlord to Be Let in to Defend*.—If a state statute permits the landlord to come in and defend an action of ejectment brought against his tenant, the federal courts may do likewise.<sup>6</sup>

bb. *Joinder of Parties Defendant*.—A state statute allowing suit to be brought against the maker and payee, jointly, of a promissory note, by the indorsee; is of no force and effect in the courts of the United States as it tends to oust their jurisdiction.<sup>7</sup>

cc. *Separate Actions against Parties Jointly Bound*.—A state statute providing that when two or more persons are jointly bound by contract, an action may be brought against all or any of them at the plaintiff's option, is applicable to proceedings in the federal courts.<sup>8</sup>

dd. *Joint and Several Judgments*.—A state statute providing that a judgment may be given for or against one or more of several plaintiffs or for or against one or more defendants, and that though all of the defendants have been summoned a judgment may be rendered against any one of them, provided judgment could have been rendered against him if the action had been against him alone, is applicable to proceedings in the federal courts being a rule of practice within the practice conformity act.<sup>9</sup>

(6) *Pleadings*—(a) *In General*.—Pleadings in common-law causes are, of course, within the practice conformity act, and, with respect to them, the state practice is binding on the federal courts.<sup>10</sup>

(b) *Adoption of Code Pleading*.—Where a state law, in force when the act of congress was passed, has abolished the different forms of action, and the forms of pleading appropriate to them, and has substituted a simple petition or complaint setting forth the facts, and prescribed the subsequent proceedings of pleading or practice to raise the issues of law or fact in the case, such law is undoubtedly obligatory upon the courts of the United States in that locality.<sup>11</sup>

**6. Right of landlord to come in and defend action against tenant.**—*Phelps v. Oaks*, 117 U. S. 236, 240, 29 L. Ed. 888. See the titles EJECTMENT; LANDLORD AND TENANT.

**7. Joint action against makers and indorsers of note.**—*Dromgoole v. Farmers', etc.*, Bank, 2 How. 241, 11 L. Ed. 252; *Keary v. Farmers', etc.*, Bank, 16 Pet. 88, 89, 10 L. Ed. 897. See, generally, the titles BILLS, NOTES AND CHECKS, vol. 3, p. 257; PARTIES.

"But it has been already decided by this court, that the statute of Mississippi is of no force or effect in the courts of the United States, and that independently of that statute no such joint action is by law maintainable. This was decided in *Keary v. Farmers', etc.*, Bank, 16 Pet. 88, 89, 10 L. Ed. 897." *Dromgoole v. Farmers', etc.*, Bank, 2 How. 241, 243, 11 L. Ed. 252.

**8. Separate actions against parties jointly bound.**—*Sawin v. Kenny*, 93 U. S. 289, 290, 23 L. Ed. 926.

Under the code of practice of Arkansas, in force when this judgment was rendered, and therefore furnishing a rule of practice for the courts of the United States in that state, an action on a contract, upon which two or more persons were jointly bound, might be brought against all or any of them; and, although they were all summoned, judgment might be rendered against any of them severally, where the plaintiff would have been entitled to a judgment against such defendants if the action had been against them alone.

*Sawin v. Kenny*, 93 U. S. 289, 23 L. Ed. 926.

**9. Joint and several judgments.**—*Sawin v. Kenny*, 93 U. S. 289, 290, 23 L. Ed. 926.

**10. Pleadings—In general.**—*Amy v. Watertown* (No. 1), 130 U. S. 301, 303, 32 L. Ed. 946; *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, 300, 23 L. Ed. 898; *Lowndes v. Huntington*, 153 U. S. 1, 18, 38 L. Ed. 615.

**11. Code pleading.**—*Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, 300, 23 L. Ed. 898; *Lowndes v. Huntington*, 153 U. S. 1, 18, 38 L. Ed. 615; *Beard v. Federy*, 3 Wall. 478, 479, 18 L. Ed. 88.

In the federal courts for the California circuit (which have herein adopted the practice prevailing in the state courts under the state act regulating proceedings in civil cases), not only may distinct parcels of land, if covered by one title, be included in one complaint or declaration, but, with a demand for these, may be united a claim for their rents and profits, or for damages for withholding them. *Beard v. Federy*, 3 Wall. 478, 479, 18 L. Ed. 88.

But in *Greer v. Mezes*, 24 How. 268, 278, 16 L. Ed. 661, it was said: "Although the circuit court may have adopted the mode of instituting the action of ejectment by petition and summons, instead of the old fiction of lease, entry and ouster, it is still governed by the principles of pleading and practice which have been established by courts of common law. The hybrid mixture of civil and common-law

(c) *Sufficiency and Effect of Pleadings*—aa. *In General*.—The sufficiency and scope of pleadings in actions at law are matters in which the circuit courts of the United States are governed by the practice of the courts of the state in which they are held.<sup>12</sup>

bb. *Petition or Complaint*.—The sufficiency of the averments of a petition in an action in the federal court against the personal representative of a decedent's estate for a devastavit are to be governed by the state practice.<sup>12</sup>

cc. *Plea or Answer*.—The question whether the defendant's pleadings in a state court were sufficient to present an equitable defense in proper form for final adjudication is one upon which the decision of the state courts is conclusive.<sup>14</sup>

(d) *Effect of Denials or Admissions in Pleadings*.—The state rules as to the effect of denials or admissions in pleadings govern in the federal courts.<sup>15</sup> Thus a state statute providing that the answer must contain a general or specific denial of each material allegation of the complaint controverted by the defendant, and that each material allegation of the complaint not controverted by the answer must, for the purposes of the action, be taken as true, is binding on the federal courts.<sup>16</sup>

(e) *Verification of Pleadings*.—Where under the state practice an unverified plea of non est factum is demurrable, such practice also obtains in the federal courts.<sup>17</sup>

pleadings and practice introduced by state codes cannot be transplanted into the courts of the United States." But see *Beard v. Federy*, 3 Wall. 478, 479, 18 L. Ed. 88.

12. *Sufficiency and scope of pleadings*.—Rev. Stat., § 914; *Bond v. Dustin*, 112 U. S. 604, 28 L. Ed. 835; *Glenn v. Sumner*, 132 U. S. 152, 156, 33 L. Ed. 301; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 209, 36 L. Ed. 943; *Northern Pac. Railroad v. Paine*, 119 U. S. 561, 562, 30 L. Ed. 513; *Henderson v. Louisville, etc., Railroad*, 123 U. S. 61, 64, 31 L. Ed. 92; *Roberts v. Lewis*, 144 U. S. 653, 657, 36 L. Ed. 579.

"All defenses are open to a defendant in the circuit court of the United States, under any form of plea, answer or demurrer, which would have been open to him under like pleading in the courts of the state within which the circuit court is held. Act of June 1, 1872, c. 255, § 5; 17 Stat. 197; Rev. Stat., § 914; *Chemung Canal Bank v. Lowery*, 93 U. S. 72, 23 L. Ed. 806; *Glenn v. Sumner*, 132 U. S. 152, 33 L. Ed. 301; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 35 L. Ed. 55." *Roberts v. Lewis*, 144 U. S. 653, 656, 36 L. Ed. 579.

13. *Averment of petition in action against personal representative for devastavit*.—*McGill v. Armour*, 11 How. 142, 13 L. Ed. 638. See, generally, the title EXECUTORS AND ADMINISTRATORS.

Where a creditor brought an action against an executrix in the circuit court of the United States for Louisiana, and the petition only averred that the petitioner was shown to be a creditor by the accounts in the state court which had jurisdiction over the estates of deceased persons, and then proceeded to charge the executrix with a devastavit, and exceptions were taken to the petition as insufficient, these exceptions must be sustained. The

petition should have gone on to allege further proceedings in the state court analogous to a judgment at common law, as a foundation of a claim for a judgment against the executrix de bonis propriis, suggesting a devastavit. The laws of Louisiana provide for compelling the executrix to file a tableau of distribution, which is a necessary and preliminary step towards holding the executrix personally responsible. The petition, not having averred this, was defective, and the exceptions must be sustained. *McGill v. Armour*, 11 How. 142, 13 L. Ed. 638.

14. *Plea or answer*.—*Chouteau v. Gibson*, 111 U. S. 200, 201, 28 L. Ed. 400.

15. *Effect of denials or admissions in pleadings*.—*Northern Pac. Railroad v. Paine*, 119 U. S. 561, 562, 30 L. Ed. 513; *Robertson v. Perkins*, 129 U. S. 233, 32 L. Ed. 686.

16. *Undenied allegation taken as true*.—*Robertson v. Perkins*, 129 U. S. 233, 235, 32 L. Ed. 686, construing § 522 of the New York Code of Civil Procedure.

Where in an action to recover back duties the complaint alleged that the plaintiff made a proper protest, and duly appealed to the secretary of the treasury, and properly filed his action after the decision of the secretary was made, as required by law, and none of these allegations are denied as required by the state practice, they are to be taken as true under another rule of statutory practice providing for that effect to be given the allegations in the complaint which are not denied by the answer. *Robertson v. Perkins*, 129 U. S. 233, 235, 32 L. Ed. 686.

17. *Verification of pleas*.—*Bell v. Vicksburg*, 23 How. 443, 16 L. Ed. 579.

The circuit court may adopt the usual practice in the state if not contrary to an act of congress. *Bell v. Vicksburg*, 23 How. 443, 16 L. Ed. 579.



(f) *Method of Raising Defenses or Objections*.—aa. *Objections to Jurisdiction*.—The circuit courts of the United States follow the practice of the courts of the state in regard to the manner in which objections may be taken to the jurisdiction, and the question whether objections to the jurisdiction and defenses on the merits shall be pleaded successively or together.<sup>18</sup>

bb. *Defense of Statute of Limitations*.—The state method of objecting that the claim sued on is barred by the statute of limitations governs in proceedings in the federal courts.<sup>19</sup>

cc. *Objection for Insufficiency of Evidence*.—Whether a defendant in an action at law may present by a motion to order a nonsuit of the plaintiff, motion to direct a verdict, or by demurrer to the evidence, the defense that the plaintiff, upon his own case, shows no cause of action, is a question of "practice, pleadings, and forms and modes of proceeding," as to which the courts of the United States are required to conform as near as may be to those existing in the courts of the state within which the trial is had.<sup>20</sup>

dd. *Nonsuit or Discontinuance*.—The state practice to nonsuit a plaintiff where the evidence is insufficient, is to be followed by the federal courts within that state,<sup>21</sup> and as to what constitutes a discontinuance of an action, federal courts are governed by the state practice.<sup>22</sup>

(g) *Amendments*.—In the absence of any regulation of congress, the state practice as to amendment of pleadings prevails in trials at common law in the United States courts.<sup>23</sup>

(7) *Evidence*.—See ante, "Evidence," VII, J, 13, c, (21).

(8) *Equitable Defenses*.—State statutes permitting equitable defenses in actions or proceedings at law,<sup>24</sup> or which abolish the distinction between law and

**18. Mode of raising objections to jurisdiction.**—Southern Pac. Co. v. Denton, 146 U. S. 202, 209, 36 L. Ed. 943; Roberts v. Lewis, 144 U. S. 653, 36 L. Ed. 579, citing Chemung Canal Bank v. Lowery, 93 U. S. 72, 23 L. Ed. 806; Glenn v. Sumner, 132 U. S. 152, 33 L. Ed. 301; Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 35 L. Ed. 55.

Where under the state practice an objection to the jurisdiction is properly made by answer, the same rule obtains in the United States courts. Roberts v. Lewis, 144 U. S. 653, 657, 36 L. Ed. 579.

**19. Method of raising objections because claim barred by limitations.**—Chemung Canal Bank v. Lowery, 93 U. S. 72, 23 L. Ed. 806 (where the Wisconsin practice allowed the objection to be taken by demurrer, where it appeared on the face of the complaint, and the same rule was held to govern in the federal courts for that state). See, generally, the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION.

**20. Method of raising objection for insufficiency of evidence.**—Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 39, 35 L. Ed. 55, citing Sawin v. Kenny, 93 U. S. 289, 23 L. Ed. 926; Ex parte Boyd, 105 U. S. 647, 26 L. Ed. 1200; Chateaugay, etc., Iron Co., Petitioner, 128 U. S. 544, 32 L. Ed. 508; Glenn v. Sumner, 132 U. S. 152, 156, 33 L. Ed. 301; Coughran v. Bigelow, 164 U. S. 301, 308, 41 L. Ed. 442.

**21. Nonsuit.**—Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 35 L. Ed. 55; Coughran v. Bigelow, 164 U. S. 301, 308, 41 L. Ed. 442. See the title DIS-

MISSAL, DISCONTINUANCE AND NONSUIT.

**22. Discontinuance.**—Brown v. Van Braam, 3 Dall. 344, 1 L. Ed. 629.

The Rhode Island practice that the entry of default, after a plea of the general issue, no similitur being on the record, does not operate as a discontinuance, obtains in the federal courts for that state. Brown v. Van Braam, 3 Dall. 344, 1 L. Ed. 629.

**23. Amendments.**—Henderson v. Louisville, etc., Railroad, 123 U. S. 61, 64, 31 L. Ed. 92; West v. Smith, 101 U. S. 263, 266, 25 L. Ed. 809; Liverpool, etc., Ins. Co. v. Gunther, 116 U. S. 113, 126, 29 L. Ed. 575. See, generally, the title AMENDMENTS, vol. 1, p. 288.

A federal court to which a case is removed is governed by the state statute which permits the plaintiff to correct any defect, mistake or informality in his declaration, not changing the form or ground of the action, or to insert new counts for the same cause of action as that alleged in the original counts. West v. Smith, 101 U. S. 263, 264, 25 L. Ed. 809.

Where congress has legislated as to amendments.—See ante, "Act of Congress in Relation to Amendments," VII, K, 3, i, (3).

**24. Effect of state statutes permitting equitable defenses.**—Jones v. McMasters, 20 How. 8, 15 L. Ed. 805; Scott v. Armstrong, 146 U. S. 499, 36 L. Ed. 1059; Van Norden v. Morton, 99 U. S. 378, 381, 25 L. Ed. 453; Lantry v. Wallace, 182 U. S. 536, 550, 45 L. Ed. 1218; Northern Pac. Railroad v. Paine, 119 U. S. 561, 30 L. Ed.

equity,<sup>25</sup> do not have the effect of making equitable defenses available in actions at law in the federal courts.

(9) *Juries*—(a) *Qualification and Exemption of Jurors*.—In respect to the qualifications and exemptions of jurors to serve in the courts of the United States, the state laws are controlling.<sup>26</sup>

(b) *Designation, Impanelment and Challenge*—aa. *In Absence of Rule Adopting State Practice*.—Congress has not made the laws and usages relating to the designation and impaneling of jurors in the respective state courts applicable to the courts of the United States, except as the latter shall by general standing rule or by special order in a particular case adopt the state practice in that regard.<sup>27</sup>

bb. *Adoption of State Practice by Rule of Court*.—The act of congress, passed on the 20th of July, 1840 (5 Stat. at Large 394), confers upon the courts of the United States the power to make all necessary rules and regulations, for conforming the impaneling of juries to the laws and usages in force in the state.<sup>28</sup>

513. See, also, *Scott v. Neely*, 140 U. S. 166, 35 L. Ed. 358. See, generally, the title ACTIONS, vol. 1, p. 96, and cross references there given.

In an action at law in a circuit court of the United States equitable defenses are not permitted, and if the defendant has equitable grounds for relief against the plaintiff, he must seek to enforce them by suit in equity. *Northern Pac. Railroad v. Paine*, 119 U. S. 561, 30 L. Ed. 513; *Lantry v. Wallace*, 182 U. S. 536, 550, 45 L. Ed. 1218, citing *Bennett v. Butterworth*, 11 How. 669, 13 L. Ed. 859; *Thompson v. Railroad Companies*, 6 Wall. 134, 18 L. Ed. 765.

**Actions to enforce statutory liability of stockholders.**—An equitable defense in an action to enforce the statutory liability of a stockholder is not permitted in the United States courts. *Lantry v. Wallace*, 182 U. S. 536, 550, 45 L. Ed. 1218. See the titles CORPORATIONS, ante, p. 621; STOCK AND STOCKHOLDERS.

**25. Effect of state statute abolishing distinction between law and equity on equitable defenses.**—*Jones v. McMasters*, 20 How. 8, 15 L. Ed. 805; *Scott v. Armstrong*, 146 U. S. 499, 36 L. Ed. 1059.

**Equitable set-off in actions at law.**—An equitable set-off should not be allowed in actions at law in the courts of the United States, even when sitting in a state where the distinction between law and equity has been abolished. *Scott v. Armstrong*, 146 U. S. 499, 36 L. Ed. 1059. See, generally, the title SET-OFF, RECoupMENT AND COUNTERCLAIM.

**Action for recovery of real estate.**—In an action for the recovery of real estate, in the United States court, an equitable defense arising out of the regularity of the survey and location under which the plaintiff claims, cannot be set up, even though, under the state statute, there is no distinction between law and equity. *Jones v. McMasters*, 20 How. 8, 15 L. Ed. 805.

**26. Qualification of jurors.**—*Pointer v. United States*, 151 U. S. 396, 407, 38 L. Ed. 208; *St. Clair v. United States*, 154 U. S. 134, 147, 38 L. Ed. 936; *Crowley v.*

*United States*, 194 U. S. 461, 48 L. Ed. 1075. See, generally, the title JURY.

**The United States district court of Porto Rico** is governed by the local statutes in the empanelment of jurors, since the passage of the Foraker act. *Crowley v. United States*, 194 U. S. 461, 462, 48 L. Ed. 1075.

**27. Designation and impanelment in absence of adoption of state practice by rule.**—*Pointer v. United States*, 151 U. S. 396, 407, 38 L. Ed. 208; *St. Clair v. United States*, 154 U. S. 134, 147, 38 L. Ed. 936; *United States v. Shackelford*, 18 How. 588, 15 L. Ed. 495; *United States v. The Insurgents*, 2 Dall. 335, 1 L. Ed. 404. See, also, *Gulf, etc., R. Co. v. Shane*, 157 U. S. 348, 351, 39 L. Ed. 727. See, generally, the title JURY.

In an early case it was held that the exact number of which the panel should consist was not a matter governed by state law. *United States v. The Insurgents*, 2 Dall. 335, 1 L. Ed. 404.

In the absence of such a rule or order (and no such rule or order appears to have been made by the court below) the mode of designating and impaneling jurors for the trial of cases in the courts of the United States is within the control of those courts, subject only to the restrictions congress has prescribed, and, also, to such limitations as are recognized by the settled principles of criminal law to be essential in securing impartial juries for the trial of offenses. *Pointer v. United States*, 151 U. S. 396, 407, 38 L. Ed. 208; *St. Clair v. United States*, 154 U. S. 134, 147, 38 L. Ed. 936.

But this recognition does not necessarily draw along with it the qualified right, existing at common law, of challenges by the government; and unless the laws and usages of the state, adopted by rule of court, allow it on behalf of the prosecution, it should be rejected, conforming, in this respect, the practice to the state law. *United States v. Shackelford*, 18 How. 588, 15 L. Ed. 495.

**28. Power to adopt state practice by rule.**—*United States v. Shackelford*, 18 How. 588, 15 L. Ed. 495.



This power includes that of regulating the challenges of jurors, whether peremptory or for cause, and in cases both civil and criminal,<sup>29</sup> with the exception, in criminal cases, of treason and other crimes of which the punishment is death, in which cases the right of peremptory challenge cannot be taken away.<sup>30</sup>

(c) *Withdrawal and Substitution of Jurors.*—The federal courts may follow the state practice as to the withdrawal and substitution of jurors, where the withdrawal and substitution takes place before any evidence is given and before the plaintiff concludes his opening address.<sup>31</sup>

(10) *Personal Conduct of Judge at Trial.*—The personal conduct and administration of the judge in the discharge of his separate functions is neither practice, pleading, nor a form nor mode of proceeding within the meaning of those terms as found in the conformity act and state regulations in respect thereto are not binding upon the federal courts.<sup>32</sup>

(11) *Instructions.*—The judges of the federal courts are not controlled in their manner of charging juries by state regulations.<sup>33</sup> Thus a state statute or constitution providing that the jury shall only be charged as to the law of the cases, does not prevent a federal court from charging as to facts,<sup>34</sup> and, upon a

**29. Nature and extent of power to adopt state practice.**—United States *v.* Shackelford, 18 How. 588, 15 L. Ed. 495. See, also, *Gulf, etc., R. Co. v. Shane*, 157 U. S. 348, 351, 39 L. Ed. 727.

**30. Treason of crimes punishable by death.**—The act of 1790 recognizes the right of peremptory challenge in these cases, and therefore it cannot be taken away. United States *v.* Shackelford, 18 How. 588, 15 L. Ed. 495.

**31. Withdrawal and substitution of jurors.**—*Silby v. Foote*, 14 How. 218, 219, 14 L. Ed. 394. See, generally, the title JURY.

Upon a trial in New York, a juror became ill, and was discharged before any evidence was given, and before the plaintiffs' counsel had concluded his opening address. The court ordered another juror to be sworn, and proceeded with the trial. The defendant cannot object to this. It is the practice in New York, and the circuit court had a right to follow it. *Silby v. Foote*, 14 How. 218, 14 L. Ed. 394.

**32. Personal conduct of judge.**—*Nudd v. Burrows*, 91 U. S. 426, 442, 23 L. Ed. 286; United States Mut. Accident Ass'n *v.* Barry, 131 U. S. 100, 33 L. Ed. 60; *Grimes Dry Goods Co. v. Malcolm*, 164 U. S. 483, 490, 41 L. Ed. 524; *St. Louis, etc., Railway v. Vickers*, 122 U. S. 360, 30 L. Ed. 1161; *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, 300, 23 L. Ed. 898; *Chateaugay, etc., Iron Co., Petitioner*, 128 U. S. 544, 553, 32 L. Ed. 508; *Vicksburg, etc., R. Co. v. Putnam*, 118 U. S. 545, 30 L. Ed. 257; *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387, 417, 33 L. Ed. 730.

**33. Charging jury.**—*Lincoln v. Power*, 151 U. S. 436, 442, 38 L. Ed. 224; United States *v.* Philadelphia, etc., R. Co., 123 U. S. 113, 114, 31 L. Ed. 138; United States Mut. Accident Ass'n *v.* Barry, 131 U. S. 100, 33 L. Ed. 60; *Grimes Dry Goods Co. v. Malcolm*, 164 U. S. 483, 490, 41 L. Ed. 524; *Vicksburg, etc., R. Co. v. Putnam*, 118 U. S. 545, 30 L. Ed. 257; *St. Louis,*

*etc., Railway v. Vickers*, 122 U. S. 360, 30 L. Ed. 1161; *Rucker v. Wheeler*, 127 U. S. 85, 93, 32 L. Ed. 102; *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387, 417, 33 L. Ed. 730; *Nudd v. Burrows*, 91 U. S. 426, 23 L. Ed. 286; *Chateaugay, etc., Iron Co., Petitioner*, 128 U. S. 544, 553, 32 L. Ed. 508; *Shepard v. Adams*, 168 U. S. 618, 625, 42 L. Ed. 602; *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, 300, 23 L. Ed. 898; *Continental Improvement Co. v. Stead*, 95 U. S. 161, 166, 24 L. Ed. 403; *Ruch v. Rock Island*, 97 U. S. 693, 696, 24 L. Ed. 1101. See, generally, the title INSTRUCTIONS.

**Propriety of expression of opinion on facts, according to state practice.**—Where, under the state practice, the court expresses its opinion upon the facts, it is not improper for the federal courts within that state to follow the state practice. *Mitchell v. Harmony*, 13 How. 115, 14 L. Ed. 75; *Insurance Co. v. Rodol*, 95 U. S. 232, 238, 24 L. Ed. 433; *McLanahan v. Universal Ins. Co.*, 1 Pet. 170, 182, 7 L. Ed. 98; *Games v. Stiles*, 14 Pet. 322, 10 L. Ed. 476.

**34. Rule requiring charging of jury only as to law.**—*Nudd v. Burrows*, 91 U. S. 426, 23 L. Ed. 286; *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387, 417, 33 L. Ed. 730; *Vicksburg, etc., R. Co. v. Putnam*, 118 U. S. 545, 30 L. Ed. 257; *Lincoln v. Power*, 151 U. S. 436, 443, 38 L. Ed. 224; United States *v.* Philadelphia, etc., R. Co., 123 U. S. 113, 114, 31 L. Ed. 138; *Rucker v. Wheeler*, 127 U. S. 85, 93, 32 L. Ed. 102; *St. Louis, etc., Railway v. Vickers*, 122 U. S. 360, 361, 30 L. Ed. 1161 (where the state constitution contained such a provision.)

Where a state statute required a judge to instruct a jury only as to the law of a case, and the circuit court judge charged the jury upon the facts, it was held that this was not error, because the personal conduct and administration of the judge in the discharge of his separate functions were not practice or pleading, or a form



like principle, a state law requiring the written instructions of the court to be taken by the jury to their room and returned with the verdict is not binding on the federal courts.<sup>35</sup>

(12) *Verdict*—(a) *Form and Effect*.—The form and effect of verdicts in actions at law are matters in which the United States courts are governed by the practice of the courts of the state in which they are held.<sup>36</sup>

(b) *Requiring Special Findings*.—A state statute prescribing that the judge should require the jury to answer special interrogatories in addition to finding a general verdict does not apply to the courts of the United States.<sup>37</sup>

(c) *Taking and Entering*.—If any particular practice prevails in the state courts, as to the manner of entering upon the record the finding of the jury, it is a matter of practice as to the form of taking and entering the verdict of the jury, and cannot be binding upon the courts of the United States.<sup>38</sup>

(d) *Verdict on Good and Bad Counts*.—A state statute providing, that when an entire verdict shall be given on several counts the same shall not be set aside or reversed on the ground of any defective count, if one or more of the counts in the declaration is sufficient to sustain the verdict, governs proceedings tried in the federal courts in that state.<sup>39</sup>

(13) *Judgments*—(a) *Record of Judgments*.—There is no necessity that the courts of the United States should follow the careless precedents of state courts which do not make a record of judgments in any legal form.<sup>40</sup>

or method of proceeding, within the meaning of those terms in the act of congress. *Nudd v. Burrows*, 91 U. S. 426, 23 L. Ed. 286; *Lincoln v. Power*, 151 U. S. 436, 443, 38 L. Ed. 224.

**35. Requiring written instructions to be given to jury on retirement and returned with verdict.**—*Nudd v. Burrows*, 91 U. S. 426, 441, 23 L. Ed. 286; *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, 300, 23 L. Ed. 898; *Chateaugay, etc., Iron Co., Petitioner*, 128 U. S. 544, 553, 32 L. Ed. 508; *Lincoln v. Power*, 151 U. S. 436, 443, 38 L. Ed. 224. See, generally, the title INSTRUCTIONS.

The practice act of Illinois provides that the jury shall, on their retirement, take the written instructions of the court, and return them with their verdict. The circuit court below refused to allow the jury to take to their room the written instructions given to them. Held, that the act of congress of June 1, 1872, § 5 (17 Stat. 197), has no application to the case, and that there was no error in the action of the court below. *Nudd v. Burrows*, 91 U. S. 426, 427, 23 L. Ed. 286.

**36. Form and effect of verdicts.**—*Bond v. Dustin*, 112 U. S. 604, 28 L. Ed. 835; *Glenn v. Sumner*, 132 U. S. 152, 156, 33 L. Ed. 301. See, generally, the title VERDICT.

In Louisiana, the sufficiency of the verdict must be judged by the rules of the common law and the statutes of the United States, and not by the laws and practice of Louisiana. The act of 1824 does not include such a case. Hence, where the jury found a verdict in general terms for the plaintiff in a suit upon a promissory note, without finding the amount due, which the laws and practice of Louisiana require them to do, and, the court then gave judgment for the amount of the note,

this would have been adjudged to be a cause of reversal of the judgment by the supreme court of the state, but cannot be so held by this court. *Parks v. Turner*, 12 How. 39, 13 L. Ed. 883.

**37. Requiring special findings by jury.**—*Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898; *Lincoln v. Power*, 151 U. S. 436, 442, 38 L. Ed. 224; *Chateaugay, etc., Iron Co., Petitioner*, 128 U. S. 544, 554, 32 L. Ed. 508; *Duncan v. United States*, 7 Pet. 435, 8 L. Ed. 739; *Grimes Dry Goods Co. v. Malcolm*, 164 U. S. 483, 490, 41 L. Ed. 524; *Vicksburg, etc., R. Co. v. Putnam*, 118 U. S. 545, 50 L. Ed. 257; *United States Mut. Accident Ass'n v. Barry*, 131 U. S. 100, 33 L. Ed. 60. See, generally, the title VERDICT.

Before the jury were sworn, the defendant offered a statement to the court, for the purpose of obtaining a special verdict on the facts, according to the provisions of the act of legislature of Louisiana, of 1818; the court would not suffer the same to be given to the jury for a special finding, because it "was contrary to the practice of the court, to compel a jury to find a special verdict." *Duncan v. United States*, 7 Pet. 435, 8 L. Ed. 739.

**38. Manner of taking and entering verdict.**—*Long v. Palmer*, 16 Pet. 65, 10 L. Ed. 888. See, generally, the title VERDICT.

**39. Validity of verdict on good and bad counts.**—*Bond v. Dustin*, 112 U. S. 604, 28 L. Ed. 835 (construing § 914 of the Revised Statutes of Illinois); *Townsend v. Jemison*, 7 How. 706, 12 L. Ed. 880.

**40. Record of judgment.**—*Piquignot v. Pennsylvania R. Co.*, 16 How. 104, 14 L. Ed. 863; *Reeside v. Walker*, 11 How. 272, 13 L. Ed. 693.

According to the practice in Pennsylv

(b) *Summary Entry of Judgments on Appeal Bonds*.—The federal court may adopt as a rule of practice regulations established by state law, by which, on appeal bonds, when the appellants fail in their appeal, on the coming in of the decree or judgment of the appellate court, a summary judgment, on motion, may be entered against principal and sureties in the appeal bond.<sup>41</sup>

(c) *Conclusiveness*.—See ante, "Conclusiveness," VII, J, 13, c, (28), (e).

(d) *Lien*.—See ante, "Lien," VII, J, 13, c, (28), (f).

(e) *Setting Aside, Modifying or Vacating*.—In general, state rules as to the power of a court to modify, set aside or vacate its own judgments after the term at which they are rendered are not binding on the federal courts,<sup>42</sup> and a special proceeding under a state statute for the purpose of setting aside a judgment obtained by fraud which proceeding is removed to the federal courts, is governed by the special authority given by the state statutes.<sup>43</sup>

(14) *Enforcement of Judgment*—(a) *Adoption of State Procedure in General*.—Express provision is made by act of congress for enforcing the judgments of the United States courts by borrowing from the state practice those remedies for the enforcement of judgments of the state courts which were in force at the time of the enactment of the act of congress, and by the employment of such remedies as have been subsequently enacted by the states, and expressly adopted by general rules of the United States courts.<sup>44</sup>

vania, where a defendant pleads set-off, the jury are allowed to find in their verdict the amount that the plaintiff is indebted to the defendant, and according to their mode of keeping records this result is entered by way of note; e. g., "new trial refused and judgment on the verdict." Although this may be a good record in the courts of Pennsylvania, it does not follow that it is so in the courts of the United States. *Reese v. Walker*, 11 How. 272, 13 L. Ed. 693.

**41. Entry of judgment on appeal bond.**—*Hiriart v. Ballon*, 9 Pet. 156, 9 L. Ed. 85.

Under this rule, after the affirmance of a decree of the district court by the supreme court of the United States, and the filing of the mandate of the supreme court, the district court, on a motion for a rule on the surety in an appeal bond to show cause why judgment should not be entered against him, on the first day of the next term, and no cause being shown, entered a judgment against the surety. The party against whom the judgment was entered afterwards came into court, and prayed a trial by jury, which was refused; and he prosecuted this writ of error, to reverse the judgment of the district court refusing the said trial. The rule of the district court of Louisiana follows the analogy of the laws of Louisiana, being modified only so far as is proper to suit the organization of the courts of the United States, and to conform to the laws thereof; the summary judgment is therefore strictly authorized, and the party had no right to a trial by jury. In becoming a surety, he submitted himself to be governed by the fixed rules which regulate the practice of the court. *Hiriart v. Ballon*, 9 Pet. 156, 9 L. Ed. 85.

**42. State rules as governing in federal courts**.—*Bronson v. Schulten*, 104 U. S. 410, 417, 26 L. Ed. 797. See, also, *Phillips*

*v. Negley*, 117 U. S. 665, 678, 29 L. Ed. 1013. See, generally, the title JUDGMENTS AND DECREES.

Authority to set aside, vacate or modify judgments after the term at which they were rendered, can neither be conferred upon nor withheld from the courts of the United States by the statute of the state or the practice of its courts. *Bronson v. Schulten*, 104 U. S. 410, 26 L. Ed. 797.

**43. Statutory proceedings to set aside judgment**.—*Cowley v. Northern Pac. R. Co.*, 159 U. S. 569, 570, 40 L. Ed. 263. See, generally, the title JUDGMENTS AND DECREES.

**44. Enforcement of judgments**.—Rev. Stat., § 916; *Chateaugay, etc., Iron Co.*, Petitioner, 128 U. S. 544, 554, 32 L. Ed. 508; *Lamaster v. Keeler*, 123 U. S. 376, 31 L. Ed. 238; *United States v. Council of Keokuk*, 6 Wall. 514, 18 L. Ed. 933; *Riggs v. Johnson County*, 6 Wall. 166, 18 L. Ed. 768; *Smith v. Cockrill*, 6 Wall. 756, 18 L. Ed. 973; *Wayman v. Southard*, 10 Wheat. 1, 2, 6 L. Ed. 253; *Cooke v. Avery*, 147 U. S. 375, 385, 37 L. Ed. 209; *Ex parte Boyd*, 105 U. S. 647, 651, 26 L. Ed. 1200; *United States Bank v. Halstead*, 10 Wheat. 51, 6 L. Ed. 264; *McCracken v. Hayward*, 2 How. 608, 615, 11 L. Ed. 397; *United States v. Knight*, 14 Pet. 301, 10 L. Ed. 465; *Beers v. Haughton*, 9 Pet. 329, 332, 9 L. Ed. 145; *Duncan v. Darst*, 1 How. 301, 309, 11 L. Ed. 139; *Canal, etc., Streets R. Co. v. Hart*, 114 U. S. 654, 661, 29 L. Ed. 226; *Ward v. Chamberlain*, 2 Black 430, 17 L. Ed. 319; *Riggs v. Johnson County*, 6 Wall. 166, 190, 18 L. Ed. 768.

"All the early laws on this subject were carefully and most ably reviewed by this court, in *Wayman v. Southard*, 10 Wheat. 1, 20, 6 L. Ed. 253, and *United States Bank v. Halstead*, 10 Wheat. 51, 6 L. Ed. 264, in



(b) *General Construction of Process Act.*—The words “the proceedings on the writs of execution and other final process,” must, from their very import, be construed to include all the laws which regulate the rights, duties and conduct of officers in the service of such process, according to its exigency, upon the person or property of the execution debtor, and also all the exemptions from arrest or imprisonment under such process created by those laws.<sup>45</sup>

(c) *Proceedings Supplementary to or in Aid of Execution.*—State statutory remedies supplementary to or in aid of execution in common-law causes are applicable to judgments rendered in the federal courts of that state.<sup>46</sup>

(d) *Imprisonment or Exemption from Imprisonment of Judgment Debtor.*—The act of congress making state procedure for the enforcement of judg-

which it was held, that the proceedings in the courts of the United States should be the same as they were in the several states at the time of passing the acts of congress, subject to be altered by the circuit courts, or regulations of the supreme court.” *McCracken v. Hayward*, 2 How. 608, 615, 11 L. Ed. 397.

The power of congress, under the constitution, as well as that of the courts of the United States, acting under its authority, extends to the adoption of the laws of the several states, not only as to the nature and form of writs of execution for the enforcement of judgments, but also as to all proceedings thereupon. *Ex parte Boyd*, 105 U. S. 647, 652, 26 L. Ed. 1200; *Beers v. Haughton*, 9 Pet. 329, 9 L. Ed. 145.

Writs of execution issuing from the courts of the United States, in virtue of those provisions, are not controlled or controllable, in their general operation or effect, by any collateral regulations which the state laws have imposed upon the state courts, to govern them in the actual use, suspension or superseding of them; such regulations and restrictions are exclusively addressed to the state tribunals, and have no efficacy in the courts of the United States, unless adopted by them. *Boyle v. Zacharie*, 6 Pet. 648, 8 L. Ed. 532; *Palmer v. Allen*, 7 Cranch 550, 3 L. Ed. 436; *Wayman v. Southard*, 10 Wheat. 1, 6 L. Ed. 253; *United States Bank v. Halstead*, 10 Wheat. 51, 6 L. Ed. 264.

The meaning of that section is, that the remedies, by execution or otherwise, on a judgment in a common-law cause, in a circuit court, shall be the same as were then provided by the laws of the state in respect to judgments in suits of a like nature or class. “Like causes” is the expression. *Canal, etc., Streets R. Co. v. Hart*, 114 U. S. 654, 662, 29 L. Ed. 226.

The modes of describing executions prescribed by the state laws, that can be executed just as conveniently and properly, by the federal courts and judges, as they can be by the state courts or judges, in cases where the execution issues from the latter courts, have been adopted by the acts of congress, as incident to the remedy. *Duncan v. Darst*, 1 How. 301, 309, 11 L. Ed. 139.

The act of congress is constitutional.—*Ex parte Boyd*, 105 U. S. 647, 26 L. Ed.

1200; *United States v. Knight*, 14 Pet. 301, 10 L. Ed. 465.

**45. General construction of process act.**—*Beers v. Haughton*, 9 Pet. 329, 331, 9 L. Ed. 145; *United States v. Knight*, 14 Pet. 301, 316, 10 L. Ed. 465; *Fink v. O'Neil*, 106 U. S. 272, 27 L. Ed. 196.

Forms of process, mesne and final, and the modes of process varied in essential particulars from the principles and usages of the common law, and in many cases they were different in the different states. Intention of congress, in passing the process acts, was, that the forms of writs and executions, and the modes of process, and proceedings in common-law suits, in the several circuit courts, should be the same as they were at that time in the courts of the respective states. *Riggs v. Johnson County*, 6 Wall. 166, 190, 18 L. Ed. 768.

**46. Proceedings in aid of execution.**—*Ex parte Boyd*, 105 U. S. 647, 26 L. Ed. 1200; *Canal, etc., Streets R. Co. v. Hart*, 114 U. S. 654, 661, 29 L. Ed. 226. See, also, *Mutual Reserve, etc., Ass'n v. Phelps*, 190 U. S. 147, 159, 47 L. Ed. 987.

A judgment creditor of the city of New Orleans, may proceed under article 246 of the Code of Louisiana, by supplemental petition and interrogatories, to summon a debtor of the city in garnishment proceedings, and obtain judgment compelling the debtor to pay the judgment. *Canal, etc., Streets R. Co. v. Hart*, 114 U. S. 654, 29 L. Ed. 226.

“It is urged that, by § 2 of the act of the legislature of Louisiana, passed March 17, 1870, Sess. Laws of 1870, Extra Session, Act No. 5, p. 10, it was made unlawful to issue any writ of execution or fieri facias, from any of the courts in Louisiana, against the city of New Orleans, to enforce the payment of any judgment for money, against that city. But we are of opinion that the provisions of that special act, in reference to judgments against the city of New Orleans, were not adopted by § 916.” *Canal, etc., Streets R. Co. v. Hart*, 114 U. S. 654, 661, 29 L. Ed. 226.

The exception made by the statute as to the city of New Orleans may be of force as to suits in the courts of the state, but it is not an exception which operates proprio vigore in the circuit court. *Canal, etc., Streets R. Co. v. Hart*, 114 U. S. 654, 661, 29 L. Ed. 226.



ments applicable to proceedings in the federal courts adopted the state practice as to the imprisonment of judgment debtors, and consequently gives imprisoned debtors the same rights and privileges as to jail limits as are fixed by the laws of the state.<sup>47</sup> And state laws as to exemptions of a party from arrest and imprisonment are binding on the federal courts.<sup>48</sup>

(e) *Homestead Exemption Laws*.—Homestead exemption laws in force in the states at the time of the enactment by congress of the practice conformity act are applicable to exempt property from levy on executions issued from the United States courts as well as those issued from the state courts.<sup>49</sup>

(f) *Compelling Municipal Corporation to Levy Tax to Pay Judgment*.—Mandamus being, in the supreme court of the state, the remedy to compel a municipal corporation to levy a tax to pay a judgment of which a creditor has no means of obtaining payment, a party having a judgment in a circuit court is entitled to the same remedy in that court.<sup>50</sup>

(g) *Forthcoming Bonds*.—Provisions of state law or practice as to forthcoming bonds are binding on the federal courts, as forthcoming bonds are to be regarded as part of the final process.<sup>51</sup>

**47. Imprisonment for debts—Rights of imprisoned debtor.**—United States v. Knight, 14 Pet. 301, 10 L. Ed. 465; Ward v. Chamberlain, 2 Black 430, 440, 17 L. Ed. 319.

The act of 1828 gives to debtors imprisoned under executions, from the courts of the United States, at the suits of the United States, the privilege of the jail limits in the several states, as they were fixed by the laws of the several states at the date of that act. United States v. Knight, 14 Pet. 301, 317, 10 L. Ed. 465.

**48. Exemption from arrest and imprisonment.**—Beers v. Haughton, 9 Pet. 329, 330, 9 L. Ed. 145.

**49. Exemption laws.**—Fink v. O'Neil, 106 U. S. 272, 279, 27 L. Ed. 196; Lanahan v. Sears, 102 U. S. 318, 26 L. Ed. 180. See, generally, the title HOME-STEAD EXEMPTIONS.

As the statute of Wisconsin, exempting homesteads from levy and sale upon executions, was in force at the time the act of congress of June 1, 1872, c. 255, took effect, and has remained so continuously from that time, it also follows that the exemption has thereby become a law of the United States within that state, and applies to executions issued upon judgments in civil causes recovered in their courts in their own name and behalf, equally with those upon judgments rendered in favor of private parties. Fink v. O'Neil, 106 U. S. 272, 279, 27 L. Ed. 196.

"The appellant is the owner of the mortgage in this case, and aware—so states his counsel—that he could not enforce it against the homestead in the state courts, as there mortgages can only be enforced by a decree of sale, commenced an action of ejectment for the premises in the circuit court of the United States, contending that the mortgage passed the legal title as against the mortgagors, and that, as its owner, he had a right to recover the possession of the

premises for default in the payment of the notes secured. He sought, in other words, to get around the state constitution by the form of his procedure in the federal court. We do not think that its wise and beneficent purpose of securing a home to the family against the vicissitudes of fortune can be thus easily evaded. A forced dispossession in ejectment is as much within the prohibition as a forced sale under judicial process. We think, therefore, that the decree in the suit, enjoining the action of ejectment, was properly rendered upon the undisputed facts stated in the complaint; and it is accordingly." Lanahan v. Sears, 102 U. S. 318, 322, 26 L. Ed. 180.

**Executions on judgments in favor of United States.**—No distinction is made, in any of these statutes on the subject, between executions on judgments in favor of private parties and on those in favor of the United States. And as there is no provision as to the effect of executions at all, except as contained in this legislation, it follows necessarily that the exemptions from levy and sale, under executions of one class, apply equally to all including those on judgments recovered by the United States. Fink v. O'Neil, 106 U. S. 272, 279, 27 L. Ed. 196.

**50. Compelling municipal corporation to levy tax to pay judgment.**—United States v. Council of Keokuk, 6 Wall. 514, 18 L. Ed. 933.

An injunction by a state court against such a levy is inoperative against a mandamus from the federal court ordering it, though issuing subsequently to the injunction. United States v. Council of Keokuk, 6 Wall. 514, 18 L. Ed. 933, affirming Riggs v. Johnson County, 6 Wall. 166, 18 L. Ed. 768.

**51. Forthcoming bonds.**—Amis v. Smith, 16 Pet. 303, 304, 10 L. Ed. 973. See, generally, the title FORTHCOMING AND DELIVERY BONDS.

The provisions of the third section of the act of congress of May 19th, 1828,

(h) *Sale under Execution*.—A sale by the marshal, not conforming to the state practice as to the mode of proceeding in levying the execution and making the sale, is irregular and void, and a deed by him on such sale conveys no title.<sup>52</sup>

(15) *New Trials*—(a) *In General*.—As to new trials in general, see ante, "Act of Congress in Relation to New Trials," VII, K, 3, i, (7).

(b) *New Trials in Ejectment*.—It is the duty of the federal courts to follow the practice of the state courts with respect to new trials in the action of ejectment, as where the laws of the state allow a new trial without showing cause.<sup>53</sup>

(16) *Revival of Suits or Actions*.—See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 45.

adopted the forthcoming bond in Mississippi, as a part of the final process of that state, at the time of the passage of the act. "A final process" is understood by the court to be all the writs of execution then in use in the state courts of Mississippi, which were properly applicable to the courts of the United States; and the phrase, "the proceedings thereupon," are understood to mean the exercise of all the duties of the ministerial officers of the state, prescribed by the laws of the state, for the purpose of obtaining the fruits of judgments; among those are the provisions of the laws relating to forthcoming bonds, which must be regarded as part of the final process. *Amis v. Smith*, 16 Pet. 303, 304, 10 L. Ed. 973.

The proceeding which produced the forthcoming bond was purely ministerial; the judicial mind was in no way employed in its production. It does not, then, possess the attributes of a judgment; and ought, therefore, to be treated in this court as final process, or, at least, as part of the final process. *Amis v. Smith*, 16 Pet. 303, 304, 10 L. Ed. 973.

**52. Sale under execution**.—*Smith v. Cockrill*, 6 Wall. 756, 18 L. Ed. 973; *Moncure v. Zunts*, 11 Wall. 416, 20 L. Ed. 181.

**Advertisement**.—The provisions of the code of procedure of Louisiana concerning sales of real estate under execution require that the sale shall be advertised in a newspaper published in the parish where the land is situated. A sale of lands in such cases, under execution from the federal court in Louisiana, should be set aside in a proper proceeding for that purpose, when it has not been advertised in a newspaper of the parish, and when there is a paper published in such parish. *Moncure v. Zunts*, 11 Wall. 416, 20 L. Ed. 181.

The seventh section of the act of congress of March 2, 1867 (14 Stat. at Large 466), applies only to such advertisements as may be published in behalf of the government, and are to be paid for out of the federal treasury. It does not affect advertisements for sale of lands under judicial process in suits between individuals. *Moncure v. Zunts*, 11 Wall. 416, 20 L. Ed. 181.

**Seizure and sale of debts due defendant**.—Where by the laws of a state, debts which are due to a defendant, against

whom an execution has issued, may be seized and sold, after being appraised at their cash value, and if two-thirds of such appraised value is not bid, the sheriff may adjourn the sale and again advertise the property, this mode of proceeding having been adopted by a rule of the circuit court of the United States, is obligatory upon the marshals of the federal courts within that state. *Collier v. Stanbrough*, 6 How. 14, 12 L. Ed. 324.

**53. New trials in ejectment**.—*Smale v. Mitchell*, 143 U. S. 99, 105, 36 L. Ed. 90; *Equator Co. v. Hall*, 106 U. S. 86, 27 L. Ed. 114; *Mansfield v. Excelsior Ref. Co.*, 135 U. S. 326, 328, 34 L. Ed. 162; *Britton v. Thornton*, 112 U. S. 526, 535, 28 L. Ed. 816; *Miles v. Caldwell*, 2 Wall. 35, 17 L. Ed. 755; *Blanchard v. Brown*, 3 Wall. 245, 18 L. Ed. 69; *Barber v. Pittsburg, etc., R. Co.*, 166 U. S. 83, 99, 41 L. Ed. 925; *Capital Traction Co. v. Hof*, 174 U. S. 1, 13, 43 L. Ed. 873. See, generally, the title EJECTMENT. See ante, "In Ejectment," VII, J, 13, c, (28), (e), bb.

"The case of enforcing, in a court of the United States, a statute of a state giving one new trial, as of right, in an action of ejectment, is quite exceptional, and such a statute does not enlarge, but restricts, the rules of the common law as to re-examining facts once tried by a jury; for by the common law a party was not concluded by a single verdict and judgment in ejectment, but might bring as many successive ejectments as he pleased, unless restrained by a court of equity after repeated verdicts against him. *Bac. Abr. 'Ejectment,' I*; *Equator Co. v. Hall* (1882), 106 U. S. 86, 27 L. Ed. 114; *Smale v. Mitchell* (1892), 143 U. S. 99, 36 L. Ed. 90." *Capital Traction Co. v. Hof*, 174 U. S. 1, 43 L. Ed. 873.

When an action of ejectment is tried in a circuit court of the United States according to the statutory mode of proceeding, that court is governed by the provisions concerning new trials as it is by the other provisions of the state statute. There is no reason why the federal court should disregard one of the rules by which the state legislature has guarded the transfer of the possession and title to real estate within its jurisdiction. *Equator Co. v. Hall*, 106 U. S. 86, 88, 27 L. Ed. 114; *Miles v. Caldwell*, 2 Wall. 35, 17 L. Ed. 755.

(17) *Securing Right of Redemption on Foreclosure*.—Where a statute provides that the right to redeem within a certain time shall be secured to the mortgagor on foreclosure, the particular mode in which the money is paid or secured by the mortgagor is not of the substance of the rights of either the mortgagor or the purchaser, but belongs to the domain of practice, the power to regulate which, in harmony with the laws of the United States and the rules of the supreme court, as may be necessary and convenient for the administration of justice, is expressly given to the circuit courts.<sup>54</sup>

(18) *Particular Proceedings or Remedies*.—(a) *Attachment*.—Circuit courts of the United States are not governed by any separate attachment law, but are required to administer the remedy in attachment provided in the laws of the state in which the courts are held.<sup>55</sup>

(b) *Bail*.—The regulations of the state laws as to bail are made binding on the federal courts by the process act.<sup>56</sup>

**54. Securing right of redemption on foreclosure.**—Connecticut Mut. Life Ins. Co. v. Cushman, 108 U. S. 51, 63, 27 L. Ed. 648; Brine v. Insurance Co., 96 U. S. 627, 24 L. Ed. 858; Allis v. Insurance Co., 97 U. S. 144, 24 L. Ed. 1008; Metropolitan Bank v. Connecticut Mut. Ins. Co., 131 U. S., appx. clxii, clxiii, 24 L. Ed. 1011; United States Mortgage Co. v. Sperry, 138 U. S. 313, 332, 34 L. Ed. 969. See, generally, the title MORTGAGES AND DEEDS OF TRUST.

Thus the circuit court may, by rule, prescribe the mode of redemption and the person to whom the money is to be paid. Connecticut Mut. Life Ins. Co. v. Cushman, 108 U. S. 51, 27 L. Ed. 648.

The substantial right given by the statute to the purchaser is that the redemption money be secured to him before the benefit of his purchase is taken away, and the substantial right given to the party redeeming is that the redemption become complete and effectual upon payment by him of the required amount. The particular mode in which the money is paid or secured by the latter for the benefit of the former is not of the substance of the rights of either. The mode or manner of payment belongs, so far as the federal court is concerned, to the domain of practice, the power to regulate which, in harmony with the laws of the United States and the rules of this court, as might be necessary and convenient for the administration of justice, is expressly given by statute to the circuit courts. Rev. Stat., § 918; Connecticut Mut. Life Ins. Co. v. Cushman, 108 U. S. 51, 62, 27 L. Ed. 648.

**55. Attachment.**—Perez v. Fernandez, 202 U. S. 80, 98, 50 L. Ed. 942 (holding the attachment laws of Porto Rico applicable to proceedings in attachment in the district court of Porto Rico); Shepard v. Adams, 168 U. S. 618, 624, 42 L. Ed. 602. See, generally, the title ATTACHMENT AND GARNISHMENT, vol. 2, p. 660.

Section 915 of the Revised Statutes provides that in common-law cases in the circuit and district courts the plaintiff

shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are provided by the laws of the state in which such court is held; and that such circuit or district courts may, from time to time, by general rules, adopt such state laws as may be in force in the states where they are held in relation to attachment and other process. Shepard v. Adams, 168 U. S. 618, 624, 42 L. Ed. 602.

**56. Bail.**—Beers v. Haughton, 9 Pet. 329, 330, 9 L. Ed. 145. See, generally, the title BAIL AND RECOGNIZANCE, vol. 2, p. 765.

By the rules of the circuit court of Ohio, adopted as early as January, 1808, the liability of special bail was provided for and limited; and it was declared, that special bail may surrender their principal, at any time before or after judgment against the principal, provided such surrender shall be before a return of a scire facias executed, or a second scire facias returned "nihil," against the bail; and this, in fact constituted a part of the law of Ohio, at the time the present recognizance was given; the same having been so enacted by the legislature. This act of the legislature of Ohio was in force at the time of the passage of the act of congress of the 19th of May, 1828, regulating the process of the courts of the United States, in new states, and must, therefore, be deemed a part of the "modes of proceeding in suits," and to have been adopted by it, so that the surrender of the principal within the time thus prescribed is not a mere matter of favor of the court, but is strictly a matter of a legal right. Beers v. Haughton, 9 Pet. 329, 9 L. Ed. 145.

The rule of the circuit court is in perfect coincidence with the state laws existing in 1828; and if it were not, the circuit court had authority, by the very provisions of the act of 1820, to make such a rule, as a regulation of the proceedings upon final process, so as to conform the same to those laws of the state on the same subject. Beers v. Haughton, 9 Pet. 329, 331, 9 L. Ed. 145; Sturges v. Crownin-



(c) *Quieting Title to Real Estate*.—The state method of procedure to quiet title to real estate is applicable to proceeding in the federal courts within the state.<sup>57</sup>

(d) *Eminent Domain Proceedings*.—The federal court may follow the methods required by the state statutes in administering the local law for the condemnation of property, so far as required to meet the needs of justice.<sup>58</sup> Thus local laws as to the mode of trial or assessment of damages are binding on the federal courts, if they do not, in effect, deprive the landowner of a jury trial.<sup>59</sup>

(e) *Proceedings against Marshal and Sureties for Default*.—Under a state statute relating to sheriffs, a summary process against a marshal may be resorted to, in order to enforce the payment of a debt, interest, and costs, for which he is liable by reason of default.<sup>60</sup> But the courts of the United States cannot enforce the payment of a penalty imposed by the state laws in addition to the

shield, 4 Wheat. 122, 200, 4 L. Ed. 529; *Mason v. Haile*, 12 Wheat. 370, 6 L. Ed. 660; *Wayman v. Southard*, 10 Wheat. 1, 6 L. Ed. 253; *United States Bank v. Halstead*, 10 Wheat. 51, 6 L. Ed. 264.

Under the authority conferred on the courts of the United States by the acts of 1789 and 1792 there would be no solid objection to the decision of the circuit court of Ohio, in this case, but it is directly within, and governed by, the process act of the 19th of May, 1828. *Beers v. Haughton*, 9 Pet. 329, 330, 9 L. Ed. 145.

**57. Quieting title to real estate.**—*Arndt v. Griggs*, 134 U. S. 316, 33 L. Ed. 918; *Holland v. Challen*, 110 U. S. 15, 28 L. Ed. 52; *Clark v. Smith*, 13 Pet. 195, 10 L. Ed. 123. See, also, *Dick v. Foraker*, 155 U. S. 404, 39 L. Ed. 201.

A state statute providing for quieting title to real estate, as against nonresidents, by service by publication, is applicable to such proceedings in the federal courts. *Arndt v. Griggs*, 134 U. S. 316, 33 L. Ed. 918.

"Whilst it is true that alterations in the jurisdiction of the state courts cannot affect the equitable jurisdiction of the circuit courts of the United States, so long as the equitable rights themselves remain, yet an enlargement of equitable rights may be administered by the circuit courts as well as by the courts of the state." *Case of Broderick's Will*, 21 Wall. 503, 520, 22 L. Ed. 599, quoted in *Holland v. Challen*, 110 U. S. 15, 27, 28 L. Ed. 52. See the title EQUITABLE.

**58. Eminent domain proceedings.**—*Madisonville Traction Co. v. St. Bernard Min. Co.*, 196 U. S. 239, 49 L. Ed. 462; *Perez v. Fernandez*, 202 U. S. 80, 98, 50 L. Ed. 942; *Chappell v. United States*, 160 U. S. 499, 513, 40 L. Ed. 510. See, generally, the title EMINENT DOMAIN.

**59. Local laws as to mode of trial.**—*Madisonville Traction Co. v. St. Bernard Min. Co.*, 196 U. S. 239, 49 L. Ed. 462; *Perez v. Fernandez*, 202 U. S. 80, 98, 50 L. Ed. 942; *Chappell v. United States*, 160 U. S. 499, 512, 40 L. Ed. 510.

The general rule, as expressed in the Revised Statutes of the United States, is

that the trial of issues of fact in actions at law, both in the district court and in the circuit court, "shall be by jury," by which is evidently meant a trial by an ordinary jury at the bar of the court. Rev. Stat., §§ 566, 648. Congress has not itself provided any peculiar mode of trial in proceedings for the condemnation of lands for public uses. The direction in the act of 1888, c. 728, § 2, that such proceedings shall conform, "as near as may be," to those "in the courts of record of the state," is not to be construed as creating an exception to the general rule of trial by an ordinary jury in a court of record, and as requiring, by way either of preliminary, or of substitute, a trial by a different jury, not in a court of record, nor in the presence of any judge. Such a construction would unnecessarily and unwisely encumber the administration of justice in the courts of the United States. *Chappell v. United States*, 160 U. S. 499, 513, 40 L. Ed. 510.

An objection that under the state law the jury which returned the inquisition was but a body of assessors of damages, in the nature of a special jury of inquest, or board of commissioners, and that the landowner was entitled to have the whole case tried by an ordinary jury, is without merit. *Chappell v. United States*, 160 U. S. 499, 512, 40 L. Ed. 510.

**Local law as to assessment of damages by appraisers binding on federal courts.**—*Madisonville Traction Co. v. St. Bernard Min. Co.*, 196 U. S. 239, 49 L. Ed. 462. See, also, *Perez v. Fernandez*, 202 U. S. 80, 98, 50 L. Ed. 942.

**60. Right to resort to summary remedy provided by state laws relating to sheriffs.**—*Gwin v. Breedlove*, 2 How. 29, 11 L. Ed. 167; *Gwin v. Barton*, 6 How. 7, 12 L. Ed. 321. See, generally, the title UNITED STATES MARSHALS.

A marshal himself is always liable to an attachment, under which he could be compelled to bring the money into court, and by the process act of congress, of May, 1828, is also liable, in Mississippi, to have a judgment entered against himself by motion. *Gwin v. Breedlove*, 2 How. 29, 11 L. Ed. 167.

money due on the execution,<sup>61</sup> and a marshal and his sureties cannot be proceeded against, jointly in a summary war provided by state statute, but they must be sued as directly by the act of congress.<sup>62</sup>

(19) *In Criminal Cases*.—In criminal prosecutions for alleged offenses against a state, in which arises a defense under the laws of the United States, a federal court having cognizance of the case on removal should try it according to its own forms of proceeding.<sup>63</sup>

k. *Binding Effect of State Decisions Construing Practice Acts*.—See ante, "Construction of State Practice Acts," VII, J, 13, c, (37), (b).

4. POWER TO ALTER OR CHANGE PRACTICE.—Alterations can only be made by congress, or by the federal courts, acting under the authority of an act of congress.<sup>64</sup>

### VIII. State Courts.

**A. Whether Inferior Courts.**—The state courts are not, in any sense of the word, inferior courts, except in the particular cases in which an appeal lies from their judgment to the supreme court of the United States.<sup>65</sup>

**B. Jurisdiction and Powers**—1. POWER OF CONGRESS TO CONFER JURISDICTION.—No part of the judicial power conferred on the United States by the constitution can be vested in the courts of the state by congress.<sup>66</sup>

2. NATURE AND EXTENT—a. *Courts of General Civil Jurisdiction*.—Subject to certain limitations as to the amount in controversy, the states have, as a general rule, invested their courts of original jurisdiction with general jurisdiction in all civil cases,<sup>67</sup> and it is within the jurisdiction of these courts, rather than the

**61. Right to enforce penalty provided by state laws.**—Gwin v. Barton, 6 How. 7, 12 L. Ed. 321. See, also, Gwin v. Breedlove, 2 How. 29, 11 L. Ed. 167. See, generally, the titles CONFLICT OF LAWS, vol. 3, p. 1020. PENALTIES AND FORFEITURES.

**62. Right to sue marshal and sureties jointly.**—Gwin v. Breedlove, 2 How. 29, 11 L. Ed. 167; Gwin v. Barton, 6 How. 7, 12 L. Ed. 321. See, generally, the titles PRINCIPAL AND SURETY; UNITED STATES MARSHALS.

**63. Form of proceedings in criminal cases.**—Tennessee v. Davis, 100 U. S. 257, 25 L. Ed. 648.

Where a prosecution for murder against the collector of internal revenue is removed to the federal court, that court tries the case according to its own forms of proceeding. Tennessee v. Davis, 100 U. S. 257, 25 L. Ed. 648.

As to juries in criminal cases, see ante, "Juries," VII, K, 3, j, (9).

As to evidence in criminal cases, see post, "Evidence," VII, J, 13, c, (21).

**64. Power to alter practice.**—Riggs v. Johnson County, 6 Wall. 166, 190, 18 L. Ed. 768.

**65. Whether inferior courts.**—Ex parte Bollman, 4 Cranch 75, 97, 2 L. Ed. 554 (where it was said that they emanate from a different authority and are creatures of a distinct government).

**66. Power of congress.**—Robertson v. Baldwin, 165 U. S. 275, 278, 41 L. Ed. 715; Martin v. Hunter, 1 Wheat. 304, 330, 4 L. Ed. 97; Houston v. Moore, 5 Wheat. 1, 27, 5 L. Ed. 19. See, also, Burgess v. Gray, 16 How. 48, 62, 14 L. Ed. 839. See,

generally, the title CONSTITUTIONAL LAW, ante, p. 1.

It has been held that the power to arrest and imprison deserting seamen is not judicial power within the meaning of the constitution and may lawfully be conferred on state officers or courts by congress. Robertson v. Baldwin, 165 U. S. 275, 278, 41 L. Ed. 715. See the title SEAMEN.

**67. Nature and extent of jurisdiction in civil cases.**—Dow v. Johnson, 100 U. S. 158, 182, 25 L. Ed. 632; Fourniquet v. Perkins, 7 How. 160, 12 L. Ed. 650.

Where a statute extends jurisdiction to all civil causes where the amount in dispute exceeds fifty dollars, its legal import is to render those tribunals courts of general jurisdiction in all civil causes not embraced within the exception. Fourniquet v. Perkins, 7 How. 160, 169, 12 L. Ed. 650.

In Louisiana, the district courts are courts of general civil jurisdiction. Fourniquet v. Perkins, 7 How. 160, 12 L. Ed. 630; Dow v. Johnson, 100 U. S. 158, 182, 25 L. Ed. 632, citing White v. Cannon, 6 Wall. 443, 450, 18 L. Ed. 923.

The parish courts in Louisiana have jurisdiction of a suit by a wife against her husband for a separation of property. Carite v. Trotot, 105 U. S. 751, 764, 26 L. Ed. 1223. See the title HUSBAND AND WIFE.

In Wisconsin, by statute, the jurisdiction of the circuit court in matters of partition, extends to the ascertainment and determination of the rights of the parties in matters of partition, and its decree is final and effectual for their adjustment. That court is also clothed with power, at

probate courts, to entertain suits involving the exercise of general law or chancery powers.<sup>68</sup>

b. *Probate Courts*.—As a general rule, the probate courts of the states are vested with jurisdiction over all matters pertaining to the estates of decedents, but, of course, their jurisdiction is not the same in all of the states.<sup>69</sup> The pro-

the suit of a person having a legal title and possession, to call any claimant before it, to quiet a disputed title. Rev. Stat. Wis. 573, § 20; 417, § 34. *Parker v. Kane*, 22 How. 1, 16, 16 L. Ed. 286.

In *Kentucky*, the district courts had jurisdiction of suits to foreclose mortgages of realty by virtue of the act of December 19, 1795. *Appelgate v. Lexington, etc.*, Min. Co., 117 U. S. 255, 256, 29 L. Ed. 892.

**Rights claimed under treaty with foreign nation.**—Equitable or inchoate title claimed under treaty with France cannot be passed upon by the state courts, where under the treaty no inchoate and imperfect title derived from the French or Spanish authorities can be maintained in a court of justice, unless jurisdiction to try and decide it had first been conferred by act of congress. *Burgess v. Gray*, 16 How. 48, 62, 14 L. Ed. 839.

**68. Suits involving general chancery powers.**—*Gaines v. Chew*, 2 How. 619, 11 L. Ed. 402.

Where the heir at law assails the validity of the will, by bringing his action against the devisee or legatee who sets up the will as his title, the district courts of Louisiana are the proper tribunals, and the powers of a court of chancery are necessary, in order to discover frauds which are within the knowledge of the defendants. *Gaines v. Chew*, 2 How. 619, 11 L. Ed. 402.

Hence, where a petition was filed in the court of probate against an administrator, praying that he might account and also be held liable for maladministration and spoliation, it was proper to transfer the case for trial to the district court. *Fourniquet v. Perkins*, 7 How. 160, 12 L. Ed. 650.

**69. Probate courts.**—See, generally, the title *WILLS*.

In *South Carolina*, the ordinary is the court in which wills are proved, and in which letters testamentary and letters of administration are granted. It judges whether the applicant is entitled to administration or not and rejects or admits the claim, according to law. *Griffith v. Frasier*, 8 Cranch 1, 22, 3 L. Ed. 471.

In *Maryland*, the orphans' court was held to have no jurisdiction of the question of manumission of slaves. *Fenwick v. Chapman*, 9 Pet. 461, 9 L. Ed. 193.

The orphans' court, by the testamentary laws of Maryland, has a general power to administer justice in all matters relative to the affairs of deceased persons, according to law. The commission to be

allowed to an executor or administrator, is submitted to the discretion of the court, and is not to be under five per cent., nor exceeding ten per cent., on the amount of the inventory. *Nicholls v. Hodges*, 1 Pet. 562, 7 L. Ed. 263.

The powers of the orphans' court of Alexandria are made, by act of congress, identical with the powers of an orphans' court, under the laws of Maryland; it is a court of limited jurisdiction, and is authorized to revoke letters testamentary in two cases—a failure to return an inventory, or to account. The proceedings against L. were not founded upon either of these omissions; the appropriate remedy, on the failure of the executor to give counter security, is to take the estate out of his hands, and to place it in the hands of his sureties. *Yeaton v. Lynn*, 5 Pet. 224, 8 L. Ed. 105.

In *Louisiana*, the parish courts are vested with original and exclusive jurisdiction over the administration of vacant and intestate successions. *Simmons v. Saul*, 138 U. S. 439, 450, 34 L. Ed. 1054.

The jurisdiction of courts of probate in Louisiana is confined to cases which seek an account and settlement of effects presumed to be held by the representative of a succession. It has not jurisdiction over cases of alleged fraud or waste, or embezzlement of the estate. *Fourniquet v. Perkins*, 7 How. 160, 12 L. Ed. 650.

Under the Louisiana law, the court of probate has exclusive jurisdiction in the proof of wills; which includes those disposing of real as well as personal estate. *Gaines v. Chew*, 2 How. 619, 11 L. Ed. 402.

The parish court of New Orleans has exclusive jurisdiction over property ceded by insolvents and the courts of the United States have no jurisdiction over such insolvencies. *Adams v. Preston*, 22 How. 473, 16 L. Ed. 273.

The general principles of probate jurisdiction and practice, as settled by a long series of decisions in the state courts and in the courts of the United States, are applicable to the powers and proceedings of the parish courts of Louisiana, and have been recognized and enforced by the supreme court of that state. *Simmons v. Saul*, 138 U. S. 439, 450, 34 L. Ed. 1054.

In *Iowa*, the circuit courts have original exclusive jurisdiction of the settlement of estates of deceased persons and no other court has jurisdiction to allow or disallow a claim against a decedent's estate. *Clark v. Bever*, 139 U. S. 96, 102, 35 L. Ed. 88.



bate court possesses power to appoint administrators,<sup>70</sup> or guardians,<sup>71</sup> and may be given power to make partition among a decedent's heirs.<sup>72</sup>

c. *County Courts*.—See the title *COUNTIES*, ante, p. 825.

**C. Transfer between Courts.**—State statutes sometimes provide for the transfer of causes pending in one court to another court of the state upon the happening of certain contingencies. Thus in Missouri the supreme court consists of two divisions, which sit as separate courts, but causes in which a federal question arises may, on application of the losing party, be transferred to the full court for decision.<sup>73</sup> And, in Pennsylvania, under an early statute, causes could be removed from the court of common pleas to the circuit and supreme courts.<sup>74</sup>

**D. Terms and Sessions.**—By an early Pennsylvania statute special courts could be granted for the benefit of parties about to leave the state.<sup>75</sup>

**E. Administration of Federal Law by State Courts.**—Whenever the

**70. Appointment of administrators.**—*McArthur v. Scott*, 113 U. S. 340, 399, 28 L. Ed. 1015; *Griffith v. Frasier*, 8 Cranch 1, 9, 3 L. Ed. 471. See the title *EXECUTORS AND ADMINISTRATORS*.

**71. Appointment of guardians.**—Guardians may be appointed by a probate court, under a state statute, though the state constitution prohibits giving further chancery power to courts other than supreme court. The power of appointing a guardian is not a chancery power. *Hoyt v. Sprague*, 103 U. S. 613, 632, 26 L. Ed. 585. See, generally, the title *GUARDIAN AND WARD*.

**72. Power to make partition among heirs.**—*Robinson v. Fair*, 128 U. S. 53, 84, 32 L. Ed. 415.

After the final settlement of the accounts of a personal representative, and after a decree of distribution, defining the undivided interests of heirs in real estate in the hands of such representative—neither the title of the decedent nor the fact of heirship being disputed—the partition of such estate among the heirs, so as to invest them, separately, with the exclusive possession and ownership, as against co-heirs, of distinct parcels of such realty, is a subject matter which may be committed to probate courts according to the jurisdiction usually pertaining to those tribunals. *Robinson v. Fair*, 128 U. S. 53, 84, 32 L. Ed. 415.

In California the probate courts may make partition among heirs. *Robinson v. Fair*, 128 U. S. 53, 32 L. Ed. 415.

The jurisdiction may be invoked in a suit by the administrator, who is also an heir, the suit being brought for settlement of his accounts and for partition. *Robinson v. Fair*, 128 U. S. 53, 87, 32 L. Ed. 415.

**73. Missouri rule as transfer of causes involving federal questions.**—"The amendment to the constitution of the state of Missouri provided for the separation of the supreme court into two divisions for the transaction of business, and that when a federal question was involved, the cause, on the application of the losing party, should be transferred to the full court for decision. Doubtless, the particular division

would direct, of its own motion, the transfer of cases involving a federal question without a hearing in the first instance, as was also allowed by the amendment, but to justify transfer, whether before or after judgment, the question must be involved in the sense of arising for decision." *Duncan v. Missouri*, 152 U. S. 377, 380, 38 L. Ed. 485.

**74. Early Pennsylvania rule as to transfer from common pleas.**—*Lyle v. Baker*, 4 Dall. 433, 1 L. Ed. 897.

The Pennsylvania act of Feb. 24, 1806, provided "that no action shall be removed from any of the courts of common pleas to the supreme or circuit courts by consent or otherwise unless the same be removed on or before the first day of the next term, after the said action shall have been commenced." Held, that an action might be removed to the supreme court at any time before or on the first day of the term succeeding that to which the original writ is returned. *Lyle v. Baker*, 4 Dall. 433, 1 L. Ed. 897.

**75. Special courts for parties about to leave state.**—A special court was allowable to everybody, whether an inhabitant or a foreigner, who was about to leave the state. *Williams v. Geheogan*, 1 Dall. 267, 1 L. Ed. 131.

But not where there would be difficulty in obtaining evidence on short notice. *Williams v. Geheogan*, 1 Dall. 267, 1 L. Ed. 131.

A special court was not allowable where the plaintiff had assigned his interest to the other, and the latter is about to leave the country, since by thus assigning the interest in an action to a going foreigner, a special court might always be in reach to the prejudice of others. *Kunkel v. Baker*, 1 Dall. 169, 1 L. Ed. 85.

The defendant was held entitled to a special court although he had a partner who could remain, during the usual course of proceedings, to defend the cause, and who did not join in the application. *Ex parte Holker*, 2 Dall. 111, 1 L. Ed. 311.

A special court could not be granted the plaintiff before the return of the writ, where the defendant had not appeared. *McCarty v. Nixon*, 1 Dall. 77, 1 L. Ed. 44.

question, in any court, state or federal, is, whether the title to property which had belonged to the United States has passed, that question must be resolved by laws of the United States.<sup>76</sup> So in an action in a state court on an injunction bond given in a federal court, the rule of the federal courts as to allowance of attorneys' fees is controlling.<sup>77</sup>

**F. Adoption of Federal Procedure by State Courts.**—A state may prescribe the procedure in the federal courts as the rule of practice in its own tribunals.<sup>78</sup>

## IX. Territorial Courts.

**A. Whether Courts of United States.**—Courts of the territories, though possessing a jurisdiction similar to that of the United States courts, are not courts of the United States.<sup>79</sup> Thus territorial courts are not embraced within an act

**76. Passage of title to public lands governed by federal law.**—*Wilcox v. McConnell*, 13 Pet. 498, 10 L. Ed. 264; *Irvine v. Marshall*, 20 How. 558, 567, 15 L. Ed. 994. See, also, *Gibson v. Chouteau*, 13 Wall. 92, 104, 20 L. Ed. 534; *Bockfinger v. Foster*, 190 U. S. 116, 125, 47 L. Ed. 975; *Kean v. Calumet, etc., Imp. Co.*, 190 U. S. 452, 485, 47 L. Ed. 1134. See the title PUBLIC LANDS.

**77. Action on injunction bond given in federal court.**—*Tullock v. Mulvane*, 184 U. S. 497, 514, 46 L. Ed. 657; *Missouri, etc., R. Co. v. Elliott*, 184 U. S. 530, 539, 46 L. Ed. 673; *Cox v. United States*, 6 Pet. 172, 8 L. Ed. 359; *Duncan v. United States*, 7 Pet. 435, 8 L. Ed. 739; *Bein v. Heath*, 12 How. 168, 13 L. Ed. 939. See, generally, the title INJUNCTIONS.

**78. Adoption of federal procedure by state courts.**—*Miller v. Swann*, 150 U. S. 132, 137, 37 L. Ed. 1028.

**79. Territorial courts not courts of United States.**—*McAllister v. United States*, 141 U. S. 174, 35 L. Ed. 693; *Parsons v. United States*, 167 U. S. 324, 337, 42 L. Ed. 185; *Hornbuckle v. Toombs*, 18 Wall. 648, 655, 21 L. Ed. 966; *Reynolds v. United States*, 98 U. S. 145, 154, 25 L. Ed. 244; *Benner v. Porter*, 9 How. 235, 242, 13 L. Ed. 119; *American Ins. Co. v. Canter*, 1 Pet. 511, 7 L. Ed. 243; *Page v. Burnstine*, 102 U. S. 664, 668, 26 L. Ed. 268; *Good v. Martin*, 95 U. S. 90, 24 L. Ed. 341; *United States v. Coe*, 155 U. S. 76, 85, 39 L. Ed. 76; *Clinton v. Englebrecht*, 13 Wall. 434, 20 L. Ed. 659; *United States v. McMillan*, 165 U. S. 504, 510, 41 L. Ed. 805; *Steamer Coquitlam v. United States*, 163 U. S. 346, 351, 41 L. Ed. 184.

Territorial courts are but legislative courts of the territory, created in virtue of the clause which authorizes congress to make all needful rules and regulations respecting the territories belonging to the United States. *Clinton v. Englebrecht*, 13 Wall. 434, 20 L. Ed. 659; *American Ins. Co. v. Canter*, 1 Pet. 511, 7 L. Ed. 243; *United States v. Coe*, 155 U. S. 76, 85, 39 L. Ed. 76.

The judges of the supreme court of the territory are appointed by the president under the act of congress, but this does not make the courts they are authorized

to hold courts of the United States. *Clinton v. Englebrecht*, 13 Wall. 434, 447, 20 L. Ed. 659.

"By § 1910 of the Revised Statutes the district courts of the territory have the same jurisdiction in all cases arising under the constitution and laws of the United States as is vested in the circuit and district courts of the United States; but this does not make them circuit and district courts of the United States. We have often so decided. *American Ins. Co. v. Canter*, 1 Pet. 511, 7 L. Ed. 243; *Benner v. Porter*, 9 How. 235, 13 L. Ed. 119; *Clinton v. Englebrecht*, 13 Wall. 434, 20 L. Ed. 659. They are courts of the territories, invested for some purposes with the powers of the courts of the United States." *Reynolds v. United States*, 98 U. S. 145, 154, 25 L. Ed. 244.

There is no supreme court of the United States, nor is there any district court of the United States, in the sense of the constitution, in the territory of Utah. The judges are not appointed for the same terms, nor is the jurisdiction which they exercise part of the judicial power conferred by the constitution or the general government. The courts are the legislative courts of the territory, created in virtue of the clause which authorizes congress to make all needful rules and regulations respecting the territories belonging to the United States. *Clinton v. Englebrecht*, 13 Wall. 434, 447, 20 L. Ed. 659; *American Ins. Co. v. Canter*, 1 Pet. 511, 545, 7 L. Ed. 243.

**The courts created for the territory of Oklahoma** are clearly dual in their nature. They sit as territorial courts to administer the laws of the territory and as courts of the United States to administer the laws of the United States. *United States v. Pridgeon*, 153 U. S. 48, 58, 38 L. Ed. 631; *Ex parte Crow Dog*, 109 U. S. 556, 27 L. Ed. 1030; *Gon-Shay-ee, Petitioner*, 130 U. S. 343, 32 L. Ed. 973.

**The court established in the Indian Territory** by the act of March 1, 1889, although it is a court of the United States, is not a district or circuit court of the United States. *In re Mills*, 135 U. S. 263, 268, 34 L. Ed. 107; *Brown v. United States*, 171 U. S. 631, 637, 43 L. Ed. 312.

of congress relating to courts of the United States,<sup>80</sup> nor are they courts in which the judicial power conferred by the constitution on the federal government can be deposited.<sup>81</sup>

**B. Establishment, Organization, etc.**—1. **IN GENERAL.**—When the organic act establishes a supreme court of a territory and power is conferred on the territorial legislature to establish inferior courts, the legislature may establish a court having appellate jurisdiction in certain cases provided its judgment is subject to review by the supreme court.<sup>82</sup>

2. **BY WHAT JUDGES HELD.**—Where the organic act provides that the district courts of a territory are to be held by judges of the supreme court, but does not require that any particular district court shall be held by a particular judge, the territorial legislature may provide that a judge, other than the one designated for a district, may hold the district court, in case the one designated is sick or absent.<sup>83</sup>

3. **PLACE OF HOLDING.**—Where the place of holding the district court is to be fixed by the supreme court of the territory, the order specifying the place of holding need not specify the building in which the court is to be held, where it designated the town with sufficient certainty.<sup>84</sup>

**80. Territorial courts not included within statute relating to "United States" courts.**—*McAllister v. United States*, 141 U. S. 174, 35 L. Ed. 693; *Parsons v. United States*, 167 U. S. 324, 337, 42 L. Ed. 185; *Hornbuckle v. Toombs*, 18 Wall. 648, 655, 21 L. Ed. 966; *Reynolds v. United States*, 98 U. S. 145, 154, 25 L. Ed. 244; *Good v. Martin*, 95 U. S. 90, 24 L. Ed. 341; *United States v. McMillan*, 165 U. S. 504, 510, 41 L. Ed. 805; *Steamer Coquitlam v. United States*, 163 U. S. 346, 351, 41 L. Ed. 184; *Morman Church v. United States*, 136 U. S. 1, 43, 34 L. Ed. 481.

The proviso to the third section of the act of congress, approved July 2, 1864 (13 Stat. 351), that in the courts of the United States no witness shall be excluded in any civil action because he is a party to, or interested in, the issue tried, has no application to the courts of a territory. *Good v. Martin*, 95 U. S. 90, 24 L. Ed. 341.

A judge of the district court of Alaska is not a judge of a court of the United States within the meaning of the exception contained in § 1768, Rev. Stat., relating to the tenure of office of civil officers, and prior to the repeal of that section, he was subject to removal, before the expiration of his term of office, by the president in the manner and upon the conditions set forth in that section. *McAllister v. United States*, 141 U. S. 174, 35 L. Ed. 693.

**Territorial courts not district or circuit courts.**—A territorial court is not embraced within an act of congress relating to "circuit and district courts of the United States." *Reynolds v. United States*, 98 U. S. 145, 154, 25 L. Ed. 244.

But the district court of Alaska acting as a district court of the United States, and as such proceeding in admiralty, is within § 688 of the Revised Statutes which provides that the supreme court may issue writs of prohibition to the district court when proceeding as courts of admiralty and maritime jurisdiction. *In re Cooper*, 138 U. S. 404, 34 L. Ed. 993; *In re Cooper*,

143 U. S. 472, 494, 36 L. Ed. 232. See the title **PROHIBITION**.

**Courts of Porto Rico.**—See post, "District Court of Porto Rico," IX, E, 4.

**81. Territorial courts not embraced by constitution.**—*Benner v. Porter*, 9 How. 235, 242, 13 L. Ed. 119; *American Ins. Co. v. Canter*, 1 Pet. 511, 7 L. Ed. 243; *United States v. Coe*, 155 U. S. 76, 85, 39 L. Ed. 76; *McAllister v. United States*, 141 U. S. 174, 35 L. Ed. 693.

"Territorial courts are not courts of the United States, within the meaning of the constitution, as appears by all the authorities. *Clinton v. Englebrecht*, 13 Wall. 434, 20 L. Ed. 659; *Hornbuckle v. Toombs*, 18 Wall. 648, 21 L. Ed. 966." *Good v. Martin*, 95 U. S. 90, 98, 24 L. Ed. 341.

**82. Establishment.**—*Ex parte Lothrop*, 118 U. S. 113, 30 L. Ed. 108.

Section 1908 of the Revised Statutes provides that the judicial power of Arizona shall be vested in the supreme court and such inferior court as the legislative council may by law prescribe. The legislature established a county court which had appellate jurisdiction in certain cases but whose judgment was subject to review by the supreme court of the territory. It was held that this was an inferior court within the meaning of § 1908, what was required by that section being that the court should be inferior to the supreme court. *Ex parte Lothrop*, 118 U. S. 113, 30 L. Ed. 108.

**83. What judge may hold district court.**—*Gonzales v. Cunningham*, 164 U. S. 612, 622, 41 L. Ed. 572. See, generally, the title **JUDGES**.

**84. Designation by supreme court of place of holding district court.**—*Matter of Moran, Petitioner*, 203 U. S. 96, 51 L. Ed. 105.

"The first ground now relied upon is that the court was not duly organized under the act of congress requiring the supreme court to define the judicial districts, and to fix the times and places at



**C. Powers of Territorial Legislature.**—Where the powers of the territorial legislature extend to all rightful subjects of legislation, and it is also given power to establish inferior courts, it may confer jurisdiction on the inferior courts of the territory,<sup>85</sup> even though congress has also acted in this respect, provided the congressional action is not made exclusive.<sup>86</sup>

**D. Terms and Sessions.**—Although the New Mexico statutes provide that special terms shall not conflict with general terms, there is nothing in any of the provisions of the statutes of New Mexico which controls the discretion of the trial judge in continuing any special term he may have been holding until a pending case was concluded, and nothing which operates to invalidate the proceedings of such special term because prolonged beyond the day fixed for a regular term.<sup>87</sup>

**E. Jurisdiction**—1. **COURTS OF GENERAL ORIGINAL JURISDICTION**—*a. Federal Jurisdiction.*—Jurisdiction of the territorial district courts is made coextensive with both the federal, circuit and district courts.<sup>88</sup> The district courts of

each county seat where the district court shall be held. The order of the supreme court went no further in the way of fixing the place than to specify Lawton for the county of Comanche. This order was made on January 15, 1902, about six months after the land, which had been Indian territory, was opened for settlement and the county created. At that time and at the time of the trial there were no county or court buildings in the county. The order of the supreme court was as precise as the circumstances permitted it to be, and the failure to specify a building did not go to the jurisdiction of the trial court. There is no pretense that the petitioner lost any opportunities by reason of no building being named." *Matter of Moran*, Petitioner, 203 U. S. 96, 51 L. Ed. 105.

**85. Power of territorial legislature.**—*American Ins. Co. v. Canter*, 1 Pet. 511, 520, 7 L. Ed. 243; *Ex parte Lothrop*, 118 U. S. 113, 30 L. Ed. 108; *Clough v. Curtis*, 134 U. S. 361, 369, 33 L. Ed. 945.

**86. Power to confer concurrent jurisdiction with that conferred on other courts by congress.**—*American Ins. Co. v. Canter*, 1 Pet. 511, 520, 7 L. Ed. 243; *Clough v. Curtis*, 134 U. S. 361, 369, 33 L. Ed. 945.

Section 1910 of the Revised Statutes of the United States conferring jurisdiction on the district courts of a territory of cases arising under the constitution and laws of the United States does not forbid the territorial legislature of Idaho from conferring original jurisdiction upon the supreme court of the territory in cases named in § 3816 of the Revised Statutes of Idaho although such cases may depend upon questions arising under the constitution or laws of the United States. If congress had intended to confer upon the district courts of the territories named exclusive jurisdiction in the class of cases named in § 1910, it would have so declared in express terms. *Clough v. Curtis*, 134 U. S. 361, 369, 33 L. Ed. 945.

Even if under the organic act of Florida territory jurisdiction of salvage cases was

vested in the superior court, established by that act, that jurisdiction was not exclusive, as the territorial legislature was authorized to establish inferior courts, and could therefore vest them with similar jurisdiction. *American Ins. Co. v. Canter*, 1 Pet. 511, 7 L. Ed. 243.

**87. Conflict of special with general term in New Mexico.**—*Gonzales v. Cunningham*, 164 U. S. 612, 626, 41 L. Ed. 572.

In the territory of New Mexico, no specific duration of either regular or special terms is prescribed by law, but they are subject, when lawfully commenced, to be continued until adjourned by order of court, and therefore they are not necessarily determined by the advent of the particular days designated for the commencement of regular terms; and special terms may be ordered when regular terms failed to be held, and also whenever in the discretion of the judge of any district court a furtherance of justice required it. *Gonzales v. Cunningham*, 164 U. S. 612, 626, 41 L. Ed. 572.

A trial was commenced on April 23, 1895, which was, as the record declared, the thirty-second day of the special term, which had commenced March 18, and was concluded on May 29, 1895, the sixty-third day of said special term, by the return of a verdict of guilty. Motions for new trial and in arrest were denied, and the sentence pronounced on June 15, 1895, one of the days of the regular term of the district court, the postponement to that day having been granted on the request of defendants. It was held that under these circumstances the proceedings in any view could not be held void for want of jurisdiction. *Gonzales v. Cunningham*, 164 U. S. 612, 627, 41 L. Ed. 572.

**88. Jurisdiction coextensive with United States circuit and district courts.**—*The City of Panama*, 101 U. S. 453, 456, 25 L. Ed. 1061; *McAllister v. United States*, 141 U. S. 174, 179, 35 L. Ed. 693; *Steamer Coquitlam v. United States*, 163 U. S. 346, 350, 41 L. Ed. 184; *In re Cooper*, 143 U. S. 472, 36 L. Ed. 232; *United States v.*

the territories have the same jurisdiction in cases arising under the constitution and laws of the United States as is vested in the circuit and district courts of the United States.<sup>89</sup> It is the practice of the territorial courts from their first organization to observe the separation of their federal and local functions.<sup>90</sup>

b. *Local Jurisdiction.*—In addition to their federal jurisdiction, the district courts of the territories are vested with general jurisdiction of cases not of a

Pridgeon, 153 U. S. 48, 58, 38 L. Ed. 631; *Ex parte Crow Dog*, 109 U. S. 556, 27 L. Ed. 1030; *Gon-Shay-ee*, Petitioner, 130 U. S. 343, 32 L. Ed. 973; *Captain Jack*, Petitioner, 130 U. S. 353, 32 L. Ed. 976.

Two classes of courts are created in the federal system for the exercise of the necessary original jurisdiction, but in the territory, as provided in the organic act, there is but one class of courts created for that purpose. Had congress limited the jurisdiction of the territorial district courts to that exercised by the federal district courts, then those courts could not have taken cognizance of controversies in patent cases nor of crimes or offenses against the authority of the United States, where the punishment is death, and if their jurisdiction had been limited to that exercised by the circuit courts, then those courts would have had no cognizance whatever of admiralty and maritime causes, or of seizures on water where the proceeding is according to the course of the admiralty law. *The City of Panama*, 101 U. S. 453, 457, 25 L. Ed. 1061.

The district court of Alaska is invested with the powers of a district court and a circuit court of the United States. *McAllister v. United States*, 141 U. S. 174, 177, 35 L. Ed. 693; *Steamer Coquitlam v. United States*, 163 U. S. 346, 350, 41 L. Ed. 184; *In re Cooper*, 143 U. S. 472, 36 L. Ed. 232.

The district court of Alaska is to be regarded as the supreme court of that territory within the meaning of the fifteenth section of the act of March 3, 1891, and of the order of this court assigning Alaska to the ninth circuit; and, consequently, the decree of the district court of Alaska is subject to review by the circuit court of appeals of that circuit. *Steamer Coquitlam v. United States*, 163 U. S. 346, 353, 41 L. Ed. 184, reaffirmed in *Thorp v. Bonfield*, 168 U. S. 703, 42 L. Ed. 1211. See, generally, the title APPEAL AND ERROR, vol. 1, p. 333.

By the act of 1884 a district court for Alaska was established with the civil and criminal jurisdiction of district courts of the United States and the civil and criminal jurisdiction of the district courts of the United States exercising the jurisdiction of circuit courts, and made the laws of Oregon then in force the law of such district. The act of congress of March 3, 1899, provided a criminal code for Alaska. On June 6, 1900, congress passed an act to make further provision for a civil government of Alaska which established a district court for the district. The act of March 3, 1899, provided that nothing

therein contained should affect proceedings or indictments pending at that time. A was indicted in the district court of Alaska and found guilty of the crime of murder but on appeal to the supreme court of the United States the judgment was reversed, and during the pendency of this appeal the act of March 3, 1899, was passed, and subsequently the act of 1900 was passed before A's second trial. On the second trial A was convicted and upon appeal to the supreme court upon the ground that the acts of 1899 and 1900 deprived the court of jurisdiction, and that the act of 1884 was repealed and superseded, it was held that the conviction was proper. *Bird v. United States*, 187 U. S. 118, 47 L. Ed. 100. See the title TERRITORIES.

*Admiralty jurisdiction.*—See the title ADMIRALTY, vol. 1, p. 153.

89. *Cases arising under constitution and laws of United States.*—Rev. Stat., § 1910; *Reynolds v. United States*, 98 U. S. 145, 154, 25 L. Ed. 244; *The City of Panama*, 101 U. S. 453, 25 L. Ed. 1061; *Gon-Shay-ee*, Petitioner, 130 U. S. 343, 348, 32 L. Ed. 973; *Ex parte Crow Dog*, 109 U. S. 556, 27 L. Ed. 1030; *McAllister v. United States*, 141 U. S. 174, 179, 35 L. Ed. 693; *Steamer Coquitlam v. United States*, 163 U. S. 346, 350, 41 L. Ed. 184; *In re Cooper*, 143 U. S. 472, 36 L. Ed. 232; *United States v. Pridgeon*, 153 U. S. 48, 58, 38 L. Ed. 631; *American Ins. Co. v. Canter*, 1 Pet. 511, 520, 7 L. Ed. 243.

The act of congress of March 3d, 1863, giving to the district court for the territory of New Mexico jurisdiction over all cases which should arise in the collection district of Paso del Norte, in the administration of the revenue laws, does not warrant proceedings against lands in El Paso, Texas, under the "Act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," approved July 17th, 1862 (12 Stat. at Large 589). *United States v. Hart*, 6 Wall. 770, 18 L. Ed. 914.

*Criminal jurisdiction.*—See the title CRIMINAL LAW.

90. *Separation of federal and local functions.*—*Gon-Shay-ee*, Petitioner, 130 U. S. 343, 348, 32 L. Ed. 973. See *Benner v. Porter*, 9 How. 235, 13 L. Ed. 119.

When the district court is sitting as a court for the trial of criminal cases arising under the constitution and laws of the United States it cannot exercise jurisdiction in cases arising under the territorial laws or vice versa. *Gon-Shay-ee*, Petitioner, 130 U. S. 343, 348, 32 L. Ed. 973.



**federal nature.**<sup>91</sup> They possess both chancery and common-law jurisdiction.<sup>92</sup> The common law and chancery jurisdiction conferred upon them is very ample and very well understood. It includes almost every matter, whether of civil or criminal cognizance, which can be litigated in a court of justice.<sup>93</sup> The court of original general jurisdiction of a territory may, for example, entertain a suit for a divorce,<sup>94</sup> a suit to determine the validity of an election to determine the county seat,<sup>95</sup> or suits involving title to real estate.<sup>96</sup>

2. PROBATE COURT.—Where the organic act provides for district, supreme and

**91. Local jurisdiction.**—Ex parte Crow Dog, 109 U. S. 556, 27 L. Ed. 1030; United States v. Pridgeon, 153 U. S. 48, 58, 38 L. Ed. 631; Gon-Shay-ee, Petitioner, 130 U. S. 343, 32 L. Ed. 973; Captain Jack, Petitioner, 130 U. S. 353, 32 L. Ed. 976; The City of Panama, 101 U. S. 453, 25 L. Ed. 1061; Ferris v. Higley, 20 Wall. 375, 22 L. Ed. 383; Baker v. Morton, 12 Wall. 150, 153, 20 L. Ed. 262; McAllister v. United States, 141 U. S. 174, 179, 35 L. Ed. 693; Steamer Coquitlam v. United States, 163 U. S. 346, 350, 41 L. Ed. 184; Gonzales v. Cunningham, 164 U. S. 612, 622, 41 L. Ed. 572.

Under the act of congress approved March 2, 1853, entitled "An act to establish the territorial government of Washington" (10 Stat. 172), the district courts of the territory have jurisdiction of all cases arising under the laws of the territory. The City of Panama, 101 U. S. 453, 25 L. Ed. 1061.

The citizens of the territory of Orleans may sue and be sued in the district court of that territory, in the same cases in which a citizen of Kentucky may sue and be sued in the court of Kentucky. Sere v. Pitot, 6 Cranch 332, 3 L. Ed. 240.

**Power of judges of Hawaii at chambers.**—See the title CHAMBERS AND VACATION, vol. 3, p. 666.

The district court of Alaska is invested with general jurisdiction to enforce in Alaska the laws of Oregon, so far as they were applicable and were not inconsistent with the act and the constitution and laws of the United States. McAllister v. United States, 141 U. S. 174, 179, 35 L. Ed. 693; Steamer Coquitlam v. United States, 163 U. S. 346, 350, 41 L. Ed. 184; In re Cooper, 143 U. S. 472, 36 L. Ed. 232.

**Criminal jurisdiction.**—See the title CRIMINAL LAW.

**Jurisdiction of old territorial court of Florida.**—American Ins. Co. v. Canter, 1 Pet. 511, 520, 7 L. Ed. 243; United States v. Clarke, 8 Pet. 436, 8 L. Ed. 1001.

**92. Chancery and common-law jurisdiction.**—Rev. Stat. 1874; Clawson v. United States, 114 U. S. 477, 487, 29 L. Ed. 179.

The act of congress under which Utah was organized as a territory gave to the supreme and district courts a general jurisdiction at common law and in chancery, and limited and defined the powers of the justices of the peace. Ferris v. Higley, 20 Wall. 375, 22 L. Ed. 383.

**Chancery jurisdiction.**—See the title EQUITY.

**93. Nature and extent of jurisdiction.**—Ferris v. Higley, 20 Wall. 375, 382, 22 L. Ed. 383.

**94. Suits for divorce.**—De La Rama v. De La Rama, 201 U. S. 303, 308, 50 L. Ed. 765 (suit for divorce brought in the court of first instance of the province of Iloilo, in the Philippine Islands).

**95. Suit to determine validity of county seat election.**—The validity of an election to determine the county seat of a county in Dakota under the laws of the territory, when presented to the courts in the forms prescribed by those laws, becomes a subject of action within the jurisdiction of the territorial court. As thus presented, it is a case of controversy between an elector of the county and its commissioners, and the judgment thereon of the district court of the territory was subject to appeal to its supreme court. Smith v. Adams, 130 U. S. 167, 174, 32 L. Ed. 895.

The designation of the county seat of a county in Dakota, or providing for its designation by popular election, was a matter properly belonging to the legislative department of the territorial government. It was not a matter by itself for judicial cognizance. But when the law of the territory left the designation of a county seat to the voters of the county, and provided that the validity of the election could be contested by any competent elector of the county before the district court of the district within which the county was situated, upon leave obtained from such court for that purpose, and prescribed the mode in which such contest should be prosecuted by the contesting elector, and defended by the commissioners of the county under whose direction the election was held, and proofs be taken upon the matter in issue, and that the validity of the election should then be determined by the district court—the designation of a county seat under the law became the subject of judicial cognizance, a case or controversy arising upon such proceedings being taken to which the judicial power of the territory attaches. Smith v. Adams, 130 U. S. 167, 173, 32 L. Ed. 895.

**96. Suits involving title to real estate.**—Langford v. Monteith, 102 U. S. 145, 26 L. Ed. 53 (holding that district courts of Idaho had such jurisdiction, and that a justice of the peace in that territory was without authority to try such a case).



probate courts and says that a part of the judicial power of the territory shall be vested in the latter, the probate court possesses the general jurisdiction of such courts as they are known in the history of the English law and the jurisprudence of this country, and it is not competent for the territorial legislature to confer upon it a general jurisdiction in civil and in criminal cases, and in equity and at common law.<sup>97</sup> The probate court of Utah had jurisdiction to determine the conflicting rights of claimants to lots forming part of the lands in that territory entered as a town site under the act of congress of March 2, 1867 (14 Stat. 541), and an appeal could be taken from the judgment of that court to the district court, within one year after it had been rendered.<sup>98</sup>

3. **SUPREME COURT.**—The supreme court of the territories exercises appellate jurisdiction over the final decisions of the district court.<sup>99</sup> Original jurisdiction may be conferred upon the supreme court of the territory to issue writs of mandate, review, prohibition and habeas corpus.<sup>1</sup>

4. **DISTRICT COURT OF PORTO RICO.**—The district court of the United States for Porto Rico is in no sense a constitutional court of the United States, and its authority emanates wholly from congress under the sanction of the power possessed by that body to govern territory occupying the relation to the United States which Porto Rico does.<sup>2</sup> In addition to the ordinary jurisdiction of district courts of the United States it has jurisdiction of all cases cognizant in the circuit courts.<sup>3</sup> While, ordinarily, the circuit court of the United States has no jurisdiction of suits between aliens, the district court of Porto Rico is expressly given such jurisdiction.<sup>4</sup>

**F. Practice and Procedure.**—The practice, pleadings, and forms and modes of proceeding of the territorial courts, as well as their respective jurisdictions,

97. **Probate court.**—*Ferris v. Higley*, 20 Wall. 375, 22 L. Ed. 383; *Robinson v. Fair*, 128 U. S. 53, 86, 32 L. Ed. 415; *Clayton v. Utah Territory*, 132 U. S. 632, 641, 33 L. Ed. 455.

98. *Cannon v. Pratt*, 99 U. S. 619, 25 L. Ed. 446.

99. **Appellate jurisdiction of supreme court.**—Rev. Stat., § 1869. See the title APPEAL AND ERROR, vol. 1, p. 333.

1. **Original jurisdiction of supreme court.**—*Clough v. Curtis*, 134 U. S. 361, 369, 33 L. Ed. 945.

The Revised Statutes of the United States expressly declare that the jurisdiction, both appellate and original, of the courts of Idaho "shall be limited by law." Section 1866. And by § 3816 of the Revised Statutes of Idaho it is provided that the jurisdiction of the supreme court of that territory shall be original and appellate, and that "its original jurisdiction extends to the issuance of writs of mandate, review, prohibition, habeas corpus, and all writs necessary to the exercise of its appellate jurisdiction." Of the power of the legislature of Idaho to confer original jurisdiction upon the supreme court of the territory in such cases, there can be no doubt. Its power extends to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States. Rev. Stat., § 1851. The jurisdiction of the several courts of the territory is a rightful subject of legislation, and the above provision is not inconsistent with the constitution or any act of congress. *Clough v. Curtis*, 134 U. S. 361, 368, 33 L. Ed. 945.

2. **Nature and authority of district**

**court of Porto Rico.**—*Romeu v. Todd*, 206 U. S. 358, 368, 51 L. Ed. 1093.

3. **Jurisdiction same as that of circuit court.**—*Hijo v. United States*, 194 U. S. 315, 48 L. Ed. 994; *Perez v. Fernandez*, 202 U. S. 80, 96, 50 L. Ed. 942; *American R. Co. v. Castro*, 204 U. S. 453, 456, 51 L. Ed. 564; *Romeu v. Todd*, 206 U. S. 358, 368, 51 L. Ed. 1093.

"Section 34 of the Foraker act established a United States district court for Porto Rico and gave to it, in addition to the ordinary jurisdiction of a district court of the United States, jurisdiction of all cases cognizant in the circuit courts of the United States, and provides that it shall proceed therein in the same manner as a circuit court, the intention of congress obviously being to establish a United States court in Porto Rico, having like jurisdiction of both district and circuit courts of the United States in the states." *Perez v. Fernandez*, 202 U. S. 80, 96, 50 L. Ed. 942.

**Concurrent jurisdiction with court of claims.**—See post, "Concurrent Jurisdiction of District and Circuit Courts," VII, F, 2, e. (8).

**Conformity to local practice.**—See post, "United States Courts for Porto Rico," VII, K, 3, c. (5).

4. **Suits between aliens.**—*Ortega v. Lara*, 202 U. S. 339, 50 L. Ed. 1055. See the title ALIENS, vol. 1, p. 210.

The district court of Porto Rico has jurisdiction under the act of March 2, 1901 of all suits in which the parties on both sides are subjects of the king of Spain. *Ortega v. Lara*, 202 U. S. 339, 50 L. Ed. 1055.

were intended by congress to be left to the legislative action of the territorial assemblies and to the regulations which might be adopted by the courts themselves.<sup>5</sup> In case of any difficulties arising out of this state of things, congress has it in its power at any time to establish such regulations on this, as well as on any other subject of legislation, as it shall deem expedient and proper.<sup>6</sup> Both legal and equitable relief may be granted in the same action, and may be administered through the intervention of a jury or by the court itself, according to the nature of the remedy sought.<sup>7</sup>

**5. Practice regulated by territorial legislature.**—*Hornbuckle v. Toombs*, 18 Wall. 648, 21 L. Ed. 966; *Bent v. Thompson*, 138 U. S. 114, 34 L. Ed. 902; *Armijo v. Armijo*, 181 U. S. 558, 561, 45 L. Ed. 1000; *Sweeney v. Lomme*, 22 Wall. 208, 22 L. Ed. 727; *Hershfield v. Griffith*, 18 Wall. 657, 21 L. Ed. 968; *Davis v. Bilsland*, 18 Wall. 659, 21 L. Ed. 969; *Hurt v. Hollingsworth*, 100 U. S. 100, 103, 25 L. Ed. 569; *Clinton v. Englebrecht*, 13 Wall. 434, 20 L. Ed. 659; *Good v. Martin*, 95 U. S. 90, 24 L. Ed. 341; *Reynolds v. United States*, 98 U. S. 145, 25 L. Ed. 244; *Miles v. United States*, 103 U. S. 304, 26 L. Ed. 481; *Thiede v. Utah Territory*, 159 U. S. 510, 515, 40 L. Ed. 237.

In *Hornbuckle v. Toombs*, 18 Wall. 648, 21 L. Ed. 966, the cases of *Noonan v. Lee*, 2 Black 499, 17 L. Ed. 278; *Orchard v. Hughes*, 1 Wall. 73, 77, 17 L. Ed. 560, and *Dunphy v. Kleinsmith*, 11 Wall. 610, 20 L. Ed. 223, were reconsidered and not approved.

The acts of congress respecting proceedings in the United States courts are concerned with, and confined to, those courts, considered as parts of the federal system, and as invested with the judicial power of the United States expressly conferred by the constitution, and to be exercised in correlation with the presence and jurisdiction of the several state courts and governments. They were not intended as exertions of that plenary municipal authority which congress has over the District of Columbia and the territories of the United States. They do not contain a word to indicate any such intent. The fact that they require the circuit and district courts to follow the practice of the respective state courts in cases at law, and that they supply no other rule in such cases, shows that they cannot apply to the territorial courts. As before said, these acts have specific application to the courts of the United States, which are courts of a peculiar character and jurisdiction. *Hornbuckle v. Toombs*, 18 Wall. 648, 655, 21 L. Ed. 966.

In *Clinton v. Englebrecht*, 13 Wall. 434, 20 L. Ed. 659, it was held that the selection of jurors in territorial courts was to be made in conformity to the territorial statutes. In *Good v. Martin*, 95 U. S. 90, 24 L. Ed. 341, a like ruling was made as to the competency of witnesses. In *Reynolds v. United States*, 98 U. S. 145, 25 L. Ed. 244, the same rule was applied to the impaneling of grand jurors and the number of jurors. And in *Miles v. United*

*States*, 103 U. S. 304, 26 L. Ed. 481, a case coming from the territory of Utah, the same doctrine was announced with regard to the mode of challenging petit jurors. *Thiede v. Utah Territory*, 159 U. S. 510, 515, 40 L. Ed. 237.

Section 1033 of the Revised Statutes, giving the defendant in a capital case a right to have delivered to him at least two entire days before the trial a copy of the indictment and a list of the witnesses to be produced on the trial, applies to the circuit and district courts of the United States, and does not control the practice and procedure of the courts of Utah, which are regulated by the statutes of that territory. *Thiede v. Utah Territory*, 159 U. S. 510, 514, 40 L. Ed. 237.

The regulation of matters pertaining to new trials is governed by the local law. *James v. Appel*, 192 U. S. 129, 137, 48 L. Ed. 377.

**Rules of court.**—See the title RULES OF COURT.

**Probate practice in New Mexico.**—Under the provisions of the "laws of Velarde," which under the provisions of the Kearny Code, remained in force in the territory of New Mexico until modified by statute, the practice and procedure of the probate courts were matters of statutory regulation; the probate judge had jurisdiction to admit wills to probate by receiving the evidence of the witnesses; and his judgment was valid and, although reviewable on appeal, was conclusive unless appealed from and reversed. *Bent v. Thompson*, 138 U. S. 114, 123, 34 L. Ed. 902.

Under the laws of the territory of New Mexico, a judgment of a probate court in that territory admitting a will to probate cannot be annulled by the same court in a proceeding instituted by an heir more than twenty years after the original judgment was rendered and more than four years after the heir became of age. *Bent v. Thompson*, 138 U. S. 114, 120, 34 L. Ed. 902.

**6. Power of congress to establish practice.**—*Hornbuckle v. Toombs*, 18 Wall. 648, 21 L. Ed. 966.

**7. Joinder of legal and equitable causes of action.**—*Hornbuckle v. Toombs*, 18 Wall. 648, 21 L. Ed. 966; *Hershfield v. Griffith*, 18 Wall. 657, 21 L. Ed. 968; *Davis v. Bilsland*, 18 Wall. 659, 21 L. Ed. 969; *Basey v. Gallagher*, 20 Wall. 670, 22 L. Ed. 452; *Ely v. New Mexico, etc., R. Co.*, 129 U. S. 291, 293, 32 L. Ed. 688; *Hurt v. Hol-*



**G. Effect of Admission of Territory as State—1. EFFECT AS ABOLISHING TERRITORIAL COURTS.**—By the admission of a territory as a state, the jurisdiction of the territorial courts is usually abolished.<sup>8</sup>

**2. TRANSFER OF PENDING CAUSES ON ADMISSION—**a. *Necessity for Cause to Be Pending.*—The statutes providing for the transfer of cases from the territorial courts, upon its admission, provide only for the transfer of pending cases.<sup>9</sup> A case is not pending where it has gone to judgment, and the time allowed for settlement of a bill of exceptions and for moving for a new trial has expired without the proper steps having been taken to procure such action.<sup>10</sup>

b. *To What Court Transferred*—(1) *Cases Cognizable in Federal Courts.*—Whenever a territory is admitted into the Union as a state, the case pending in the territorial courts of a federal character or jurisdiction are transferred to the proper federal court.<sup>11</sup> This, of course, permits the transfer of suits brought

lingsworth, 100 U. S. 100, 103, 25 L. Ed. 569. See the title EQUITY.

"In Idaho, as in other territories, there is but one form of civil action, in which either legal or equitable remedies, or both, may be administered, through the intervention of a jury, or by the court itself, according to the nature of the relief sought, provided however, that no party can be 'deprived of the right of trial by jury in cases cognizable at common law.' Rev. Stat., § 1868; Act of congress of April 7, 1874; c. 80, § 1, 18 Stat. 27; Idaho Code of Civil Procedure of 1881, §§ 138, 139, 230, 309, 353; *Ely v. New Mexico*, etc., R. Co., 129 U. S. 291, 32 L. Ed. 688." Idaho, etc., Land Imp. Co. v. Bradbury, 132 U. S. 509, 513, 33 L. Ed. 433.

But in *Dunphy v. Kleinsmith*, 11 Wall. 610, 615, 20 L. Ed. 223, which was a creditor's bill, the court said: "The case, being a chancery case, and being instituted as such, should have been tried as a chancery case by the modes of proceeding known to courts of equity. In those courts the judge or chancellor is responsible for the decree. If he refers any questions of fact to a jury, as he may do by a feigned issue, he is still to be satisfied in his own conscience that the finding is correct, and the decree must be made as the result of his own judgment, aided, it is true, by the finding of the jury. Here the judgment is pronounced as the mere conclusion of law upon the facts found by the jury." This case was disapproved in *Hornbuckle v. Toombs*, 18 Wall. 648, 21 L. Ed. 966.

**8. As defeating jurisdiction of territorial courts.**—*Benner v. Porter*, 9 How. 235, 13 L. Ed. 119; *Downes v. Bidwell*, 182 U. S. 244, 265, 45 L. Ed. 1088; *American Ins. Co. v. Canter*, 1 Pet. 511, 7 L. Ed. 243; *Koenigsberger v. Richmond Silver Min. Co.*, 158 U. S. 41, 48, 39 L. Ed. 889; *Glaspell v. Northern Pac. R. Co.*, 144 U. S. 211, 36 L. Ed. 409; *Forsyth v. United States*, 9 How. 571, 13 L. Ed. 262; *Cotton v. United States*, 9 How. 579, 13 L. Ed. 265; *Simpson v. United States*, 9 How. 578, 13 L. Ed. 265.

The jurisdiction of the territorial courts, of which the superior court of Florida was one, ceased on the erection of the terri-

tory into a state, on the 3d of March, 1845. *Forsyth v. United States*, 9 How. 571, 13 L. Ed. 262.

In 1845, the legislature of the state of Florida passed an act for the transfer from the territorial to the state courts of all cases except those cognizable by the federal courts; and, in 1847, congress provided for the transfer of these to the federal courts. Therefore, where the territorial court took cognizance, in 1846, of a case of libel, it acted without any jurisdiction. *Benner v. Porter*, 9 How. 235, 13 L. Ed. 119, explaining *Hunt v. Palao*, 4 How. 589, 11 L. Ed. 1115.

Florida was admitted into the Union as a state, on the 3d of March, 1845. The constitution of the state provided that all officers civil and military, then holding their offices under the authority of the United States, should continue to hold them until superseded under the state constitution. But this article did not continue the existence of courts which had been created as part of the territorial government by congress. *Benner v. Porter*, 9 How. 235, 13 L. Ed. 119.

By the admission of Wisconsin as a state, the territorial government ceased to exist, and all the authority under it, including the laws organizing its courts of justice and providing for a revision of their judgments in this court. *McNulty v. Batty*, 10 How. 72, 13 L. Ed. 303, reaffirmed in *Preston v. Bracken*, 10 How. 81, 13 L. Ed. 336.

**9. Necessity for case to be "pending."**—*Glaspell v. Northern Pac. R. Co.*, 144 U. S. 211, 219, 36 L. Ed. 409.

**10. What is "pending" case.**—*Glaspell v. Northern Pac. R. Co.*, 144 U. S. 211, 36 L. Ed. 409.

**11. Cases cognizable in federal courts.**—*Baker v. Morton*, 12 Wall. 150, 153, 20 L. Ed. 262; *Glaspell v. Northern Pac. R. Co.*, 144 U. S. 211, 218, 36 L. Ed. 409; *McNulty v. Batty*, 10 How. 72, 13 L. Ed. 303; *Preston v. Bracken*, 10 How. 81, 13 L. Ed. 336; *Koenigsberger v. Richmond Silver Min. Co.*, 158 U. S. 41, 49, 39 L. Ed. 889; *Forsyth v. United States*, 9 How. 571, 576, 13 L. Ed. 262; *Express Co. v. Kountze Bros.*, 8 Wall. 342, 19 L. Ed. 457; *Washington, etc., R. Co. v. Coeur D'Alene R.*,



between citizens of the territory and citizens of a state,<sup>12</sup> or of suits brought between citizens of two territories both of which have subsequently been admitted as states,<sup>13</sup> or of suits arising under the constitution or laws of the United States, such as suits by or against federal corporations.<sup>14</sup>

(2) *Cases Cognizable in State Courts.*—Such cases as are not cognizable in the federal courts are transferred to the tribunals of the new state.<sup>15</sup>

etc., Co., 160 U. S. 77, 101, 40 L. Ed. 346; *Benner v. Porter*, 9 How. 235, 13 L. Ed. 119.

Provision is usually made for transferring to the United States district and circuit courts for the new state of cases which would have been cognizable therein had the territory been a state at the time such suits were instituted. *Glaspell v. Northern Pac. R. Co.*, 144 U. S. 211, 219, 36 L. Ed. 409.

The act of February 22d, 1848, which enacts that the provisions of the act of February 22d, 1847, transferring to the district courts of the United States, cases of federal character and jurisdiction begun in the territorial courts of certain territories of the United States, and then admitted to the union (none of which, on their admission as states, however, as it happened, were attached to any judicial circuits of the United States), shall apply to all cases which may be pending in the supreme or other superior courts of any territory of the United States which may be admitted as a state at the time of its admission, is to be construed so as to transfer the cases into district courts of the United States, if, on admission, the state did not form part of a judicial circuit, but if attached to such a circuit, then into the circuit court. *Express Co. v. Kountze Bros.*, 8 Wall. 342, 19 L. Ed. 457.

**Right to transfer dependent on statute.**

—The courts of the United States, inferior to the supreme court, having no jurisdiction except as conferred by congress, congressional legislation is necessary to enable those courts, after the admission of the state into the Union, to take jurisdiction of cases previously commenced in the courts of the territory, and not yet finally adjudged. And such legislation has been so construed and expounded by this court as to give effect, as far as possible, consistently with its terms and with the constitution of the United States, to the apparent intention of congress to vest in the courts of the United States the jurisdiction of such cases, so far as they are of a federal character, either because of their arising under the constitution and laws of the United States, or because of their being between citizens of different states. *Koenigsberger v. Richmond Silver Min. Co.*, 158 U. S. 41, 48, 39 L. Ed. 889; *Freeborn v. Smith*, 2 Wall. 160, 17 L. Ed. 922; *Express Co. v. Kountze Bros.*, 8 Wall. 342, 19 L. Ed. 457; *Baker v. Morton*, 12 Wall. 150, 20 L. Ed. 262.

**Cases pending in supreme court of territory.**—The provision for transfer is usually made applicable to such cases

when pending in the supreme court of the territory as well as when pending in the lower courts. *Glaspell v. Northern Pac. R. Co.*, 144 U. S. 211, 218, 36 L. Ed. 409; *Washington, etc., R. Co. v. Coeur D'Alene R., etc., Co.*, 160 U. S. 77, 101, 40 L. Ed. 346; *Koenigsberger v. Richmond Silver Min. Co.*, 158 U. S. 41, 48, 39 L. Ed. 889; *The Blue Jacket*, 144 U. S. 371, 36 L. Ed. 469.

**Transfer of criminal cases.**—It was competent for congress to have provided for the transfer of pending criminal cases, as well as civil, at the termination of the territorial government, to the federal courts, with authority to proceed therein to a final disposition, the same as if the cases had originated in those courts. A provision of this kind is not only fit and proper, but one that should always be made in respect to all the pending business remaining in the courts at the change of government. *Forsyth v. United States*, 9 How. 571, 576, 13 L. Ed. 262.

**12. Suits between citizens of territory and citizens of state.**—*Koenigsberger v. Richmond Silver Min. Co.*, 158 U. S. 41, 39 L. Ed. 889 (construing act admitting the states of North and South Dakota), *Glaspell v. Northern Pac. R. Co.*, 144 U. S. 211, 218, 36 L. Ed. 409.

**13. Suits between citizens of two territories, both subsequently admitted as states.**—An act providing for the admission of a territory into the Union as a state provided that cases pending in the territorial courts "whereof the circuit or district courts by this act established might have jurisdiction under the laws of the United States had such courts existed at the time of the commencement of such cases," might be transferred to the United States circuit or district court in that state, it was held that a suit brought in the territorial courts by a citizen of one territory against a citizen of another was removable to the federal court, where all of the territories have since the commencement of the suit, been admitted as states. *Washington, etc., R. Co. v. Coeur D'Alene R., etc., Co.*, 160 U. S. 77, 101, 40 L. Ed. 346; *Koenigsberger v. Richmond Silver Min. Co.*, 158 U. S. 41, 39 L. Ed. 889.

**14. Suits arising under constitution and laws.**—*Glaspell v. Northern Pac. R. Co.*, 144 U. S. 211, 219, 36 L. Ed. 409; *Washington, etc., R. Co. v. Coeur D'Alene R., etc., Co.*, 160 U. S. 77, 94, 101, 40 L. Ed. 346.

**15. Cases cognizable only in state courts.**—*Baker v. Morton*, 12 Wall. 150, 153, 20 L. Ed. 262; *Glaspell v. Northern*

(3) *Cases Over Which State and Federal Courts Have Concurrent Jurisdiction*.—Pending cases, where the federal and state courts have concurrent jurisdiction, may be transferred either to the state or federal courts by either party possessing that option under the existing law.<sup>16</sup>

## X. Courts of District of Columbia.

**A. Power of Congress.**—Congress may exercise within the District of Columbia all legislative powers that the legislature of a state might exercise within the state; and may vest and distribute the judicial authority in and among courts and magistrates, and regulate judicial proceedings before them, as it may think fit, so long as it does not contravene any provision of the constitution of the United States.<sup>17</sup>

**B. Whether Courts of United States.**—The supreme court of the District of Columbia possesses the same powers and jurisdiction as the circuit and district courts of the United States, and is to be deemed a court of the United States.<sup>18</sup>

Pac. R. Co., 144 U. S. 211, 218, 36 L. Ed. 409; *Koenigsberger v. Richmond Silver Min. Co.*, 158 U. S. 41, 48, 39 L. Ed. 889; *Benner v. Porter*, 9 How. 235, 13 L. Ed. 119.

By the act admitting Wisconsin as a state, provision was made for the transfer, from the territorial courts to the district court of the United States, of all cases appropriate to the jurisdiction of the new district court; but none for cases appropriate to the jurisdiction of state tribunals. *McNulty v. Batty*, 10 How. 72, 13 L. Ed. 303, reaffirmed in *Preston v. Bracken*, 10 How. 81, 13 L. Ed. 336.

So long as a territory of the United States remains in the territorial condition, and the United States have entire dominion and sovereignty over it, national and municipal, there is ordinarily no occasion to distinguish how far the subjects, committed by congress to the decision of the courts of the territory, are or are not of a federal character. *Koenigsberger v. Richmond Silver Min. Co.*, 158 U. S. 41, 48, 39 L. Ed. 889; *American Ins. Co. v. Canter*, 1 Pet. 511, 7 L. Ed. 243; *Benner v. Porter*, 9 How. 235, 13 L. Ed. 119.

If congress directs the transfer, to the district court of the United States, of cases appropriate to the jurisdiction of state courts, the supreme court cannot carry its judgment into effect by a mandate to the district court. *McNulty v. Batty*, 10 How. 72, 13 L. Ed. 303, reaffirmed in *Preston v. Bracken*, 10 How. 81, 13 L. Ed. 336.

On the admission of a territorial government into the Union as a state, the concurrence of both the federal and state governments would seem to be required in the transfer of the records, in cases of appropriate state jurisdiction, from the old to the new government. An act of congress would be incapable of passing them under the state jurisdiction, as would be an act of the legislature of the state to take the records out of the custody of the federal government. Both

should concur. *Benner v. Porter*, 9 How. 235, 246, 13 L. Ed. 119.

**16. Cases of concurrent jurisdiction.**—*Baker v. Morton*, 12 Wall. 150, 153, 20 L. Ed. 262; *Glaspell v. Northern Pac. R. Co.*, 144 U. S. 211, 36 L. Ed. 409.

**Transfer to be only on request.**—The statutes usually provide that except where the United States is a party, the transfer shall not be made except upon request of one of the parties, and in the absence of such request or transfer, the case is to be proceeded with in the proper court of the state. *Koenigsberger v. Richmond Silver Min. Co.*, 158 U. S. 41, 49, 39 L. Ed. 889.

**17. Power of congress.**—*Capital Traction Co. v. Hof*, 174 U. S. 1, 5, 43 L. Ed. 873.

**18. Whether a court of United States.**—Section 61 of the District Code (taking effect Jan. 1, 1902); *Benson v. Henkel*, 198 U. S. 1, 13, 49 L. Ed. 919; *Beavers v. Haubert*, 198 U. S. 77, 49 L. Ed. 979; *James v. United States*, 202 U. S. 401, 50 L. Ed. 1079; *Embry v. Palmer*, 107 U. S. 3, 10, 27 L. Ed. 346; *United States v. Schurz*, 102 U. S. 378, 393, 26 L. Ed. 167; See, also, *Page v. Burnstine*, 102 U. S. 664, 667, 26 L. Ed. 268; *Deposit Bank v. Frankfort*, 191 U. S. 499, 516, 48 L. Ed. 276.

That the supreme court of the District of Columbia is a court of the United States results from the right of exclusive legislation over the district which the constitution has given to congress. *Embry v. Palmer*, 107 U. S. 3, 10, 27 L. Ed. 346.

The supreme court of the District of Columbia is to be deemed a district court of the United States within the meaning of § 1014 of the Revised Statutes authorizing a removal of a prisoner from the district where he is committed to the district where the trial is to be had. *Benson v. Henkel*, 198 U. S. 1, 13, 49 L. Ed. 919; *Beavers v. Haubert*, 198 U. S. 77, 49 L. Ed. 950.

The supreme court of the District of Columbia is a court of the United States within the intendment of Revised Stat-



**C. Jurisdiction**—1. **CIVIL JURISDICTION**—a. *Federal Jurisdiction*.—The supreme court of the District of Columbia possesses the same federal jurisdiction as the district and circuit courts of the United States.<sup>19</sup> Thus it has the same admiralty jurisdiction as the district courts,<sup>20</sup> and the same jurisdiction with respect to patent cases as the circuit courts.<sup>21</sup>

b. *Local Jurisdiction*.—(1) *In General*.—The supreme court of the District of Columbia has a local as well as a federal jurisdiction and may exercise jurisdiction over cases which, if arising within the limits of any other district of the United States, would be relegated to the state courts.<sup>22</sup>

(2) *In What Court Jurisdiction Vested*.—Original civil jurisdiction in the District of Columbia was formerly vested in a court known as the circuit court,<sup>23</sup> but it is now vested in the supreme court, by virtue of the act of 1863 consolidating all the courts previously existing in the district.<sup>24</sup>

(3) *Nature and Extent of Jurisdiction*.—(a) *In General*.—In organizing a judicial department for the district, all the judicial power necessary for the purposes of the government was vested in the highest court of original jurisdiction.<sup>25</sup> Thus the courts of the district, like the state courts, may issue man-

utes, § 714, and in consequence the judges of that court are entitled on resignation to the benefits intended to be conferred thereby. *James v. United States*, 202 U. S. 401, 405, 50 L. Ed. 1079.

19. **Federal jurisdiction**.—*Benson v. Henkel*, 198 U. S. 1, 13, 49 L. Ed. 919; *United States v. Schurz*, 102 U. S. 378, 393, 26 L. Ed. 167; *Cochrane v. Deener*, 94 U. S. 780, 24 L. Ed. 139.

The act of February, 1801, clothes the courts and judges of the District of Columbia with the jurisdiction and powers of the circuit courts and judges of the United States. *Bank v. Okely*, 4 Wheat. 235, 4 L. Ed. 559; *United States v. Schurz*, 102 U. S. 378, 393, 26 L. Ed. 167; *Page v. Burnstine*, 102 U. S. 664, 667, 26 L. Ed. 268.

20. **Proceedings in admiralty**.—*Smith v. Burnett*, 173 U. S. 430, 43 L. Ed. 753.

21. **Patent cases**.—The powers and jurisdiction of the supreme court of the District of Columbia, in patent cases, are the same, as well in equity as at law, as those of the circuit courts of the United States; and whether a case, involving the validity or the infringement of letters patent, shall be first tried at law is a matter of discretion and not of jurisdiction. *Cochrane v. Deener*, 94 U. S. 780, 24 L. Ed. 139.

22. **Local jurisdiction**.—*Benson v. Henkel*, 198 U. S. 1, 13, 49 L. Ed. 919; *United States v. Schurz*, 102 U. S. 378, 393, 26 L. Ed. 167 (where it was held that the jurisdiction was not limited to such cases as were cognizable in the district and circuit courts of the United States).

23. **Circuit court formerly had original civil jurisdiction**.—*Kendall v. United States*, 12 Pet. 524, 526, 9 L. Ed. 1181.

24. **Supreme court now has original civil jurisdiction**.—*Ormsby v. Webb*, 134 U. S. 47, 61, 33 L. Ed. 805; *Metropolitan R. Co. v. Moore*, 121 U. S. 558, 30 L. Ed. 1022. See post, "Special and General Terms," X, D. 1.

As was said in *Metropolitan R. Co. v. Moore*, 121 U. S. 558, 30 L. Ed. 1022, the

act of 1863 was the introduction into this district of a new organization of its judicial system, under which all the courts previously existing here as separate and independent tribunals, having special and diverse jurisdictions, were consolidated into the new supreme court of the District of Columbia. *Ormsby v. Webb*, 134 U. S. 47, 61, 33 L. Ed. 805.

"But the act of March 3, 1863, 'to reorganize the courts in the District of Columbia and for other purposes,' 12 Stat. 762, was the introduction into the District of Columbia of a new organization of its judicial system. It established a single court, to be called the supreme court of the District of Columbia, having general jurisdiction in law and equity. It gave to that court the same jurisdiction as was then possessed and exercised by the circuit court of the District of Columbia, and to the justices of the new court the powers and jurisdiction of the judges of the circuit court. It also gave to each of the justices of the court power to hold a district court of the United States for the District of Columbia, with all the powers and jurisdiction of other district courts of the United States; and also to hold a criminal court for the trial of all crimes and offenses arising within the district, with the same powers and jurisdiction as was then possessed and exercised by the criminal court of the District of Columbia. All the courts, therefore, previously existing in the District of Columbia, as separate and independent tribunals, having special and diverse jurisdictions, were consolidated into the new supreme court of the District of Columbia." *Metropolitan R. Co. v. Moore*, 121 U. S. 558, 571, 30 L. Ed. 1022.

25. **Judicial power necessary for purposes of government**.—*Kendall v. United States*, 12 Pet. 524, 576, 9 L. Ed. 1181.

In *Curtiss v. Georgetown, etc., Co.*, 6 Cranch 233, 3 L. Ed. 209, it was held that the circuit court for the District of Columbia had no jurisdiction, upon motion,



damus,<sup>26</sup> entertain proceedings for trespass upon personal property,<sup>27</sup> or grant a summary remedy under a special statute giving them power so to do.<sup>28</sup> But it has no jurisdiction of a suit against the United States or a public officer for the specific performance of a contract made by the United States.<sup>29</sup>

(b) *Probate Jurisdiction*.—The supreme court of the District of Columbia has, except as since altered by congress, the same probate jurisdiction as that possessed by the orphans' court and the court of chancery of Maryland.<sup>30</sup> It is clothed, as an orphans' court, with ample powers to proceed in the settlement of estates and the distribution thereof to those entitled, in accordance with equitable principles and procedure.<sup>31</sup> But while it may admit a will of personalty to pro-

to quash an inquisition taken under the act "to authorize the making of a turnpike road from Mason's causey to Alexandria."

**26. Mandamus.**—*Kendall v. United States*, 12 Pet. 524, 526, 9 L. Ed. 1181; *United States v. Schurz*, 102 U. S. 378, 393, 26 L. Ed. 167; *Decatur v. Paulding*, 14 Pet. 497, 10 L. Ed. 559. See, generally, the title MANDAMUS.

The supreme court of the District of Columbia is authorized to issue the writ of mandamus as an original process in cases where, by the principles of the common law, the petitioner is entitled to it. *United States v. Schurz*, 102 U. S. 378, 26 L. Ed. 167.

The power of the circuit court of the District of Columbia to exercise the jurisdiction to issue a writ of mandamus to a public officer to do an act required of him by law, results from the 3d section of the act of congress of February 27th, 1801, which declares, that the circuit court and the judges thereof shall have all the power by law vested in the circuit courts of the United States. The circuit courts referred to were those established by the act of February 13th, 1801; the repeal of that law, fifteen months afterwards, and after the circuit court for this district had been organized, and had gone into operation, under the act of 27th February, 1801, could not, in any manner, affect that law any further than was provided by the repealing act. *Kendall v. United States*, 12 Pet. 524, 526, 9 L. Ed. 1181.

In the case of *Kendall v. United States*, 12 Pet. 524, 527, 9 L. Ed. 1181, it was decided by the supreme court, that the circuit court of Washington county, for the District of Columbia, has the power to issue a mandamus to an officer of the federal government, commanding him to do a ministerial act. *Decatur v. Paulding*, 14 Pet. 497, 10 L. Ed. 559.

**27. Actions for trespass.**—The courts in the District of Columbia have a like jurisdiction in trespass upon personal property with the courts in England and in the states in this Union, and in the absence of statutory provisions, in the trial of them must apply the same common-law principles which regulate the mode of bringing such actions, the pleadings, and the proof. *McKenna v. Fisk*, 1 How. 241, 249, 11 L. Ed. 117.

**28. Summary remedy under Maryland statute applicable to district.**—By § 5 of

the act of February, 1801, courts of the District of Columbia are vested generally with jurisdiction of all causes in law and equity, and by § 5 of the act of March 3, 1801, the clerks of the circuit court are required to perform all the services then performed by the clerks of the counties of the state of Maryland. The Maryland act of 1793 incorporating the Bank of Columbia, gave to the corporation a summary process, by execution in the nature of an attachment, against its debtors who had, by an express consent, in writing made bonds or bills or notes drawn or indorsed by them, negotiable at the bank. It was held that the courts of the District of Columbia were empowered to carry into effect the summary remedy given the bank by the Maryland statute. *Bank v. Okely*, 4 Wheat. 235, 4 L. Ed. 559.

**29. Specific performance of contract of United States.**—*United States v. Stock-lager*, 129 U. S. 470, 478, 32 L. Ed. 785.

**30. Probate jurisdiction same as that of Maryland courts.**—The law of wills and of probate, as existing in Maryland on February 27, 1801, is the law of the District of Columbia, except as since altered by congress; and the supreme court of the District of Columbia, in special and general term respectively, has, by virtue of successive acts of congress, the probate jurisdiction formerly exercised by the orphans' court and the court of chancery of the state of Maryland, and by the orphans' court and the circuit court of the United States for the District of Columbia; with authority, also, at a special term, to order any matter to be heard in the first instance at a general term. *Campbell v. Porter*, 162 U. S. 478, 482, 40 L. Ed. 1044.

**31. Power to proceed in settlement of estates.**—*Kenaday v. Sinnott*, 179 U. S. 606, 614, 45 L. Ed. 339. See, generally, the title WILLS.

The district supreme court as an orphans' court has jurisdiction over an alleged residue of personalty in the hands of an executrix undisposed of by the will. *Kenaday v. Sinnott*, 179 U. S. 606, 614, 45 L. Ed. 339.

"The powers of the orphans' court of Alexandria are made, by act of congress, identical with the powers of an orphans' court, under the laws of Maryland. It is a court of limited jurisdiction, and is authorized to revoke letters testamentary in two cases—a failure to return an in-

bate,<sup>32</sup> it has no power to admit a will or codicil to probate as a devise of real estate.<sup>33</sup>

(c) *Sale of Infants' Lands*.—The orphans' court of the District of Columbia with the approval of the circuit court of the United States of the District of Columbia sitting in chancery, has jurisdiction to order the sale of real estate of infants for their maintenance and education.<sup>34</sup>

2. CRIMINAL JURISDICTION.—See the title CRIMINAL LAW. As to jurisdiction of police court of district over crime of conspiracy, see the title CONSPIRACY, vol. 3, p. 1107.

D. *Terms of Court*.—1. SPECIAL AND GENERAL TERMS.—The supreme court of the District of Columbia sits both in special and in general term.<sup>35</sup> The

ventory, or to account." *Yeaton v. Lynn*, 5 Pet. 224, 230, 8 L. Ed. 105.

**Waiver of objection to trial of suit to set aside will by equity court.**—In a suit to set aside a will in the supreme court of the District of Columbia, the agreement of the parties to submit certain questions to a jury, the trial before the jury and the stipulation for returning the testimony there taken to the equity court for consideration by the judge thereof, is a waiver of the objection to the jurisdiction of the court upon the ground that the case is not cognizable in equity. *Beyer v. LeFevre*, 136 U. S. 114, 118, 46 L. Ed. 1030.

As to waiver of objections to jurisdiction, in general, see the titles APPEARANCES, vol. 2, p. 429; JURISDICTION.

32. **Power to admit will of personality to probate.**—*Campbell v. Porter*, 162 U. S. 478, 482, 40 L. Ed. 1044.

33. **Power to admit will of real estate to probate.**—*Campbell v. Porter*, 162 U. S. 478, 482, 40 L. Ed. 1044.

The act of July 9, 1888, c. 597, did not confer on the supreme court of the District of Columbia any jurisdiction to admit to probate a will of real estate only; it related simply to the proof of wills already probated. *Campbell v. Porter*, 162 U. S. 478, 487, 40 L. Ed. 1044.

34. **Sale of infants' lands.**—*Thaw v. Ritchie*, 136 U. S. 519, 537, 34 L. Ed. 531. See the titles GUARDIAN AND WARD; INFANTS.

Under the Maryland act of 1798 express authority is granted to the orphans' court to order a sale of any part of the ward's estate, real or personal, for his maintenance and education; but that, before any sale of real estate can be made for this purpose, the order of the orphans' court shall be approved by the court of chancery or the general court. Whether the property to be sold for this purpose is personal or real, the application is to be made to the orphans' court, and the order granted by that court in the first instance. In the case of personal property, no action of any other court is required. In the case of real estate, the order of sale, after being passed by the orphans' court, must be presented to and approved by the court of chancery or the general court; but no separate suit need be instituted in

either of those courts. *Thaw v. Ritchie*, 136 U. S. 519, 542, 34 L. Ed. 531.

That statute is not restricted to legal estates, or to estates in possession. *Thaw v. Ritchie*, 136 U. S. 519, 542, 34 L. Ed. 531.

**Notice to infants.**—"In this form of proceeding, the guardian sufficiently and fully represented the infants, and no notice to them was required by the statute of Maryland or by any general rule of law. The want of proof of such notice, or of any record of the evidence on which the orphans' court proceeded in making the order, or the chancery court in approving it, or of any subsequent accounting by the guardian for the proceeds of the sale, is immaterial. The orders of those courts within their jurisdiction were conclusive proof in favor of the purchaser and grantee at the sale, and cannot be collaterally impeached on any such ground." *Thaw v. Ritchie*, 136 U. S. 519, 548, 34 L. Ed. 531.

35. **Special and general term.**—*Metropolitan R. Co. v. Moore*, 121 U. S. 558, 564, 30 L. Ed. 1022.

"The arrangement of that court, for purposes of convenience and dispatch of business, into general and special terms, was taken from the system long previously established and known in the state of New York in reference to its supreme court; and, for the purpose of determining the relation of the special to the general term, the act of congress of March 3, 1863, adopted the provisions from the legislation of New York incorporated into the sections of the Revised Statutes now under consideration." *Metropolitan R. Co. v. Moore*, 121 U. S. 558, 572, 30 L. Ed. 1022.

"When congress reorganized the judicial system of the district, by abolishing the old courts and by establishing the present supreme court of the district, with its general and special terms, and adopted them from the legislation of New York in substantially the same language, these provisions are to be construed in the sense in which they were understood at the time in that system from which they were taken. In other words, we think that congress adopted for this purpose the law of New York as it was understood in New York." *Metropolitan R. Co.*



special terms are designated as the circuit court, the equity court, the criminal court, the probate court, and the district court of the United States.<sup>36</sup> Special terms are held by one justice,<sup>37</sup> while general terms may be held by three justices, two constituting a quorum.<sup>38</sup> The supreme court sitting at special term and the supreme court sitting in general term are the same tribunal,<sup>39</sup> but the court in general term exercises, as a general rule, appellate power over the special terms,<sup>40</sup> although it may also exercise jurisdiction in hearing in the first instance matters referred to it by the special term.<sup>41</sup>

2. **PROLONGATION OF TERM.**—Under its rules, the supreme court of the District of Columbia may prolong its terms indefinitely for the purpose of settling bills of exception.<sup>42</sup> Prolongation can only be made upon motion, which motion must be made before the end of the term.<sup>43</sup>

3. **ADJOURNMENT.**—See the title **ADJOURNMENTS**, vol. 1, p. 118.

**E. Ministerial Court for District of Columbia.**—The Levy Court of Washington City, in the District of Columbia, is the body charged with the ad-

*v. Moore*, 121 U. S. 558, 572, 30 L. Ed. 1022; *Ormsby v. Webb*, 134 U. S. 47, 61, 33 L. Ed. 805.

**36. Kinds of special terms.**—D. C. Code of 1902, § 64; *Metropolitan R. Co. v. Moore*, 121 U. S. 558, 562, 30 L. Ed. 1022.

The several general terms and special terms of the circuit courts, district courts, and criminal courts authorized by law are declared to be, severally, terms of the supreme court of the District of Columbia; *Rev. Stat. 753. Metropolitan R. Co. v. Moore*, 121 U. S. 558, 562, 30 L. Ed. 1022.

**37. Special terms held by one justice.**—*Cross v. United States*, 145 U. S. 571, 572, 36 L. Ed. 821.

**38. General term held by three justices.**—*Cross v. United States*, 145 U. S. 571, 572, 36 L. Ed. 821.

**39. *Cross v. United States***, 145 U. S. 571, 572, 36 L. Ed. 821; *Hume v. Bowie*, 148 U. S. 245, 254, 37 L. Ed. 438.

A decree upon a mandate, although rendered at general term, is still the decree of the supreme court of the district. *Richards v. Mackall*, 113 U. S. 539, 540, 28 L. Ed. 1132; *Mackall v. Richards*, 116 U. S. 45, 47, 29 L. Ed. 558.

**40. General term an appellate court.**—*Cross v. United States*, 145 U. S. 571, 572, 36 L. Ed. 821; *Inland, etc., Coasting Co. v. Hall*, 124 U. S. 121, 31 L. Ed. 369; *Metropolitan R. Co. v. Moore*, 121 U. S. 558, 574, 30 L. Ed. 1022.

The judgment of the general term setting aside a verdict and judgment at law, and ordering a new trial, is equivalent to remanding the cause to the special term for a new trial; an appeal from the special to the general term is simply a step in the progress of the cause during its pendency in the court; and though the judges may differ, the tribunal remains the same. *Hume v. Bowie*, 148 U. S. 245, 254, 37 L. Ed. 438; *Metropolitan R. Co. v. Moore*, 121 U. S. 558, 30 L. Ed. 1022; *Ormsby v. Webb*, 134 U. S. 47, 33 L. Ed. 805.

**As to appeals from special to general term**, see the title **APPEAL AND ERROR**, vol. 1, pp. 504, 505.

**41. Hearing by general term in first instance.**—*Cross v. United States*, 145 U. S. 571, 572, 36 L. Ed. 821; *Grant v. Phoenix Life Ins. Co.*, 121 U. S. 118, 30 L. Ed. 909; *Hume v. Bowie*, 148 U. S. 245, 254, 37 L. Ed. 438.

Where a cause is referred to the general term for hearing in the first instance, a special term does not lose its jurisdiction to entertain the application of a receiver in the case for directions in regard to the expenditure of funds in his hands, especially where an interlocutory decree of the general term gives the receiver leave to apply to the special term for instructions. *Grant v. Phoenix Life Ins. Co.*, 121 U. S. 118, 30 L. Ed. 909.

**42. Prolongation of term.**—*Hume v. Bowie*, 148 U. S. 245, 254, 37 L. Ed. 438; *Gordon v. Randle*, 189 U. S. 417, 47 L. Ed. 875.

While it would be more proper to specify the time to which the term might be extended under the provisions of the rule, an omission to do so does not invalidate the order. *Hume v. Bowie*, 148 U. S. 245, 254, 37 L. Ed. 438.

A judgment entered prolonging the term is equivalent to the practice in many jurisdictions of entering an order granting additional time, after the expiration of the term, in which to settle bills of exceptions. The provision as to the prolongation of the term for the particular purpose is a mere difference in phraseology and not of the substance, and the question as to the close of the term in other respects is quite immaterial. *Hume v. Bowie*, 148 U. S. 245, 253, 37 L. Ed. 438.

**43. Motion for prolongation.**—*Gordon v. Randle*, 189 U. S. 417, 47 L. Ed. 875.

The January term of the supreme court of the District of Columbia begins on the first Tuesday in January, and where the first Tuesday in January falls upon the first day of the month, a national holiday, a motion to prolong the October term can not be made thereafter, as the January term begins upon January 2nd. *Gordon v. Randle*, 189 U. S. 417, 47 L. Ed. 875.



ministration of the ministerial and financial duties of Washington county. If not a corporation in the full sense of the term it is a quasi corporation; and can sue and be sued in regard to any matter in which, by law, it had rights to be enforced, or is under obligations which it refuses to fulfill.<sup>44</sup>

**F. Compensation of Officers.**—The deputy clerk, crier, and messengers of the supreme court of the District of Columbia are not entitled to the twenty per cent additional compensation granted by the joint resolution of congress approved Feb. 28, 1867 (14 Stat. 569).<sup>45</sup>

## XI. Courts of Indian Nations or Tribes.

See the title INDIANS.

## XII. Exclusive, Concurrent and Conflicting Jurisdiction.

**A. Exclusive or Concurrent Jurisdiction**—1. AS BETWEEN STATE AND FEDERAL COURTS—*a. General Rules.*—In some cases to which the judicial power of the United States is extended, the jurisdiction of the federal courts is exclusive of the state courts, but in most cases the state and federal courts exercise a concurrent jurisdiction. It is competent for congress to make the judicial power of the United States exclusive in all cases to which it extends;<sup>46</sup> but, as we have already seen, the states cannot make their jurisdiction exclusive, as to cases which are cognizable in the federal courts by act of congress.<sup>47</sup> In general, the intention to make the federal jurisdiction exclusive must appear by

**44. Levy court.**—*Levy Court v. Coroner*, 2 Wall. 501, 17 L. Ed. 851. See, also, *Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1, 5, 33 L. Ed. 231.

The Levy court is charged with the duty of laying out and repairing roads, building bridges, and keeping them in good order, providing poorhouses, and the general care of the poor; and with laying and collecting the taxes which are necessary to enable it to discharge these and other duties, and to pay the other expenses of the county. It has the capacity to make contracts in reference to any of these matters, and to raise money to meet these contracts. It has perpetual succession. Its functions are those which, in the several states, are performed by "county commissioners," "overseers of the poor," "county supervisors," and similar bodies with other designations. Nearly all the functions of these various bodies, or of any of them, reside in the Levy court of Washington. It is for all financial and ministerial purposes the county of Washington. If not a corporation in the full sense of the term, it is a quasi corporation, and can sue and be sued, in regard to any matter in which, by law, it has rights to be enforced, or is under obligations which it refuses to fulfill. This principle, a necessary one in the enlarged sphere of usefulness which such bodies are made to perform in modern times, is well supported by adjudged cases. *Levy Court v. Coroner*, 2 Wall. 501, 507, 17 L. Ed. 851.

The fees allowed by the eighth section of the act of congress of July 8, 1838, to the coroners of the counties of Washington and Alexandria, and to jurors and witnesses who may be lawfully summoned by them to an inquest, are payable by the Levy court of the county, not by the fed-

eral government. *Levy Court v. Coroner*, 2 Wall. 501, 17 L. Ed. 851.

**45. Compensation of officers.**—*United States v. Meigs*, 95 U. S. 748, 24 L. Ed. 578.

**46. Congress may make federal jurisdiction exclusive in all cases.**—*Martin v. Hunter*, 1 Wheat. 304, 397, 4 L. Ed. 97; *Railroad Co. v. Whitton*, 13 Wall. 270, 288, 20 L. Ed. 571; *The Moses Taylor*, 4 Wall. 411, 429, 18 L. Ed. 397; *Tennessee v. Davis*, 100 U. S. 257, 25 L. Ed. 648; *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U. S. 511, 517, 42 L. Ed. 1126.

The concurrent jurisdiction of the state tribunals depends altogether upon the pleasure of congress, and may be revoked and extinguished whenever they think proper, in every case in which the subject matter can constitutionally be made cognizable in the federal courts, and that without an express provision to the contrary the state courts will retain a concurrent jurisdiction in all cases where they had jurisdiction originally over the subject matter. *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U. S. 511, 517, 42 L. Ed. 1126.

Nothing more was done by the constitution than to extend the judicial power of the United States to specified cases and controversies; leaving to congress to determine whether the courts to be established by it from time to time should be given exclusive cognizance of such cases or controversies, or should only exercise jurisdiction concurrent with the courts of the several states. *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U. S. 511, 517, 42 L. Ed. 1126.

**47. Power of state to make state jurisdiction exclusive.**—See ante, "Power of States to Extend or Restrict Jurisdiction," VII, A, 4, c.

clear language,<sup>48</sup> though in some cases the federal jurisdiction is unavoidably exclusive,<sup>49</sup> or may be made so by implication.<sup>50</sup> The mere fact that the clause giving the federal courts jurisdiction provides that they shall have cognizance of "all" cases of a designated class does not mean that they shall have exclusive jurisdiction of such cases.<sup>51</sup>

b. *Suits between Citizens of Different States*.—Except where the federal jurisdiction is expressly made exclusive by an act of congress, the state and federal courts exercise a concurrent jurisdiction of suits between citizens of different states.<sup>52</sup>

c. *Suits Arising under Constitution, Laws or Treaties*.—Except where other power is provided by statute, the state and federal courts exercise a concurrent jurisdiction with respect to suits arising under the constitution and laws of the United States.<sup>53</sup>

**48. Intention to make jurisdiction exclusive to be clear.**—*Plaquemines Tropical Fruit Co. v. Henderson*, 170 U. S. 511, 517, 42 L. Ed. 1126; *Ames v. Kansas*, 111 U. S. 449, 28 L. Ed. 482; *Robb v. Connolly*, 111 U. S. 624, 28 L. Ed. 542; *Cohens v. Virginia*, 6 Wheat. 264, 396, 5 L. Ed. 257.

If it was intended to withdraw from the states authority to determine, by its courts, all cases and controversies to which the judicial power of the United States was extended, and of which jurisdiction was not given to the national courts exclusively, such a purpose would have been manifested by clear language. *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U. S. 511, 517, 42 L. Ed. 1126. The statutes of the United States are as much the law of the land in any state as are those of the state; and although exclusive jurisdiction for their enforcement may be given to the federal courts, yet where it is not given, either expressly or by necessary implication, the state courts, having competent jurisdiction in other respects, may be resorted to. *Claffin v. Houseman*, 93 U. S. 130, 23 L. Ed. 833.

It has been generally held, that the state courts have a concurrent jurisdiction with the federal courts, in cases to which the judicial power is extended, unless the jurisdiction of the federal courts be rendered exclusive by the words of the third article. *Cohens v. Virginia*, 6 Wheat. 264, 396, 5 L. Ed. 257.

**49. Federal jurisdiction unavoidably exclusive.**—*Martin v. Hunter*, 1 Wheat. 304 397, 4 L. Ed. 97; *Railroad Co. v. Whitton*, 13 Wall. 270, 288, 20 L. Ed. 571; *The Moses Taylor*, 4 Wall. 411, 429, 18 L. Ed. 397.

While the courts of the state may legitimately take cognizance of controversies between the riparian owners, concerning the use and apportionment of the waters flowing in the nonnavigable parts of the stream, they cannot interfere by mandatory injunction or otherwise, with the control of the surplus water power incidentally created by the dam and canal now owned and operated by the United States. *Green Bay, etc., Canal Co. v.*

*Patten Paper Co.*, 173 U. S. 179, 190, 43 L. Ed. 658.

**50. Federal jurisdiction exclusive by implication.**—*Claffin v. Houseman*, 93 U. S. 130, 133, 23 L. Ed. 833.

**51. Grant of jurisdiction of "all" cases not exclusive.**—*Claffin v. Houseman*, 93 U. S. 130, 139, 23 L. Ed. 833; *Cohens v. Virginia*, 6 Wheat. 264, 397, 5 L. Ed. 257.

**52. Suits between citizens of different states.**—*Railroad Co. v. Whitton*, 13 Wall. 270, 288, 20 L. Ed. 571; *Claffin v. Houseman*, 93 U. S. 130, 137, 23 L. Ed. 833.

**53. Cases arising under constitution and laws of United States.**—*Claffin v. Houseman*, 93 U. S. 130, 137, 23 L. Ed. 833; *Teal v. Felton*, 12 How. 284, 292, 13 L. Ed. 990; *Yates v. Jones Nat. Bank*, 206 U. S. 158, 51 L. Ed. 1002; *Yates v. Utica Bank*, 206 U. S. 181, 51 L. Ed. 1015; *Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257; *Blythe v. Hinckley*, 173 U. S. 501, 43 L. Ed. 783; *Blythe v. Hinckley*, 180 U. S. 333, 338, 45 L. Ed. 557.

Rights, whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States courts, or in the state courts, competent to decide rights of the like character and class; subject, however, to this qualification, that where a right arises under a law of the United States, congress may, if it see fit, give to the federal courts exclusive jurisdiction. *Claffin v. Houseman*, 93 U. S. 130, 137, 23 L. Ed. 833. See remarks of Mr. Justice Field in *The Moses Taylor*, 4 Wall. 411, 429, 18 L. Ed. 397, and *Story, J.*, in *Martin v. Hunter*, 1 Wheat. 304, 334, 4 L. Ed. 97, and of Mr. Justice Swayne, in *Ex parte McNeil*, 13 Wall. 236, 20 L. Ed. 624.

The statutes of the United States are as much the law of the land in any state as are those of the state; and although exclusive jurisdiction for their enforcement may be given to the federal courts, yet where it is not given, either expressly or by necessary implication, the state courts, having competent jurisdiction in other respects, may be resorted to. *Claffin v. Houseman*, 93 U. S. 130, 23 L. Ed. 833.

In such cases, the state courts do not exercise a new jurisdiction conferred upon



d. *Suits between Citizens and Aliens*.—Unless otherwise provided by congress, the jurisdiction of the state and federal courts over suits between citizens and aliens is concurrent.<sup>55</sup>

e. *Cases Affecting Ambassadors and Ministers*.—See the title **AMBASSADORS AND CONSULS**, vol. 1, p. 273.

f. *Suits by United States*.—The federal courts have exclusive jurisdiction of suits by the United States.<sup>56</sup>

g. *Suits in Admiralty*.—See the title **ADMIRALTY**, vol. 1, pp. 127, 130. And see the title **MARITIME LIENS**.

h. *Suits by States against Citizens of Other States or Aliens*.—See ante, "Suits between States and Citizens of Other States, or Aliens," VII, E, 1, a, (4), (c), ff.

i. *Over Lands Ceded to United States*.—As a general rule the United States courts have exclusive jurisdiction over lands ceded to the United States,<sup>57</sup> but this may be lost upon nonuser of the land for public purposes, where the instrument of cession so provides.<sup>58</sup>

2. **AS BETWEEN SEVERAL FEDERAL COURTS**.—This subject is treated elsewhere in this title.<sup>59</sup>

3. **CONCURRENT JURISDICTION OF LAW AND EQUITY**.—See the titles **EQUITY**; **JURISDICTION**.

**B. Conflict between Courts of Concurrent Jurisdiction**—1. **RETENTION OF JURISDICTION BY COURT FIRST ACQUIRING IT**—a. *In General*.—The court which first acquires jurisdiction of a case has a right to retain it until the cause

them, but their ordinary jurisdiction, derived from their constitution under the state law. *Claflin v. Houseman*, 93 U. S. 130, 23 L. Ed. 833.

**Suits under postal laws**.—State courts have jurisdiction of an action of trover against a postmaster for failure to deliver mail under the postal laws of the United States. *Teal v. Felton*, 12 How. 284, 292, 13 L. Ed. 990; *Claflin v. Houseman*, 93 U. S. 130, 142, 23 L. Ed. 833.

**Suits by or against national banks**.—See ante, "Suits by or against National Banks," VII, C, 4, b, (1), (g).

**Jurisdiction of suit to enforce right of stockholder to inspect books of national banks**, see the title **BANKS AND BANKING**, vol. 3, pp. 128, 129.

**Garnishment of insolvent national banks**, see the title **BANKS AND BANKING**, vol. 3, pp. 190, 191.

**An action against the directors of a national bank for damages for making an untrue report as to the condition of the bank, whereby the plaintiff was damaged, may be sustained in the state courts**. *Yates v. Jones Nat. Bank*, 206 U. S. 158, 51 L. Ed. 1002; *Yates v. Utica Bank*, 206 U. S. 181, 51 L. Ed. 1015.

**Suits under patent laws**.—See ante, "Patent Laws," VII, C, 4, b, (1), (f), gg.

**Cases arising under revenue laws**.—See ante, "Revenue Laws," VII, C, 4, b, (1), (f), ii.

**Suits under copyright laws**.—See ante, "Copyright Laws," VII, C, 4, b, (1), (f), ee.

**Suits under trademark laws**.—See ante, "Trademark Laws," VII, C, 4, b, (1), (f), jj.

**Seizures under laws of United States**.—See ante, "Suits for Seizures," VII, B, 3, d.

**Suits for penalties and forfeitures**.—See ante, "Suits for Penalties and Forfeitures," VII, B, 3, c.

**Suits under bankruptcy laws**.—See the title **BANKRUPTCY**, vol. 2, p. 792.

**Criminal cases**.—See the titles **CRIMINAL LAW**; **HABEAS CORPUS**.

**55. Suits between citizens or aliens concurrent**.—*Railroad Co. v. Whitton*, 13 Wall. 270, 288, 20 L. Ed. 571; *Claflin v. Houseman*, 93 U. S. 130, 139, 23 L. Ed. 833.

**56. Suits by United States**.—*Railroad Co. v. Whitton*, 13 Wall. 270, 288, 20 L. Ed. 571; *Claflin v. Houseman*, 93 U. S. 130, 139, 23 L. Ed. 833.

**57. Lands ceded to United States**.—*Palmer v. Barrett*, 162 U. S. 399, 40 L. Ed. 1015. See, generally, the titles **CRIMINAL LAW**; **UNITED STATES**.

**58. Loss of jurisdiction upon nonuser for public purposes**.—Where an act of the state legislature ceding land to the United States for public purposes provided that the United States should have exclusive jurisdiction over it so long as used for such purposes and no longer, the exclusive jurisdiction of the United States ceased, where the land was leased by the United States to a city for the purposes of a city market. *Palmer v. Barrett*, 162 U. S. 399, 40 L. Ed. 1015.

**59. Courts having concurrent jurisdiction with court of claims**.—See ante, "Concurrent Jurisdiction of District and Circuit Courts," VII, F, 2, e, (8).

**Concurrent jurisdiction of district and circuit courts**.—See ante, "Concurrent Jurisdiction with Circuit Courts," VII, B, 3, e.



is finally disposed of, and its jurisdiction is not subject to be ousted by court exercising a concurrent jurisdiction.<sup>60</sup>

b. *Necessity for Identity of Causes.*—The rule that among courts of concurrent jurisdiction, that one which first obtains jurisdiction of a case has the exclusive right to decide every question arising in the case, is subject to some lim-

**60. Retention by court first acquiring jurisdiction.**—*Prout v. Starr*, 188 U. S. 537, 544, 47 L. Ed. 584; *Harkrader v. Wadley*, 172 U. S. 148, 43 L. Ed. 399; *Wiswall v. Sampson*, 14 How. 52, 14 L. Ed. 322; *Peale v. Phipps*, 14 How. 368, 14 L. Ed. 459; *Pulliam v. Osborne*, 17 How. 471, 15 L. Ed. 154; *People's Bank v. Calhoun*, 102 U. S. 256, 26 L. Ed. 101; *Heidritter v. Elizabeth Oil Cloth Co.*, 112 U. S. 294, 28 L. Ed. 728; *In re Tyler*, 149 U. S. 164, 37 L. Ed. 689; *Porter v. Sabin*, 149 U. S. 473, 480, 37 L. Ed. 815; *Wallace v. McConnell*, 13 Pet. 136, 10 L. Ed. 95; *Gumbel v. Pitkin*, 124 U. S. 131, 155, 31 L. Ed. 374; *Ellis v. Davis*, 109 U. S. 485, 497, 27 L. Ed. 1006; *Payne v. Hook*, 7 Wall. 425, 19 L. Ed. 260; *Stout v. Lye*, 103 U. S. 66, 26 L. Ed. 428; *Shields v. Coleman*, 157 U. S. 168, 177, 39 L. Ed. 660; *Rio Grande R. Co. v. Gomila*, 132 U. S. 478, 482, 33 L. Ed. 400; *Covell v. Heyman*, 111 U. S. 176, 28 L. Ed. 390; *Buck v. Colbath*, 3 Wall. 334, 18 L. Ed. 257; *Taylor v. Taintor*, 16 Wall. 366, 21 L. Ed. 287; *Louisville Trust Co. v. Knott*, 191 U. S. 225, 232, 48 L. Ed. 159; *Randall v. Howard*, 2 Black 585, 589, 17 L. Ed. 269; *Ableman v. Booth*, 21 How. 506, 16 L. Ed. 169; *Tarble's Case*, 13 Wall. 397, 20 L. Ed. 597; *Orton v. Smith*, 18 How. 263, 266, 15 L. Ed. 393; *Amy v. The Supervisors*, 11 Wall. 136, 20 L. Ed. 101; *Riggs v. Johnson County*, 6 Wall. 166, 18 L. Ed. 768; *Farr v. Thomson*, 11 Wall. 139, 20 L. Ed. 102; *Smith v. McIver*, 9 Wheat. 532, 6 L. Ed. 152; *In re Chetwood*, 165 U. S. 443, 41 L. Ed. 782; *In re Swan*, 150 U. S. 637, 652, 37 L. Ed. 1207; *New Orleans v. Steamship Co.*, 20 Wall. 387, 392, 22 L. Ed. 354; *Put-in-Bay Waterworks, etc., Co. v. Ryan*, 181 U. S. 409, 430, 45 L. Ed. 927.

"When a state court and a court of the United States may each take jurisdiction of a matter, the tribunal where jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed and the jurisdiction involved is exhausted; and this rule applies alike in both civil and criminal cases. *Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749; *Buck v. Colbath*, 3 Wall. 334, 18 L. Ed. 257; *Taylor v. Taintor*, 16 Wall. 366, 21 L. Ed. 287; *Ex parte Crouch*, 112 U. S. 178, 28 L. Ed. 690." *Harkrader v. Wadley*, 172 U. S. 148, 164, 43 L. Ed. 399; *Prout v. Starr*, 188 U. S. 537, 544, 47 L. Ed. 584.

The jurisdiction of the district court of the United States for the district of Alabama, and the right of a plaintiff to prosecute his suit, having attached by the commencement of the suit in the district court, that right cannot be taken away or arrested by any proceedings in another court. An attachment of the debt by the

process of a state court, after the commencement of the suit in a court of the United States, cannot affect the right of the plaintiff to recover in the suit. *Wallace v. McConnell*, 13 Pet. 136, 10 L. Ed. 95.

Where the two suits related to the same subject matter, and were in fact pending at the same time in two courts of concurrent jurisdiction, state and federal, but the former having first acquired jurisdiction of the subject matter, the parties also being in legal effect the same, because in the state court the mortgagor represented all who, pending the suit, acquired any interest through him in the property about which the controversy arose, by electing to bring a separate suit the plaintiffs voluntarily took the risk of getting a decision in the federal court before the state court settled the rights of the parties by a judgment in the suit which was pending there. Failing in this, they must submit to the same judgment that has already been rendered against their representative in the state court, and the suit in the federal court was properly dismissed on these facts being established. *Stout v. Lye*, 103 U. S. 66, 70, 26 L. Ed. 428.

"Ever since the case of *Ableman v. Booth*, 21 How. 506, 16 L. Ed. 169, it has been the settled doctrine of this court that a court having possession of a person or property cannot be deprived of the right to deal with such person or property until its jurisdiction is exhausted, and that no other court has the right to interfere with such custody or possession. This rule was reaffirmed in *Tarble's Case*, 13 Wall. 397, 20 L. Ed. 597; in *Robb v. Connelly*, 111 U. S. 624, 28 L. Ed. 542; and in *re Spangler*, 11 Michigan 298, and with reference to personal property has been so often restated as to have become one of the maxims of the law. *Taylor v. Carryl*, 20 How. 583, 15 L. Ed. 1028; *Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749; *Ellis v. Davis*, 109 U. S. 485, 27 L. Ed. 1006; *Krippendorf v. Hyde*, 110 U. S. 276, 25 L. Ed. 145; *Covell v. Heyman*, 111 U. S. 176, 28 L. Ed. 390; *Byers v. McAuley*, 149 U. S. 608, 37 L. Ed. 867; *Moran v. Sturges*, 154 U. S. 256, 38 L. Ed. 981; *In re Chetwood*, 165 U. S. 443, 41 L. Ed. 782." *In re Johnson*, 167 U. S. 120, 125, 42 L. Ed. 103.

**Suit to determine validity of assignment for creditors.**—Where a federal court is already seized of the question of the validity of a trust, created by an assignment for creditors, the state courts have no jurisdiction, if the first proceeding is pleaded therein as a defense. *Chittenden v. Brewster*, 2 Wall. 191, 17 L. Ed. 839.

itations; and is confined to suits between the same parties, or privies, seeking the same relief or remedy, and to such questions or propositions as arise ordinarily and properly in the progress of the suit first brought: and does not extend to all matters which may by possibility become involved in it.<sup>61</sup>

c. *Property in Custody of Court*—(1) *General Rule*.—Whenever property has been seized by an officer of a court, by virtue of its process, the property is to be considered as in the custody of the court, and under its control for the time being, and no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises.<sup>62</sup>

(2) *Mode of Procuring Custody*—(a) *In General*.—The rule that the court first getting custody of property may deal with it to the end, applies equally to property taken under execution or attachment.<sup>63</sup> And it is not restricted in its ap-

61. *Identity of causes*.—Buck v. Colbath, 3 Wall. 334, 18 L. Ed. 257.

As to another suit pending, see the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 12.

62. *Property in custody of court*.—Buck v. Colbath, 3 Wall. 334, 18 L. Ed. 257; Porter v. Sabin, 149 U. S. 473, 480, 37 L. Ed. 815; Farmers' Loan, etc., Co. v. Lake Street, etc., R. Co., 177 U. S. 51, 61, 44 L. Ed. 667; Peck v. Jenness, 7 How. 612, 12 L. Ed. 841; Freeman v. Howe, 24 How. 450, 16 L. Ed. 749; Moran v. Sturges, 154 U. S. 256, 38 L. Ed. 981; Central Nat. Bank v. Stevens, 169 U. S. 432, 42 L. Ed. 807; Gumbel v. Pitkin, 124 U. S. 131, 155, 31 L. Ed. 374; In re Watts and Sachs, 190 U. S. 1, 27, 47 L. Ed. 933; Byers v. McAuley, 149 U. S. 608, 615, 37 L. Ed. 867; Rio Grande R. Co. v. Gomila, 132 U. S. 478, 482, 33 L. Ed. 400; Covell v. Heyman, 111 U. S. 176, 28 L. Ed. 390; Shields v. Coleman, 157 U. S. 168, 177, 39 L. Ed. 660; Insurance Co. v. Dunn, 19 Wall. 214, 223, 22 L. Ed. 68; New Orleans v. Steamship Co., 20 Wall. 387, 392, 22 L. Ed. 354; Ellis v. Davis, 109 U. S. 485, 498, 27 L. Ed. 1006; Providence, etc., Steamship Co. v. Hill Mfg. Co., 109 U. S. 578, 607, 27 L. Ed. 1038; Smith v. McIver, 9 Wheat. 532, 6 L. Ed. 152; Prince v. Bartlett, 8 Cranch 431, 434, 3 L. Ed. 614; Metcalf v. Barker, 187 U. S. 165, 175, 47 L. Ed. 122; Missouri Pac. R. Co. v. Fitzgerald, 160 U. S. 556, 569, 40 L. Ed. 536; Calhoun v. Lanau, 127 U. S. 634, 32 L. Ed. 297; Louisville Trust Co. v. Knott, 191 U. S. 225, 232, 48 L. Ed. 159; Taylor v. Carryl, 20 How. 583, 15 L. Ed. 1028; Peale v. Phipps, 14 How. 368, 375, 14 L. Ed. 459; Geilinger v. Philippi, 133 U. S. 246, 257, 33 L. Ed. 614; Brown v. Clarke, 4 How. 4, 11 L. Ed. 850; Lammon v. Feusier, 111 U. S. 17, 19, 28 L. Ed. 337; Hammock v. Loan & Trust Co., 105 U. S. 77, 82, 26 L. Ed. 1111; Hagan v. Lucas, 10 Pet. 400, 9 L. Ed. 470; Borer v. Chapman, 119 U. S. 587, 30 L. Ed. 532; In re Chetwood, 165 U. S. 443, 460, 41 L. Ed. 782; In re Swan, 150 U. S. 637, 652, 37 L. Ed. 1207; Leadville Coal Co. v. McCreery, 141 U. S. 475, 35 L. Ed. 824; Tua v. Carriere, 117 U. S. 201, 208, 29 L. Ed. 855; Williams v. Benedict, 8 How. 107, 12 L. Ed. 1007; Krippendorf v. Hyde, 110 U. S. 276, 25 L. Ed. 145; Min-

nesota Co. v. St. Paul Co., 2 Wall. 609, 632, 17 L. Ed. 886; People's Bank v. Calhoun, 102 U. S. 256, 262, 26 L. Ed. 101; Amy v. The Supervisors, 11 Wall. 136, 20 L. Ed. 101; Riggs v. Johnson County, 6 Wall. 166, 18 L. Ed. 768.

The possession of the res vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subject and persons. Farmers' Loan, etc., Co. v. Lake Street, etc., R. Co., 177 U. S. 51, 61, 44 L. Ed. 667.

The doctrine is firmly established that where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court, and that where property is actually in the possession of one court of competent jurisdiction, such possession cannot be disturbed by process out of another court of concurrent jurisdiction. In re Chetwood, 165 U. S. 443, 460, 41 L. Ed. 782; Moran v. Sturges, 154 U. S. 256, 38 L. Ed. 981.

Where a court has jurisdiction it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment till reversed is regarded as binding in every court; and where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. Freeman v. Howe, 24 How. 450, 457, 16 L. Ed. 749; Peck v. Jenness, 7 How. 612, 624, 12 L. Ed. 841; Stout v. Lye, 103 U. S. 66, 26 L. Ed. 428; Randall v. Howard, 2 Black 585, 589; 17 L. Ed. 269.

Where property is levied upon, it is not liable to be taken by an officer acting under another jurisdiction. Taylor v. Carryl, 20 How. 583, 584, 15 L. Ed. 1028.

63. *Principle applies equally to executions and attachments*.—Covell v. Heyman, 111 U. S. 176, 28 L. Ed. 390.



plication to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected.<sup>64</sup>

(b) *Seizure under Execution*.—See the title EXECUTIONS.

(c) *Seizure under Attachment*.—See the title ATTACHMENT AND GARNISHMENT, vol. 2, p. 667.

(d) *Appointment of Receiver*.—As to appointment of receiver by state or federal courts as drawing to the court making the appointment the right to decide all questions as to receivership, see the title RECEIVERS.

(3) *Effect Where First Seizure Is Void*.—If the seizure is void because for any reason, as where it is made on Sunday, the second is entitled to priority.<sup>65</sup>

(4) *Actions for Wrongful Seizure*.—Where property has been seized under process of a court, a suit which does not invade the custody of that court over the property may be brought in a court of concurrent jurisdiction for a wrongful seizure.<sup>66</sup> Thus the officer may be sued in a court of concurrent jurisdiction on his official bond,<sup>67</sup> or in trespass,<sup>68</sup> but an action of replevin for the goods seized cannot be maintained in another court.<sup>69</sup>

d. *Application of Rules as between State and Federal Courts*—(1) *In General*.—The rule that the court having possession of property has a right to deal with it to the exclusion of other courts of concurrent jurisdiction is of special importance in its application to state and federal courts.<sup>70</sup> As between a state and federal court the one first seizing property has exclusive jurisdiction.<sup>71</sup>

**64. Rule not restricted to seizures under federal process.**—*Farmers' Loan, etc., Co. v. Lake Street, etc., R. Co.*, 177 U. S. 51, 61, 44 L. Ed. 667.

This principle is equally applicable to the case of property attached under mesne process, for the purpose of awaiting the final judgment, as in the case of property seized in admiralty, and the proceedings in rem. *Freeman v. Howe*, 24 How. 450, 451, 16 L. Ed. 749.

**65. First seizure void.**—*Gumbel v. Pitkin*, 124 U. S. 131, 155, 31 L. Ed. 374.

Property was seized by a United States marshal in attachment on Sunday. On Monday, the sheriff of a state court attempted to seize it by virtue of state process, but did not take actual possession. The property afterwards came into the federal court by virtue of the Sunday levy and of a valid federal process levied subsequent to that from the state courts. The creditors who made the levy under the state process intervened therein to protect their rights. It was held that they were entitled to priority. *Gumbel v. Pitkin*, 124 U. S. 131, 155, 31 L. Ed. 374.

**66. Actions not invading court's custody.**—*Rio Grande R. Co. v. Gomila*, 132 U. S. 478, 482, 33 L. Ed. 400; *Covell v. Heyman*, 111 U. S. 176, 28 L. Ed. 390; *Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749.

**Relief by ancillary proceedings.**—See ante, "Ancillary Jurisdiction," VII, C, 4, e.

**67. Action on officer's bond.**—*Covell v. Heyman*, 111 U. S. 176, 179, 28 L. Ed. 390; *Krippendorf v. Hyde*, 110 U. S. 276, 25 L. Ed. 145.

**68. Trespass.**—*Covell v. Heyman*, 111 U. S. 176, 28 L. Ed. 390; *Rio Grande R. Co. v. Gomila*, 132 U. S. 478, 482, 33 L. Ed. 400; *Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749; *Krippendorf v. Hyde*, 110 U. S. 276, 25 L. Ed. 145; *Buck v. Colbath*, 3 Wall. 334, 18 L. Ed. 257; *McKee v. Rains*, 10 Wall. 22, 25, 19 L. Ed. 860; *Matthews v. Densmore*, 109 U. S. 216, 218, 27 L. Ed. 912; *Sharpe v. Doyle*, 102 U. S. 686, 26 L. Ed. 277; *Leroux v. Hudson*, 109 U. S. 468, 477, 27 L. Ed. 1000.

The state court has jurisdiction of an action of trespass against a United States marshal for wrongfully seizing property under an attachment or other process issuing from a federal court. *Buck v. Colbath*, 3 Wall. 334, 18 L. Ed. 257.

**69. Replevin.**—*Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749; *Riggs v. Johnson County*, 6 Wall. 166, 196, 18 L. Ed. 768; *Covell v. Heyman*, 111 U. S. 176, 179, 28 L. Ed. 390; *White v. Schloerb*, 178 U. S. 542, 546, 44 L. Ed. 1183; *Lammon v. Feusier*, 111 U. S. 17, 19, 28 L. Ed. 337. See, also, dissenting opinion of Harlan, J., in *Denny v. Bennett*, 128 U. S. 489, 502, 32 L. Ed. 491.

**70. Conflict between state and federal courts.**—*Farmers' Loan, etc., Co. v. Lake Street, etc., R. Co.*, 177 U. S. 51, 61, 44 L. Ed. 667.

**71. First seizure governs right to dispose of property.**—*Heidritter v. Elizabeth Oil-Cloth Co.*, 112 U. S. 294, 28 L. Ed. 728; *Amy v. The Supervisors*, 11 Wall. 136, 20 L. Ed. 101; *Riggs v. Johnson County*, 6 Wall. 166, 18 L. Ed. 768; *In re Swan*, 150 U. S. 637, 652, 37 L. Ed. 1207; *In re Tyler*,



(2) *Property in Custody of Federal Court.*—The jurisdiction of a court of the United States once obtained over property by being brought within its custody continues until the purpose of the seizure is accomplished, and cannot be impaired or affected by any proceedings subsequently commenced in a state court.<sup>72</sup>

149 U. S. 164, 37 L. Ed. 689; *Pulliam v. Osborne*, 17 How. 471, 15 L. Ed. 154; *Tarble's Case*, 13 Wall. 397, 20 L. Ed. 597.

The possession of property by the judicial department, whether federal or state, cannot be arbitrarily encroached upon without violating the fundamental principle, which requires co-ordinate departments to refrain from interference with the independence of each other. In *re Swan*, 150 U. S. 637, 652, 37 L. Ed. 1207; In *re Tyler*, 149 U. S. 164, 37 L. Ed. 689.

Although, by the laws of Alabama, a lien upon property accrues from the delivery of the execution to the sheriff or marshal, and the rights of creditors claiming under the same jurisdiction are adjudged accordingly, yet the same rule does not apply where a controversy arises between executions issued by a court of the United States and a state court. In such a case the rule is, that whichever officer, the sheriff or the marshal, acquires possession of the property first by the levy of the execution, obtains a prior right, and a purchaser at a judicial sale will take the property free from all liens of the same description. *Pulliam v. Osborne*, 17 How. 471, 15 L. Ed. 154.

The state and national courts being independent of each other, neither can impede or arrest any action the other may take, within the limits of its jurisdiction, for the satisfaction of its judgments and decrees. *Amy v. The Supervisors*, 11 Wall. 136, 20 L. Ed. 101; *Riggs v. Johnson County*, 6 Wall. 166, 265, 18 L. Ed. 768; *Farr v. Thomson*, 11 Wall. 139, 20 L. Ed. 102; *Central Nat. Bank v. Stevens*, 169 U. S. 432, 465, 42 L. Ed. 807.

**72. Property in custody of federal court.**—*Moran v. Sturges*, 154 U. S. 256, 38 L. Ed. 981; *Amy v. The Supervisors*, 11 Wall. 136, 20 L. Ed. 101; *Riggs v. Johnson County*, 6 Wall. 166, 18 L. Ed. 768; *People's Bank v. Calhoun*, 102 U. S. 256, 262, 26 L. Ed. 101; *Heidritter v. Elizabeth Oil-Cloth Co.*, 112 U. S. 294, 28 L. Ed. 728; *Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749; *Covell v. Heyman*, 111 U. S. 176, 28 L. Ed. 390; *Chapman v. Brewer*, 114 U. S. 158, 172, 29 L. Ed. 83; *Lammon v. Feusier*, 111 U. S. 17, 19, 28 L. Ed. 337; *Krippendorf v. Hyde*, 110 U. S. 276, 280, 25 L. Ed. 145; *Hammock v. Loan, & Trust Co.*, 105 U. S. 77, 82, 26 L. Ed. 1111; *Leadville Coal Co. v. McCreery*, 141 U. S. 475, 35 L. Ed. 824; *Rio Grande R. Co. v. Gomila*, 132 U. S. 478, 480, 33 L. Ed. 400; *Pulliam v. Osborne*, 17 How. 471, 15 L. Ed. 154; *New Orleans v. Steamship Co.*, 20 Wall. 387, 392, 22 L. Ed. 354.

This exemption of the authority of the courts of the United States from inter-

ference by legislative or judicial action of the states is essential to their independence and efficiency. If their jurisdiction could in any particular be invaded and impaired by such state action, it would be difficult to perceive any limit to which the invasion and impairment might not be extended. To sanction the doctrine for which the executor, appointed by the probate court of the parish of Orleans, contends, would be to subordinate the authority of the federal courts in essential attributes to the regulation of the state, a position which is wholly inadmissible. The principle declared in *Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749, and in *Buck v. Colbath*, 3 Wall. 334, 18 L. Ed. 257, both of which have, from their importance, attracted special attention from the profession; in effect determines the question presented here. *Rio Grande R. Co. v. Gomila*, 132 U. S. 478, 481, 33 L. Ed. 400.

Property of a debtor, brought within the custody of the circuit court of the United States by seizure under process issued upon its judgment, remains in its custody to be applied in satisfaction of the judgment notwithstanding the subsequent death of the debtor, or is removed by such death from the jurisdiction of the circuit court and passes under the control of the probate court of the state, to be disposed of in the administration of the assets of the deceased. *Rio Grande R. Co. v. Gomila*, 132 U. S. 478, 480, 33 L. Ed. 400.

Where the marshal, by virtue of mesne process issuing out of the circuit court of the United States for the district of Massachusetts, attached certain railroad cars, which were afterwards taken out of his hands by the sheriff of Middlesex county under a replevin brought by the mortgagees of the railroad company, the proceeding of the sheriff was entirely irregular. *Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749.

Buildings owned by A and used by him as a distillery were seized by the collector of internal revenue for a forfeiture incurred under the laws of the United States and on Feb. 4, 1873, an information to force the foreclosure was filed in the district court, and on Feb. 5, 1873, process of attachment was issued to the marshal who on the 19th made return that he had taken possession of the property. Sentence of forfeiture was passed, sale ordered and B became purchaser. C claimed title to the same premises under a sale by the state court in a suit brought therein to enforce mechanic's lien upon the building, which suit was instituted on Feb. 21, 1873. It was held that B's title was good and C's bad. *Heidritter v.*

And the question of the validity of the seizure is for the federal courts to determine.<sup>73</sup>

(3) *Property in Custody of State Court.*—Thus, where property is in the lawful possession of a state court, it cannot be seized by process issuing from a federal court.<sup>74</sup>

Elizabeth Oil-Cloth Co., 112 U. S. 294, 28 L. Ed. 728.

In *Moran v. Sturges*, 154 U. S. 256, 38 L. Ed. 981, the supreme court of the state of New York had issued process against certain libellants in the district court of the United States, and had, after hearing, enjoined them from taking any further proceedings on their libels. This judgment of the supreme court being affirmed by the court of appeals, and the judgment of the latter court being remitted to the supreme court and entered there as its judgment, the libellants sued out a writ of error to this court, and it was here held that the state court had no jurisdiction in personam over the libellants as holders of maritime liens when the libels were filed; that the question of jurisdiction was one for the district court to decide in the first instance; that the district court had jurisdiction; and that the judgment under review was in effect an unlawful interference with the proceedings in that court. *Central Nat. Bank v. Stevens*, 169 U. S. 432, 461, 42 L. Ed. 807.

A bank was attempting in the state court to enforce by judicial sale a rival and conflicting lien to that of parties who were proceeding in the federal court to sell the same property under their lien. The latter court had not only obtained jurisdiction of the question of lien prior to the initiation of the bank's suit, but it had taken possession of the property by its receiver. It was held that it had thus drawn to itself the subject matter of the litigation and the right to decide upon the conflicting claims to the possession and control of the property. *People's Bank v. Calhoun*, 102 U. S. 256, 262, 26 L. Ed. 101.

**73. Validity of seizure a question for federal courts.**—*Freeman v. Howe*, 24 How. 450, 459, 16 L. Ed. 749. See, also, *Ableman v. Booth*, 21 How. 506, 16 L. Ed. 169; *United States v. Peters*, 5 Cranch 115, 3 L. Ed. 53.

**74. Property in custody of state court.**—*Prince v. Bartlett*, 8 Cranch 431, 434, 3 L. Ed. 614; *Metcalf v. Barker*, 187 U. S. 165, 175, 47 L. Ed. 122; *Louisville Trust Co. v. Knott*, 191 U. S. 225, 232, 48 L. Ed. 159; *Williams v. Benedict*, 8 How. 107, 12 L. Ed. 1007; *Amy v. The Supervisors*, 11 Wall. 136, 20 L. Ed. 101; *Riggs v. Johnson County*, 6 Wall. 166, 18 L. Ed. 768; *Wallace v. McConnell*, 13 Pet. 136, 10 L. Ed. 95; *Hagan v. Lucas*, 10 Pet. 400, 404, 9 L. Ed. 470; *Borer v. Chapman*, 119 U. S. 587, 600, 30 L. Ed. 532; *Yonley v. Lavender*, 21 How. 276, 22 L. Ed. 536; *Freeman v. Howe*, 24 How. 450, 16 L. Ed.

749; *Put-in-Bay Waterworks, etc., Co. v. Ryan*, 181 U. S. 409, 430, 45 L. Ed. 927; *Taylor v. Carryl*, 20 How. 583, 15 L. Ed. 1028; *Covell v. Heyman*, 111 U. S. 176, 28 L. Ed. 390; *Pulliam v. Osborne*, 17 How. 471, 15 L. Ed. 154; *Byers v. McAuley*, 149 U. S. 608, 617, 37 L. Ed. 867.

Property being in the possession of a sheriff, by virtue of legal process, before the issuing of a writ on behalf of the United States, is bound to satisfy the debts for which it was taken, and the rights of the individual creditors, thus acquired, cannot be defeated by the process on the part of the United States, subsequently issued. *Prince v. Bartlett*, 8 Cranch 431, 434, 3 L. Ed. 614.

Where the state courts have jurisdiction over the parties and the subject matter, and possession of the property, it is well settled that it may decide on conflicting claims to its ultimate possession and control. *Metcalf v. Barker*, 187 U. S. 165, 175, 47 L. Ed. 122.

A most injurious conflict of jurisdiction would be likely often to arise between the federal and the state courts, if the final process of the one could be levied on property which had been taken by the process of the other; the marshal or the sheriff, as the case may be, by a levy, acquires a special property in the goods, and may maintain an action for them. But if the same goods may be taken in execution, at the same time, by the marshal and the sheriff, does this special property vest in the one or the other, or both of them? No such case can exist; property once levied on, remains in the custody of the law, and it is not liable to be taken by another execution, in the hands of a different officer; and especially, by an officer acting under a different jurisdiction. *Hagan v. Lucas*, 10 Pet. 400, 9 L. Ed. 470.

Where a vessel had been seized under a process of foreign attachment issuing from a state court in Pennsylvania, and a motion was pending in that court for an order of sale, a libel filed in the district court of the United States, for mariner's wages, and process issued under it, could not divest the authorities of the state of their authority over the vessel; and of the two sales made, one by the sheriff and one by the marshal, the sale by the sheriff must be considered as conveying the legal title to the property, and the sale by the marshal as inoperative. *Taylor v. Carryl*, 20 How. 583, 15 L. Ed. 1028.

An attachment commenced, and conducted to a conclusion, before the institution of a suit against the debtor in a



(4) *Conflict between Federal and Probate Courts.*—Jurisdiction of the circuit court of the United States, in a case for equitable relief, is not excluded because, by the laws of the state, the matter was within the exclusive jurisdiction of its probate courts; but, as in all other cases of conflict between jurisdictions of independent and concurrent authority, that which has first acquired possession of the res, which is the subject of the litigation, is entitled to administer it.<sup>75</sup> But even though the estate is in the probate court to be administered, a debt against it may be established in the federal court, and when established it takes its place and share of the estate as administered by the probate court;<sup>76</sup> it can-

court of the United States, may be set up as a defense to the suit; and the defendant will be protected pro tanto, under a recovery had by virtue of the attachment; and may plead such recovery in bar. So, too, an attachment pending in a state court, prior to the commencement of a suit in the court of the United States, may be pleaded in abatement; the attachment of the debt, in such case, in the hands of the defendant, would fix it there in favor of the attaching creditors, and the defendant cannot afterwards pay it over to the plaintiff. The attaching creditor, in such a case, acquires a lien on the debt, binding on the defendant, which the courts of all other governments, if they recognize such proceedings at all, will not fail to regard. The rule must be reciprocal; and when the suit in one court is commenced prior to proceedings under attachment in another court, such proceedings cannot arrest the suit. *Wallace v. McConnell*, 13 Pet. 136, 10 L. Ed. 95.

A judgment was obtained in a state court of Alabama, against B. and M. and the sheriff, under an execution issued upon the judgment, levied upon certain slaves, as the property of the defendants; they were claimed by L., and were delivered to him, he having given a bond to the sheriff to try the title, and for the forthcoming of the slaves, according to the laws of the state; H. had obtained a judgment against B. and M., in the district court of the United States for the district of Alabama, acting as a circuit court; under an execution issued on this judgment, the marshal levied on the slaves, and they were claimed by L.; the marshal returned, that they were so claimed, upon which an issue was formed in the district court, to try the title of L. to the slaves. L. gave in evidence the record of the judgment in the state court against B. and M., and the proceedings under it; certificates of the records were given on the 4th of December, 1834, and they showed, that the suit, respecting the right of property in the slaves, had been continued at March term, 1834, but did not show whether any further proceeding in the case had taken place, at the preceding spring term of the state court. The district court instructed the jury, that the records of the state court were legal evidence, by which they might infer the proceedings were still depending and undetermined in the state court. Held, that the instruction was

correct. *Hagan v. Lucas*, 10 Pet. 400, 9 L. Ed. 470.

**Where property delivered to claimant under bond.**—Where on the giving of a bond, the property is placed in the possession of the claimant, his custody is substituted for the custody of the sheriff and the property is not withdrawn from the custody of law, and in the hands of the claimant, under the bond for its delivery to the sheriff, the property is as free from the reach of other processes, as it would have been in the hands of the sheriff. *Hagan v. Lucas*, 10 Pet. 400, 401, 9 L. Ed. 470.

**Bill of peace in federal court as to property involved in state court.**—The courts of the United States should not entertain a bill of peace upon a title in litigation in a state court. *Orton v. Smith*, 18 How. 263, 15 L. Ed. 393.

**75. Conflict between federal and probate courts.**—*Payne v. Hook*, 7 Wall. 425, 19 L. Ed. 260; *Hyde v. Stone*, 20 How. 170, 175, 15 L. Ed. 874; *Byers v. McAuley*, 149 U. S. 608, 612, 37 L. Ed. 867; *Rio Grande R. Co. v. Gomila*, 132 U. S. 478, 484, 33 L. Ed. 400; *Ellis v. Davis*, 109 U. S. 485, 498, 27 L. Ed. 1006; *Williams v. Benedict*, 8 How. 107, 12 L. Ed. 1007; *Bank v. Horn*, 17 How. 157, 15 L. Ed. 70; *Yonley v. Lavender*, 21 Wall. 276, 22 L. Ed. 536.

Property in possession of an administrator appointed by a state court cannot be taken out of the hands of the state court by a federal court. *Byers v. McAuley*, 149 U. S. 608, 612, 37 L. Ed. 867.

The courts of the United States, as courts of equity, have jurisdiction over executors and administrators, where the parties to the suit are citizens of different states, and this jurisdiction is not barred by subsequent proceedings in insolvency in the probate court of a state. In such a case, the courts may interpose in favor of a foreign creditor, to arrest the distribution of any surplus of the estate of a decedent among the heirs. *Green v. Creighton*, 23 How. 90, 16 L. Ed. 419.

**76. Right to establish debt against estate in federal court.**—*Byers v. McAuley*, 149 U. S. 608, 620, 37 L. Ed. 867; *Yonley v. Lavender*, 21 Wall. 276, 22 L. Ed. 536; *Hess v. Reynolds*, 113 U. S. 73, 28 L. Ed. 927. See ante, "Power of States to Extend or Restrict Jurisdiction," VII, A, 4, c.

"In like manner a distributee, citizen of



not be enforced by process directly against the estate of the decedent.<sup>77</sup>

(5) *Bankruptcy Proceedings*.—See the title BANKRUPTCY, vol. 2, p. 814, et seq.

(6) *In Criminal Cases*.—As to concurrent and conflicting jurisdiction between state courts, or between state and federal courts, between federal and territorial courts, or between federal and territorial courts and courts of the Indian tribes, in criminal cases, see the title CRIMINAL LAW. As to habeas corpus from federal to state courts, see the title HABEAS CORPUS.

2. **TERMINATION OF PROCEEDING IN COURT FIRST ACQUIRING JURISDICTION.**—It is only while the property is in possession of the court, either actually or constructively, that the court is bound, or professes to protect that possession from the process of other courts. Whenever the litigation is ended, or the possession of the officer or court is discharged, other courts are at liberty to deal with it according to the rights of the parties before them, whether those rights require them to take possession of the property or not.<sup>78</sup>

3. **INJUNCTION AGAINST JUDGMENTS OR PROCEEDINGS.**—As to the power of one court to enjoin the judgment of another, including the power of a state court

another state, may establish his right to a share in the estate, and enforce such adjudication against the administrator personally, or his sureties. *Payne v. Hook*, 7 Wall. 425, 19 L. Ed. 260, or against any other parties subject to liability, *Borer v. Chapman*, 119 U. S. 587, 30 L. Ed. 532, or in any other way which does not disturb the possession of the property by the state court." *Byers v. McAuley*, 149 U. S. 608, 620, 37 L. Ed. 867.

Where a voluntary assignment for benefit of creditors is made in Ohio, a citizen of another state who is a creditor of the assignor, and who has not become a party to the assignment proceedings in the probate court, may sue in the federal courts to set aside mortgages, made by the assignor at the same time as the assignment, which constitutes an unlawful preference. *Smith, etc., Purifier Co. v. McGroarty*, 136 U. S. 237, 240, 34 L. Ed. 346.

A suit may be maintained in the federal courts to set aside as fraudulent and void sales made by a testamentary executor under the orders of a probate court of a state. *Johnson v. Waters*, 111 U. S. 640, 667, 28 L. Ed. 547; *Arrowsmith v. Gleason*, 129 U. S. 86, 99, 32 L. Ed. 630. See the title JUDGMENTS AND DECREES.

**Suits to enforce pre-existing liens.**—Where a lien existed on property by a special mortgage before the debtor's death, and the property passed, with the lien attached, into the hands of an executor, and was in the course of administration in the probate court, the circuit court of the United States had jurisdiction, notwithstanding, to proceed against the property, enforce the creditor's lien, and decree a sale of the property. And such sale was valid. *Erwin v. Lowry*, 7 How. 172, 12 L. Ed. 655.

77. **Process against decedent's estate.**—*Yonley v. Lavender*, 21 Wall. 276, 22 L. Ed. 536; *Byers v. McAuley*, 149 U. S. 608,

620, 37 L. Ed. 867; *Williams v. Benedict*, 8 How. 107, 112, 12 L. Ed. 1007.

"An administrator appointed by a state court is an officer of that court; his possession of the decedent's property is a possession taken in obedience to the orders of that court; it is the possession of the court, and it is a possession which cannot be disturbed by any other court. Upon this proposition we have direct decisions of this court. In *Williams v. Benedict*, 8 How. 107, 112, 12 L. Ed. 1007, it is said: 'As, therefore, the judgment obtained by the plaintiffs in the court below did not entitle them to a prior lien, or a right of satisfaction in preference to the other creditors of the insolvent estate, they have no right to take in execution the property of the deceased which the probate court has ordered to be sold for the purpose of an equal distribution among all creditors. The jurisdictions of that court has attached to the assets; they are in gremio legis. And if the marshal were permitted to seize them under an execution, it would not only cause manifest injustice to be done to the rights of others, but be the occasion of an unpleasant conflict between courts of separate and independent jurisdiction.'" *Byers v. McAuley*, 149 U. S. 608, 615, 37 L. Ed. 867.

78. **Termination of proceeding in court first acquiring jurisdiction.**—*Day v. Gallup*, 2 Wall. 97, 17 L. Ed. 855; *Buck v. Colbath*, 3 Wall. 334, 342, 18 L. Ed. 257; *Moran v. Sturges*, 154 U. S. 256, 274, 38 L. Ed. 981.

Where a proceeding in the federal court is terminated so that no case is pending there, a state court, unless there be some special cause to the contrary, may have jurisdiction of a matter arising out of the same general subject, although, if the proceeding in the federal court had not been terminated, the state court might not have had it. *Day v. Gallup*, 2 Wall. 97, 17 L. Ed. 855.

to enjoin the judgment of a federal court, or the enforcement thereof, and vice versa, see the title JUDGMENTS AND DECREES. As to the power of one court to enjoin proceedings in another, including the power of a federal court to enjoin proceedings in a state court, and vice versa, see the title INJUNCTIONS. As to injunctions by federal courts against proceedings in state courts in bankruptcy proceedings, see the title BANKRUPTCY, vol. 2, p. 850.

**C. Conflict between Civil and Military Courts.**—See the title MILITARY LAW.

**COURTS-MARTIAL.**—See the title MILITARY LAW.













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